OVERSIGHT ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 1980

HEARING

BEFORE THE

COMMITTEE ON
OR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

OVERSIGHT ON THE ADMINISTRATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

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OVERSIGHT ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 1980

TUESDAY, SEPTEMBER 16, 1980

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

The committee met, pursuant to notice, at 9:40 a.m., in room 4232 Dirksen Senate Office Building, Senator Harrison A. Williams, Jr., (chairman) presiding.

Present: Senator Williams.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. Come to order.

Today we are holding oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

The committee has been aware and concerned for some time about employer dissatisfaction with the functioning of the Longshore Act. I and other members of the committee have received substantial correspondence on this subject, and we have held a number of meetings with representatives of covered employers. As long ago as May and June of 1979, I had the opportunity to meet with representatives of stevedoring companies in New Jersey and to visit facilities at Port Newark and Port Elizabeth in New Jersey.

We have also been monitoring hearings on the Longshore Act conducted by committees in the House of Representatives. House committee hearings from the 95th Congress alone took 17 days, and the printed report of those hearings is nearly 1,900 pages long.

We have also been following the hearings held in the House this year, and have had an opportunity to review the testimony presented there, although the formal hearing record has not yet been published.

With this extensive background of consideration of employer concerns about the act, I am hopeful that today's hearings will be well focused on the most important issues that have been raised concerning the act.

We are pleased that we will have an opportunity to hear this morning from Assistant Secretary Elisburg. The Department of Labor plays a special role in interpreting and administering the act, and it will be helpful to receive the Department's views on the issues that we will be considering.

We will also be pleased to hear from the unions representing workers protected by this act. Work on the waterfront continues to be one of the most hazardous occupations. The necessity of fair and adequate workers' compensation for workers covered by the Long-

shore Act has been recognized by this committee and by Congress since the Longshore Act was first passed more than a half century ago. The fundamental necessity of providing full and adequate worker's compensation for employees in this industry is a basic principle that is important to bear in mind as we review this important legislation.

Our first witness today will be Mr. Donald Elisburg, Assistant Secretary for Employment Standards at the U.S. Department of Labor.

Mr. Elisburg, welcome.

STATEMENT OF DONALD ELISBURG, ASSISTANT SECRETARY OF LABOR FOR EMPLOYMENT STANDARDS, ACCOMPANIED BY RALPH M. HARTMAN, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, EMPLOYMENT STANDARDS ADMINISTRATION; NEIL MONTONE, ASSOCIATE DIRECTOR, LONGSHORE PROGRAM, DEPARTMENT OF LABOR; AND GEORGE LILLY, COUNSEL, OFFICE OF SOLICITOR OF LABOR

Mr. ELISBURG. Good morning, Mr. Chairman.

I have a full statement that I would like to submit for the record and, if I may, I would like to summarize my testimony for you.

The CHAIRMAN. Fine.

Mr. ELISBURG. First, if I may introduce my colleagues this morning, on my left is Ralph Hartman, who is the Director of the Office of Workers' Compensation programs. On my right is Neil Montone, Associate Director for the longshore program; and on my far right is George Lilly, who is the counsel for these programs with the Solicitor's Office.

We appreciate the opportunity to discuss with you today the administration of the Longshoremen's and Harbor Workers' Compensation Act. Reform and amendment have been a major part of the history of the law since it was originally passed by the Congress in 1927.

The act initially provided compensation to certain maritime employees while working on navigable waters. It has been amended nine times over the years. The latest reforms were made in 1972. These changes were not without controversy then, nor are they today. We at the Department of Labor believe these amendments were, and continue to be, necessary.

They have transformed the Longshoremen's Act into a modern workers' compensation statute. They have expanded and improved benefits. The amendments also gave claimants the right to choose their own physicians, and provided benefits for death unrelated to a previously compensable permanent disability. An adjudicatory system was also created to hold formal hearings by administrative law judges and appeals through the benefits review board and the U.S. courts of appeals.

Much of the reform has been accepted by industry and the courts—to the benefit of workers and employees and the Nation as a whole. We believe the Labor Department has been correctly interpreting both the language and the spirit of these reforms in administering the law.

In the long run, the Department's goals for the longshore program are to administer it with the greatest possible efficiency and

to do so in a manner intended by Congress and in line with judicial decisions.

There has been continuing debate about the reforms, particularly coverage extensions, benefit levels and the unrelated death provisions. Concerns have been raised about the cost and availability of insurance.

As I stated earlier, I have submitted a detailed statement of reasons why we believe these amendments were good in the past and why they are good today.

In this statement, we discuss the two major areas of criticism of the 1972 amendments—the extension of coverage and the increased benefits.

First, on extended coverage, the courts have consistently upheld the Department of Labor by rejecting the so-called point of rest theory which narrowly specifies a shoreside demarcation line for coverage.

Also, the courts have consistently agreed with our contention that a worker is not bound to his original decision to choose either longshore coverage or State workers' compensation.

On the matter of increased benefits, critics generally claim that the reforms are too expensive and cite several particularly troublesome areas: annual escalation of benefits, the absence of a ceiling on death benefits, potential for liability for unrelated death benefits, rising insurance rates and availability of insurance, abuse of the system, and the second injury fund.

First, we believe putting a cap as low as 3 percent on the annual escalation as has been suggested would hurt people on fixed incomes, as it would permit the erosion of their purchasing power. Protecting an otherwise fixed income was the purpose of the escalator provision and is certainly an important protection for persons who are, to one degree or another, no longer capable of earning a living.

Second, the lack of a ceiling on death benefits seems to have resulted from true legislative oversight. It does not exist in any other workers' compensation law.

Third, alarming statements of potential liability for unrelated death benefits ignore certain factors. We believe that citations of cases involving millions of dollars in future benefit liabilities exaggerate the total death benefits situation. The number of unrelated death cases is small in relation to all Longshore Act claims. Further, pure cost projections totally disregard the reason for the unrelated death provisions—to meet the human needs of survivors who depend on the injured worker's compensation, regardless of the cause of death. These provisions have thus far withstood all litigation challenges. All litigated unrelated death cases have been decided by the courts in favor of the claimants.

Fourth, obtaining private insurance no longer appears to be the problem it seemed a few years ago, because private carriers are becoming aware that they can write longshore coverage profitably.

In California, for example, several carriers have reentered the market recently and, more significantly, several new carriers are actively seeking longshore business. Rates in California have actually decreased over the last year, and it is expected that the experi-

ence in the California market will be reflected in other areas, notably the high cost in the Northeast.

Fifth, abuse of the system through exaggerated claims has been lessened by standardizing case processing procedures. And an Office of Inspector General has been established to investigate alleged fraud and abuse in the program.

Finally, we at the Department of Labor share the concern about the provisions for payments of second injury cases. The second injury provisions must be administered and construed with emphasis on their original purpose—to encourage the hiring and rehiring of partially disabled workers. However, some recent judicial decisions have adopted a much broader interpretation of these provisions.

Now, many employers feel they are being penalized for having better safety records than others; and that they, in effect, are underwriting the costs of others because of the larger number of preexisting conditions now covered. This is a legitimate issue which has no clear answers.

We are seeking ways to deal with the situation to protect both the purpose of the law and the legitimate interest of employers.

My statement submitted for the record goes into further detail on these matters, Mr. Chairman, but in the few minutes I have today, I would like to tell you where we plan to go from here.

Momentum for future progress has been built into the workers 'compensation office spirit and our program for improving administration has come a long way.

In short, we have taken a troubled program and made real strides in turning it into a smoothly functioning one.

But what has all this meant to those people out there who have been injured or have contracted serious illnesses in their jobs?

The improvements we have made have shown results. Users of the program are no longer frustrated by long delays and by the feeling that no one cares.

Injured workers, employers, insurance companies—users of the system—benefit from the internal changes we have made in the Department as well as from the 1972 legislative changes. And they will continue to benefit in the coming years.

We have drastically cut down the number of claims waiting for action. Since 1976, these cases have been reduced by one-half. The number of people waiting for claims action in October 1976, was 20,143. At the end of the first quarter of fiscal year 1980, that number had been reduced to 9,470.

We also feel that significant strides have been taken in the rehabilitation area. We recognized the need to merge rehabilitation with adequate compensation so that the two do not become mutually exclusive goals.

The economic and social loss is much too great when injured workers are not rehabilitated. Within OWCP, we have established a separate rehabilitation division to stress the need to provide early rehabilitative medical services.

This approach goes far beyond providing mere supportive treatment as was permitted in the past, and entails the active supervision of medical care. We have added rehabilitation specialists to district office staffs to provide counseling and referral services.

Before 1977, rehabilitation counseling was provided on a part-time basis only. We have systematized our procedures for early identification of injured workers who need and could benefit from rehabilitation. Our program is flexible and is designed to make a wide range of services available to achieve these gains.

We believe that the statistics show the success of our efforts in this area. The number of cases referred to rehabilitation specialists by claims examiners increased by 284 percent between fiscal 1976 and 1979.

The active rehabilitation caseload grew from 613 at the end of fiscal year 1976, to an estimated 1,500 at the end of the current fiscal year.

In the coming years, we expect to give continuing increased emphasis to the rehabilitation of injured workers so they can return to work. Improving our record in rehabilitation is just one of many ways we are achieving or have accomplished uniformity and other objectives through management improvements. In addition, we have taken these steps: Intensified efforts in medical monitoring; comprehensive training; a revised procedures manual; stepped-up quality control; and reduced case processing time.

The law requires Longshore Deputy Commissioners to supervise medical care for injured workers. In our revised manual we have given detailed guidance for medical supervision. Commissioners may now authorize a change in the treating physician when they believe a claimant is not receiving proper care. We will emphasize this medical monitoring in the future.

This, along with use of impartial medical examiners and clearer standards for rating the extent of physical impairment, should significantly reduce the volume of expensive and prolonged litigation over the nature and extent of a worker's disability.

To improve efficiency in the longshore program, we also have instituted a comprehensive national training program for claims examiners and their supervisors and have developed a new longshore procedure manual for the claims examiners.

Additionally, a strict quality control system has been implemented. National performance standards have been developed and we are conducting on-site reviews of district offices to insure compliance with these standards.

Since this program of improvement of our district office performance was implemented, we have seen a considerable improvement in scheduling and completing informal conferences to resolve disputed cases.

Nearly 65 percent of all cases which require a conference are now scheduled, conducted and reported within 45 days after they are requested. This compares to 120 days 3 years ago.

We have made intense and continuing efforts to solve our problems. We have not yet solved them all. But our accomplishments are, up to now, substantial.

We are fully committed to making our compensation programs under the Longshore Act work in an effective and efficient manner.

We will continue to press on in our improvement efforts and will continue to implement it enthusiastically. We fully expect it to produce even better results in the future.

This concludes my summary, Mr. Chairman.

My colleagues and I will be happy to answer any questions that you may have at this time.

[The prepared statement of Mr. Elisburg follows:]

STATEMENT OF
DONALD ELISBURG
ASSISTANT SECRETARY OF LABOR
FOR EMPLOYMENT STANDARDS
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

September 16, 1980

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before your Committee today to discuss the administration of the Longshoremen's and Harbor Workers' Compensation Act, and to focus on some of the significant issues relating to the Act.

The original Longshoremen's and Harbor Workers' Compensation Act was enacted by Congress on March 4, 1927, to provide workers' compensation coverage to certain classes of maritime employees while working over navigable waters. The Act has been amended on nine different occasions since its original enactment.

The most recent amendments were in 1972. These amendments transformed the Longshoremen's Act into a modern workers' compensation statute. They expanded coverage and greatly improved benefits. The expanded coverage brought Longshore Act protection to employees

injured in shoreside areas customarily used in longshoring, shipbuilding and repair work and maritime employment. The benefit improvements increased the maximum amount for compensation to 200 percent of the national average weekly wage in nonfarm employment, and provided for annual adjustments in benefits equal to the percentage increase, if any, in the national average weekly wage from the previous year. The amendments also gave claimants the right to choose their own physicians, and provided benefits for deaths unrelated to a previously compensable permanent disability. An adjudicatory system was also created to hold formal hearings by Administrative Law Judges and appeals through the Benefits Review Board and the U.S. Courts of Appeal.

These reforms in the Longshoremen's Act have not been without controversy. Indeed there has been continuing discussion and debate about them--particularly coverage extensions, benefit levels and the unrelated death provisions of the Act. Concerns have also been raised about both the cost and the availability of insurance. We believe, however, that these reforms were necessary. We believe that the Labor Department has been correctly interpreting both the language and the spirit of these reforms in administering the

law. And we believe that these reforms are being increasingly accepted by the industry and the courts as the law matures--to the benefit of workers, employers and the nation as a whole.

For example the coverage changes have been the subject of a heavy volume of litigation brought by those who believed that the Act did not apply to injuries occurring on shoreside areas, except those occurring at the water's edge or seaward of a narrowly specified shoreside demarcation line--the so-called "point of rest." The Labor Department disagreed with this limiting contention as not in keeping with the legislative intent, and our interpretations of the expanded coverage provisions have been upheld by the Supreme Court in two unanimous decisions in the Caputo and Ford cases.

Another example relates to the provisions of the 1972 amendments that permit an employee to elect benefits under either the Longshoremen's Act or State workers' compensation laws. Two very recent decisions of the Supreme Court -- Sun Ship and Thomas -- involving the Longshoremen's Act and its extensions have reaffirmed the Department's long-term understanding of these provisions of the statute. Taken together, they establish the basic proposition that workers' compensation legisla-

tion provides alternative and cumulative remedies for an injured worker. These decisions provide that, absent very express statutory language to the contrary, a worker is not held to have made a binding election based on the initial choice of the jurisdiction in which to pursue a claim.

A number of concerns have been expressed by employers and insurance companies about the increased benefits for permanent total disability and for death mandated by the 1972 amendments. A major focus of this concern has been the annual escalation of benefits which is said to make the Act prohibitively expensive to the industry. It has been suggested that a three percent cap be placed on the upper level of the annual escalator as a means of reducing the insurance rate levied upon covered employers to defray rising benefit costs. A three percent cap on the escalator provision is not reasonable as it would not prevent the erosion of purchasing power of compensation recipients; yet protecting an otherwise fixed income was the purpose of the escalator provision. This is certainly an important protection for persons who are, to one degree or another, no longer capable of earning a living.

Another element of the benefit issue involves the lack of a ceiling for death benefits in the Act

as amended in 1972. The Supreme Court decision in the Rasmussen case held that maximum limits on weekly disability benefits do not apply at all in death cases. The amended Act, as interpreted by this decision, requires inequitable treatment between death benefits and total disability compensation, a practice inconsistent with all other workers' compensation laws.

Another result of the 1972 amendments, the unrelated death provisions, has produced alarming statements of an astronomical potential for liability for unrelated death benefits. We believe that citations of cases involving millions of dollars in future benefit liabilities exaggerate the total death benefits situation. The number of unrelated death cases is small in relation to all Longshore Act claims. Further, pure cost projections totally disregard the reason for the unrelated death provisions--to meet the human needs of survivors who depend on the injured worker's compensation, regardless of the cause of death. These provisions have thus far withstood all litigation challenges. All litigated unrelated death cases have been decided by the courts in favor of the claimants.

Another major concern has involved increased insurance rates and the availability of insurance.

Higher wages in the maritime industry, increased benefits, the annual adjustment, litigation and other costs have contributed to rising insurance rates as increasing costs are reflected in the ratemaking process. It should be noted, however, that while escalating insurance rates under the Act cause difficulty for some employers, particularly small employers, insurance availability is no longer a major difficulty for maritime employers. In California, for example, up until approximately three years ago, many small employers found it virtually impossible to obtain insurance coverage under the Act. The State Compensation Fund was not authorized to provide insurance coverage, and with one exception, the private insurance market was not providing coverage. Since that time, the State Fund has entered the market successfully, several carriers have renentered the market, and, significantly, several new carriers are actively seeking Longshore business. This development can be seen as indicative of a growing awareness on the part of the private insurance carriers that the Longshore Act coverage can be written profitably. Rates in California have actually decreased over the last year, and it is expected that the experience in the California market will be reflected in other areas, notably the high cost states of the Northeast.

Now, I would like to discuss another issue raised by critics of the statute--efforts to investigate and prosecute those who abuse the system. Alleged abuses of the Longshore Act seem to involve two categories--exaggerated claims and fraudulent claims. We have extensively addressed the problem of exaggerated claims through standardizing case-processing procedures, including greater emphasis on impartial medical examination.

With respect to alleged fradulent claims, the Department, as authorized by the Inspector General Act of 1978, has established an Office of Inspector General (OIG). The OIG has offices in each of the Federal regions. They are responsible for conducting investigations of alleged fraud and abuse in the Longshore Act program as well as other Departmental programs. Even prior to the Inspector General Act, back in 1977, we had acted to identify cases of possible fraud by establishing an investigations unit within the Office of Workers' Compensation Programs (OWCP). This unit was subsequently incorporated in the OIG. We wholeheartedly support and cooperate with the OIG in identifying compensation abuses and prosecuting those who violate the law.

Finally, I would like to discuss the second injury fund, an issue about which the Department shares the

growing concern expressed by some employers and insurance companies. We remain convinced that the provisions of the Act involving the payment of second injury cases must be administered and construed with emphasis on their original purpose. This purpose was to encourage the hiring or rehiring of partially disabled workers by making second injury relief available only in those cases where the worker's previous disability was realistically manifest to the employer. Recent decisions by the Administrative Law Judges, by the Benefits Review Board, and by some of the Courts of Appeals, however, have adopted a much broader interpretation of these provisions. Nevertheless, we continue to defend our position in this regard in numerous cases, even though it strains our available resources.

Because of the large number of pre-existing conditions which are now being covered, many employers argue that they are being penalized for having better safety records than others, and, in effect, that they are underwriting the costs of other employers. I think this is a legitimate issue, but it is not clear that easy answers are available. The Department has become more involved in the employment of the disabled as our other laws, such as our rehabilitation requirements

for the handicapped and Vietnam veterans, have placed an obligation on employers to hire disabled workers whom they might not otherwise have hired. We are going to have to explore how to deal with the special fund in ways that protect both its purpose and the employers' legitimate interests.

The 1972 amendments created an adjudicatory system which was both nationwide and independent from administrative functions under the Act. Under the amendments, all formal hearings must be conducted in conformity with the Administrative Procedure Act. The first level of adjudication under the amended Act--before Administrative Law Judges--replaces the formal hearing that was held by Longshore Deputy Commisioners prior to 1972. Recently, the function of the Office of Administrative Law Judges has been improved because field offices have been opened in San Francisco and New Orleans to conduct local hearings in these two seaport areas. Two additional offices, in Boston and Norfolk, are in the process of being established.

The Benefits Review Board was also created by the 1972 amendments so as to provide for review of ALJ decisions. Appeal to the U.S. Courts of Appeals was authorized following Board review and decision.

The Board provides a uniform body of law, instead of the diverse opinions rendered prior to 1972 by the various district courts, which can then be easily followed by the Administrative Law Judges. The adjudicatory system created by the 1972 amendments has thus replaced a fragmented appelate system with one which provides more uniform and integrated legal interpretations which can be applied nationwide.

Now, I would like to turn my attention to the administration of the Longshore program and the areas in which our efforts will be focused in the years ahead. The Department of Labor's goals for the Longshore program are to administer it with the greatest possible efficiency, and to do so in the manner intended by the Congress and in line with judicial decisions. Frankly, when I assumed responsibility for this program three and one-half years ago, there were a number of serious deficiencies that prevented us from carrying out our responsibilities efficiently and effectively. At that time, two problems were paramount within the OWCP, the organization within the Department's Employment Standards Administration that is responsible for the administration of the Longshoremen's Act. The two problems were:

- OWCP's apparent incapacity to manage a greatly increased workload and to cope with the issues surrounding the growing complexity of the Act; and
- Excessive delays in processing cases and in completing the informal conference process prescribed by the Act.

Since I took office, we have made intense and continuing efforts to resolve these problems. We have not yet solved them all. But given the magnitude of the task, the accomplishments to date are substantial. Separate to be sure, but perhaps more meaningful in terms of the long run, is the momentum for future progress that has been built into the workers' compensation office spirit and our program for improving administration. We have moved a considerable way towards institutionalizing the process of change. And, as a result, we are making measurable progress in the Longshore program. In short, we have taken a troubled program and made real strides in turning it into a smoothly functioning one.

We are taking steps in all facets of our Longshore program operation to ensure that procedures and claims management are handled in uniform and consistent ways

in all of our district offices across the country. This is necessary to ensure equitable treatment of injured workers throughout the country. We are achieving or have accomplished uniformity and other objectives through a number of management improvements in these major areas:

- Intensified efforts in the areas of medical monitoring, rehabilitation and reemployment;
- Comprehensive training;
- A revised and expanded procedures manual;
- A stepped-up quality control system; and
- Reduced case processing time.

I would like to briefly discuss each of these improvements.

Section 7(b) of the Act requires the Longshore Deputy Commissioners to supervise the medical care of injured employees. In doing so, they may order changes of physicians or hospitals when they believe such changes are desirable or in the injured person's best interests. In our revised procedures manual we have included expanded and detailed guidance for medical supervision. This expanded medical monitoring effort enables Deputy Commissioners to exercise their statutory authority to change treating physicians when claimants are obviously not receiving the appropriate

medical care. We will be placing even greater emphasis upon medical monitoring in the future. This, together with the use of impartial medical examiners, and the adoption where appropriate of clear standards for the rating of the extent of physical impairment, should significantly reduce the volume of expensive and prolonged litigation over issues concerning the nature and extent of disability. This is an area that has not until recently received the attention it warrants from either the Department of Labor or from other interested parties.

As early as 1972, the National Commissison on State Workmen's Compensation Laws recognized the need to merge rehabilitation of injured workers with adequate compensation for lost income, and emphasized in its report that these should not, and must not, be mutually exclusive goals. We also recognize this need in the Longshore Act programs. The economic and social loss is much too great when injured workers are not rehabilitated and re-employed to the greatest extent possible. Within OWCP, we have established a separate rehabilitation division for all our compensation programs, to stress the need to provide early rehabilitative medical services for disabled persons who might benefit from such assistance. This approach goes far beyond providing mere supportive

treatment as was permitted in the past, and entails the active supervision of medical care.

We have added rehabilitation specialists to district office staffs to provide eligible claimants with counseling and referral services to expedite their return to work. Before 1977, rehabilitation counseling was provided, on a part-time basis only, by specialists from the Federal Employees' Compensation Program, which is also administered under my supervision.

We have systematized our procedures for early identification of those injured workers who need and could benefit from rehabilitation. The social and economic gains to be realized by returning claimants to the workforce cannot be denied. Our program is flexible and is designed to make a wide range of services available to achieve these gains. In the coming years, we expect to give increased emphasis to the rehabilitation of injured workers so that they can return to work.

We are improving our training efforts. We have designed and implemented a comprehensive national training program for claims examiners and their supervisors. Scheduled, formal, topically based training is a recent innovation in the Longshore program. Previously all training was accomplished only through on-the-job

training in the district offices--largely on a hit-or-miss, whenever possible, basis. Further, formal, unified training reenforces the acceptance and application of uniform claims processing procedures within and among all district offices.

These procedures, along with references to new court decisions, precedents, and regulations, have been incorporated in a new Longshore Procedure Manual that serves as a reference tool used by claims examiners in our district offices. The Manual has been extensively revised and was reissued last year. It is updated quickly whenever changes are required, and kept current in terms of the programs' needs.

A strict quality control system has been established. National performance standards for the entire range of Longshore functions have been developed, and we are accelerating and intensifying our schedule of field audits of program operations to ensure compliance with these standards. These audits are referred to as accountability reviews. This new management review process enables us to detect and correct problems quickly before they get out of hand, and to strengthen the standardization process to achieve uniformity of program administration.

My office is directly involved in the on-site reviews of Longshore district offices, and I, or a personal representative, have participated in reviews of each Longshore office. During the reviews, each office is evaluated against the national performance standards. Before the review team leaves an office, written recommendations are provided to the regional administrator and immediate implementation is expected. We schedule follow-up visits when needed to see that offices are complying with accountability review recommendations. The status of corrective actions is reported in quarterly review and analysis reports submitted by the district offices.

Since the implementation of the national performance standards, there has been considerable improvement in scheduling and speedily completing informal conferences to resolve disputed issues, and in making recommendations and preparing conference reports after they are held. Nearly 65 percent of all cases which require a conference are now scheduled, conducted and reported within 45 days of the date of request as compared to 120 days three years ago. This improvement was accomplished although the number of informal conferences conducted increased by 10 percent from 8,920 in FY 1976 to 9,824

in FY 1979. The conference count in FY 1980 will increase by 16 percent over FY 1979 to 11,400.

Our fundamental management changes are yielding measurable benefits through increased productivity. At the beginning of FY 1977 (October 1976) the inventory of cases awaiting claims action was 20,143. At the end of FY 1979 (September 30) the inventory of cases awaiting claims action was down to 12,511, even though the number of injuries reported annually increased by 30,821 over the period. At the end of the third quarter of FY 1980, the pending inventory had been further reduced to 9,470. By the end of FY 1980, 72 percent of controverted cases will be processed within 60 days, while nearly 65 percent of all conferences will be completed within 45 days.

We are especially pleased with our rehabilitation efforts. During Fy 1979, 5,094 cases were referred to rehabilitation specialists by claims examiners, up substantially--by 284 percent--from the 1,328 referrals in the previous year. Rehabilitation referrals in FY 1980 will approximate FY 1979 levels. The number of cases in which rehabilitation was completed during those years also increased substantially--from 24 in FY 1976 to an estimated 280 during FY 1980. And the active rehabilitation caseload grew from 417 at the close of FY 1976 to an estimated 5,250 at the end of FY 1980.

I do not think we have by any means seen the end of this trend. We continue to press on in our administrative improvement program and will continue to implement it enthusiastically. We fully expect it to produce even better results in the future. All of these improvements point to one inescapable conclusion: users of the program are no longer frustrated by massive administrative delays and by the feeling that no one cares and no one is interested. All users of the system--injured workers, employers, and insurance companies--benefit from the management improvements that we have made, and they will continue to do so in the upcoming years.

Thank you. My colleagues and I will be happy to answer any questions you or the members of the Committee may have.

The CHAIRMAN. It is good to hear your report of the Longshoremen's Act here in terms of smoother operations, and you seem to feel that your—you have moved well down the road in the direction of—the administration of a fairer act than we had before the 1972 amendments.

I will say here, and I am sure it is true in the House, too, we hear considerable of the laments of those who have to live under the act, as you well know.

I just wondered, administratively, how does the Department receive the—from the affected community, their impression of how effective the act is in operation?

Mr. ELISBURG. Well, you are obviously going to hear a number of different versions of that this morning, Mr. Chairman.

I have asked each of our regional managers frequently to go out and contact the representatives of the employers as well as the employees of the various people who are involved in this process.

I believe there is a recognition that the process itself has improved dramatically over the years.

I think that we hear the same observations from many of the constituencies, particularly on the employer's side of the act. The amendments in 1972 were not inexpensive; I am not sure that anybody ever assumed that they would be.

Congress took a statute that had been sitting for many years without an improved level of benefits and raised it to provide adequate protection to injured workers. I think that, as that has taken hold, there certainly has been some impact on the costs and on what people may have expected.

The extension of coverage to shoreside, of course, created an enormous number of new claims—several hundred thousand, as a matter of fact, over the last 8 years, a dramatic increase in reported injuries, and so forth, that has led to an extensive amount of litigation.

We believe that the directions we have been following in the Department's representation before the courts, are those that Congress intended. The Supreme Court has certainly upheld the Department in coverage matters. But there seems to be a view that the Longshore Act is too rich for some people and is ahead of itself as it were in the kinds of benefits protection provided. We do not quite view it that way.

We think that it represents the level of protection that workers ought to have. Obviously, there are also those who would perhaps fight to turn the clock back to the preworkers' compensation days, and I think that is simply not going to happen. We have recognized that there are several areas, as I have said in prior testimony before other committees, that perhaps, after 8 years of experience, ought to be looked at.

The whole question of escalation, while we believe it is correct, may be one with room for some limitations.

Another question is the whole business of the failure to have a cap on death benefits. We argued in the Supreme Court unsuccessfully that Congress really intended that there should be a cap on death benefits.

We are very concerned about the second injury fund and are currently seeing if we can do something through the regulatory

process, short of legislation, to try to provide better protection for the second injury fund. A lot of claims are being put into that fund, and that means very high assessments on employers. We do hear from and communicate with these folks.

The CHAIRMAN. Let us get some of the specifics here.

A representative of the Shipbuilders Council and the American Waterways Shipyard Conference are going to testify later and they will say that the act was extended to cover shipyard workers on shore through an inadvertence. In particular, they will state that when the Shipbuilders Council testified on the 1972 amendments, the bill then before Congress did not extend this coverage and that the shipbuilders did not take a position with regard to extension of coverage.

I would like to know what the Department's position is with regard to the legislative history on this point; was the extension of the act to the dry land workers in shipyards a deliberate action?

Mr. ELISBURG. Well, let me comment briefly and perhaps Mr. Hartman might also like to comment.

The shipbuilders were represented at public hearings held by this subcommittee in 1972 before the amendments were passed by the Congress and were certainly aware of their intended coverage.

The fact is that shipyards in their operations over the navigable waters or in dry docks were covered before the 1972 amendments, although there was certainly a twilight zone, much as there were problems on the docks. I believe there was certainly ample time between the time the Senate passed the bill for anyone who was affected to have looked at the thrust of these amendments before the final passage by the House and enactment of the legislation.

Insofar as these cases have gone to the courts, they have consistently upheld coverage of maritime work performed within a shipyard. So I cannot imagine that it really should have come as any surprise to anyone.

But perhaps Mr. Hartman might—or might not want to comment.

Mr. HARTMAN. I have nothing to add—well, I might say this.

The record will reflect that I testified in behalf of the Shipbuilders Council of America. I was then employed in private industry and a question was put to me with respect to the extension of the coverage of the act shoreside.

My testimony reflected a consensus, but in response to the specific question I think my concluding statement was that I could not speak for the Shipbuilders Council but personally and for my own company, I saw no objection to extending the coverage shoreside.

The CHAIRMAN. Staying with this, Mr. Elisburg and Mr. Hartman, Mr. Maisonpierre will testify later today that one of the effects of the 1972 amendments was to newly cover the small pleasure craft manufacturers and marinas built exclusively to cover small pleasure crafts. He asserts that these employers have traditionally been covered by State workers' compensation coverage.

Do you agree with this assessment of the effect of the 1972 amendments with regard to these employers?

Mr. ELISBURG. Well, it was somewhat of a large sweep of coverage under the 1972 amendments.

The fact is, Mr. Chairman, that builders of small boats were considered covered by the act before 1972. There in fact was an old case going back to the early forties on the matter.

The CHAIRMAN. What does that mean "considered"? Were they covered?

Mr. ELISBURG. They were covered.

The CHAIRMAN. Were they putting claims in?

Mr. ELISBURG. No, that is the problem. They were covered.

The CHAIRMAN. Who considered them first?

Mr. ELISBURG. Well, to the extent——

The CHAIRMAN. Evidently they, and the workers did not, if they were putting in claims under the law.

Mr. ELISBURG. As I understand it, in fact there was in most policies a rider, whenever these boatbuilders would get insurance. If one looked at all the little rate forms and went down into the details, one would see in the policy that there was Longshore coverage provided prior to 1972, if in fact somebody ever fell off the end of a pier and filed under the Longshore Act.

The fact of the matter was that probably in every case, virtually every case, the claim was just routinely processed in the State courts. The Department did not go out and look for claims; the claimants did not have any particular knowledge that they should file under a different law; the insurance carriers just treated it as part of the State law; the State agencies just treated it as part of the State law. So it was, I guess, if I can use some lawyers' terms, de facto coverage under State law, although de jure there was longshore coverage.

To this day, we in the Department feel, in fact, that technically the law covers small boatbuilders and we have issued opinions to that effect, upon request. That is not to say that if there was a way to carve out that particular industry and still protect the workers over navigable waters, if they were injured, constitutionally, that we are not necessarily adverse to that, but at the present time our view is that the law covered them before and it covers them now.

Now, part of their problem, of course, was that there were some enormous insurance premiums levied on these folks after the passage of the act, at least insofar as this matter has been handled in California in the last few years. The California Legislature authorized the California State fund to write insurance for them. They began to do so and their premiums have dropped rather substantially. So I suspect that it may still be something of a problem for the small boat builders, but not the one that it was.

The CHAIRMAN. This seemed to have been a lightning rod—the coverage of this kind of shipbuilding. It has produced a couple of bills in the House, Erlenborn I and Erlenborn II. Nelson from this committee, mid-America speaking out. Ferry schooner folks are being heard from.

Mr. ELISBURG. It is true, Senator, that at least to my own personal recollection of the hearings at the time and the discussion, I do not recall any discussions one way or another of small boat builders. It was not exactly the high point of the consideration of the statute.

The CHAIRMAN. Well, it has now reached a point of particular concern expressed in these bills.

Are you familiar with the two House bills?

Mr. ELISBURG. I am familiar with some of the legislation. It seems to me the last time I testified on this, before Senator Cranston, I guess, we indicated that we would be willing to try to work with the committee to try to come up with some language that might provide some treatment for these people under State law, assuming you could get around the constitutional problems of people falling into navigable waters. We do not want to leave a worker without some protection. Our fear is that when you get through rewriting this statute, you might have the workers still covered under the Longshore Act, and the premiums would not be any different because they always were covered. But that is a close legal question right now.

The CHAIRMAN. Now, coming to some of the other questions that you touched on.

Employers and insurance carriers believe that high benefit levels under the act are causing a tendency toward overutilization of Longshore, compensation program and its benefits.

I wonder, are there any statistics which indicate a trend in utilization rates?

Mr. ELISBURG. Well, it is clear that the extension of coverage and the increased benefits led to a significant increase in claims filed and in litigation to determine coverage.

There is no question that, to the extent the Longshore Act provides more, or better, benefits than a State law, the effort for a particular injury would be to try to have it under the Longshore Act. There has been a substantial amount of litigation on that.

On the other hand, we do not believe there is evidence of either wholesale filings of questionable or false claims or of substantially widespread abuse under this law.

In 1977, we did establish an investigative unit within the Employment Standards Administration to investigate allegations of fraud and abuse. This unit was absorbed in our Inspector General's office in 1978. We occasionally do get complaints which we follow through, but the majority of the cases that we find coming through our system are bona fide injuries.

But to make it clear, there is no question that once the law was extended shoreside, there were substantial new cases added because it was a whole jurisdiction that the Department had never had before.

On the other hand, those are cases that would otherwise have been filed in the State courts and the State agencies. So the total number of injuries reported may not be more than there were prior to the act.

The CHAIRMAN. I should think that this would lend itself easily to a statistical analysis.

Is there a statistical analysis utilized?

Mr. ELISBURG. Oh, sure. In 1972, there were 17,500 lost-time injuries reported. In 1976, it was 39,000. The 1980 estimate is 60,000.

The CHAIRMAN. 1976, 39,000?

Mr. ELISBURG. Right, in and 1980 we estimate 60,000 lost-time injuries.

The CHAIRMAN. Not quite double, but the act was fully effective in 1976?

Mr. ELISBURG. It was fully effective in 1972.

The CHAIRMAN. But you gave us a 1976 figure of 39,000 plus.

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. Four years later, 60,000. Did you say 1980?

Mr. ELISBURG. Yes, sir.

By the end of this fiscal year, we estimate 60,000. Yes, the last year, for example 1979, there were 57,000. So it is probably going up between 4,000 or 5,000 a year. There is no question that there have been substantially more injuries reported. Part of our problem in reforming our own administrative procedures the last couple of years was to get a uniform set of statistics.

I found in 1977, for example, when I took office, that each of our district offices was reporting things differently, so certain cases that were reported in one district were not reported in another. But I do not know that one could characterize this as something that is an abuse.

The fact is that we do not find people filing that many claims where it did not happen. Some place the injury did happened.

In those cases where we have apparent fraud, of course, we recommend prosecution and that does happen.

The CHAIRMAN. Now, the figures you just gave us, these are lost-time cases?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. That produce claims?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. And on the other side of the equation, you would have to have the numbers covered under the act for the period that you have the statistics.

You have all of that, whether coverage was increasing, decreasing, those employed, those numbers employed during these years?

What I am saying is to get any meaning from those figures, you have to know what the full picture was: employed, covered. Do you have all of that? You are reading this off a yellow sheet of paper that Mr. Montone had.

Is there a statistical analysis?

Mr. ELISBURG. There is, but I will have to find it for you and submit it, if I can.

If you are looking for a breakdown of covered workers, about 1 million workers are covered.

The CHAIRMAN. I think we ought to have—do the statistics indicate any trend in the utilization of the program? I think that maybe you better do an analysis of this for our record here.

Mr. ELISBURG. All right.

The CHAIRMAN. Because, quite frankly, those figures are rather startling from 39,000 in 1976 to 60,000 in 1980; startling. We have to know what it relates to.

Mr. ELISBURG. We will do that.

But it is also true, Senator, that there has been a trend in the last 7 or 8 years, generally, in workers' compensation systems around the country for more claims to be filed. Part of it relates to benefits going up; part of it relates to people filing claims for

occupational disease; part of it relates to the fact that workers are becoming more cognizant of their rights under the statute.

So there is no dispute about the fact that there is an upward curve, but it is not necessarily something limited to the Longshore Act.

We will provide that information to you.

[The following was received for the record:]

Covered Employees Under LHWCA
and Extensions

The following is an approximate breakdown of the number of employees covered under the LHWCA and each of its extensions.

Act	No. of Employees covered
Longshoremen's Act (LHWCA)	270,000
Defense Base Act	11,000
Outer Continental Shelf Lands Act	40,000
Nonappropriated Fund Instrumentalities Act	194,000
Dist. of Columbia Workmen's Comp. Act (DCCA)	390,000

There were approximately 230,000 production workers engaged in ship and boat building and repair and marine cargo handling immediately prior to the 1972 Amendments. However, an indeterminate number of workers in ship and boat yards were not covered prior to the 1972 Amendments. Approximately fifty percent of the injuries reported under the LHWCA are shoreside coverage injuries which were only covered since the 1972 Amendments. Also, prior to the 1972 Amendments there were approximately 300,000 employees covered under the DCCA. This number has increased significantly because the extra territorial provision has been broadly applied in recent years by the administrative review process established by the 1972 Amendments. Finally, increased gas and oil drilling activity on the outer continental shelf has increased the number of covered employees.

The CHAIRMAN. One observation leads to another question.

OSHA covers this area, does it not?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. And that has been a change within the last 8 years, am I right on that?

Mr. ELISBURG. With the enactment of the Occupational Safety and Health Act, that statute became the statute for the Longshore Act. As a matter of fact, stevedoring had been one of the high risk or high incidence industries under the statistics, prior to the Occupational Safety and Health Act. The safety and health inspections were accomplished under section 41 of the Longshore Act but that was preempted by OSHA. We do not do longshore inspections any more. The Department does, but my agency does not.

The CHAIRMAN. Now, Mr. Elisburg, a witness who is going to appear later will testify that—these are his words and his testimony:

> Under the present law, a person eligible for escalation under the Longshore Act who receives increases, based upon the increase in the national average weekly wage, will net out substantially higher than a person in the work force. This is said to occur because the recipient of the longshore benefits is free of taxes or other deductions while a member of the work force has State and Federal taxes, social security, other deductions subtracted prior to his receiving the increase.

In other words, he is getting ahead.

Now, your comment. Is this correct and, if so, does it present a real problem of disincentive to return to work?

Mr. ELISBURG. I am not sure that the formula that has been reflected by you in fact happens. Obviously, if you are getting more by being on compensation than by working, that could be a disincentive.

We also have to look at the fact that you may well be dealing with someone who simply cannot return to work. Our understanding is that the escalation of benefits which permanently disabled workers and survivors receive is based on a percentage of the national average weekly wage. It is supposed to protect the erosion of their purchasing power. The increase has not been over 8 percent since 1972; and that would, it seems to me, be generally less than the percentage of the loss of purchasing power that the individual suffers.

The escalation has not been higher than the increase in the cost of living because of the way in which we compute it. It is not computed on the CPI.

I suppose there are permutations that could show higher wages, but I think when someone, starting with two-thirds of his wages, is getting an escalation on that, he has had a rather substantial deduction from day one. You do not get your take-home pay when you are disabled.

The CHAIRMAN. What is the employment picture here in the longshore industry? Is it similar to construction where there are periods of reduced employment opportunities as in construction?

Is there a comparability here?

Mr. ELISBURG. Yes, sir, certainly on the west and gulf coasts. There are obviously slow seasons and sometimes more people working than not, and sometimes a lot of people are laid off. I cannot quite speak about the New York area because I do not fully understand their guaranteed annual income plan. Perhaps the witness from the ILA can deal with that. As Mr. Hartman points out, certainly for those longshoremen on the Great Lakes, that is clearly seasonal.

The people in the shipyards obviously have their ups and downs.

The CHAIRMAN. We will, as I say, receive this testimony. Maybe we can learn more from the witness about the real wage picture, and I do not know—where do we go? What if that is true and there appears to be this advantage to not working or disincentive to work where do we go from there? How does that affect what we would be dealing with in terms of the legislation?

We hear this in other areas too, that benefits under a program are a disincentive to productivity.

Mr. ELISBURG. Well, I do know, Mr. Chairman, that we have been exploring our own Federal Employees' Compensation Act where there are some permutations, where some workers might have an incentive to go on disability because they would take home more than if they were working. It is our general belief that you ought not to be in that position; that is, that whatever you get by way of the disability ought not be greater than what you were getting when you were working. But I am not sure in the typical situation of the people working in the occupations covered by the statute that that is a major factor. I think most of the serious injuries that take place here involve people whose income is dramatically reduced. Even with the compensation payments they have trouble making it because of the economic destruction to their families.

The CHAIRMAN. You talked about the Inspector General with the Department?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. Now, it is not exactly within the Department; am I right or wrong on that?

Is not this a congressional creation, an office that really is not reporting to you or to the Secretary of Labor; am I right?

Mr. ELISBURG. The Inspector General does not report to me. The Inspector General does report to the Secretary and Under Secretary of Labor directly and has certain other reporting functions to Congress as well.

The CHAIRMAN. But not accountable to the Secretary of Labor?

Mr. ELISBURG. I believe so. Just 1 second.

[Pause.]

Mr. ELISBURG. If I could ask Mr. Berrington, who has had a good deal of experience with that and who is the Deputy Assistant Secretary, to respond to that. Mr. Berrington worked with the IG operation.

Mr. BERRINGTON. The Inspector General's office has a dual responsibility under the Inspector General Act. It has reporting responsibilities to the Department of Labor; it has reporting responsibilities to the Congress as well.

The Inspector General in that sense has a unique responsibility and unique authority. The Inspector General has no reporting relationship in a subordinate/superior role to any other official in the Department of Labor. But we do have a close working relationship with the Inspector General on both specific cases of fraud and also in the Inspector General's management responsibilities to look at our case-processing and claims-handling responsibility in all of our programs.

The CHAIRMAN. Do you define the accountability and to what part of Government; is it a congressional creation?

Mr. BERRINGTON. Yes, sir.

The CHAIRMAN. And it really does report and is accountable to Congress; is that right?

Mr. BERRINGTON. Yes, sir; it is as I understand it, a unique position in the executive branch with responsibilities directly to the Congress and also responsibilities to the Cabinet head.

The CHAIRMAN. Responsibilities in terms of furnishing a Cabinet head with reports and studies?

Mr. BERRINGTON. Yes, that is correct. And responsibilities in assisting the Cabinet head in management of programs from the standpoint of fraud and abuse.

Mr. ELISBURG. Since the Inspector General has assumed responsibility for this fraud and abuse program, we have had outstanding cooperation with them. We have worked very closely. We just simply have not had a problem in that regard.

The CHAIRMAN. It is felt by some that when the 1972 amendments were passed, they really incorporated the National Commission on State Workmen's Compensation Laws recommendations.

Really, the amendments embrace more than the Commission suggested for workers' compensation; am I right on that?

Mr. ELISBURG. A few more issues, sir.

The CHAIRMAN. One of them is this nonscheduled payments of nonscheduled permanent partial disability. There will be statements here that reflect that this reaches situations where there has been no loss of wages.

I wonder if you could state the purpose that is served by the payments of benefits for loss of wage-earning capacity where there in fact has been no loss of wages. This is the permanent partial situation that we, over the years, have not tackled within our consideration of workers' compensation; the Commission did not come to any judgments on this with recommendations, but the Longshore Act does, of course, fully embrace nonscheduled permanent partial disability benefits.

Mr. ELISBURG. I would ask Mr. Hartman if he would comment on that.

Mr. HARTMAN. If my memory serves me correctly, in considering the 1972 amendments, there was a proposal that was discussed, and I think dismissed very quickly, that at the end of a scheduled award, say 25 percent loss of use of the left hand, x dollars extending for x number of weeks, the case be looked at and an attempt made to determine if there was a continuing wage loss. Did it impair his ability to earn? If so, then on a wage loss basis, benefits could be extended. That did not result in any consideration or at least in adoption.

Now progressively, in the intervening years, however, that concept has come in through the appellate procedure, so that at the end of a scheduled award, if there is a wage loss extending beyond the term of that scheduled award, then payments for wage loss are extended beyond that point.

I would just like to check that point with counsel. Is that correct, Mr. Lilly?

Mr. LILLY. Yes.

Mr. HARTMAN. But that, as I say, is through the appellate process.

The CHAIRMAN. What is the state of the law on that nationally? Has this gone to the highest court and has that been made national through law, through the appellate process?

Mr. LILLY. Not yet, Mr. Chairman.

There is pending in the Supreme Court a case from the District of Columbia which will test the relationship between scheduled and unscheduled from the standpoint of one or the other in a particular case.

The case involves of a man who injured his leg, and in a sense decided he would rather go with the unscheduled loss of wage-earning-capacity award rather than a scheduled. There was a vigorous dissent in the District of Columbia circuit, but that case is presently pending in the Supreme Court and should go some distance toward resolving that particular situation.

The CHAIRMAN. The schedule, there is a schedule that existed before the 1972 amendments?

Mr. LILLY. Yes, sir.

The CHAIRMAN. The 1972 amendments did not alter that scheduling, is that right?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. Prior to the 1972 amendments, had this extension of benefits to the unscheduled, had that been established prior to 1972?

Mr. LILLY. In some cases, I believe. This is another situation that is described as a trend in the workers' compensation law—that the schedule may not literally adequately compensate the worker for what he or she has lost and that therefore on a loss of wage earning capacity, he or she is literally entitled to further benefits rather than the straight number of weeks scheduled.

Mr. HARTMAN. You see, Senator, prior to 1972 and now, section 8 of the act runs through some 19 schedule categories—a finger, a hand, a leg, any limb. Then it comes down to your nonschedule and this is where the case is considered not to be scheduled. Let us take a back, a low back strain condition or head injury where you are not taking a proportionate loss or loss of use of a member, for example. Those are the nonscheduled. There, that comes into a wage loss concept totally.

What was the individual making, what was his average wage before; what is he able to make now? Two-thirds of the difference between them is his compensation rate. So that you have the schedule and then in addition to the schedule, even prior to 1972, where there was a nonschedule award, or a nonschedule condition. Then it was on a wage loss concept. But beyond that, no, prior to 1972. There was none of this extending it unless it fell into that category, and there was some degree of litigation over whether it was a schedule award or it was not, as Mr. Lilly said a moment ago.

If a man has an amputated leg, there are times when he may elect, and he may prevail, that it is a schedule, whatever he is paid, 312 weeks, whatever the loss for that leg.

On the other hand, he may elect and may pursue with medical and prevail on a pure wage loss concept. He may even end up showing that he is a permanent total disability for any gainful employment which he is capable of performing.

The CHAIRMAN. There is an option even though the situation apparently falls under the schedule; you say the loss of a leg, that is 288 weeks compensation, given that there is still an opportunity to proceed with a different approach, not in terms of the schedule but the total person.

Mr. HARTMAN. That is correct. The Supreme Court has so ruled.

Mr. ELISBURG. This is not the result of any amendments of 1972.

The CHAIRMAN. No.

Mr. ELISBURG. The 1972 amendments did not touch this area. It is just the development of case law.

The CHAIRMAN. The 1972 amendments probably did not change this section 8 provision.

Mr. ELISBURG. Right, it did not.

The CHAIRMAN. Now, on the filing of claims, what is the entry point and then the processing of claims? When does the administrative law judge come into the picture for decision?

Mr. ELISBURG. The first report of the injury, of course, goes to the employer. The employer is then obligated to file a notice with the Department of Labor, that is, at our Deputy Commissioner level. That is in the office. The claim is then processed at that level. The Department basically becomes involved in it if it becomes controverted.

The CHAIRMAN. Is this in a regional office?

Mr. ELISBURG. Yes, sir, I am sorry. This is in our regional—we call them district offices—but they are regional offices located around the country and that is where that case would be processed. If it becomes controverted, the Deputy Commissioner will then set up an informal conference proceeding. If they cannot resolve it then, it is at that point that the case then goes to the administrative law judge for decision. Appeals from the administrative law judge then go to the Benefits Review Board.

The CHAIRMAN. How many districts are there; how convenient to the place of employment?

Mr. ELISBURG. We have 16. We have them in virtually every major maritime coastal area.

For example, we have them in New York, Boston, Philadelphia, Norfolk, Baltimore, and Jacksonville. We have them in Galveston, Houston, and New Orleans. We have an office in Seattle and in San Francisco. We opened up one within the last few years in Long Beach, Calif., which is enormously successful. It has taken a good deal of the business away from San Francisco.

The CHAIRMAN. Where do the Midwestern employees of pleasure boat companies go for their filing of their claims?

Mr. ELISBURG. Well, they go to Chicago, which is where our longshore office is, or we do get claims in Kansas City and occasionally in Denver. We have very small offices in Kansas City and Denver. The Midwest center is in Chicago. We did have an office in Cleveland. We found that the usage, as it were, between Cleveland and Chicago, made it more convenient to have it in our regional office in Chicago.

The CHAIRMAN. Have any complaints reached you of the long distances claimants have to go in the next procedure to get to the administrative law judge?

Mr. ELISBURG. We have not had any come to our attention in a long time. The administrative law judges opened offices in New Orleans and out on the west coast within the last couple of years and, in fact, the administrative law judges travel to the areas where the claims are. They travel out pretty far, pretty close to where the claimants are.

Our general posture would be within the Department that if there is a difficulty for claimants, we will try to bring the process

to them, rather than to have them come to the process. That is our general philosophy, Senator.

The CHAIRMAN. We have many more questions, Mr. Elisburg, and I am wondering whether because of our time problem that maybe we will submit these to you in writing.

Will you be monitoring the rest of these hearings from your office?

Mr. ELISBURG. Yes, sir.

The CHAIRMAN. All right, thank you very much.

[The following was received for the record:]

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS
WASHINGTON, D.C. 20210

DEC 18 1980

Honorable Harrison A. Williams, Jr.
Chairman, Committee on Labor
and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of October 3, 1980, requesting the Department of Labor's views on a proposal by the International Association of Drilling Contractors (IADC) to amend the Longshoremen's and Harbor Workers' Compensation Act to, among other purposes, permit indemnification agreements throughout the marine petroleum industry.

The agreements in question provide for indemnification of the rig owner (typically an oil company) by the independent service contractors whose employees work aboard the rig, against injury claims by the contractor's employees, even if the injuries were the fault of the rig owner. Under current law, such agreements are permitted if the rig in question is a fixed platform. Indemnification of the rig owner by the injured worker's employer is prohibited by section 5(b) of the Longshoremen's Act, added in 1972, if the rig is a "vessel," i.e., any of the several types of "mobile offshore drilling unit" (MODU). IADC's proposal would, in effect, make an exception to section 5(b)'s prohibition of indemnification of vessels, for MODU's and any other vessels engaged in marine petroleum (or other mineral) extraction or exploration operations.

Although IADC's statement discusses only the exception to section 5(b)'s anti-indemnification provision described above, the proposed amendment is designed to affect current law in other significant ways. The proposal's application is not limited, as page 6 of the accompanying statement says it is, to injuries on the Outer Continental Shelf, but expressly includes also vessels "in state territorial water." Furthermore, the second and third sentences of the proposed amendment

would limit significantly the current rights of injured workers to recover damages. This is contrary to the statement's description of the proposal as simply permitting "allocation" among industry parties of liability to such workers. Those sentences and the reference to "other applicable State laws" in the proposal's final sentence would preclude enforcement of State law rules either imposing liability or limiting indemnification. Under current law, those rules apply to fixed platforms both on the Outer Continental Shelf (as surrogate federal law, under Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)) and in state territorial waters (of their own force). Particularly in view of the failure of IADC's statement even to describe the effect of these provisions on current law, we see no basis for the significant alteration these proposed provisions would effect in the current allocation, between the Federal government and the States, of regulatory authority over the marine petroleum industry.

With respect to the proposal's first sentence, excepting the industry's vessels from the section 5(b) prohibition on vessel indemnification, we have both technical and substantive objections. First, the drafting of the sentence is defective in at least two respects: the parallelism of the clause beginning, "or the incident occurs," is at best obscure, and at worst would apply the proposed amendment to cases heretofore governed by the Jones Act and general maritime law. We presume this effect to be unintentional. The use of the word "offshore" to mean "on the Outer Continental Shelf," while colloquial, lacks sufficient legal precision. A further technical insufficiency is that although the most central intention of the proposal is uniformity of treatment of indemnification agreements in the industry, it might very well fail to reach fixed platforms in State territorial waters, which are arguably not within the application of the Longshoremen's Act. State laws restricting indemnification would therefore remain in effect with respect to injuries on such platforms. Thus the uniformity supposedly intended by IADC would not be achieved.

Finally, we are opposed to the substantive concept embodied in the proposal. Indemnification of the owner of the platform - fixed or MODU - by the injured worker's employer does indirectly affect workers. Indemnification makes the employer an ally of the owner, rather than of the injured worker as contemplated by section 33 of the Act, in litigation of the worker's maritime tort action against the owner. This shift in alliance may often determine the outcome of the suit. Further, and more importantly, such agreements decrease the direct safety incentive of the party best able to control the safety of the platform-workplace--its owner. Some jurisdictions, either by statute or by judicial decision, have strictly prohibited enforcement under any circumstances of an agreement by one party to indemnify another for loss caused by the indemnitee's sole negligence, on the ground that the effect of such a provision on the indemnitee's safety incentive is contrary to public policy. In our opinion, it would be inimical to the interests of marine petroleum workers, and inappropriate, to extend the permissibility of such arrangements.

In view of the incompleteness of IADC's statement in support of its proposal, of the technical deficiencies in the drafting of the proposed amendment, and of our serious reservations concerning its substance, we are opposed to amendment of the Longshormen's Act in the manner proposed by the IADC.

We appreciate the opportunity to present our views on this proposal.

Sincerely,

Donald Elisburg
Assistant Secretary

The CHAIRMAN. Next we have Mr. Norman Leonard, general counsel of the International Longshoremen's & Warehousemen's Union, San Francisco.

I understand Mr. Gleason is not able to be with us today.

Off the record for a minute.

[Short recess.]

The CHAIRMAN. Mr. Leonard, good morning. We welcome you and look forward to your statement.

STATEMENT OF NORMAN LEONARD, GENERAL COUNSEL, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, ACCOMPANIED BY RICHARD C. WISE, COAST LABOR RELATIONS COMMITTEE, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, SAN FRANCISCO

Mr. LEONARD. Thank you.

My name is Norman Leonard and I am general counsel for the International Longshoremen's & Warehousemen's Union, which represents longshoremen in the State of California, Oregon, Washington, Alaska, and Hawaii.

With me is Mr. Richard Wise, who is a member of the Coast Labor Relations Committee of the International Longshoremen's & Warehousemen's Union. The coast committee is the body which is charged with the administration of the collective-bargaining contract and all of its details.

Mr. Wise and I appreciate this opportunity to present our views to this subcommittee on the Longshoremen's & Harbor Workers' Compensation Act.

The 1972 amendments to the act, as has already been indicated here this morning, were based upon the recommendations of the National Commission on State Workmen's Compensation Laws and, as this committee knows, were generally supported by labor, industry, and indeed by the insurance carriers. Those amendments established a program that has been a national model for benefits and scope of coverage.

As we consider the status of the present program, it seems to the ILWU that it needs to be remembered, that the 1972 legislation represented a compromise by which longshoremen gave up their rights to maintain third-party suits in exchange for the increased benefits and extended coverage about which we heard so much this morning.

Any efforts to reduce those benefits or to restrict that coverage is, in our view, a breach of the 1972 understanding. We would suggest that it would not be unfair to propose that if one part of the bargain is to be renegotiated, the other part should be too.

Our members on the west coast do have problems with the act. They are mostly problems relating to enforcement and the timely processing of claims. We are very heartened this morning to hear the Assistant Secretary give the subcommittee some figures and some information which indicate that the delivery process to claimants is improving and has been speeded up. We trust that that will continue in the future.

In any event, we are satisfied that problems of that kind can be dealt with through administrative action and increased agency staffing without changing the present legislation. In the view of the

west coast longshoremen and their union, there is no need to amend the act in any way.

In this regard, I might say parenthetically that a statement submitted to this committee by our counterpart on the east coast, the International Longshoremen's Association, does make some suggestions for amendments. While we feel that no amendments are necessary, we are prepared to discuss with the ILA their proposals, and if we can resolve some of those problems, present this committee with a common suggestion, insofar as both unions are concerned.

As this committee knows, the amending legislation which was introduced early this year by Representative Erlenborn and Senator Nelson is only the most recent attempt to eliminate the gains that were made in 1972. Heretofore, the ILWU has testified and submitted statements through its Washington representatives with respect to those matters. We appeared before the House Committee on Labor Standards in November of last year and stated our opposition to any proposed changes.

Now once again, here in 1980, we are told that because premium costs to maritime employers have been prohibitively high, the industry cannot afford to provide compensation benefits at their present level.

We feel that we must remind the committee, as we constantly have, that the longshore industry is the second only to mining in health and safety risks, and that the accident frequency rate in longshore is four times the national average. For all of the shippers' and stevedoring companies' complaints about high compensation benefits, it is the longshoreman on the job who runs the constant risk of losing his eye or his leg, or even his life.

Instead of intensifying efforts to make the waterfront a safe place within which to work, instead of making efforts to exert control over premium rates about which they complain, our employers and the insurance carriers apparently would prefer to solve the financial problems associated with safety hazards at the expense of those workers who suffer because of those very safety hazards.

To put the claim that these benefits are disproportionately high in its proper perspective, we recall a statement that we submitted to the committee the observations made by Assistant Secretary Elisburg before the House subcommittee in May 1978. I do not need to repeat them now. They appear in the statement and, essentially, Mr. Elisburg stated them again this morning and the ILWU concurs in what he said.

Those amendments in 1972, as has been indicated, were a step in the direction of national acceptance of the principle that a worker and his family should not suffer financially because he or she has had the misfortune to be injured on the job. In viewing this in perspective, Senator Williams, I think it is important to remember what we are talking about. We are talking about a man, and now a woman—we have women in our industry—who has been injured on the job, we are talking about the person who, for whatever reason, oftentimes it is because of lack of safety, is hurt. He is the one or she is the one who has lost that arm that you were talking about this morning, or lost the use of the hand and so on, and the

question really is: In considering these amendments, where does society, where does the legislature, where does Congress, where do all of us put the burden that that person must undergo in that situation?

Do we put it on the injured worker and his family or do we make an effort somehow to see that the risk is spread and that other segments of society pick up the slack?

There was some discussion this morning—I am now departing a little bit from my written statement—there was some discussion this morning about a worker under some circumstances that I could not quite envisage getting more money on compensation than when he was actually on the job. It is hard to understand how that can happen, but the important thing to remember, I submit, is that they do not have to automatically keep him on compensation. There was some discussion about disincentive this morning, but if a worker is physically able to go to work, there is going to be a medical report submitted by an insurance doctor who is going to say this man can go back to work and if the matter is contested, it is going to be litigated before the administrative law judge who is going to make a finding presumably based upon the entire record and subject to judicial review that the man, first, is no longer disabled and therefore is not entitled to compensation or, second, is in fact disabled and cannot work. It is not as though the worker is just going to say, I am not going to go back to work because I can make more on compensation. There are medical, administrative, and other kinds of checks that will see to it, to say nothing of the Inspector General that was spoken of this morning, that those abuses do not happen. It is our submission that this is a kind of spectre that is being raised to attack the legitimacy of the entire program.

Let me talk about some other aspects of this matter that are of concern to the longshoremen on the west coast.

We have heard a lot about the financial status of the maritime employers and the high cost of the insurance premiums. We submit to this committee that if those matters are to be taken into consideration, this committee also needs to take into consideration that in the last 20 years in this industry, in this longshore industry, on the west coast—and I am sure it is true on the east coast, our colleagues on the east coast can speak to that—there was almost 500 percent increase in workers' productivity, an incredible increase, an increase much greater than what our members received in wages and fringe benefits. The cargo tonnage of these very employers who are going to be speaking here this afternoon has quadrupled and is handled by far fewer workers. Those improvements in efficiency and the resulting savings to the longshore industry were so spectacular that in 1972, during the Nixon administration, the staff of the Nixon Pay Board cited those increases in productivity as a justification for making an exception to the Wage Board's ceiling at that time to accommodate the ILW longshore contracts. They could not do otherwise. When they saw the figures about what longshoremen were producing on the west coast, they had to say that the men were entitled——

The CHAIRMAN. This was the advent of containerization?

Mr. LEONARD. Yes, sir, it was.

The CHAIRMAN. And the unions accepted this technological advance, as I recall it?

Mr. LEONARD. Exactly. In the most recent decision involving this matter, the Supreme Court pointed out that as a result of these technological developments, the amount of on-pier work involved in cargo handling has been drastically reduced, and at the same time productivity had been dramatically increased. This was pioneered on the west coast in what has come to be known as the modernization and mechanization program, which was instituted in the late 1950's and early 1960's even before containerization began to develop. The union and the employers together worked out a program which would permit the introduction of labor-saving devices rather than the union taking a position of resisting them. The union accommodated to the technology; it paid a great price for it in terms of lost jobs. Both the Supreme Court, the NLRB, other agencies that are concerned with these matters have said that that mechanization agreement was a remarkable, forward-looking position which the ILWU took to attempt to resolve difficult problems in the west coast longshore industry.

So as we think in terms of cost now, and we are focusing on costs of an insurance program for injured workers, it is our submission that our employers and their insurance carriers have to recognize that the huge profits that they make, out of which these insurance premiums and costs and so on are paid, come to a large extent from the fact that the unions on both coasts have been willing to go along with the increase in productivity and with a decline in job opportunities for their men.

Mr. Wise, who as I said is on the coast committee and is involved in the day-to-day activity of the contract, can point out that our people are not always happy with their loss of jobs and yet we have got to work out a solution to these technological problems and we have made efforts to do so. We do not like it then when people tell us these costs are so great that when somebody does get injured on the job, the industry cannot afford to take care of him.

Another problem that we can address is why are these costs so high? We think there are probably two reasons for this.

One, there is a great tendency on the part of carriers to contest and litigate cases. An awful lot of money is spent unfortunately, or maybe fortunately, depending on where you are sitting, in attorney's fees and in litigation expenses that ought to go to the injured worker.

Two, there is a large compensation cost, because money that should be spent in developing safety programs is not so spent. A dollar invested in a safety program is going to be much more valuable in terms of ultimately reducing compensation costs than a dollar spent in litigation or something of that kind.

Our members and the union on the west coast have constantly worked to improve health and safety practices on the job. Since 1934, we have fought, sometimes against our employers, to establish and strengthen the Pacific Coast Marine Safety Code which is a code of safe practices in the industry. We have now finally got it into the ILWU Pacific Maritime Association longshore contracts. We currently in the union have a health and safety program, funded by OSHA, which provides staff training, is developing a

resource center, is providing technical assistance, developing educational materials and conducting classes and workshops throughout the longshore division of the union, in connection with health and safety matters.

For these reasons, we are satisfied that the arguments against the present law and the proposals to change it and amend it are not well taken. We agree that there are problems in relation to the administration of the act.

As I indicated earlier, and as the Secretary indicated, the agency is working toward solutions of those problems and we believe that they can be solved internally. If indeed legislation is necessary in that area, we would defer to our colleagues in the ILA with respect to that.

The bills currently bearing on the act, as we understand it, will be reintroduced in the Congress next year and we take it we will have an opportunity to comment at great length at that time on their provisions. But we understand what their general substance will be. They will basically eliminate the gains made in 1972 by substantially reducing the benefits available to injured maritime workers and by making it more difficult to get those benefits and by narrowing the act's jurisdiction.

Such amendments, if they were passed, such legislation if it was passed, would return us to the era when an employee could be covered by the act 1 minute and not covered by it in another. When two employees could be working practically side by side, and one of them could be covered by the act and one and would not—a situation which all recognized for many years was ludicrous and ridiculous and which the 1972 amendments was intended to wipe out.

As this committee knows, attacks such as these on the hard-won gains are intensifying. Congressional spokesmen for private industry and the right wing are exploiting the current economic downturn to distract the public's attention from the real causes of inflation, recession, and unemployment. At a time when record-breaking profits are being made by the corporations that dominate our economy, and billions of dollars in private capital is being funded out of our centers of cheap labor, the most important improvements in our social programs that have been made in the last 5 years are attacked as wasteful or unaffordable.

The labor movement—certainly the ILWU—will continue to resist these attacks, and our union will continue to defend the living standards of our members and of the public at large. We urge your committee to look beyond the rhetoric of limited expectations—we hear a lot about that in California—and toward the real solutions to the economic problems we face.

In summary, with respect to this legislation, it is our contention that, No. 1, the jurisdiction which was established in 1972 and which has been affirmed and reaffirmed in the Supreme Court decisions that the committee is familiar with, the *Caputo* case, and the *Ford* case, be left untouched.

Second, that the benefits structures be left untouched and;

Third, that on an administrative level—and if legislation is necessary, but we think not—on an administrative level, steps be

taken to speed up the delivery of the benefits to the injured longshoremen.

Thank you.

[The prepared statement of Mr. Leonard follows:]

INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S UNION

1188 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94109 • 775-0533

JAMES R. HERMAN
President

RUDY RUBIO
Vice President

GEORGE MARTIN
Vice President

CURTIS McCLAIN
Secretary-Treasurer

Statement by the

International Longshoremen's & Warehousemen's Union

in Oversight Hearings on the

Longshoremen's and Harbor Workers' Compensation Act

Conducted by the

Senate Committee on Labor and Human Resources

Washington, D.C.

September 16, 1980

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to present our views on the Longshoremen's and Harbor Workers' Compensation Act.

The 1972 amendments to the Act, sponsored by Senators Williams, Javits, and Eagleton, and Representative Dominick Daniels, were based on the recommendations of the National Commission on State Workmen's Compensation Laws and were supported by labor, industry, and insurance carriers alike. They established a program that has been a national model for benefits and scope of coverage.

As we consider the status of the present program, it should be remembered that the 1972 legislation represented a compromise by which longshoremen gave up the right to maintain third-party suits in exchange for increased benefits and extended coverage. An effort to reduce benefits or coverage now is a breach of the 1972 understanding. It would not be unfair to suggest that if one part of the bargain is renegotiated, the other part ought to be too.

Our members have had problems with the Act related to enforcement and the timely processing of claims, but we feel that these problems can be dealt with through administrative action and increased agency staffing, without changing the present legislation. In our view, there is no need to amend the Act in any way.

As you know, the amending legislation introduced this year by Representative Erlenborn and Senator Nelson is only the most recent attempt to eliminate the gains that were made in 1972. Both bills are quite similar to Representative Erlenborn's earlier H.R. 2448, to which we expressed our opposition before the House Subcommittee on Labor Standards in November of last year. Once again we are being told that because premium costs to maritime employers have been prohibitively high, the industry cannot afford to provide compensation benefits at their present level.

We must repeat that the longshore industry is second only to mining in health and safety risks, and that its accident frequency rate is four times the national average. For all of the shippers' and stevedoring companies' clamor about high compensation benefits, it is the longshoreman who runs the constant risk of losing an eye, a leg, or even his life on the job. Yet, rather than intensify efforts to make the harbor a safer place to work, rather than take steps to exert some control over premium rates, our employers and the insurance carriers would prefer to solve the financial problems associated with these safety hazards at the expense of those who suffer from them.

To put the claim that Comp Act benefits are disproportionately high in its proper perspective, we should recall an observation made by Assistant Secretary of Labor Donald Elisburg before the House Subcommittee on Compensation, Health and Safety in May of 1978:

> "These benefit changes, together with provisions to improve administrative and adjudicatory procedures under the Act, were designed to make the Longshore Act a federal model for state workers' compensation reform. Because the improved benefits in the Act and those recommended by the National Commission exceed those of most state laws, the longshore program is naturally 'expensive' by comparison."

The 1972 amendments, in other words, were one more step in the direction of national acceptance of the principle that a worker and his family should not suffer financially because he or she has had the misfortune to be injured on the job.

Moreover, as the Senate Committee on Labor and Public Welfare pointed out in its 1972 report on the amendments to the Act, "adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."

In introducing the latest version of his bill, Representative Erlenborn stated that the large increase in claims under the Act since 1972 has occurred because "benefits became more generous, they became easier to get, and more people could get them." The last reason is by far the most telling. Contrary to the Congressman's and the industry's contentions, longshoremen cannot simply claim compensation benefits under the current law and then sit back and collect them. They must go through an involved medical process to prove their eligibility.

On the other hand, according to Assistant Secretary Elisburg, over half of the injuries reported by employers today occurred in shoreside areas which were brought under coverage by the 1972 amendments. It is also worth noting that although the industry has complained loudly of accelerating costs and proliferating cases of reported injuries, it has never had any qualms about dragging out the settlement of claims through expensive litigation.

If the financial status of maritime employers is to be examined in relation to insurance rates, it should also be taken into consideration that in the last 20 years, this same industry on the West Coast enjoyed a 483 percent increase in workers' productivity - a far greater increase than our members have received in wages and fringe benefits. Cargo tonnage has quadrupled, and is handled by far fewer workers.

These improvements in efficiency and the resulting savings to the industry have been so spectacular that in 1972 the staff of the Nixon Pay Board cited them as justification for making an exception to the board's wage ceiling to accommodate the ILWU longshore contract of that year. The Supreme Court has likewise recognized this in its latest decision on containerization, in which it ruled that as a result of technological development, the amount of on-pier work involved in cargo handling has been drastically reduced, while at the same time longshore productivity has been dramatically increased (NLRB vs. ILA, 44 US at --, 48 USLW at 4766). Longshoremen, in short, have already contributed more than their share to improve the profitability of the industry.

However, we certainly agree - as we have in the past - that the premiums shippers have been forced to pay are exorbitant. In fact, we have been more militant than our own employers in attempting to address this issue: We have called repeatedly for the regulation of the insurance business and have offered to work with the maritime industry and appropriate congressional committees toward this end. Insurance companies are currently free of any federal regulation, and they are exempt from price-fixing and antitrust actions. They dominate the local rating boards that are supposed to represent the public interest. State attempts to exert some control have been ineffectual.

As a result, according to Secretary of Labor Ray Marshall, 35 percent of employers' costs for all state compensation programs goes to overhead expenses.* We are presently awaiting the findings of a study commissioned by the Employment Standards Administration which we believe will show that the percentage is far higher in the maritime industry. The profit margins in this business have been such that, contrary to the industry's contention, the number of insurance companies providing maritime coverage has consistently grown (AFL-CIO testimony before the House Subcommittee on Labor Standards, December 6, 1979).

* According to the AFL-CIO, insurers pay out only 52 cents of every premium dollar collected for state programs.

Legal costs are a primary reason for this unjustifiable loss of benefit funds. As has been pointed out in the past, private carriers contest 12 percent of all claims nationwide and 44 percent of permanent total disability and death claims. Self-insured companies contest 17 percent of claims and over 70 percent of claims for permanent total disability and death. A huge proportion of premium dollars that should be spent on benefit payments is wasted on litigation.

In the state of Washington, which has an exclusive state fund, however, total benefit payments to injured workers actually exceed the total premiums, because the cost of administering the program is more than offset by the fund's investment earnings. Other countries with economic systems similar to that of the United States have programs similar to Washington's with corresponding levels of performance. Clearly this is the direction in which we should be moving to maximize benefits and to minimize overhead cost. We favor the creation of federal or state funds along these lines, and urge that all litigation arising under the Act be made the province of government agencies and their legal staffs.

If as much energy and resources had been invested to improve health and safety conditions in the maritime industry as has been spent on contesting injured longshoremen's claims and on attempting to emasculate the Act, phenomenal savings might have been made by the companies that now claim to be in such severe financial jeopardy. We repeat what has always been obvious to our members, who actually load the cargo: the best way to alleviate the problem of health and safety costs on the docks is to reduce the risks of occupational injury and disease.

On a day-to-day basis, our members have constantly worked to improve health and safety practices on the job - usually over bitter resistance from management. Since 1934, we have also fought to strengthen the Pacific Coast Marine Safety Code (the safety rules negotiated by ILWU with the Pacific Maritime Association and now a part of our Longshore Contract), again usually over the objections of the industry. We currently have a health and safety program funded by OSHA to provide staff training, develop a resource center, provide technical assistance, develop educational materials, conduct classes and workshops, and disseminate information through our longshore division.

Much remains to be done, however. Since the Nixon administration terminated a longshore safety program that employed 90 experienced inspectors around the country, our industry has not been policed as it needs to be. Just last month, one of our members in

the Port of Sacramento was killed when a frayed mooring line that should never have been used snapped and struck him on the head. We re-emphasize that government and industry can minimize expenses most effectively by concentrating on the preventive aspects of occupational safety.

The legitimate problems that exist in relation to the Act have, in our view, been confined to its administration. Our locals report that injured longshoremen are still often forced to wait too long to receive weekly benefits and to obtain final settlement of claims after returning to work. Though the Office of Workers' Compensation Programs' performance has improved, thanks to the work of Assistant Secretary Elisburg and to increased staffing, additional funding for the agency is necessary for adequate enforcement of the Act.

The House and Senate bills currently bearing on the Act will be reintroduced in the new Congress next year, and we will comment at length on their provisions then. Their general substance, however, is quite simple: they would basically eliminate the gains made in the 1972 amendments by substantially reducing the benefits available to injured maritime workers, making it more difficult to get them, and narrowing the Act's jurisdiction. It is worth noting here that H.R. 7610 redefines an employee eligible for coverage as "a longshoreman, ship repairman, ship builder, ship breaker, or harbor worker directly engaged in activities relating to such employment... when the injury resulting in such person's disability or death occurred." S. 1511, Senator Nelson's bill, similarly defines such an employee as one engaged in longshore operations - not maritime employment as discussed by the Supreme Court in the Pfeiffer and Caputo cases (432 U.S. 249 and 62 L Ed. 2d 225).

Moreover, H.R. 7610 specifically excludes "any person who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance, or repair of gear or equipment, security, timekeeping, rail car loading and unloading, mechanical, truck loading or unloading, warehousing, or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking" (emphasis added). It also introduces a "point of rest" concept based on the most artificially narrow definition of eligible worksite. S. 1511 does substantially the same.

These bills would, in short, return us to the era when an employee could be covered by the Act one minute and not covered the next; and when two persons could be working practically side by side, with one covered by the Act and the other not. The absurdity of

such a situation was recognized by the U.S. Supreme Court last year when it ruled that the present law covers all employees in maritime employment, regardless of whether at a given moment they are loading or unloading a vessel (Pfeiffer case).

Another provision in the Bill would eliminate death benefits for the families of permanently and totally disabled workers who die from causes other than injury. We have heard a great deal about the profligacy of this particular benefit, which since 1972 has been one of the prime targets of the Act's detractors. Yet, as Assistant Secretary Elisburg has observed, all this innovation did was recognize the right to compensation of family members who were deprived by the employee's injury of the social security, pension, and insurance benefits they would otherwise have gained. It was a prefectly logical extension of the principle that the price of a worker's physical misfortune on the job should not be paid by his dependents - and is, in our view, a vital precedent for state compensation programs to follow. It has, naturally, been singled out as a benefit unrelated to occupational health and safety on the waterfront, even though, as Mr. Elisburg observed to the ABA Section on Insurance, Negligence and Compensation Law in August of 1979, "there are few cases where it can be said that there is definitely no causal relationship between the employment-related disability and the cause of death."

As you know, attacks such as these on the hard-won gains of American labor are intensifying, both at the national and local levels. Congressional spokesmen for private industry and the right wing are exploiting the current economic downturn to distract the public's attention from the real causes of inflation, recession, and unemployment. At a time when record-breaking profits are being made by the corporations that dominate our economy, and billions of dollars in private capital are being pumped out of our country into foreign centers of cheap labor, the most important improvements in our social programs that have been made in the last five decades are now threatened by demogogic claims that they are "wasteful" and "unaffordable." The labor movement will continue to resist these attacks, and our union will continue to defend the living standards of our members and the public at large. We urge your committee to look beyond the rhetoric of "limited expectations" and toward the real solutions to the economic problems we face.

Thank you for your attention.

The CHAIRMAN. Are there any other areas that are in discussion and contention that you would look at and say that administrative remedies are not available and that if there are to be changes, they would have to be through legislative action?

Mr. LEONARD. We do not think so. We do not think so, your honor—excuse me, I am so used to addressing courts. We do not think so, Senator.

As I indicated, I have not had a chance to analyze it but I understand that our compatriots in the ILA have made such suggestions and they submitted a statement this morning. I have not had a chance to look at it. So I was kind of hedging a bit as I said that.

We think that, as the Secretary said this morning, whatever the problems are with the delivery system, whatever the problems are with that, and our members sometime complain about how long it takes to get a hearing, we think those can be handled internally. If Mr. Leonard of the ILA wants to comment, I understand he is here in the room, I would like him to. But we do not think it is necessary to have any legislative changes.

The CHAIRMAN. Mr. Gleason deals with the State operated port facilities for one thing.

Mr. LEONARD. We do not—I might defer to Mr. Wise on that. I do not think that we have that kind of a problem.

I understand they have some kind of problems in the South Atlantic.

Do we have any problems of that kind, Dick?

Mr. Wise tells me that the problems are nowhere near as extensive on the west coast as they appear to be in the South Atlantic area and we are solving them in our areas.

The CHAIRMAN. His examples deal with Texas, Alabama, Georgia, North Carolina, South Carolina, with discrepancy in benefits under the State plan and under the Longshoremen's Act.

Mr. LEONARD. I would have to defer to the ILA for that.

I mentioned Mr. Leonard before, and that might cause some confusion. I was referring to Mr. Joe Leonard of the ILA. But, as far as we are concerned, the problems that they have appear not to be so pressing on the west coast. We think that the problems that we have can be solved administratively, and they think they need some legislation to take care of that. We both have to review this with them.

The CHAIRMAN. Mr. Gleason also has an interesting suggestion that the program of rehabilitation be given more emphasis, and in order to get worker cooperation with the rehabilitation program, if there is not cooperation, that disability benefits be cut in half.

Mr. LEONARD. Cooperation by the worker to participate?

The CHAIRMAN. Yes.

Mr. LEONARD. We would certainly agree that there needs to be a rehabilitation program and that obviously is an important objective of legislation of this kind and of a program of this kind. We would also agree that a worker has got to cooperate in a rehabilitation program. You cannot have a program like that if you have an unwilling worker. If the worker did not work with the rehabilitation people, it would not work out.

As to cutting benefits in half or what the sanction should be, obviously some sanction is indicated. We have not given any thought precisely to the kind of the sanction. We would want to discuss that with our people, with the ILA people, perhaps with the people in the Department of Labor to see what an appropriate sanction should or should not be. A rehabilitation program is important and a worker has to cooperate with such a program.

The CHAIRMAN. Are you familiar with the rehabilitation programs on the west coast?

Mr. LEONARD. No. Neither one of us is able to address that question at this time.

The CHAIRMAN. OK.

Mr. Gleason—we are getting his observations in here through raising it in questions, to you.

He talks about the third party situation, too. We all can recall vividly how the third party situation, as it was, was really one of the sticking points for a long while.

Mr. LEONARD. Yes.

The CHAIRMAN. And the compromises were arrived at, using a change in the third party situation, and the result of that was that employers are automatically given the employee's right of action against third parties, is that right?

Mr. LEONARD. That is my understanding.

The CHAIRMAN. How is that working out?

Mr. LEONARD. I really am not in a position to respond. I do not know.

Have you had any experience with that, Dick?

Mr. Wise indicates that the area is far from clear as to how it has worked out. As he just said to me, he thinks there are arguments both ways. The fact of the matter is, as far as the official union position is concerned, as I indicated earlier, this was part of the compromise. This was a quid pro quo.

The longshoremen gave up something in return for something and now if, in fact, somebody is coming before this committee or any place else and saying, well, give us back what we gave the longshoremen, then, as we suggested, maybe the whole thing becomes unraveled and maybe we go back to where we were. We are not proposing that, understand? We are satisfied with what we did in 1972, and it is our position that the people on the other side should equally be satisfied with what happened in 1972.

If they want to open the door, then I guess no holds are barred.

The CHAIRMAN. When it was otherwise, and the employee had the right of action, as a lawyer, were you involved in third-party situations?

Mr. LEONARD. My office and I personally did very little of that. Most of my personal activity has been in representing the union in its collective bargaining matters and union policy and so on.

We generally did not handle third-party litigation.

The CHAIRMAN. Mr. Gleason suggests in his testimony that perhaps the employee should be reinstated in a right of action in a third-party situation if the employer who now has the employee's former right or is in the position that the employee used to be in, does not exercise that, then it should revert back to where it began.

Mr. LEONARD. Well, it seems to make sense. As I just said a minute ago, Senator, it is not an area of my personal expertise, my representation of the union is in a different area. But as you put it, if indeed there is a right and if the employer automatically has it, but does not exercise it, it seems to make some sense that after a period of time—I do not know what would be a reasonable time, 6 months or a year, or whatever—if the employer has not exercised the right, it seems that it ought to be back to the employee, so if there is a claim against a third party, it should not just be lost by default.

The CHAIRMAN. Now to a question on the economics of industry.

I am told that—I have not read it, but there is a report from the U.S. Department of Commerce which evidently has a conclusion that some 1.6 million tons of U.S.-origin cargo, valued at $1.4 billion, was exported from the United States over land and loaded onto vessels at Canadian ports.

Are you familiar with any of this area of possible diversion of port activity from the States to Canada?

Mr. LEONARD. Are you?

Mr. WISE. No.

The CHAIRMAN. Not familiar?

Mr. LEONARD. No.

The CHAIRMAN. This will be discussed later, I am sure.

Mr. LEONARD. We have indicated that we are not familiar with it so I am not speaking now to the facts or the absence of fact. But I would strongly suggest that when it is discussed later, somebody probe it carefully. If anybody is making a suggestion that that amount of cargo, was diverted and that amount of money was diverted to Canadian ports because of the cost of longshore compensation, I am sure that is incorrect. There must be countless other reasons. I think we need a careful analysis and not just a kind of quick conclusion that, well, this cargo has been diverted, therefore let us reduce longshore benefits.

We could put our research department to work on that report and perhaps come up with something for you.

The CHAIRMAN. We will see how that evolves.

The National Association of Stevedores will assert later today that problems under the Longshore Act may seriously affect longshore jobs in that organized labor has, on several occasions, declined to seriously discuss the problem with the stevedoring industry.

Now, that is very cryptic in that the problems that they see are not described there. My question is: Could you comment on this assertion? And I imagine what we are seeing here is the communication of the union with the stevedoring companies, and the problems that the companies have wanted to express to you.

Mr. LEONARD. As you have indicated, the comment is cryptic and it is a little bit hard to understand what the commentator is driving at, but I can tell you from our experience that there is no lack of communication between the ILWU and the employers, be they steamship companies, stevedore companies or whoever.

As I indicated, sitting with me here is Mr. Wise, who is a member of the coast committee, and, Dick, perhaps you can tell the

Senator how often does your coast committee meet jointly with the employers?

Do you have regular——

Mr. WISE. At least weekly.

Mr. LEONARD. At least weekly, and I know from what comes across my desk there is a constant flow of communication.

It is hard for me to understand how anybody could suggest that the unions, certainly the ILWU and the west coast employers are not in communication. A couple of my good friends who represent employers are sitting behind me, Dennis Lindsay and Rick Smith, and we are always talking together about our problems.

The CHAIRMAN. This was not a west coast observation, by the way, that I referred to. It was an east coast observation.

Now, on this question of the workers' free choice of physicians. It has been asserted that free choice, which is now an opportunity under the act, has increased the incidence of overtreatment or unnecessary treatment; that the employees are not always treated by physicians who are well qualified to treat industrial injuries. The suggested remedy, which will be presented to us later, is the nomination of physicians by employers to be selected by Deputy Commissioners as part of an approved panel.

I wonder if you could comment on whether or not there is evidence that free choice of physicians is causing problems under the act?

Mr. LEONARD. I am not aware of any evidence that that is so, and I would suppose that the rather than self-serving statements from either side, from the insurance carriers or from persons who represent claimants in these matters, could be checked by the files of the Department. I should think the Department would be in a position to advise this committee whether or not that, in fact, is so. Any such suggestions that came from claimants' counsel might be regarded by the committee with—or might be taken by the committee with a grain of salt and certainly any claims of that kind that come from the insurance carrier should be taken with a grain of salt. I would imagine that Secretary Elisburg and his people would be in a position to advise the committee whether that has been an abuse or not.

The CHAIRMAN. Have you testified here before, Mr. Leonard?

Mr. LEONARD. No, I have not.

The CHAIRMAN. You come on like an old pro.

Mr. LEONARD. Thank you.

The CHAIRMAN. Are you sure you have not testified before any of these panels?

Mr. Leonard. No, I have not.

The CHAIRMAN. It has been a long-time effort.

Mr. LEONARD. The union, for many, many years, had a Washington representative. I am sure that you have had testimony from Mr. Kibre and Mr. Tobin and from others. At the moment, that office is vacant, that is why Mr. Wise and I are here now. It will be filled shortly by Mike Lewis, and I suppose in the future when you have hearings of this kind, Mr. Lewis will be here.

The CHAIRMAN. What is your firm?

Mr. LEONARD. It is just my name. The law offices of Norman Leonard.

The CHAIRMAN. In San Francisco?

Mr. LEONARD. In San Francisco. It was a firm called Leonard and Patsey, and my partner, Mr. Patsey, is now Judge Patsey. So I am carrying on by myself.

The CHAIRMAN. Thank you very much.

Mr. Charles Coakley, Mr. Andre Maisonpierre, Mr. Howard Bunn, Mr. William Huff, their frame of reference will be described as they come before us.

We welcome those who are once again with us. We welcome you back. For any newcomers, we welcome you here.

I understand Mr. Bunn will lead off for the panel, is that correct? I think that is understood by everybody.

We look forward to your statements, Mr. Bunn.

STATEMENTS OF HOWARD J. BUNN, VICE PRESIDENT FOR WORKERS' COMPENSATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, WASHINGTON, D.C., CHARLES COAKLEY, ASSOCIATE COUNSEL, AMERICAN INSURANCE ASSOCIATION, WASHINGTON, D.C.; AND ANDRE MAISONPIERRE, VICE PRESIDENT, ALLIANCE OF AMERICAN INSURERS, WASHINGTON, D.C.; ACCOMPANIED BY TEXAS EMPLOYERS INSURANCE CO., WILLIAM H. HUFF III, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ROY MOORE, MANAGER, MARITIME CLAIMS; AND PAT WHATLEY, ASSOCIATE ACTUARY, A PANEL

Mr. BUNN. Thank you, Mr. Chairman.

My name is Howard J. Bunn and appearing with me today is Mr. Andre Maisonpierre from the Alliance of American Insurers; Mr. Pat Whatley, Mr. Roy Moore, Mr. William Huff, from the Texas Employers Insurance Co. and Mr. Charles Coakley from American Insurance Association.

I will make a few brief remarks and Mr. William Huff from the Texas Employers Insurance Co. will likewise make a statement and we will all be available to respond to questions.

My name is Howard Bunn, as I indicated a few moments ago, and I am vice president for workers' compensation with the National Association of Independent Insurers, NAII.

We appreciate the opportunity for appearing before you and presenting our comments on the Longshore and Harbor Workers' Act.

The NAII is a property/casualty insurance trade association comprised of over 460 member companies.

The 1972 amendments to the Longshore and Harbor Workers' Act have resulted in a workers' compensation law characterized by uncertainty, lack of predictability and exceptionally high costs. To appreciate the difficulties caused by these amendments, I would like to highlight the following areas briefly.

First of all: jurisdiction.

Before passage of the 1972 amendments, the concept of "water's edge" clearly prevailed. Employees who worked seaward of the water's edge were covered under the act. Those landward were covered under the applicable State system. The 1972 amendments extended the coverage landward but left doubts about how far and to whom.

No one today can say with assurance where longshore coverage ends and where State workers' compensation jurisdiction begins. This has encouraged employees to "migrate" from State programs if there is the possibility of qualifying for the higher Longshore benefits. It has also created extensive litigation and caused all reviewing courts to complain about the lack of clarity in the amendments of 1972.

The solution to these jurisdictional problems is for the Congress to enact legislation defining what constitutes the terms "maritime employment" and "adjoining area." We prefer the language employed prior to the 1972 amendments. If that is not acceptable, then specifically set forth in detail the coverage requisites.

Another problem area that the insurance industry finds difficulty with is the benefits escalation provision.

Section 10(f) of the act mandates that on October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be adjusted annually based on increases in the national average weekly wage. The uncertainty of the future increases based on the national average weekly wage is a principal factor in the retreat of the insurance industry from this segment of the market.

The solution lies in either repealing this subsection or placing a cap, for example 3 percent annually, on the escalation amount. We believe that there are several provisions. One would be to put a cap, or possibly setting up a provision that would allow some review of the impact of inflation on workers' compensation and by incorporating some type of adjustment at these periodic intervals.

Another section we find troublesome is the unrelated death benefits section. The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the act was originally passed, and it further complicates the matter of risk predictability. We think that this section has no place in the NAII workers' compensation program and should be repealed.

Another section in which nearly all who are connected to it attribute to a drafting or oversight, is that portion dealing with weekly benefits and death cases. What is really felt to be a pure drafting oversight, or through a drafting oversight, death benefits are not subject to the maximum of 200 percent of the national average weekly wage. Taking into account that these benefits are indexed, this is an exceptionally costly oversight. Nevertheless, the Supreme Court has expressly stated that the Congress must correct this error.

The solution is for Congress to spell out the same limitation for death cases as is applicable for other income benefits under the act. We think that it obviously should be.

Another area is permanent partial disability, and this was the section that there was considerable discussion by yourself and Mr. Elisburg this morning. The act as amended allows for recovery for unscheduled permanent partial disability when there has been no loss of wages. An employee can resume work at full pay, with the

permanent partial benefits serving, in effect, as supplemental income.

The solution is to enact legislation amending section 8(c)(21) of the act to require that there be actual loss of earnings before an award can be made.

Another subsection that we find to be cumbersome is in the administration of the act. Perhaps the most frustrating administrative practices for both employers and employees are found in the Labor Department's review process. Creation of the Benefits Review Board by the 1972 amendments as the top layer of the process has slowed procedures considerably and made contested cases more difficult to close. We suggest that there needs to be some refinement of this appellate process in order that the process of determining what the finality is not take as long as it does under the current circumstances.

Another aspect of the act that we have considerable problems with is in dealing with the special fund. By limiting the liability an employer has under workers' compensation for an employee who at the time of hiring had a disability, the special fund is designed to encourage employment of the handicapped.

Absence of administrative safeguards for the fund creates the temptation to use it in cases which may not be justified—to encourage the development of a record in such cases which would establish both total disability and preaccident disability.

Without getting into a great deal of detail about the fund, which has grown considerably, we feel that perhaps the appropriate thing to be done with reference to the fund would be to turn it over to the private sector for administration.

A similar approach has been done, as we understand it, with reference to New York and Michigan funds and that that seems to have worked out rather well.

Predictability, insofar as the insurance companies are concerned, is most important. At the present time, insurance companies and their reinsurers are retreating from the Longshore market because of its unpredictability. Not knowing clearly who is covered under the Longshore Act, and how inflation will affect future benefits, both insurance companies and self-insurers cannot project their risk exposure and claims losses.

As Longshore insurance has become less available, many employers have had to turn reluctantly to self-insurance, if they are large enough to afford the bonding, or to more costly and less effective assigned risk coverage. However, for both self-insurers and insurance companies, the same problem then looms: reinsurance. Reinsurers are reluctant to accept unlimited escalation when there is no possibility of obtaining adequate rates.

Ultimate losses simply cannot be predicted when future claims payments are linked to inflationary factors which make it impossible to collect or set aside reserves adequate to protect both insurers and their reinsurers.

In conclusion, the 1972 amendments were pulled together at midnight amidst furious efforts to get something passed. As is frequently the case under those circumstances, errors are made and poorly thought out ideas find themselves into the law. Even the District of Columbia is now abandoning its long association

with the act because of its many problems. We suggest the entire act be rewritten with special emphasis upon those areas highlighted for correcting.

I would also like to request that the full statement that we have presented be entered in or received into the record if possible.

I would also like to attach to our full statement a statement of a coalition of interests that have prepared a statement entitled "A Federal Program In Crisis," under the Longshore Act. While this is not attached officially to our statement that we have filed, we would like to incorporate that by reference and have that part of our official statement for the committee to consider.

Those conclude my remarks, and I believe at this time Mr. William Huff has some remarks to make.

[The following was received for the record:]

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

A Federal Program In Crisis

Runaway costs for employers, inadequate reponse to employee medical needs, and unpredictability of the insurance risk exposures involved have brought the workers' compensation program established under the Longshoremen's and Harbor Workers' Compensation Act to an operational crisis.

Enacted in 1927 and administered by the Department of Labor, the Longshore Act provides for payment of medical expenses and wage replacement benefits for employment-related injuries. As presently interpreted, the law covers more than one million employees. The beneficiaries include not only longshoremen and harbor workers but also workers in the shipbuilding, ship repair, marina, construction, boatyard and offshore drilling industries; some U.S. personnel overseas; private employees in the District of Columbia; and many others.

Geography -- a work site over navigable waters or out of the country -- prevents many workers from qualifying for protection under state workers' compensation systems. But many employees who could receive state workers' compensation benefits are covered by the Longshore Act because Congress, the Department of Labor and the courts have extended the federal law's jurisdiction unnecessarily and in a confusing pattern. In fact, coverage has been expanded to such an extent that construction and other activities remote from the longshore and harbor workers' industries are caught under the umbrella.

Problems with the law stem from the Congressional amendments to the Act passed in 1972. Technical omissions and unspecific

language, combined with generous interpretations of the revised law, have moved the program well beyond medical benefits, rehabilitation, and income replacement into life insurance, pension benefits and other supplemental income.

Compensation benefits, for instance, are often awarded when workers continue to work at full pay, and survivors' benefits are payable even when the death is unrelated to the deceased's employment injury. Such coverage was never intended by those who drafted the original law and does not belong in any workers' compensation program.

The generous benefits provided by the 1972 amendments and the jurisdictional confusion arising from them have created a legal and financial nightmare for employers and insurers. The Longshore Act today is virtually uninsurable because it is impossible to predict the degree of risk exposure. As a result, the number of insurance companies willing to underwrite this line of protection has dwindled.

Because of the generous benefits available under the law, the companies which will still underwrite the coverage are forced to charge extremely high rates for it. Similarly, self-insured employers must incur and finance exorbitant costs.

Because the expense of workers' compensation insurance is usually passed through the distribution system, the high cost of Longshore coverage creates additional pressure on the present inflationary economy. For example, in the case of stevedoring companies, much of the cost is transferred to shipowners, then to their customers, and ultimately to consumers of the products involved. Shipyards

also must pass the high price of Longshore coverage through to shipowners.

The high cost is passed along, to the detriment of American industry and the number of jobs it can provide. At the point the cost is reflected in the price which those buying shipping services must pay, American ships and ports become less competitive in the market for handling world trade, and business can be lost.

The cost, as it affects the non-commercial consumer, has clearly been seen in the District of Columbia, where, through an anomaly, all private sector employees have been covered under the Longshore and Harbor Workers' Compensation Act. The District, which rates as one of the safest jurisdictions in the nation in terms of incidence of work-related injuries and illnesses, has had workers' compensation insurance rates which are three to four times higher than those in neighboring jurisdictions of Maryland and Virginia. This translates directly into higher consumer costs. For example, a new $95,000 town house in the District of Columbia, would sell for $5,000 less if workers' compensation insurance costs were equivalent to those in Maryland or Virginia.

So critical has the cost situation become that the District of Columbia recently enacted legislation to remove itself from coverage under the Longshore Act and create a program which is independent and financially sound. The new law will take effect October 1, 1981.

There is another price the nation as a whole is paying -- in the area of affirmative action and opportunity for all citizens regardless of background or handicaps. Since the generous benefits

paid under the Act are tax-free, many individuals receive awards approaching or exceeding pre-injury take-home pay. This constitutes a negative work incentive which has had the effect of unnecessarily prolonging disabilities and inviting claims for conditions more serious than they really are.

The Longshore Act has thus effectively discouraged rehabilitation and return to work within reasonable time -- concepts fundamental to all workers' compensation programs.

The Ill-Conceived Amendments of 1972

Mystery surrounds the origin of some of the most troublesome provisions of the 1972 amendments. Those who hammered out the changes during the last days of the 92nd Congress lacked and failed to seek cost studies and other hard data as a basis for their decisions. It is doubtful that anyone understood the full implications of the revisions.

The 1972 amendments were enacted to remedy two situations: the low weekly benefit level being offered at the time, and the loss -- through judical interpretations -- of employers' "exclusive remedy" protection under the Act. Over the years, the Supreme Court had interpreted the law to permit third party liability and indemnification actions in which an injured longshoreman could sue a shipowner for damages. The shipowner could, in turn, sue the employer of the longshoreman to recoup those damages, thus indirectly allowing the employee to sue his employer. This had eliminated the fundamental no-fault principle of workers' compensation.

The 1972 amendments seemingly struck a balance among labor, management and government concerns. Through specific new language in the law eliminating employer liability in third-party suits, workers' compensation was re-established as the exclusive remedy employees have under the Longshore program. In return, compensation benefits were substantially increased.

Far from achieving balance, however, the 1972 amendments removed controls which provided balance and left other intentions unclear. The effect in a few short years was to make compensation under the Longshore Act an inordinately generous and expensive program. Maximum disability benefits have increased from $70 a week in 1972 to $426 a week in 1979, and are automatically escalated annually.

The built-in generosity has been compounded by galloping inflation and by the liberal interpretations of the Act which enable many workers having marginal eligibility or marginal claims to qualify for benefits.

Dimensions of the Crisis

Problems under the Longshore Act were graphically described by stevedores, shipbuilders, small boat builders and repairers, marinas, port authorities, insurers, state insurance funds, and many others at hearings before the House Subcommittee on Compensation, Health and Safety in 1977-78.

The same groups appeared, joined by a growing number of others affected by the Act, for additional hearings in late 1979 before the House Labor Standards Subcommittee, which now has jurisdiction. All pointed to 1972 as the year trouble began.

By vastly expanding the opportunities to receive high tax-free benefits, and lacking counterbalancing controls, the 1972 amendments triggered a surge in utilization of the program. According to Department of Labor statistics, injuries reported under the Act (excluding those for private employees in the District of Columbia) rose from 72,087 in 1972 to 105,384 during 1973, and to 151,274 during 1974. In 1977, the number was 205,584.

This is an increase of 185% in only 5 years. Conversely, during the period immediately preceding the amendments, reported claims had dropped steadily -- from 96,944 in 1969 to the 72,087 in 1972, a decrease of 25% in three years. The 1972 amendments emphatically and expensively reversed the downward trend of compensation claims.

Besides the stimulus to increased utilization which the amendments provide, the ambiguity of the revised law leaves great latitude to the Labor Department review process and the courts to rule in favor of claimants whether grounds for the awards are justified or not.

The problems with the Longshore program today are even worse than they were at the time of the original hearings in 1977-78:

- Jurisdiction

  Before passage of the 1972 amendments, the concept of "water's edge" clearly prevailed. Employees who worked seaward of the water's edge were covered under the Act. Those landward were covered under the applicable state system. The 1972 amendments extended the coverage landward but left doubts about how far and to whom.

  No one today can say with assurance where Longshore coverage ends and where state workers' compensation jurisdiction begins. This has encouraged employees to "migrate" from state programs if there is the possibility of qualifying for the higher Longshore benefits. It has also created extensive litigation and

caused all reviewing courts to complain about the lack of clarity in the amendments and their legislative history.

- Benefits Escalation (Indexing)

The 1972 amendments quadrupled the weekly benefit level and pegged it permanently to two-thirds of the workers' income, not to exceed 200% of the national average weekly wage. This means that there is an open-ended annual tax-free increase in benefits -- both for those who will have claims in the months and years ahead and for those with claims in the process of being paid.

The increase is determined by the Secretary of Labor each October 1 based on the percentage increase during the previous year in the national average weekly wage. For example, the increase was 8.05% for 1978 and 7.5% for 1979, bringing the maximum benefits for disability to the current $426 a week.

These are quantum jumps. Inability to project the increases gives employers and insurers their greatest risk assessment problems. The adjustments are also a major factor in employers' escalating premium costs.

- Insurability

Insurance companies and their reinsurers are retreating from the Longshore market because of its unpredictability. Not knowing clearly who is covered under the Act, and how inflation will affect future benefits, both insurance companies and self-insurers cannot project their risk exposure and claims losses. A one percentage miscalculation of inflation rates for the year ahead can literally make millions of dollars' difference in the cost of claims.

As Longshore insurance has become less available, many employers have had to turn reluctantly to self-insurance, if they are large enough to afford the bonding, or to more costly and less effective assigned risk coverage. However, for both self-insurers and insurance companies, the same problem then looms: reinsurance. Reinsurers are reluctant to accept unlimited escalation when there is no possibility of obtaining adequate rates.

Ultimate losses simply cannot be predicted when future claims payments are linked to inflationary factors which make it impossible to collect or set aside reserves adequate to protect both insurers and their reinsurers.

Predictability is essential to retain the involvement of companies still voluntarily underwriting or reinsuring Longshore risks, and to attract others back into the market.

- Cost

  Because benefits are high and continually escalating, opportunities to qualify are many, and administration of the program has been generous, insurance premiums and self-insurance costs have soared. In New York, the employers' rate for general stevedoring coverage runs $363 per employee per week or $18,876 a year. For many employers under the Act, workers' compensation is the second greatest cost after direct payroll.

  The effects of the generous program must also be assessed in terms of disincentive to return to work and the loss of productivity this involves.

  Evidence even has emerged suggesting that the volume of trade and number of jobs at American ports is being affected. During 1974-1976, more than $1 billion in cargo was exported by land and loaded for shipment overseas at Canadian ports where Longshore rates are much lower. It the trend continues and is positively linked to Longshore rates, the greatest cost -- lost jobs and pay -- could be experienced by the very people the program is designed to protect.

- Unrelated Death Benefits

  The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the Act was originally passed, and it further complicates the matter of risk predictability.

- Maximum Death Benefits

  Through a quirk in the law upheld by the Supreme Court, death benefits to surviving spouses can be tremendous since they are granted tax-free at half the actual gross income the deceased was earning, subject to no maximum. Additional benefits are paid to surviving children. Not only that, all death benefits are escalated annually.

  This interpretation literally puts a premium on death. The surviving spouses of high-paid workers can collect benefits at a higher rate than the workers would have received in disability compensation had they lived -- benefits which can total millions of dollars tax-free over the spouses' lifetime.

- "Unscheduled Injury" Awards

  In the case of unscheduled injuries -- primarily back and head injuries and occupational disease -- employees can receive

permanent partial disability payments, unqualified, for a lifetime. An employee can thus resume work at full pay, with the permanent partial benefits serving, in effect, as supplemental income.

- Administration

The most frustrating administrative practices for both employers and employees are found in the Labor Department's review process. Creation of the Benefits Review Board by the 1972 amendments as the top layer of the process has slowed procedures considerably and made contested cases more difficult to close.

Approximately two years is required for review -- first by a Deputy Commissioner, then by an Administrative Law Judge, and finally by the Board. If the case is appealed further, it takes another year-and-a-half at least for a decision from the appropriate federal appeals court. Prior to 1972, decisions of the Deputy Commissioner could be appealed directly to the U.S. District Court.

Members of the Board are appointed by the Secretary of Labor, for an indefinite term, without Congressional review of their credentials or appropriateness. With no Departmental guidelines and an ambiguous law, the Board's judgements, along with those of the Administrative Law Judges, have favored claimants whether for good cause or not.

- Medical Treatment

The medical service provision in the 1972 amendments is interpreted by the Department of Labor to allow any physician to treat and evaluate Longshore injuries instead of only those doctors experienced in industrial medicine and willing to cooperate with the Longshore program. As a result, many employees receive incompetent medical care.

Besides the failure to exercise supervisory authority over medical treatment given to employees, the opportunities for rehabilitating the disabled have also been overlooked. Practical rehabilitation efforts which fit the aspirations and remaining abilities of those disabled to jobs where they can truly be productive have been neither developed nor encouraged under the Longshore Act. The situation stands out as one of the most tragic indictments of the program.

- The Special Fund

By limiting the liability an employer has under workers' compensation for an employee who at the time of hiring had a disability, the Special Fund is designed to encourage employment of the handi-

capped. If a work accident occurs and the employer can show that previous disability existed, his liability for the accident is limited to payment of the first 104 weeks of compensation. The Special Fund pays the rest of the claim.

The Special Fund is administered by the Department of Labor, and claims payments made by the Fund are financed through annual assessments on insurers and self-insurers. The cost of these usually open-ended claims is thus spread among all those underwriting the Longshore program.

Absence of administrative safeguards for the Fund creates the temptation to use it in cases which may not be justified -- to encourage the development of a record in such cases which would establish both total disability and pre-accident disability.

During the period 1972-75, claims payments by the Special Fund increased from $42,000 to $2,200,000, a jump of 5,138%. Claims currently being paid by the Fund are increasing at the rate of an additional $10 million in liability each month. Even greater increases are expected.

To complicate matters, the Fund is not subject to reserving practices and other insurance procedures to assure that claims obligations can be met. Concern is spreading over the escalating liability and the need for a realistic plan to handle the cases involved.

Solution to the Longshore Dilemma

The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act have created many more problems than they solved. Designed to provide a balanced trade-off of increased benefits for re-establishment of the "exclusive remedy" principle, they have instead produced excessive costs, uninsurability, more administrative delays, court confusion, and an unnecessary additional need for legal services.

These results have had adverse effects for both employers and employees. Society as a whole also suffers because the consumer ultimately pays for the additional costs in the price of products and services.

The only effective cure is to start at the core of the dilemma, the law itself. The Longshoremen's and Harbor Workers' Compensation Act cries out for revision. Even the Supreme Court has noted that it is about as unclear as any statute could conceivably be and has termed it a "jurisdictional monstrosity."

Legislation -- not simply renovation of administrative and operational procedures under the Longshore Act -- offers the only hope for true reform.

LONGSHORE ACTION COMMITTEE

The following associations and companies are actively seeking appropriate remedial legislation in the Longshoremen's and Harbor Workers' Compensation Act. They have formed an ad hoc coalition -- the Longshore Action Committee -- to help focus their joint and individual actions.

Air Transport Association
Alaska Insurance Company
Alliance of American Insurers
American Association of Port Authorities
American Boat Builders & Repairers Association
American Home Assurance Company
American Insurance Association
American International Group
American International Underwriters of Dallas
American Life Insurance Company
American Trucking Association
American Waterways Shipyard Conference
Associated Waterways Shipyard Conference
Birmingham Fire and Marine Insurance Company
C. V. Starr Company
Chamber of Commerce of the United States
Commerce and Industry Insurance Company
Crane & Rigging Association
Crum & Forster Insurance Companies
Delaware American Life Insurance Company
Great Lakes Terminal Association
Greater Washington Board of Trade
Hartford Insurance Group
Hawaii Fire & Marine Insurance Company
Illinois Fire & Marine Insurance Company
Independent Insurance Agents of America
Independent Liquid Terminal Association
Inland Rivers Ports & Terminals, Inc.
Insurance Company of North America
International Association of Drilling Contractors
Kemper Group
Landmark Assurance
Life Insurance Company of New Hampshire
Master Contracting Stevedore Assn. of the Pacific Coast, Inc.
Metropolitan Marine Maintenance Contractors Association
New Hampshire Insurance Company
National Association of Casualty and Surety Agents
National Association of Independent Insurers
National Association of Insurance Brokers
National Association of Manufacturers
National Association of Stevedores
National Constructors Association
National Food Processors Association
National Marine Manufacturers Association
National Ocean Industries Association
National Union Fire Insurance Company
National Club Association

Pacific Union Assurance
Professional Insurance Agents
Reinsurance Association of America
Sheetmetal & Air Conditioning Contractors National Assn.
Shipbuilders Council of America
Southeastern Risk Specialists
Southern California Marine Association
Southwestern Risk Specialists
UBA, Inc.
Vermont Accident & Health Insurance Company
West Gulf Maritime Association

The CHAIRMAN. Fine.

Mr. Huff?

Mr. HUFF. My name is William H. Huff, and I am senior vice president and general counsel for a group of companies including Texas Employers' Insurance Association, Employers Casualty Co. and Employers National Insurance Co. With me today are Roy Moore, manager, maritime claims, and Pat Whatley, associate actuary.

Mr. Chairman, in my attempt to honor your request to limit my formal remarks, I will not cover or fully develop a lot of material. I would request, therefore, that my entire statement be made a part of this record. Roy Moore is the manager of our maritime claims and has been working in the Longshore Act for many years, long before 1972, and Pat Whatley is an associate actuary with our company and deals with the ratemaking of our act.

I intend to make just a few remarks and I would ask that my entire statement be included in the record if possible.

The CHAIRMAN. It will be.

Mr. HUFF. TEIA, a mutual type company, writes our LSHWA coverage in Texas. ECC and ENIC write our LSHWA coverage outside of Texas. We have been writing LSHWA coverage in Texas since the passage of the act in 1927 and since 1969 on the east gulf coast.

Our LSHWA premium volume in 1979 was approximately $40 million, of which approximately $30 million was stevedore business. Virtually all of that premium was to provide coverage for operations located on the gulf coast.

In my brief oral testimony today, I would like to discuss the problem of reserving under the LSHWA and briefly discuss the problems we see developing with the Second Injury Fund.

Workers' compensation claims have been traditionally difficult to evaluate and properly reserve because they are developmental in nature and 1, 2, 3, or more years are required for an adjudication or determination to be made regarding extent of injury.

LSHWA claims are among the most, if not the most, difficult of all WC claims to properly reserve with confidence because of the many unknown and uncertain features of the act such as the jurisdictional issues not yet fully resolved, the practical elimination of the statute of limitations, the "long tail" on many of the claims, the high benefits that have created negative incentive to return to work in many instances, and last but certainly not least, the indexing or escalation feature of total permanent injuries and death claims.

The most important single factor complicating the reserving problem is the escalation feature of the act which calls for an annual adjustment to the compensation or death benefits payable

for permanent and total disability or death claims based upon the percent increase in the nationwide average weekly wage. The uncertainty of guessing what this will be over a 20-, 30-, or 40-year period causes us great concern and also has concerned our reinsurers which I will more fully discuss later. I have pointed out in my statement the difference between 0 percent, 5 percent, and 6.5 percent in the amount of payout over various periods of time. It is significant and raises the worrisome possibility of being substantially underreserved and not discovering it until many years later.

The problem of guessing at the future inflation rate is further compounded by the equally difficult task of guessing which claim or claims are going to cross over the magic line and become subject to the escalated benefits. Some T. & P. claims are of such severity that they are recognizable within a short period of time, but more often, the initial injury is relatively insignificant and often it is several years after the date of the accident before the claim develops into a T. & P. claim. In ordinary mathematics, 50 percent $\times$ 2=100 percent, but in dealing with the escalation feature of the act 100-percent disability is six to seven times the amount of reserve required for 50 percent.

To the extent that losses are unpredictable, it follows that the setting of a proper rate to collect the correct amount of premiums to mature these obligations is equally unpredictable.

For an insurer, in addition to the problem of obtaining adequate reinsurance to cover escalation is the difficulty in obtaining catastrophe coverage. Everyone will concede that those covered under LSHWA are engaged on many occasions in hazardous work. The danger of an explosion resulting in multiple deaths or severe injury is everpresent in many situations covered under LSHWA such as drilling platforms, loading and unloading of certain products and dockside grain elevators. We now find ourselves in the situation where our retention is increased to avoid going to the reinsurer on every death and serious injury case and we must also buy a substantially higher upper limit of reinsurance to protect ourselves against the possibility of such a catastrophe.

Prior to 1976, our reinsurance program was very simple in that we collected from the reinsurer when the actual paid loss exceeded a predetermined retention per accident. Thus as an insurer, we knew exactly what our ultimate liability would be.

Our current program also has a predetermined amount per accident, although substantially higher as explained previously. Because of the escalation feature, we now recover our loss based on the commuted or present value of the claim 5 years after the date of the accident. To the extent that we err in our assumptions on escalation for example, we will bear the cost alone and not the reinsurer.

Our reinsurance program is not unique and is, in my opinion, better than many reinsurance programs being offered by reinsurers dealing with the problem of indexing. All to one extent or another exclude escalation or limit it such as our program.

By whatever method chosen, however, it all points to the same problem. Reinsurers are not willing to assume the uncertain and speculative exposure of an unlimited escalation of benefits. If the indexing feature were eliminated or capped at a certain percent-

age, it is my opinion that the reinsurers would be able to both offer and price the product with a better degree of certainty.

On November 14, 1979, we testified before the House Subcommittee on Labor Standards concerning problems with the Longshoremen's and Harbor Workers' Compensation Act. We pointed out one rapidly developing problem area, at that time largely unrecognized by the industry, as being the overutilization of section 8(f), Second Injury Fund. We pointed out the rapid increase in the payments, the rapidly increasing number of cases going into the fund, and multiplying assessments from the industry and attempted to show that in the few short years since 1976, the fund had grown from a mere token to the largest carrier in the business in terms of assumed liability. This trend continues.

On October 10, 1979, there were 306 longshore cases in the fund, and as of September 11, 1980, there were 513, an increase of 207. In 1978, industry assessments for the operation of the special fund were $4,250,000. The 1979 assessments totaled $6,930,000, an increase of over 50 percent with no reversal of this trend in sight. To more graphically illustrate the increasing liability being assigned to the fund, let's see what this assessment would be if these new fund liabilities were on a prefunded basis rather than on a deferred payment plan.

We have been advised that almost all of these claims assigned to the fund are fatal or total and permanent disability claims. Since we do not know the exact figure, we will conservatively assume that 150 of these 207 are fatal or total and permanent disability claims. We will further assume that the present value of these claims is the same as the average our company has established on our claims in this category of $440,112. One can readily see that it would take assessments of $66,016,800 just to prefund payments of these 150 claims that have been added to the fund in the last 11 months without considering the other 57 new claims or the already existing claims wherein the fund is obligated to meet the increasing annual payments. For comparison, the industry total of compensation and medical payments in 1978 was $161,629,670.

On an individual case basis, getting an award charged to the special fund is the next best thing to getting a complete win, as the company involved shares the loss with the entire industry. However, what is good on an individual claim for an individual company is not necessarily good for the industry as a whole. The great majority of the cases where permanent and total disability was awarded against the special fund would, in our opinion, have been settled and concluded for a fraction of the present value of the permanent and total award, and the ultimate cost to the industry as a whole would be considerably in excess of what the cost to the industry would have been if section 8(f)—second injury fund provision—did not exist. It is a question of pay now or pay much more later.

In its present state, the second injury fund is a shared loss deferred cost albatross hung around the necks of succeeding generations. The day of reckoning will come, and the sooner the problem is recognized and corrected, the better it will be for all concerned with the Longshoremen's and Harbor Workers' Act.

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We don't know the exact solution to this rapidly evolving problem but do feel that this problem must be addressed in any legislation amending this act. We do feel the special fund needs a protector. As Howard indicates, perhaps similar to the New York or Michigan approaches.

We also are looking at the possibility of a longer period of exposure than 104 weeks as a possible disincentive to these collusive settlements.

We have many other suggestions and recommendations summarized on pages 27–29 of our written statement which times does not permit us to discuss.

We have been writing Longshore coverage for over 50 years in Texas. We have many subscribers who have been with us that entire period of time. We feel an intense loyalty to our faithful subscribers as I hope they do to us. We intend to stay in the business of writing this coverage along the Texas-Louisiana gulf coast so long as it remains prudent to do so. Should the day come, however, when we feel that our other subscribers in Texas and elsewhere are jeopardized by our continuing to write this coverage we will have no choice but to withdraw from the market. Hopefully, we will not have to make that decision. Certainly Congress could help by taking action in some of the areas mentioned by me and others who will testify before you.

I hope that we have been of some help to you in your review of the act and would be glad to attempt to respond to any questions you might have.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Huff.

Who is next?

Mr. MAISONPIERRE. My name is Andre Maisonpierre, vice president, Alliance of American Insurers.

I see no reason to repeat the views of Mr. Bunn and Mr. Huff.

The Alliance joins in those views and, for the sake of time, I would appreciate if our statement could be introduced fully in the record, and I am prepared to answer any questions which you may have.

The CHAIRMAN. We took a pause here, Mr. Huff, to examine your introduction and got stopped on point 1, where you point out many cases where an individual is drawing workers' compensation, retirement, and social security.

Do you suggest anything here?

Mr. HUFF. We suggested in our full statement, Mr. Chairman, that some committee of the Congress should review this whole area of coordination of benefits between these various benefit plans.

In our testimony, on the House side, before Congressman Beard, we had three examples that were listed. One, because they showed a slight overpayment over what their take-home pay was but mainly because they also show that they were drawing social security and retirement at the same time. We dropped those because we did not feel they were particularly good examples and we did not have enough time because of the notice to pull any new examples out. But our recommendation is that benefits, at least upon reaching age 65, be coordinated in some manner, perhaps similar

to the disability provisions that exist now of up to 80 percent of their take-home pay.

The CHAIRMAN. You do not have any statistics or any studies that show the extent of this situation, the numbers that would tell us how many are in this category?

Mr. HUFF. Perhaps Mr. Moore, who handles these claims on a daily basis, could respond.

Mr. MOORE. No, sir, we do not have any figures. Often, we are not aware of the collateral benefits being paid unless the plan advises us, and we have no way of determining how many people drawing compensation also draw some other benefits. We are simply aware of some of them.

The CHAIRMAN. All right, let us move on to Mr. Coakley.

Mr. COAKLEY. Mr. Chairman, my name is Charles Coakley. I am associate counsel with the American Insurance Association. We have submitted a prepared statement and our association agrees with the views expressed by Mr. Bunn and Mr. Huff and we ask that you accept our statement into the record.

The CHAIRMAN. All right, it will be included, of course, and the same with Mr. Maisonpierre.

I do not know that I indicated that I heard you, and your statement will appear.

[The prepared statements of Mr. Huff, Mr. Maisonpierre, and Mr. Coakley follows:]

STATEMENT OF
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
EMPLOYERS CASUALTY COMPANY AND
EMPLOYERS NATIONAL INSURANCE COMPANY

BEFORE THE
LABOR AND HUMAN RESOURCES COMMITTEE

OF THE

UNITED STATES SENATE

ON
THE LONGSHORE AND HARBOR WORKERS'
COMPENSATION ACT

SEPTEMBER 16, 1980

WILLIAM H. HUFF, III, SENIOR VICE PRESIDENT & GENERAL COUNSEL
ROY MOORE, MANAGER, MARITIME CLAIMS
PAT WHATLEY, ASSOCIATE ACTUARY

My name is William H. Huff. I am Senior Vice President and General Counsel for a group of companies including Texas Employers' Insurance Association, Employers Casualty Company and Employers National Insurance Company. With me today are Roy Moore, CPCU, who is the manager of our maritime claims division and is dealing on a daily basis with the claims and administrative aspects of the Act and Pat Whatley, an actuary with our companies who deals with the rating aspects of LSHWA. While I will handle our brief oral presentation, I felt that these gentlemen could be extremely helpful in their areas of expertise in responding to questions that you may have which are not covered in our statement or not covered in sufficient depth in our formal presentation.

Perhaps a brief background about our companies would be helpful.

Texas Employers' Insurance Association, which is licensed to do business only in Texas, is a mutual type company which was created by statute in 1913 by the Texas legislature at the same time that the first compensation act was passed in Texas. At that time there were few, if any, companies writing workers' compensation and none in Texas. The purpose and philosophy of Texas Employers' Insurance Association was and is to write workers' compensation coverage at cost, a philosophy we have maintained to this day. As a mutual company it is owned by its policyholders and we pay back in either dividends or discounts any underwriting profit we earn keeping only the investment income to build surplus. In fact, our

losses, expenses, dividends, and discounts have approximated our premiums earned during the 66 year period of our existence. Texas Employers' writes most of the Stevedore business in Texas.

Employers Casualty Company is a stock insurance company organized under the laws of Texas which is publicly held and traded on the National Over-the-Counter market. Employers National Insurance Company is a stock insurance company organized under the laws of the State of Delaware and is owned jointly by Texas Employers' Insurance Association and Employers Casualty Company. Employers Casualty Company and Employers National Insurance Company write our Stevedore business outside of Texas.

Our companies are very active in the writing of Longshore and Harbor Workers' Coverage for stevedores and we write a substantial portion of the Stevedore coverage written on the Texas, Louisiana and Alabama Gulf Coast. We have written some business in other jurisdictions but only as an accommodation to our Gulf based stevedores. The only reason, initially, that we wrote any stevedore business outside of Texas was to accommodate our Texas based stevedores.

We wrote approximately 40 million in Longshore premium last year which would make us one of the largest writers of this coverage. If related to total premium volume we have probably the largest percentage of writings of any insurance company writing this business. We have been writing longshore and harbor workers' coverages since 1927 in Texas and since 1969 in Louisiana.

We have invested much manpower, time and money in the fields of safety and rehabilitation of Longshoremen. For example, the Engineering Department of our companies offer a variety of accident prevention services designed to assist each stevedoring company in maintaining, improving and installing an accident prevention program tailored to fit operational needs. To accomplish this, graduate engineers who have been trained and are familiar with stevedoring operations are strategically located along the Gulf Coast.

Sufficient managment surveys, ship surveys and surveys of dock operations are made by these engineers to determine hazardous environmental conditions and to make recommendations for elimination and reduction of these hazards based on accepted engineering standards. Consultative service is offered to management regarding the planning and conducting of accident prevention activities.

A staff of specialized Industrial Hygiene and Health Specialists assist stevedores in determining hazardous conditions which might endanger their workers' health or lead to occupational disease. Permanent and mobile laboratories are equipped to test for chemical hazards, fire and explosive hazards, airborne contaminants, noise, radiation and other health exposures.

The Department's Communication Section develops technical, educational and other safety material needed to support our consultative and training services. Professionals skilled in technical writing, illustration, training, library science and photography combine their talents in creating and producing such items as:

1. Survey Guide Sheets for Longshoring Operations
2. Investigation of Accident Guide
3. Stevedoring Supervisor's Course in Accident Prevention
4. Longshore Accident Analysis
5. Film Presentations
6. Stevedore Safety Data Sheets
7. Flyers (handout material) on Longshore Safety
8. Stevedoring Safety Posters
9. Accident frequency studies by Port and by each individual Stevedore.

Employers Insurance of Texas engineers work closely with the Maritime Association, Port Authorities, Port Safety Councils, State Safety Councils, National Safety Council and other groups and organizations to assist in industry-wide accident prevention efforts.

We have a separate rehabilitation unit which includes a staff of registered nurses working with the treating physician and our medical advisors which have developed a nationwide reputation of excellence.

We encourage rehabilitation referral by the claims representative as soon as they know of the injury. Most referrals are: 1. all spinal cord injuries, 2. head injuries with residual deficit, 3. burns--20% body surface with second and third degree depth, 4. all electrical burns, 5. all upper and lower extremity amputees, 6. brachial plexus injuries with paralysis or weakness, 7. multiple injuries with expected long convalescence.

Other considerations for referral on less severe injuries are pre-existing physical or social complications.

The function of the rehabilitation nurse after assignment is to be the liaison and coordinator for all people involved. These include doctors, paramedical professionals, claims representatives, employer, the patient and family, community agencies, attorneys, attendants and vocational agencies.

Our primary goal is to return the claimant to employment in minimum time with the least disability, at a minimum cost by obtaining the best medical care available. This is done by, 1. keeping cognizant and maintaining rapport with special facilities such as burn units and rehabilitation centers, 2. incorporating the use of our medical advisors when applicable, 3. keeping up-to-date on new medical-rehabilitation techniques.

If employment and/or self-care cannot be obtained, prevention of complications and deterioration become primary goals through proper medical follow-up, health teaching, counseling and home modifications.

We have 17 medical advisors in Texas, Oklahoma, and Louisiana who assist us by reviewing medical reports and bills, communicating with treating doctors concerning patient condition, and assisting us in severe injury cases to determine extent of injuries and the possibility and advisability of a rehabilitation/burn/special center referral.

We have medical advisors along the Gulf Coast at New Orleans, Beaumont, Galveston, Houston, Corpus Christi, and Harlingen.

What this points out is that, to us, LSHWA coverage is big business, we have been in it an awfully long time and our actions, I think, indicate our desire to stay in this business. While we are continuing to write longshore and harbor workers' coverage for our present stevedore policyholders, we are closely watching our results. When or if we determine that continuing to provide coverage is detrimental to all other policyholders for any reason, then we will withdraw from this market.

Prior to the House hearings we had not been active in hearings relating to benefits under LSHWA since we have felt that those discussions should be between those who pay for benefits and those who receive benefits and that as long as we could price the product with some degree of confidence we would write it. We are here today to discuss with you those areas which are causing us the most concern and affect our ability to confidently price our product and also to suggest areas which we think your committee should review in further detail.

Under the Texas Insurance Rating Law, the ratemaking authority lies with the Texas State Board of Insurance. While in most other jurisdictions, the State authority will approve or disapprove a workers' compensation filing made by the National Council on Compensation Insurance, in Texas, the State Board of Insurance not only promulgates WC rates but also has the responsibility to compile the statistical data used as a basis for determining the rate. The State Board has a competent actuarial staff who then computes the rate based on the compiled statistical data which the Board will approve or disapprove after a public hearing is held. A copy of the calculation of manual rate level for the stevedoring classes prepared by the staff of the Texas State Board is attached as exhibit 1.

Page 2 of this exhibit shows a rate history since 1959 for the classification codes involved. Please note the substantial increase effective December 11, 1972 from $24.10 to $38.37 which was due to the increased benefits effective November 26, 1972. It is also noteworthy that each year since, rates have been adjusted, sometimes upwards - sometimes downwards to its present gross level of $51.69.

Page 3 of the exhibit shows the actual derivation of the change in Manual rate level. This page clearly shows that the rates are based on

the actual premium and loss experience of the stevedores. The premiums and losses (including claim reserves) are reported to the State Board by the carriers. Thus, the key to an adequate rate depends on the ability of the carrier to establish an accurate reserve in a relatively short period after a claim is reported.

When we talk about claims reserves, we are talking about the amount of money set aside or earmarked to pay losses. The aggregate claims reserve of a carrier or a self-insured as of a certain date is in theory the amount which would liquidate all unsettled claims up to and including that date. This includes claims that are reported and known and those claims that have occurred but have not yet been reported. Workers' compensation claims are historically difficult to evaluate and properly reserve because they are developmental in nature and one, two, three or more years are required for an adjudication or determination to be made regarding the extent of injury. Longshoremen's and Harbor Workers' Act claims are among the most difficult of all claims to properly reserve because of the influence of many variables particularly on permanent total disability and fatal cases. These variables are as follows:

1. escalation (discussed later)
2. rate of return on investments - funds set aside for an extended period of time for future loss payments will earn interest and are reflected in the reserve.
3. mortality of survivors in fatal cases as well as the claimant who is totally disabled.
4. in the case of a surviving widow the probability of remarriage is a consideration.

While contingencies (2), (3) and (4) are important and not 100% predictable they do not affect future benefits, only the amount of reserves that a carrier must establish. Therefore, escalation is the single most important variable in the value of the claim because of its unknown quantity. Since escalation does affect future benefits, it is one of the major concerns of insurers and reinsurers alike. While remarriage will affect future cost there are those who believe that there should be no remarriage factor in the calculation of a reserve since, with such liberal benefits, very few seem to ever remarry.

Since losses (paid and reserved) are necessarily related to premium received for a given period of time such as a policy year or calendar year, the establishing of an accurate reserve soon after a claim is reported is essential in spite of the many variables. The insurers must fund and have reserves for losses in the year the accidents or injuries occur. While a legislature can appropriate money from general reserve to pay a bill in the year it is due, an insurer does not have the same luxury. They must set aside the present value of a claim to insure that the money will be available to pay the loss over the years. It is a position of trust and fiduciary responsibility to our insured and to the injured claimant.

If we find ourselves substantially under reserved over a period of years the results could be catastrophic because rates are based, to a great extent, on losses trended to date. The experience of the past dictates what the price should be at the present time to provide funds to pay for losses in the future. If reserves are not carefully and frequently scrutinized, it could result in an extreme jump in rates in one year or could eventually lead to insolvency especially with the extremely high

benefits available under the Longshore and Harbor Worker's Act. The problem has been particularly difficult since the 1972 Amendments because of the many uncertainties and unknown features in the Act such as the jurisdictional disputes not yet fully resolved, the practical elimination of the Statute of Limitations, the "long tail" on many of the claims, the high benefits that have created negative incentive to return to work in many instances, and last but not least, the indexing or escalating feature of total permanent injuries and death claims.

Indexing or Escalation

The most important single factor complicating the reserving problem is the escalating or indexing feature of the Act. Under Section 10(f) of the Act, each October 1, there is an annual adjustment to the compensation or death benefits payable for permanent and total disability or death claims. The increase is based on the percentage by which the average national weekly wage exceeds the previous year's average national weekly wage. These costs are illustrated in the attached exhibits 2A, 2B and 2C. They are calculated from year 1 through year 50 and at a 0% escalation, 5% escalation and 6.5% escalation. Chart 2A is calculated using the minimum weekly payment of $106.57; chart 2B uses the Texas Employers' Insurance Association's average weekly compensation rate of $270.94 for our largest port of Houston, Texas; and 2C uses the maximum comp rate of $426.26. (Preliminary figures indicate that as of Oct. 1, 1980, the maximum comp rate will be $456.16) (Note - fatal benefits have no maximum comp. rate) The charts are fairly self-explanatory. The most significant factor they show, in my opinion, is the substantial effect that an error of just 1.5% makes in the calculation. For instance, the difference between 5% and 6.5% escalation in accumulated payout for the minimum compensation rate at

30 years is approximately $110,000; for the TEIA average compensation rate the difference for 30 years is over $280,000 and at the maximum rate the difference for 30 years is almost $442,000. At 50 years the differences are approximately $742,000; $1,885,000 and $2,966,000, respectively. These charts vividly illustrate the inherent dangers which escalation presents to an insurance carrier in the setting of reserves. A miscalculation can be catastrophic. It is interesting to note that even at a 5% escalation over a 50 year period (the average life expectancy of a 23 year old female is over 50 years) a widow who receives the minimum compensation rate could receive $1,160,351 in benefits. Without escalation the figure would be $277,100. It becomes even more dramatic if one uses more realistic figures of the TEIA average. At 5% the widow receives $2,949,708; without escalation, $704,450.

It seems to us that a major cause of the availability and affordability problems of Longshoremen's and Harbor Worker's Act coverage is the escalation feature of the Act. Some method must be devised to eliminate or at least cap at a relatively low level, the escalation feature of this Act. It is, in our opinion, the most important issue which should be addressed by this committee.

These projected costs are based on the assumption that inflation in the average national weekly wage will increase at a certain annual rate of up to 6.5 percent. The major problem is that there is and can be no way for an insurer or employer to accurately predict the inflation rate. In fact, since 1972 the average national weekly wage has gone up 6.49% in 1973, 6.26% in 1974, 6.74% in 1975, 7.59% in 1976, 7.21% in 1977, 8.05% in 1978 and 7.43% in 1979 and 6.92% estimated in 1980. We had, by the way, used a 5% factor from 1972 through 1977 and are now using a 6% factor.

There is therefore, no way to accurately predict the reserve necessary to fulfill the liability for compensation payments for total disability or death claims. To the extent that these losses are unpredictable, it follows that the setting of a proper rate to collect the correct amount of premium to mature these obligations is equally unpredictable.

In connection with escalation one should keep in mind that under the present law a person eligible for escalation under the LSHWA who receives the increase based upon the increase in the national average weekly wage will net out substantially higher than a person in the workforce. This is because the recipient of the LSHWA benefits is free of taxes or other deductions while a member of the workforce has state and federal taxes, social security and other deductions subtracted prior to his receiving the increase. In other words, by giving the same percentage to a recipient under LSHWA he is not only keeping up with those in the workplace, he is getting ahead.

This problem of guessing at the future inflation rate is further compounded by the equally difficult task of guessing which claim or claims are going to cross over the magic line and become subject to the escalated benefits. Some permanent total disability claims are of such severity that they are recognizable as such within a short period of time, but more often, the initial injury is relatively insignificant and often it is several years after the date of the accident before the claim develops into a permanent and total claim. In ordinary mathematics, 50 percent x 2 = 100 percent, but in dealing with the escalation feature of the Act, 100 percent disability is 6 to 7 times the amount of reserve required for 50 percent. This situation can be clearly illustrated by the following examples:

Example No. 1

We handled a serious injury claim which occurred August 5, 1973, under the Defense Base Act extension of the U.S. LSHWA. This was a relatively serious injury and after an extended period of disability, rehabilitation and recovery, the claim was settled with the approval of the OWCP and our file was closed for a total cost of $104,168. Subsequent to our settlement, for reasons unknown, this man committed suicide, and we have now been advised that the beneficiaries are making claim for fatal benefits under the Act based on the allegation that the suicide was a result of the industrial accident. There are many questions and problems in the claim which we will not elaborate on at this time other than to state that under the current state of the law, the OWCP will not approve the settlement of a fatal claim, which means on trial of the claim, the beneficiaries win or lose--it is all or nothing at all. If we prevail, we need no reserve in addition to the $104,168 that we have previously paid; if we lose, we need a reserve calculated at $711,803 in addition to the $104,168 we have previously paid. It will be 1980 and perhaps later before the value of this 1973 claim can be established and even then, we will still be guessing on the assumed future inflation rate. We are considered a fairly large writer of Longshore and Harbor Workers' Act coverage, yet if this had been a Stevedore claim, the potential additional cost of $711,803 would retroactively increase our 1973 stevedoring loss ratio by 5.1 percent.

Example No. 2

This gentleman sustained an injury August 15, 1975, when he aggravated an pre-existing condition for which he had a pending claim. He was still under active treatment at the time of the subsequent injury. This was recognized as a serious case prior to the trial by the Administrative Law Judge. Fifty percent loss of earning capacity required a reserve calculated at $116,630. Permanent and total disability required a reserve calculated at $834,718. Trial resulted in permanent and total disability but also resulted in a finding that all payments beyond 104 weeks were to be made by the Office of Workers' Compensation Programs from the Special Fund. The Director appealed to the Benefits Review Board that portion of the decision that held the Special Fund responsible. Herein lies our reserving problem. If the OWCP had been successful in their appeal, our reserve needed to be $834,718. Since we were successful, our reserve only needed to be $29,845.71. We felt the law was on our side, but the Director, OWCP, had an almost perfect batting record in his appeals before the Benefits Review Board. The appeal was finally dropped by the OWCP. The difference in reserve between the present Administrative Law Judge decision and the position taken by the Director, OWCP, was $804,873, a figure that would have increased our 1975 loss ratio 6.2 percent. While this case was finally resolved in our favor, the case vividly illustrates the reserving problem with the Act.

Negative Incentive to Return to Work

The General Accounting Office, in a study reviewing the operation of the Federal Employees Compensation Act, expressed a belief that Worker's Compensation benefits exceeded the take-home pay for about 1/3 of the federal employees receiving compensation benefits. A similar situation

exists under the Longshoremen's and Harbor Workers' Compensation Act as a result of the high benefit level called for under the Act combined with the high wage level of the average longshoreman, although our data would indicate that the percentage would not be as high as the GAO study indicates. When an injured workman's weekly benefits approach or exceed his pre-injury take-home pay, the result is a negative incentive to return to gainful employment following injury. This situation has generated a new utilization tending to lengthen disability periods and creates a problem in using past experience to determine the predicted trend for the future. In trying to arrive at a proper price, the past utilization will apparently not be the same as future utilization because of the lucrative benefits under the Act.

Collateral Sources

The problem of negative incentive increases drastically when the Worker's Compensation benefits are added to income from other collateral sources, such as Social Security and union retirment. It has taken a while to develop following the 1972 Amendments, but there is a rapidly growing trend of using Worker's Compensation benefits as additional retirement benefits. The history of Worker's Compensation is to reasonably reimburse the injured worker for lost wages or earning capacity. Duration of benefits should be geared to a work life expectancy and otherwise modified or adjusted when a worker removes himself from the labor market.

More important than the medical information regarding an injured longshoreman's physical condition in setting reserves and evaluating a claim is his attitude toward continued work or taking advantage of an opportunity to retire. The dollar costs involved in this compensation retirement program are astounding.

The attached "EXHIBIT NO. 3" has been prepared to illustrate the compensation benefits that would be paid after retirement at age 65 for permanent and total disability. This exhibit has been prepared at different compensation rates, gives the anticipated weekly payout and also the present value or discounted amount required, properly invested, to make these payments. The weekly compensation rate of $270.94 per week is $388,313 based on normal life expectancy tables. The present value of this figure is $221,750. Stated differently, the average longshoreman that can also retire with a permanent and total workers' compensation claim in effect gets a retirement bonus worth $221,750. For the worker with a $300 compensation rate, the bonus amounts to $245,534 and the weekly pay out is estimated at $429,961. For the unusual longshoreman entitled to the maximum compensation rate, his retirement bonus is $348,871, and the weekly pay out is estimated at $610,916. Even the longshoreman who is only entitled to the minimum compensation rate still gets a bonus

worth $87,222 with an estimated weekly pay out of $152,737. Examined in a different light, let's see what it would cost you or me starting at age 50 to build a comparable retirement benefit, payable at age 65 through a life insurance annuity program. To equal the average longshoreman benefit at the $270.94 compensation rate, it would cost you and me $722.41 per month. To equal the benefit of the worker entitled to a compensation rate of $300 per week, it would cost you and me $799.89 per month. For the individual entitled to the maximum compensation rate the monthly required payment for you or me would be $1,136.53 and for the minimum compensation rate worker, it would require a monthly annuity payment of $284.15. We are in no way intending to convey an opinion as to the merits of the claims we used as examples. The results are often the same whether the claim is meritorious or whether a person simply takes advantage of the opportunities for an economic windfall created by this Act. It is obvious from the above that there is a great disparity of benefits between the worker who retires at age 65 and the worker who takes advantage of the opportunities of an economic windfall created by the Act by adding longshoremen and harbor worker benefits to his retirement program.

Compensation benefits should be reduced after retirement by the amount of Social Security benefits. Another method previously suggested would be to eliminate the presumption of compensability and in fact, create a presumption that no compensation disability exists after retirement. As a partial solution to the problem, escalation or indexing the benefits should be ceased after retirement.

Unrelated Death benefits

Another factor which creates problems in the setting of reserves for permanent total disability or permanent partial disability because it adds additional uncertainty is the unrelated death benefit. To date we have not developed much experience in unrelated death but it is an additional factor to be considered in setting reserves. Our major objection to the unrelated death benefit is that it is, to us, totally foreign to the concept of workers' compensation. It has no place in a compensation system. It is a fringe benefit that should be addressed in collective bargaining and not by legislative fiat. We recommend that the unrelated death benefit be removed from this Act.

Reinsurance

In the ensuing years since 1972, a complex reinsurance problem has evolved. It has become increasingly difficult for an insurer to obtain reinsurance against a catastrophic event. Certainly old reinsurance concepts, procedures, methods, and coverage have gradually changed. As I understand it most insurers have had to re-evaluate their reinsurance programs and in most cases, make substantive changes. Reinsurance is vital to the economic well being of any Casualty Insurance Company. Certainly inflation in general, especially as it affects medical costs, high weekly benefits, and escalation of benefits have made their contribution to the reinsurance problem.

While I believe it would be better if you had a representative of the reinsurance business to comment on the reasons for the changes in the reinsurance market, I can relate to you the changes in our program within the last few years and speculate as to the reasons why.

Prior to 1976 our reinsurance program was very simple in that we collected from the reinsurer when the actual paid loss exceeded a pre-determined retention. This retention applied regardless of the number of claims in the accident. Thus as an insurer we knew exactly what our ultimate liability would be.

Our current reinsurance program also has a pre-determined retention amount for each accident. However, a notable difference is that we now recover our loss based on the commuted or present value of the claim five years after the date of the accident. Our recovery from the reinsurer is dependent on future escalation, the remarriage contingency, mortality contingency, and the assumed rate of return on investments. Thus, it is evident that the correctness of these assumptions will have a direct bearing on whether or not we are adequately reinsured. We think we have an adequate reinsurance program and that our reserve assumptions are correct. However, to the extent we err in our assumptions on escalation, for example, we will bear the cost alone and not the reinsurer. If for any reason we could not obtain reinsurance we could no longer write longshore coverage.

Our reinsurance program is not unique and is, in my opinion, better than many reinsurance programs being offered by reinsurers dealing with the problem of indexing. Some reinsurers simply exclude escalation; some have an index clause in which the companies' retention increases each year by some pre-determined formula and others have an adjusted dollar clause in which the reinsurance liability is adjusted to the dollar value at the date of injury.

By whatever method chosen, however, it all points to the same problem. Reinsurers are not willing to assume the uncertain and speculative exposure of an unlimited escalation of benefits. If the indexing feature were eliminated or capped at a certain percentage it is my opinion that the reinsurers would be able to both offer and price the product with a better degree of certainty.

Settlement Approval

The Act recognized that compromise settlements have performed a useful function in the system when legitimate doubts existed concerning the employer's liability and/or the extent of disability where the worker might receive nothing if he pursued his claim. Settlement is an expeditious method for the parties to agree among themselves, subject to approval, on a format for avoiding costly, time-consuming, and uncertain litigation. Section 8(i) of the Act was broadened by the 1972 Amendments to permit settlement of claims upon approval of the Deputy Commissioners. This same authority was extended to the Administrative Law Judges by Section 19, which revised the hearing procedure.

It was the Solicitor's Office representing the Director of the O.W.C.P. that insisted that only Deputy Commissioners had authority to approve settlements, not Administrative Law Judges nor the Benefits Review Board nor the appellate courts. This position was largely responsible for the case of Liberty Mutual vs. S. H. DePuy, wherein the Seventh Circuit reached a decision contrary to that expected or desired by any of the participants when they held that neither the Deputy Commissioners nor the Administrative Law Judges nor anyone else had the authority to approve settlements on fatal claims. As a result of this holding, questionable fatal cases involving heart attacks, cancer, etc., with legitimate medical

questions of causation have to go through the litigation process where the result is all or nothing at all. If a settlement agreement is reached, it has to be concluded on an informal basis that affords no final relief.

The position taken by the Solicitor's Office for the first six years following the 1972 Amendments, in effect, administratively repealed the authority of the Administrative Law Judges to approve settlements since they were reluctant to exercise that authority in face of the Solicitor's position. Cases worked out during the trial or a formal hearing had to be referred back to the Deputy Commissioner for consideration regarding approval, and he was under no obligation to approve. Yet, if he disapproved, all he could do was again refer the case for formal hearing. Therefore, theoretically, the ball could bounce back and forth, consuming time, money and effort and contributing to the backlog of claims. On October 26, 1978, approximately six years after the 1972 Amendments, the present Benefits Review Board concluded that the prior Board decisions to the contrary were in error and held that Administrative Law Judges, within their sphere of authority and subject to limitations set forth in that decision, were empowered to approve or disapprove agreed settlements. This system is functioning quite well in its present posture, but there needs to be some protection against future Review Boards returning to the situation that existed for six years. There needs to be an additional statutory mandate making it clear that Administrative Law Judges have the authority to approve settlements and that the Administrative Law Judges, Deputy Commissioners and the courts should have authority to approve settlements in questionable death claims.

Section 8(f) - Second Injury Fund

One rapidly developing problem area, as yet largely unrecognized by the industry, is the over-utilization of Section 8(f), "Injury increasing disability", often referred to as the Second Injury Provision.

Section 8(f) of the Longshoremen's and Harbor Workers' Compensation Act is intended to prevent discrimination against handicapped employees, and this purpose is promoted by limiting the liability of the employer when such a worker has been injured on the job. Section 8(f) provides that if any employee who has an "existing permanent partial disability" sustains a second injury which, when combined with the previous condition, leaves the employee permanently and totally disabled or permanently partially disabled to a greater degree, the employer shall pay compensation for 104 weeks, and the Special Fund will be liable for the remainder of compensation due.

The Second Injury Fund is administered by the Department of Labor and financed by employers based on pro-rated assessment in proportion that a carrier's or employer's payments of compensation and medical bear to the total compensation and medical benefits paid.

Prior to 1976, it was almost impossible to get a claim accepted for payment by the Special Fund. Since that time, the rapid evolution of the case law has made the Fund a target in every serious injury claim, and the Fund, on the basis of liabilities assumed in these three short years, may already be the "largest carrier" of longshore coverage.

8(f) payments are approximately $200,000 per month at the present time. This is not a large figure, but it is the trend and the rapid increase in these payments that is significant. 8(f) payments for the last four years are as follows:

1976	$ 80,000 approximately
1977	$ 295,000
1978	$1,060,556
1979	$2,538,825

Claims for which the Fund is responsible are not, of course, pre-funded, nor are there any reserves set aside to mature these obligations as required of the insurance industry, but for comparative purposes, let's speculate as to the amount of deferred liability rapidly building up in the Special Fund. As of October 10, 1979, the Department of Labor had 306 Longshoremen's and Harbor Workers' Act 8(f) claims on hand, and new ones are being added at the rate of twenty per month. 142 of these claims have been added during the first nine months of the year - twenty percent by administrative decision and the balance by judicial decision. We do not, of course, know the exact number, but it has been reported that "almost all" of these claims are fatal or total and permanent disability claims. Let's assume conservatively that 200 or less than 2/3 of these 306 claims are New Law fatal or total and permanent disability claims and assume further that the average value of our claims at Employers in this category are representative of the country as a whole. Our companies' average reserve value on all open fatal or total and permanent disability claims since the 1972 Amendments is $440,112 based on a 6% escalation factor and a 3½% after-tax investment factor. If the government was required to

reserve these cases as the private insurance industry must do, it is readily apparent that 200 claims with an average present value of $440,112 is equal to $88,022,400. This reserve would also be increasing at a monthly rate of 20 (x) $440,112 or $8,802,240 per month. This hypothetical required reserve to mature 200 existing 8(f) claims exceeds the reserve set aside by the country's largest carrier of Longshoremen's and Harbor Workers' Act coverage to mature all open claims under the Act. Based on these figures, in three short years, Section 8(f) of the Special Fund has grown from a mere token to the "largest carrier" in the business.

The present state of the law actually encourages collusion between the claimant's attorney and the employer-carrier. The plaintiff is interested in obtaining a total and permanent disability award and is not ordinarily concerned whether it is paid by the employer or the Special Fund. The employer-carrier facing a possible or probable T & P award has a natural monetary interest in getting a Second Injury Fund finding as it reduces his exposure to a small fraction of a T & P award. A small trade-off between the defendant and the plaintiff results in a total and permanent disability award against the Special Fund, and this trade-off eliminates the risk to either party.

On an individual case basis, getting an award charged to the Special Fund is the next best thing to getting a complete win as the company involved shares the loss with the entire industry. However, what is good for an individual company is not necessarily good for the industry as a whole. In our opinion a great majority of the cases where total and permanent disability is awarded against the Special Fund could have been settled and concluded for a fraction of the present value of the total and

permanent award, and the ultimate cost to the industry as a whole will be considerably in excess of what the cost to the industry would have been if the Second Injury Provision did not exist. It is a question of "pay now or pay much more later."

The Fund can be likened to a pot of gold that is unguarded and unprotected, free for the taking for those who can qualify. The pot is kept full by annual assessments. Procedures need to be developed to periodically monitor payments and to verify that recipients remain eligible for these benefits. We are familiar with a case that was being handled by the Fund on a partial disability basis where the claimant sought modification to a total and permanent disability award, and no one appeared at the hearing on behalf of the Fund. Failure to protect the Fund on this one case could have been an oversight, but it illustrates the conflict of interest position of the Department of Labor, and this conflict exists in every situation where the injured workman attempts to receive benefits from the Fund.

The administrators of the Fund have also taken the position that they have no authority to "settle" or to "compromise" a Second Injury claim. They have authority to administratively accept a claim with an average value of $440,112, but disclaim any authority to contribute $10,000 toward a compromise settlement. The Fund needs a protector.

The 1978 industry assessments for operation of the Special Fund were $4,250,000. 1979 assessments total $6,930,000, an increase of over 50%, with no reversal of this trend in sight. The 1979 assessments amount to 4.28% of the total compensation and medical payments made by the industry the preceding year.

As the 8(f) situation has evolved to date, there is a serious question that the Second Injury Provision actually performs the function it was designed to do. There needs to be some legislative curtailment limiting access to this Fund and a great improvement made in the administration and the responsibility for the preservation of this Fund before it becomes the largest disburser of Longshore benefits without any restraints or controls by those paying the bill.

Handling of Medical

Under section 7c the Secretary of Labor has the authority to designate a list of physicians who are authorized to treat injured workers in each community. We have seen no indication that the Secretary intends to do so other than to designate any licensed physician and surgeon in the community (see Rule 702.404). While we recognize that the easy way out politically was to designate all M.D.'s and D.O.'s and D.C.'s and other health care providers, I seriously question whether all physicians are qualified to treat the type of industrial injuries which arise on the docks and seriously doubt that it is in the best interest of the injured worker in all cases. In cases where we feel that the injured worker is not receiving adequate medical care and attempt to arrange more specialized care by agreement, we sometimes run afoul of the Deputy Commissioner who rightly says that he has the duty of supervising medical care. While the Deputy Commissioner will generally send him to another physician there is delay involved and if the new physician finds nothing wrong, generally the injured worker goes back to the original doctor for continued treatment.

We feel that the present carte blanche authorization of any licensed medical practitioner adds substantial costs to the system and does not result in the best medical care for the injured worker. We feel that the Secretary of Labor should designate a panel of physicians authorized to treat the injured workers in each applicable community and then allow free choice from amongst the designated panel who, hopefully, will be those physicians whose expertise and training would qualify them to treat industrial type injuries.

Benefits Review Board

The Benefits Review Board, the first step in the appellate process, is composed of three members appointed by the Secretary of Labor. While the present Board is functioning in a commendable manner as an independent quasi-judicial body, and the judicial integrity of the Board has largely been restored, it has not always been so, and there is no safeguard or guarantee that it will continue. The Board as it was constituted in the first five years after the 1972 Amendments made it simply an expensive and unnecessary adjunct to the Longshoremen's and Harbor Workers' Compensation Act. Its decisions were entirely predictable. We knew that if we appealed a case to the Benefits Review Board, we might as well be prepared to go to the Court of Appeals since we had won very few cases at the Benefits Review Board level. Similarly, if the Solicitor appealed a case, we knew we should be prepared to appeal to the Court of Appeals as the Solicitor on behalf of the Director lost very few cases. The Benefits Review Board, at that time, in our opinion, served no useful purpose in this compensation act.

We still question the need for a Benefits Review Board and feel that this review function could be better performed by returning it to the Federal District Courts. However, if it is felt that the Benefits Review Board is necessary, then we suggest it should be separate and apart from the Department of Labor and that its members be appointed by the President of the United States by and with the advice and consent of the Senate.

Recommendations

We think that extensive revision of the Longshore and Harbor Workers' Act, both legislatively and administratively, is in order. The results from 1972 to date have indicated an increasing difficulty in obtaining and/or providing coverage under the Act. This Act has quickly become more even than a Cadillac program, it is a Rolls Royce program. The following are some of the major areas which we feel should be addressed by the Congress.

1. We think that it is time for the Congress, either this committee or some other committee of the Congress, to look into the total picture of the relationship of all of these benefit programs. We have many cases where an individual is drawing Workers' Compensation, retirement and social security. This creates a situation ripe for fraud or exaggeration of injury as one approaches retirement age. A system in which a worker receives more for not working than for working or which makes disability near retirement so lucrative creates an environment that is going to be over-utilized and extremely expensive. I think it is time for a broad overview of the inter-relationships of these various benefit programs to the end of eliminating duplication and to discourage over-utilization of the system.

   This problem may even be broader than the Longshore and Harbor Workers' Act, but this is a place to start.

2. Escalation or indexing of benefits on death and T & P cases should either be eliminated or at least capped at some reasonable level.
3. The law should specifically allow Administrative Law Judges to approve compromise settlements of a claim under the same criteria and guidelines as authorized by the Deputy Commissioners. The law should also be amended to allow the settlement of contested death cases, under strict guidelines.
4. The Benefits Review Board should either be abolished or should be made independent of the Department of Labor, appointed by the President and confirmed by the Senate.
5. The law should be amended to mandate the appointment of a panel of physicians qualified to treat industrial accidents in each district.
6. Eliminate the Unrelated Death Benefit.
7. The maximum comp benefit should also apply to fatal benefits.
8. Jurisdiction - More than seven years have elapsed since the 1972 Amendments and we have Supreme Court clarification in only a rather limited area. We seem assured of additional years of expensive litigation unless we can get Congressional clarification of their intent. It is not our role as an insurance carrier to suggest who should or should not be covered under this Act, but we do strongly suggest that the terms "maritime employment" and "employee" be clarified, in order to reduce the years of uncertainty and the expense and delay of litigation, which promises to continue for many, many years.

9. Second Injury Fund - Section 8(f) - The Second Injury Fund should either be eliminated or some method devised to substantially limit access to the fund. There also needs to be great improvement in the administration and responsibility for the fund whereby some restraint and control can be put into the system either by the Department of Labor or, as in New York, by those who are paying the bill.

Conclusion

As I stated in the beginning we have been writing Longshore coverage for over 50 years in Texas. We have many subscribers who have been with us that entire period of time. We feel an intense loyalty to our faithful subscribers as I hope that they do to us. We intend to stay in the business of writing this coverage along the Texas-Louisiana gulf coast so long as it remains prudent to do so. Should the day come, however, when we feel that our other subscribers in Texas and elsewhere are jeopardized by our continuing to write this coverage we will have no choice but to withdraw from the market. Hopefully, we will not have to make that decision. Certainly the Congress could help by taking action in some of the areas we have mentioned and in other areas mentioned in testimony previously heard by this committee.

There are many other areas which we could have covered in this testimony which, because of time constraints, we left out.

We hope that our written testimony and our response to any questions which you might have will be of help to you in your review of the LSHWA and the problems documented under it. Thank you for your consideration.

72-745 O—81——8

TEXAS
WORKERS' COMPENSATION INSURANCE
STEVEDORING CLASS CODES
7309F, 7313F, 7317F
RATE AND STATISTICAL EXHIBITS
1979

PREPARED BY

PROPERTY AND CASUALTY

ACTUARIAL DIVISION

EXHIBIT 1

TEXAS WORKERS' COMPENSATION INSURANCE
RATE REVISION EFFECTIVE OCTOBER 1, 1979
EXPENSE PROVISIONS FOR STEVEDORING CLASS CODES

1. Total Production Expenses	17.50%
2. General Expenses	8.73
3. State Texas, Licenses & Fees	4.88
4. Potential Underwriting Profit	2.50
5. Total (Rounded)	33.6 %
6. Loss and Loss Adjustment Expenses	66.4 %

Notes:

(a) General Expenses: Average General Expenses of..... 5.23%
plus proportionate share of Premium Discount of... +3.58%
minus Departmental Maintenance Tax of..... -0.08%
to eliminate duplication of expenses. 8.73%

(b) Texas taxes consist of the following:

Gross Premium Tax (Maximum Rate).....	3.85%
Industrial Accident Board.....	+ .45%
Department Maintenance.....	+ .08%
Miscellaneous.....	+ .50%
	4.88%

(c) Loss Adjustment Expense:
A factor of 1.109 is used to adjust incurred losses to include all loss adjustment expenses.
Pure incurred loss ratio: (66.4 + 1.109 = 59.9%)

RATE HISTORY OF TEXAS STEVEDORING CLASSES
OCTOBER 1, 1959 / 1978

Effective Date	Manual Rate	% Change	Effective Date	Manual Rate	% Change
		CODE 7309F			
October 1, 1959	$20.20	---	October 1, 1969	$21.46	+ 1.8%
October 1, 1960	20.20	N.C.	October 1, 1970	21.28	- 0.8
October 1, 1961	22.21	+10.0%	April 1, 1972	23.93	+12.5
October 1, 1962	20.26	- 8.8	October 1, 1972	24.10	+ 0.7
October 1, 1963	20.45	+ 0.9	December 11, 1972	38.37	+59.2
October 1, 1964	17.91	-12.4	October 7, 1973	39.05	+ 1.8
October 1, 1965	18.43	+ 2.9	October 1, 1974	35.25	- 9.7
October 1, 1966	16.92	- 8.2	October 1, 1975	28.95	-17.9
October 1, 1967	18.67	+10.3	October 1, 1976	36.16	+25.0
October 1, 1968	20.51	+ 9.9	October 1, 1977	41.61	---
May 17, 1969	21.08	+ 2.8	October 1, 1978	48.71	+17.1
		CODE 7313F			
October 1, 1959	$ 7.03	---	October 1, 1969	$ 5.19	+11.2%
October 1, 1960	7.03	N.C.	October 1, 1970	5.31	+ 2.3
October 1, 1961	6.62	- 5.8%	April 1, 1972	5.56	+ 4.7
October 1, 1962	6.23	- 5.9	October 1, 1972	5.82	+ 4.7
October 1, 1963	6.74	+ 8.2	December 11, 1972	12.13	+108.4
October 1, 1964	5.84	-13.4	October 7, 1973	14.73	+21.4
October 1, 1965	4.73	-19.0	October 1, 1974	13.61	- 7.6
October 1, 1966	3.82	-19.2	October 1, 1975	11.18	-17.9
October 1, 1967	4.04	+ 5.8	October 1, 1976	12.63	+13.0
October 1, 1968	4.37	+ 8.2	October 1, 1977	13.56	---
May 17, 1969	4.67	+ 6.9	October 1, 1978	13.42	- 1.0
		CODE 7317F			
October 1, 1959	$ 5.22	---	October 1, 1969	$ 4.27	+ 2.4%
October 1, 1960	5.22	N.C.	October 1, 1970	3.85	- 9.8
October 1, 1961	4.58	-12.3%	April 1, 1972	4.06	+ 5.5
October 1, 1962	3.72	-18.8	October 1, 1972	4.46	+ 9.9
October 1, 1963	3.83	+ 3.0	December 11, 1972	7.79	+74.7
October 1, 1964	3.69	- 3.7	October 7, 1973	8.88	+14.0
October 1, 1965	3.37	- 8.7	October 1, 1974	10.55	+18.8
October 1, 1966	2.88	-14.5	October 1, 1975	10.55	N.C.
October 1, 1967	3.55	+23.3	October 1, 1976	10.55	N.C.
October 1, 1968	3.97	+11.9	October 1, 1977	10.02	---
May 17, 1969	4.17	+ 5.0	October 1, 1978	11.81	+17.9

October 1, 1977 rates and later are based on $300 Payroll Limitation Rule; rates shown for prior years are based on $200 Payroll Limitation Rule.

TEXAS WORKERS' COMPENSATION

RATE DEVELOPMENT OCTOBER 1, 1979

STEVEDORING CLASSES

The development of the indicated change in rate level for the Stevedoring Classes (7309F, 7313F, and 7317F), set out below, is determined from the experience of these classifications for the 1976 and 1977 policy years weighted with the latest calendar year experience from July 1, 1978 through June 30, 1979.

I. Summary of Texas Policy Year Data - Stevedoring Classes Only

Policy Year	Earned Premiums At Present Rates	Losses & Loss Adjustment Expense	Loss And Loss Adj. Ratio
1976	$20,255,232	$11,895,463	58.7%
1977	23,038,156	17,140,615	74.4
Total	$43,293,388	$29,036,078	67.1%

II. Summary of Texas Calendar Year Data - Stevedoring Classes Only

Policy Year	Earned Premiums At Present Rates	Losses & Loss Adjustment Expense	Loss And Loss Adj. Ratio
12 Months Ending June 30, 1979	$23,157,652	$17,205,810	74.3%

III. Final Indicated Change in Manual Rate Level - Overall Basis

(1) Policy Year Loss & Loss Adjustment Ratio (Item I)	67.1%
(2) Calendar Year Loss & Loss Adjustment Ratio (Item II)	74.3%
(3) Average of (1) and (2)	70.7
(4) Permissible Loss and Loss Adjustment Ratio	66.4
(5) Indicated Change in Overall Manual Rate Level [(3)+(4)]	1.065(+6.5%

TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT OCTOBER 1, 1979
STEVEDORING CLASSES

IV. The indicated rates and rating values for the Stevedoring Classifications to become effective October 1, 1979 are as follows:

BASED ON $300 PAYROLL LIMITATION RULE

Class Code No.	Rate Including Disease	Minimum Premium	Expected Loss Rates Col. (1)*	Expected Loss Rates Col. (2)**	"D" Ratio Standard
7309F	51.69	500.	29.88	27.91	.53
7313F	12.41	454.	7.54	6.70	.60
7317F	13.45	491.	9.07	7.26	.57
7323F	A	A	A	A	A
7327F	A	A	A	A	A

*Column (1) applicable to payrolls accumulated under the $200 Payroll Limitation Rule.
**Column (2) applicable to payrolls accumulated under the $300 Payroll Limitation Rule.

Listed below are the rates based on the old $200 weekly Payroll Limitation Rule and class offset factors. These rates at the $200 weekly payroll basis are not to be used on policies but are provided only to determine the application of the transition program.

Class Code No.	Rate	Offset
7309F	55.34	.934
7313F	13.96	.889
7317F	16.79	.801
7323F	A	.922
7327F	A	.922

Stevedoring Classes (7309F, 7313F, 7317F, 7323F, 7327F) Distribution of the Texas Workers' Compensation Premium Dollar Effective October 1, 1978, Showing the Effect of Expense Gradation

STEVEDORING
TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT EFFECTIVE 10-1-78

The Discounts by Premium Groups are as follows:

(1) Standard Premium	(2) Discount For Acquisition And General Expenses	(3) Factor To Reflect Additional Savings On Tax (5.1%) And Profit and Contingencies (2.5%)*	(4) Total Discount (2)+(3)
First $ 1,000	0.0%	--	0.0%
Next 4,000	8.8	.924	9.5
Next 95,000	13.8	.924	14.9
Over 100,000	15.3	.924	16.5

* (1.000 - .051 - .025 = .924)

Expense Provisions by Premium Groups are as follows:

(1) Standard Premium	(2) Acq. & Other Prod. Exp.	(3) General Expense	(4) Profit & Contingencies	(5) Taxes	(6) Total Expense Allowance	(7) Discount
First $ 1,000	17.5%	8.7%	2.5%	5.1%	33.8%	0.0%
Next 4,000	12.5	4.9	2.3	4.6	24.3	9.5
Next 95,000	7.5	4.9	2.1	4.4	18.9	14.9
Over 100,000	6.0	4.9	2.1	4.3	17.3	16.5
Average	6.5%	4.9%	2.1%	4.4%	17.9%	15.9%

(1) Standard Premium	(2) Stevedoring 1976 Policy Year Texas W.C. Premium Distribution	(3) Percentage Distribution	(4) Provision For Expenses
First $ 1,000	$ 68,306	0.5%	33.8%
Next 4,000	241,358	1.7	24.3
Next 95,000	3,421,851	24.0	18.9
Over 100,000	10,516,920	73.8	17.3
	$14,248,435	100.0%	17.9% Average

STEVEDORING
TEXAS WORKERS' COMPENSATION
RATE DEVELOPMENT EFFECTIVE 10-1-78

1. The premiums are 15.9% lower than the premiums that would be produced if manual rates applied to all risks. Thus, the company collects only 84.1¢ of the manual classification dollar out of which 66.2¢ goes for losses and loss adjustment expense leaving 17.9¢ (instead of 33.8¢) for expenses, taxes and contingencies or profit. The premiums actually collected because of premium discounts by premium brackets are as follows:

	STANDARD PREMIUM				
	First $1,000	Next $4,000	Next $95,000	Over $100,000	Average
Loss & Loss Adj.	66.2%	66.2%	66.2%	66.2%	66.2%
Expenses	26.2	17.4	12.4	10.9	11.4
Taxes	5.1	4.6	4.4	4.3	4.4
Profit & Contin.	2.5	2.3	2.1	2.1	2.1
	100.0%	90.5%	85.1%	83.5%	84.1%

2. Since the company collects only 84.1¢ out of each manual classification premium dollar, below is set out the distribution of the net workers' compensation dollar actually collected. The percentages available for Losses and Loss Adjustment, Expenses and Profit and Contingencies by premium brackets are as follows:

	STANDARD PREMIUM				
	First $1,000	Next $4,000	Next $95,000	Over $100,000	Average
Loss & Loss Adj.	66.2%	73.2%	77.8%	79.3%	78.7%
Expenses	26.2	19.2	14.5	13.0	13.6
Taxes	5.1	5.1	5.2	5.2	5.2
Profit & Contin.	2.5	2.5	2.5	2.5	2.5
	100.0%	100.0%	100.0%	100.0%	100.0%

3. Therefore, based on the premium actually collected, the average provisions for Losses and Loss Adjustment, Expenses and Profit and Contingencies are as follows:

Losses and Loss Adjustment	78.7%
Expenses	13.6
Taxes	5.2
Profit and Contingencies	2.5
TOTAL	100.0%

COMPARISON OF PAYMENTS UNDER USL&HW ACT ASSUMING VARIOUS WAGE ESCALATION RATES

INITIAL WEEKLY COMP RATE $106.57 10/1/79 MINIMUM

	RATE OF ESCALATION 0.00 +/-		RATE OF ESCALATION 5.00 +/-		RATE OF ESCALATION 6.50 +/-		
YEAR	ANNUAL PAYMENT	ACCUMULATED PAYMENT	ANNUAL PAYMENT	ACCUMULATED PAYMENT	ANNUAL PAYMENT	ACCUMULATED PAYMENT	YEAR
1	$ 5542	$ 5542	$ 5542	$ 5542	$ 5542	$ 5542	1
2	$ 5542	$ 11084	$ 5819	$ 11361	$ 5902	$ 11444	2
3	$ 5542	$ 16626	$ 6110	$ 17471	$ 6286	$ 17730	3
4	$ 5542	$ 22168	$ 6416	$ 23887	$ 6695	$ 24425	4
5	$ 5542	$ 27710	$ 6737	$ 30624	$ 7130	$ 31555	5
6	$ 5542	$ 33252	$ 7074	$ 37698	$ 7593	$ 39148	6
7	$ 5542	$ 38794	$ 7428	$ 45126	$ 8087	$ 47235	7
8	$ 5542	$ 44336	$ 7799	$ 52925	$ 8613	$ 55848	8
9	$ 5542	$ 49878	$ 8189	$ 61114	$ 9173	$ 65021	9
10	$ 5542	$ 55420	$ 8598	$ 69712	$ 9769	$ 74790	10
11	$ 5542	$ 60962	$ 9028	$ 78740	$ 10404	$ 85194	11
12	$ 5542	$ 66504	$ 9479	$ 88219	$ 11080	$ 96274	12
13	$ 5542	$ 72046	$ 9953	$ 98172	$ 11800	$ 108074	13
14	$ 5542	$ 77588	$ 10451	$ 108623	$ 12567	$ 120641	14
15	$ 5542	$ 83130	$ 10974	$ 119597	$ 13384	$ 134025	15
16	$ 5542	$ 88672	$ 11523	$ 131120	$ 14254	$ 148279	16
17	$ 5542	$ 94214	$ 12099	$ 143219	$ 15181	$ 163460	17
18	$ 5542	$ 99756	$ 12704	$ 155923	$ 16168	$ 179628	18
19	$ 5542	$ 105298	$ 13339	$ 169262	$ 17219	$ 196847	19
20	$ 5542	$ 110840	$ 14006	$ 183268	$ 18338	$ 215185	20
21	$ 5542	$ 116382	$ 14706	$ 197974	$ 19530	$ 234715	21
22	$ 5542	$ 121924	$ 15441	$ 213415	$ 20799	$ 255514	22
23	$ 5542	$ 127466	$ 16213	$ 229628	$ 22151	$ 277665	23
24	$ 5542	$ 133008	$ 17024	$ 246652	$ 23591	$ 301256	24
25	$ 5542	$ 138550	$ 17875	$ 264527	$ 25124	$ 326380	25
26	$ 5542	$ 144092	$ 18769	$ 283296	$ 26757	$ 353137	26
27	$ 5542	$ 149634	$ 19707	$ 303003	$ 28496	$ 381633	27
28	$ 5542	$ 155176	$ 20692	$ 323695	$ 30348	$ 411981	28
29	$ 5542	$ 160718	$ 21727	$ 345422	$ 32321	$ 444302	29
30	$ 5542	$ 166260	$ 22813	$ 368235	$ 34422	$ 478724	30
31	$ 5542	$ 171802	$ 23954	$ 392189	$ 36659	$ 515383	31
32	$ 5542	$ 177344	$ 25152	$ 417341	$ 39042	$ 554425	32
33	$ 5542	$ 182886	$ 26410	$ 443751	$ 41580	$ 596005	33
34	$ 5542	$ 188428	$ 27731	$ 471482	$ 44283	$ 640288	34
35	$ 5542	$ 193970	$ 29118	$ 500600	$ 47161	$ 687449	35
36	$ 5542	$ 199512	$ 30574	$ 531174	$ 50226	$ 737675	36
37	$ 5542	$ 205054	$ 32103	$ 563277	$ 53491	$ 791166	37
38	$ 5542	$ 210596	$ 33708	$ 596985	$ 56968	$ 848134	38
39	$ 5542	$ 216138	$ 35393	$ 632378	$ 60671	$ 908805	39
40	$ 5542	$ 221680	$ 37163	$ 669541	$ 64615	$ 973420	40
41	$ 5542	$ 227222	$ 39021	$ 708562	$ 68815	$ 1042235	41
42	$ 5542	$ 232764	$ 40972	$ 749534	$ 73288	$ 1115523	42
43	$ 5542	$ 238306	$ 43021	$ 792555	$ 78052	$ 1193575	43
44	$ 5542	$ 243848	$ 45172	$ 837727	$ 83125	$ 1276700	44
45	$ 5542	$ 249390	$ 47431	$ 885158	$ 88528	$ 1365228	45
46	$ 5542	$ 254932	$ 49803	$ 934961	$ 94282	$ 1459510	46
47	$ 5542	$ 260474	$ 52293	$ 987254	$ 100410	$ 1559920	47
48	$ 5542	$ 266016	$ 54908	$ 1042162	$ 106937	$ 1666857	48
49	$ 5542	$ 271558	$ 57653	$ 1099815	$ 113888	$ 1780745	49
50	$ 5542	$ 277100	$ 60536	$ 1160351	$ 121291	$ 1902036	50

EXHIBIT 3A

COMPARISON OF PAYMENTS UNDER USL&HW ACT ASSUMING VARIOUS WAGE ESCALATION RATES

INITIAL WEEKLY COMP RATE $270.94 T.E.I.A. AVERAGE

YEAR	RATE OF ESCALATION 0.00 %/% ANNUAL PAYMENT	RATE OF ESCALATION 0.00 %/% ACCUMULATED PAYMENT	RATE OF ESCALATION 5.00 %/% ANNUAL PAYMENT	RATE OF ESCALATION 5.00 %/% ACCUMULATED PAYMENT	RATE OF ESCALATION 6.50 %/% ANNUAL PAYMENT	RATE OF ESCALATION 6.50 %/% ACCUMULATED PAYMENT	YEAR
1	$ 14089	$ 14089	$ 14089	$ 14089	$ 14089	$ 14089	1
2	$ 14089	$ 28178	$ 14793	$ 28882	$ 15005	$ 29094	2
3	$ 14089	$ 42267	$ 15533	$ 44415	$ 15980	$ 45074	3
4	$ 14089	$ 56356	$ 16310	$ 60725	$ 17017	$ 62093	4
5	$ 14089	$ 70445	$ 17126	$ 77851	$ 18125	$ 80218	5
6	$ 14089	$ 84534	$ 17982	$ 95833	$ 19303	$ 99521	6
7	$ 14089	$ 98623	$ 18881	$ 114714	$ 20558	$ 120079	7
8	$ 14089	$ 112712	$ 19825	$ 134539	$ 21894	$ 141973	8
9	$ 14089	$ 126801	$ 20816	$ 155355	$ 23317	$ 165290	9
10	$ 14089	$ 140890	$ 21857	$ 177212	$ 24833	$ 190123	10
11	$ 14089	$ 154979	$ 22950	$ 200162	$ 26447	$ 216570	11
12	$ 14089	$ 169068	$ 24098	$ 224260	$ 28166	$ 244736	12
13	$ 14089	$ 183157	$ 25303	$ 249563	$ 29997	$ 274733	13
14	$ 14089	$ 197246	$ 26568	$ 276131	$ 31947	$ 306680	14
15	$ 14089	$ 211335	$ 27896	$ 304027	$ 34024	$ 340704	15
16	$ 14089	$ 225424	$ 29291	$ 333318	$ 36236	$ 376940	16
17	$ 14089	$ 239513	$ 30756	$ 364074	$ 38591	$ 415531	17
18	$ 14089	$ 253602	$ 32294	$ 396368	$ 41099	$ 456630	18
19	$ 14089	$ 267691	$ 33909	$ 430277	$ 43770	$ 500400	19
20	$ 14089	$ 281780	$ 35604	$ 465881	$ 46615	$ 547015	20
21	$ 14089	$ 295869	$ 37384	$ 503265	$ 49645	$ 596660	21
22	$ 14089	$ 309958	$ 39253	$ 542518	$ 52872	$ 649532	22
23	$ 14089	$ 324047	$ 41216	$ 583734	$ 56309	$ 705841	23
24	$ 14089	$ 338136	$ 43277	$ 627011	$ 59969	$ 765810	24
25	$ 14089	$ 352225	$ 45441	$ 672452	$ 63867	$ 829677	25
26	$ 14089	$ 366314	$ 47713	$ 720165	$ 68018	$ 897695	26
27	$ 14089	$ 380403	$ 50099	$ 770264	$ 72439	$ 970134	27
28	$ 14089	$ 394492	$ 52604	$ 822868	$ 77148	$ 1047282	28
29	$ 14089	$ 408581	$ 55234	$ 878102	$ 82163	$ 1129445	29
30	$ 14089	$ 422670	$ 57996	$ 936098	$ 87504	$ 1216949	30
31	$ 14089	$ 436759	$ 60896	$ 996994	$ 93192	$ 1310141	31
32	$ 14089	$ 450848	$ 63941	$ 1060935	$ 99249	$ 1409390	32
33	$ 14089	$ 464937	$ 67138	$ 1128073	$ 105700	$ 1515090	33
34	$ 14089	$ 479026	$ 70495	$ 1198568	$ 112571	$ 1627661	34
35	$ 14089	$ 493115	$ 74020	$ 1272588	$ 119888	$ 1747549	35
36	$ 14089	$ 507204	$ 77721	$ 1350309	$ 127681	$ 1875230	36
37	$ 14089	$ 521293	$ 81607	$ 1431916	$ 135980	$ 2011210	37
38	$ 14089	$ 535382	$ 85687	$ 1517603	$ 144819	$ 2156029	38
39	$ 14089	$ 549471	$ 89971	$ 1607574	$ 154232	$ 2310261	39
40	$ 14089	$ 563560	$ 94470	$ 1702044	$ 164257	$ 2474518	40
41	$ 14089	$ 577649	$ 99194	$ 1801238	$ 174934	$ 2649452	41
42	$ 14089	$ 591738	$ 104154	$ 1905392	$ 186305	$ 2835757	42
43	$ 14089	$ 605827	$ 109362	$ 2014754	$ 198415	$ 3034172	43
44	$ 14089	$ 619916	$ 114830	$ 2129584	$ 211312	$ 3245484	44
45	$ 14089	$ 634005	$ 120572	$ 2250156	$ 225047	$ 3470531	45
46	$ 14089	$ 648094	$ 126601	$ 2376757	$ 239675	$ 3710206	46
47	$ 14089	$ 662183	$ 132931	$ 2509688	$ 255254	$ 3965460	47
48	$ 14089	$ 676272	$ 139578	$ 2649266	$ 271846	$ 4237306	48
49	$ 14089	$ 690361	$ 146557	$ 2795823	$ 289516	$ 4526822	49
50	$ 14089	$ 704450	$ 153885	$ 2949708	$ 308335	$ 4835157	50

Exhibit 28

COMPARISON OF PAYMENTS UNDER USL&HW ACT ASSUMING VARIOUS WAGE ESCALATION RATES

INITIAL WEEKLY COMP RATE $426.26 10/1/79 MAXIMUM

YEAR	RATE OF ESCALATION 0.00 +/- ANNUAL PAYMENT	RATE OF ESCALATION 0.00 +/- ACCUMULATED PAYMENT	RATE OF ESCALATION 5.00 +/- ANNUAL PAYMENT	RATE OF ESCALATION 5.00 +/- ACCUMULATED PAYMENT	RATE OF ESCALATION 6.50 +/- ANNUAL PAYMENT	RATE OF ESCALATION 6.50 +/- ACCUMULATED PAYMENT	YEAR
1	$ 22166	$ 22166	$ 22166	$ 22166	$ 22166	$ 22166	1
2	$ 22166	$ 44332	$ 23274	$ 45440	$ 23607	$ 45773	2
3	$ 22166	$ 66498	$ 24438	$ 69878	$ 25141	$ 70914	3
4	$ 22166	$ 88664	$ 25660	$ 95538	$ 26775	$ 97689	4
5	$ 22166	$ 110830	$ 26943	$ 122481	$ 28515	$ 126204	5
6	$ 22166	$ 132996	$ 28290	$ 150771	$ 30368	$ 156572	6
7	$ 22166	$ 155162	$ 29705	$ 180476	$ 32342	$ 188914	7
8	$ 22166	$ 177328	$ 31190	$ 211666	$ 34444	$ 223358	8
9	$ 22166	$ 199494	$ 32750	$ 244416	$ 36683	$ 260041	9
10	$ 22166	$ 221660	$ 34388	$ 278804	$ 39067	$ 299108	10
11	$ 22166	$ 243826	$ 36107	$ 314911	$ 41606	$ 340714	11
12	$ 22166	$ 265992	$ 37912	$ 352823	$ 44310	$ 385024	12
13	$ 22166	$ 288158	$ 39808	$ 392631	$ 47190	$ 432214	13
14	$ 22166	$ 310324	$ 41798	$ 434429	$ 50257	$ 482471	14
15	$ 22166	$ 332490	$ 43888	$ 478317	$ 53524	$ 535995	15
16	$ 22166	$ 354656	$ 46082	$ 524399	$ 57003	$ 592998	16
17	$ 22166	$ 376822	$ 48386	$ 572785	$ 60708	$ 653706	17
18	$ 22166	$ 398988	$ 50805	$ 623590	$ 64654	$ 718360	18
19	$ 22166	$ 421154	$ 53345	$ 676935	$ 68857	$ 787217	19
20	$ 22166	$ 443320	$ 56012	$ 732947	$ 73333	$ 860550	20
21	$ 22166	$ 465486	$ 58813	$ 791760	$ 78100	$ 938650	21
22	$ 22166	$ 487652	$ 61754	$ 853514	$ 83177	$ 1021827	22
23	$ 22166	$ 509818	$ 64842	$ 918356	$ 88584	$ 1110411	23
24	$ 22166	$ 531984	$ 68084	$ 986440	$ 94342	$ 1204753	24
25	$ 22166	$ 554150	$ 71488	$ 1057928	$ 100474	$ 1305227	25
26	$ 22166	$ 576316	$ 75062	$ 1132990	$ 107005	$ 1412232	26
27	$ 22166	$ 598482	$ 78815	$ 1211805	$ 113960	$ 1526192	27
28	$ 22166	$ 620648	$ 82756	$ 1294561	$ 121367	$ 1647559	28
29	$ 22166	$ 642814	$ 86894	$ 1381455	$ 129256	$ 1776815	29
30	$ 22166	$ 664980	$ 91239	$ 1472694	$ 137658	$ 1914473	30
31	$ 22166	$ 687146	$ 95801	$ 1568495	$ 146606	$ 2061079	31
32	$ 22166	$ 709312	$ 100591	$ 1669086	$ 156135	$ 2217214	32
33	$ 22166	$ 731478	$ 105621	$ 1774707	$ 166284	$ 2383498	33
34	$ 22166	$ 753644	$ 110902	$ 1885609	$ 177092	$ 2560590	34
35	$ 22166	$ 775810	$ 116447	$ 2002056	$ 188603	$ 2749193	35
36	$ 22166	$ 797976	$ 122269	$ 2124325	$ 200862	$ 2950055	36
37	$ 22166	$ 820142	$ 128382	$ 2252707	$ 213918	$ 3163973	37
38	$ 22166	$ 842308	$ 134801	$ 2387508	$ 227823	$ 3391796	38
39	$ 22166	$ 864474	$ 141541	$ 2529049	$ 242631	$ 3634427	39
40	$ 22166	$ 886640	$ 148618	$ 2677667	$ 258402	$ 3892829	40
41	$ 22166	$ 908806	$ 156049	$ 2833716	$ 275198	$ 4168027	41
42	$ 22166	$ 930972	$ 163851	$ 2997567	$ 293086	$ 4461113	42
43	$ 22166	$ 953138	$ 172044	$ 3169611	$ 312137	$ 4773250	43
44	$ 22166	$ 975304	$ 180646	$ 3350257	$ 332426	$ 5105676	44
45	$ 22166	$ 997470	$ 189678	$ 3539935	$ 354034	$ 5459710	45
46	$ 22166	$ 1019636	$ 199162	$ 3739097	$ 377046	$ 5836756	46
47	$ 22166	$ 1041802	$ 209120	$ 3948217	$ 401554	$ 6238310	47
48	$ 22166	$ 1063968	$ 219576	$ 4167793	$ 427655	$ 6665965	48
49	$ 22166	$ 1086134	$ 230555	$ 4398348	$ 455453	$ 7121418	49
50	$ 22166	$ 1108300	$ 242083	$ 4640431	$ 485057	$ 7606475	50

Exhibit 2C

EXHIBIT NO. 3

COMPENSATION PAYMENTS AFTER AGE 65 FOR A PERMANENTLY AND TOTALLY DISABLED CLAIMANT ASSUMING A WIFE, AGE 63 AND A 6½ PERCENT ANNUAL ESCALATION RATE

Claimant Age 65 Avg. number of years of life remaining at age 65 = 14 yrs.

Wife Age 63 Avg. number of years of life remaining at age 63 = 17 yrs.

1. Initial Compensation Rate $426.26 (Maximum)

	Total Paid Out Weekly	Present Value
Claimant	$482,483	$300,565
Wife	128,433	48,306
	$610,916	$348,871

2. Initial Compensation Rate $300.00

	Total Paid Out Weekly	Present Value
Claimant	$339,570	$211,537
Wife	90,391	33,997
	$429,961	$245,534

3. Initial Compensation Rate $270.94

	Total Paid Out Weekly	Present Value
Claimant	$306,677	$191,046
Wife	81,636	30,704
	$388,313	$221,750

4. Initial Compensation Rate $106.57 (Minimum)

	Total Paid Out Weekly	Present Value
Claimant	$120,627	$75,145
Wife	32,110	12,077
	$152,737	$87,222

EXHIBIT 3

MR. ANDRE MAISONNEUVE

STATEMENT OF THE

ALLIANCE OF AMERICAN INSURERS

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT

SEPTEMBER 16, 1980

HIGHLIGHTS OF ALLIANCE STATEMENT

1. Reform of the Longshoremen's and Harbor Workers' Compensation Act will be ineffectual unless the issues of coverages and benefits are addressed. (pages 1, 2)

2. Jurisdiction of the Act was substantially broadened thru the amendments passed in 1972. However, the resulting legislative language and intent are vague. What industries and which employers are covered is anyone's guess. The confusion has led to many litigated claims and conflicting rulings by federal appeals courts. (pages 3-4)

3. The 1972 amendments raised Longshore benefits dramatically and allowed for annual increases to keep pace with inflation. No change was made, however, to curtail payment of permanent partial benefits to employees who had sustained no industrial disability and were earning full wages. (pages 3-7)

4. Providing coverage under the Longshore program today costs many employers more than 10 percent of their gross income, and, in some cases, exceeds direct payroll expense. (pages 7-8)

5. The annual benefits adjustments, increased utilization of the program, and the unsettled question of who is covered under the Act prevent insurers from accurately predicting Longshore risk exposure. (pages 8-10)

6. The unpredictability of risk has made it almost impossible for insurance companies to obtain reinsurance on Longshore business. (page 11)

7. The high Longshore benefits structure, coupled with liberal administration and interpretation of the law, has encouraged malingering and fraud unprecedented in the history of workers' compensation insurance. (pages 11-12)

8. As essential changes, the Alliance recommends clearer definition of employees covered under the law, limitation on future benefits increases, and elimination of death benefits unrelated to job inquiries. (pages 13-16)

9. Administrative supervision over physicians who give medical services under the Act should be restored. Congress also needs to correct the oversight which failed to set the same weekly maximum for survivors' benefits as that which applies to disability payments. (pages 16-17)

10. The Special Fund established to pay certain claims under the Longshore Act faces escalating liabilities which will be difficult to meet. The Alliance recommends discontinuing the Fund or having it administered by insurers. (pages 17-19)

11. Only Congress can correct the problems inherent in the Longshoremen's and Harbor Workers' Compensation Act. (pages 19-20)

My name is Andre Maisonpierre and I am vice president of the Alliance of American Insurers. We are a major association of property and casualty insurance companies. Our member companies write workers' compensation and other property and casualty insurance coverages in all 50 states and the District of Columbia.

In testimony presented to the House Subcommittee on Compensation, Health and Safety on July 25, 1977, we stated that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act had created serious dislocations, affecting the business community, the insurance community and the Department of Labor's administration of the program. We urged the House Subcommittee to act quickly to restore a needed balance to the Act. The voluminous record developed by the House Subcommittee left no doubt that the problems which we had identified had also been recognized by countless other witnesses. Only forceful congressional action could have alleviated the crisis atmosphere surrounding the program. It is a tragedy that Congress failed to respond.

If our statement today appears repetitious of what we said three years ago, it is only because, from an insurance standpoint, the situation is no better than it was then -- in fact, it has worsened considerably. Only Congress can take the remedial action necessary to bring this federal workers' compensation program back to some economic sense. We have great hopes that the Senate through this Committee will provide the necessary leadership which has been so lacking in past Congresses.

While the Act is in need of a complete overhaul, no improvements from an insurance standpoint will do any good unless the reform addresses the two issues of coverages and benefits.

A. Coverage

Congress initially enacted the Longshoremen's and Harbor Workers' Compensation Act to fill a vacuum created by court decisions holding that state workers' compensation acts could not validly be applied to maritime accidents on navigable waters. It seems clear that when Congress passed the Act it intended the federal jurisdiction to be extremely limited -- in fact, to be applicable only "if recovery for the disability or death through workers' compensation proceedings may not validly be provided by state law." Although this language seemed to clearly define the demarcation between state and federal jurisdiction, the courts, nevertheless, broadened the application of the Act and applied the concept of "concurring jurisdiction" between state and federal laws. However, by 1969, the courts had for the most part delineated the jurisdictional perimeters between state and federal workers' compensation acts. While the business and insurance communities generally felt that the courts had breached the original intent of the act by expanding its jurisdicational reach, it was at least agreed that a high degree of certainty had been achieved on the issue of jurisdiction.

However in 1972, Congress substantially broadened the jurisdiction of the Act by expanding coverage to land operations, including "adjoining piers, wharfs, terminals, building ways, marine railways or other adjoining areas customarily used by an employer in loading, unloading, repairing or building a vessel." Further, although Congress attempted to restrict the application of the Act to maritime employment through certain specific exclusions, and very imprecise legislative language, it failed to define employments to be covered. The issue

of jurisdiction which had taken three decades to be settled by the courts became unsettled almost overnight. Additionally, the new language was believed by the Department of Labor to be sufficiently broad to include now within the definition of "employee" all boat yard and marina employees whether injured on navigable waters or on land. This brought under coverage thousands of small pleasure craft manufacturers and marinas built exclusively to accommodate small pleasure crafts. Those employers had traditionally been covered by state workers' compensation coverage.

The extent to which the 1972 amendments increased the jurisdiction of the Act is anyone's guess. The confusion created by the Act's vague legislative language has led to an unusually large number of cases being litigated before the federal courts. The difficulty which those courts have had with the Act is illustrated by the diversity in the holdings of the different appellate benches. The Supreme Court itself has at times expressed both irritation and wonderment with this legislative language. In fact, the Court recently required that a case involving jurisdiction be reargued in order to clarify additional points before it could come to an adjudication of the issues.

B. Benefits

When Congress amended the Longshoremen's and Harbor Workers' Compensation Act in 1972 it followed the pattern of state compensation systems, making workers' compensation an exclusive remedy against employers. Unfortunately over the years, the federal courts had found ways to weaken the act's exclusivity. The effect was that the compensation remedy was being circumvented.

Several unsuccessful attempts were made in the 1960's to have Congress reaffirm the exclusiveness doctrine. Finally, in 1972, a compromise was arranged which reinstated the doctrine in return for substantial benefit increases. Under

the compromise, not only were the weekly benefits raised substantially -- far above the level of benefits prevalent in most states -- but the benefits were to be indexed to compensate for future inflation. Nothing, however, was done to simultaneously amend the law to prevent payment of permanent partial disability benefits to injured employees who had sustained no industrial disability and were earning full wages.

The result has been to make this federal workers' compensation act an extremely "rich" program. Let us illustrate: in prior testimony before a House Subcommittee, we cited a hypothetical case of a 23-year old widow, eligible for a weekly compensation benefit of $342.54 at the time of accident. We projected that her benefits over a period of 50 years, without escalation or indexing would amount to $890,600. However, assuming an annual increase in the national wage level of 6.5 percent -- the indexing factor -- the total payout on that case would have amounted to $6,110,023. Some of our critics told us that such an hypothesis would be rare and challenged us to produce actual cases. Let me assure you that such cases abound. Consider for instance a multiple death accident, resulting in claims filed by a 28-year old widow with a small child and a 24-year old widow, also with a small child. The first widow is presently drawing $259 in weekly benefits. Applying both actuarial remarriage and mortality factors to the case, the insurance company would expect this claim to cost $548,000. However, the case is to be "indexed". If the company assumes that over time the index factor will average six percent, the cost of the claim will be in excess of $3,000,000. On the other hand, if the company assumes that the index will average seven percent -- the average increase since Congress acted in 1972 -- the total payout will be $4,200,000.

Our 24-year old widow is presently drawing $246 a week in benefits. Applying both remarriage and mortality factors, the company would expect to pay $446,000 in lifetime benefits. However, assuming an indexing factor of six percent, the benefits will increase to $3,700,000. If the index is seven percent, total benefits will be $5,300,000.

To recapitulate, in this single accident, resulting in two fatalities, the insurance carrier would have expected to pay out approximately $1,000,000 in benefits to both widows -- assuming no indexing. However, applying a six percent index factor, the payout will be $6,700,000, and if indexing runs at the level it has over the past seven years, the total cost will be in excess of $9,500,000.

These cases demonstrate not only the financial consequence of indexing workers' compensation benefits but the uncertainties related to indexing.

Another major concern we have is the treatment of nonscheduled permanent partial disability under the Act. Awards for permanent partial disabilities are an integral part of every workers' compensation plan. But when the Act allows for recovery of substantial money benefits for relatively minor injuries, the objectives of the workers' compensation program are frustrated. Further, such payments make no sense in an insurance scheme whose purpose is to replace wages lost as a result of industrial accidents. Under the Longshore Act, liberal awards are routinely made for non-scheduled permanent disability in spite of a worker's actual return to regular work at full pay. Consider the case history we submitted in our prior House testimony. This involved a 43-year-old employee whose pre-accident weekly wages were $431.56. As a result of slipping, he sustained a ligamentous strain of the back. He was out of work a short time, discharged by his doctor with "no permanent residual disability" and returned to his regular

work at increased pay. At an informal conference, the claims examiner found a 20 percent loss of wage earning capacity based on a subsequent anatomical rating given by the doctor. This amounted to $62.87 per week or $3,269 per year. When we testified in the House in 1977, the employee was being paid $125.74 every two weeks, and, assuming a normal future life expectancy of approximately 29 years, the total cost of the case could have been $94,801.

Let us now bring you up to date on this claim. The insurance company continued to pay such benefits for a little over three years, then, with no end in sight, despite the fact that the employee was continuing at his regular work, at increased pay, the case was settled for an additional $15,000. In this case, the company paid $421 to the employee right after his accident, when he was laid up, unable to work. Then, he returned to his regular work, at higher wages. Instead of being allowed to close out the claim, the company had to pay an additional $25,000 because of the alleged "loss of wage earning capacity." Incidentally, as a measure of the severity of the case, note that the total medical expenses amounted to $88!!!

This claim illustrates our concern that, in spite of an enormous increase in benefits under the Act, some Deputy Commissioners, Administrative Law Judges, and the Benefit Review Board are continuing the pre-amendment practice of awarding permanent partial disability benefits on the basis of anatomical medical ratings and alleged loss of future wage earning capacity, notwithstanding the employees return to regular work without loss of earnings. Such awards involve substantial benefits and cause a totally unnecessary financial drain in the system. Remember that these benefits are not only payable during the life of the employee, but such payments are to continue at an increased rate, for the life of a survivor, even if the beneficiary dies of causes totally unrelated to the accident.

These are but a few of the problems resulting from the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act which has led to substantial dislocations for employers, the insurance business and for the administrators of the Act.

The Effects of the Amendments on Employers

As we have already mentioned, a whole new industry sector has been brought within the coverage of the Longshoremen's and Harbor Workers' Compensation program as a result of the 1972 amendments. Pleasure boat manufacturing and marina workers were, of course, prior thereto covered under state workers' compensation laws. But based on the new language the Department of Labor issued a ruling, bringing those employers under the jurisdiction of the act. This resulted in substantial cost increases, not only because federal benefits are generally higher than state benefits but because of the Act's requirement for indexing, its excesses in the payment for permanent partial disabilities and the inclusion of concepts totally foreign to workers' compensation systems.

The decisions and traditions attached to the Longshoremen's and Harbor Workers' Compensation Act had in the past been particularly geared to the individual characteristics of the stevedoring industry. Employers, insurers and the courts were now being asked to apply these practices to industries which have entirely different characteristics. For instance, employment in marinas is generally considered to be seasonal. The treatment of seasonal employment under the Longshoremen's Act had never been a problem in the past. Today it has become a problem because of the extension of the Act to industries which bear little similarities to those for which the Act was initially created.

But "small" employers are not the only ones that have been adversely affected by the Act. When you consider, for instance, that the insurance cost

applicable to the general stevedoring classification in some geographical areas is approaching and has even exceeded direct payroll costs, you will readily appreciate the desperation of stevedoring companies. The cost associated with the Longshoremen's and Harbor Workers' Compensation Act has accounted for upward of 10 percent of gross income for many employers subject to the Act. Such a situation can no longer be tolerated.

Furthermore, employers are finding it extremely difficult to find insurance in the voluntary market. Many have had to turn to the assigned risk market or to state insurance funds or to self insurance for coverage under the Act. None of these avenues provide an adequate substitute for the private, competitive insurance market. This situation will not improve until Congress takes remedial action.

The Effect of the Amendments on Insurers

Two factors have affected the availability of the Longshoremen's and Harbor Workers' insurance coverage since passage of the 1972 Act. First is the question of predictability and second the question of reinsurance.

Predictability to exposure and future losses is an essential element of insurance availability. For an insurance coverage to be priced fairly there must be a general acceptance that losses to be generated under the policy will be predictable based on past experience. The 1972 amendments to the Act departed from tradition to such an extent as to make predictability under the Longshoremen's Act an impossible task.

Predictability has been affected two ways. In the first place, it is impossible to predict with any degree of certainty the effect which indexing is going to have on the total cost for claims. Remember that workers' compensation benefits are prefunded. Insurance companies must collect in advance sufficient

premiums to cover all benefits to be paid for all accidents occuring during the policy period. Miscalculating the future rate of inflation will have drastic affects on the financial stability of those companies providing Longshoremen's and Harbor Workers' Compensation insurance coverage. Take, for instance, the two actual fatality claims mentioned earlier. If we project future indexing at six percent, the combined cost of those two cases will amount to approximately $6,700,000. If we project indexing at seven percent, the cost will be $9,500,000. A one-percent error translates into a 42 percent variation.

The difficulty in estimating the effect of annual escalation of benefits is fully recognized by the Department of Labor. In a letter responding to an inquiry from Congressman John Erlenborn as to the effect which the annual escalation of benefits has on the Special Funds outstanding liabilities, Assistant Secretary Donald Elisburg stated that,

> "Trying to predict the future liability of the Fund is a most difficult problem for several reasons:
>
> 1. Employees or survivors receiving compensation for permanent total disability or death benefits are entitled to increased benefits each year. The size of this yearly increase is determined by the percentage increase in the national average weekly wage as defined in the Act. The rate at which the national average weekly wage will change, either increase or decrease, is most difficult to predict. Accordingly, the changes in benefit amounts in the appropriate cases for which the Fund is liable cannot be reliably predicted."

From an insurance company standpoint, the problem is awesome. Since we must collect enough premium in anticipation of future loss payment, serious miscalculation can lead to financial chaos for the companies and beneficiaries alike. Let me assure you that insurance economists share with government economists difficulties in projecting future rates of inflation. We, as an industry, however, do not share with government the luxury of issuing more money or increasing taxes to compensate for miscalculations.

Additionally, the high benefit level called for under the Act has generated an entirely new utilization pattern. The differential between take-home pay and benefits paid under the Act has reduced the incentive to return to work and as a result disabilities are lengthened. Moreover, there are many more loss-of-time claims resulting from minor accidents which in the past would not have entailed the payment of any benefits.

This observation is shared by the consulting firm of Cooper and Company which was requested by the Department of Labor to study "Insurance Arrangements Under the Longshoremen's and Harbor Workers' Compensation Act." Specifically, that Report notes that "while the appropriate level of benefits is a value judgement which is the ultimate responsibility of Congress, it seems obvious that benefit levels which approximate spendable income create a negative incentive to return to work and vitiate one of the fundamental goals of workers' compensation."

The unsettled question of jurisdiction has also added greatly to the Act's unpredictability. How can an underwriter determine whether a certain occupation or exposure is covered by the federal act, rather than the state act, when the Supreme Court itself is having such difficulty dividing the line of coverage?

Again, the Cooper and Company Report confirms this observation. Jurisdiction, the Report emphasized, is "one of the most serious problems under the LHWCA, from the point of view of availability, and deserves separate mention." The Report continues "it is not so much the high level of benefits, and therefore losses, that creates problems of availability and pressure for higher rates. It is the uncertainty about who, indeed, is covered. This interacts with a tremendous high end differential between state act and federal act coverage, which frightens underwriters because of the potential losses. Thus the issue of uncertainty in jurisdiction is extremely threatening to the viability of the whole system."

To make matters worse, insurance carriers are finding it almost impossible to secure adequate reinsurance on their Longshoremen's and Harbor Workers' Compensation exposure. Insurance companies must spread the risks which they have initially assumed by buying reinsurance coverage from reinsurance companies. The amount of risk that an insurance company retains for itself depends on a number of factors, but "reinsurance" is an essential element of insurance regardless of a company's size. Reinsurance companies are becoming increasingly cautious about accepting Longshoremen's and Harbor Workers' Act risk exposure. They are reducing the limits they are willing to consider and are requiring higher retentions by the primary carrier. Furthermore, many reinsurers today have excluded from their reinsurance contracts the effects of "indexing." Thus, reinsurers are prepared to respond only to the cost of claims as determined at the time of an accident and not to future escalated benefits. It is clear that such reinsurance coverage is totally inadequate for primary carriers.

The Effects of the Amendments on the Administration of the Act

We believe that the Department of Labor has made genuine effort to correct many of the findings of maladministration as reported to the Congress by the Comptroller General in numerous reports. However, most of the continuing administrative failures can be traced directly to the 1972 amendments to the Act. Likewise, those fraudulent practices related to the Act and identified by the New York Waterfront Commission in 1976 can also be traced to the same amendments. The high benefits structure coupled with liberal administration and interpretation have encouraged malingering and fraud of unprecedented scale in the history of workers' compensation. We believe that it is beyond the capacity of any administrative agency to control such abuses. Their genesis is in the law itself and only Congress can change the law so that the administration is presented

with a package which is both reasonable and fair to all parties. While there are many administrative practices in need of reform, it is wishful thinking to expect that the problems with this Act can be cured at the administrative level.

The Extension of the Longshoremen's and Harbor Workers' Act for the District of Columbia

In 1928, Congress extended the Act to cover private employment within the District of Columbia. Since the District was, legislatively, under the control of Congress, this extension made sense. Private industry in the District of Columbia remained in a competitive position because the workers' compensation acts of surrounding states were compatible with the Longshoremen's and Harbor Workers' Compensation Act.

The situation changed drastically as a result of the 1972 amendments. The very liberal benefits, including indexing, which have been described above, became automatically applicable to employers and employees of the District and have created serious problems for District employers. To a large degree, the problems faced by the pleasure boat manufacturing industry and the marinas are similar to those encountered today by businesses in the District of Columbia. Both are subject to a compensation system developed with very little regard for their problems or needs. Both should be removed from the coverage of the federal law.

The District of Columbia has, fortunately, acted to remedy the situation. Forceful action by the City Council and the Mayor produced a brand new workers' compensation law which will take effect in the District October 1981. The new law corrects many of the abuses which we and others have identified with the present law. We urge this Committee to give serious consideration to adopting the new District workers' compensation law as a model for reforming the Longshoremen's and Harbor

Workers' Compensation Act.

Recommendations

We believe that the Longshoremen's and Harbor Workers' Compensation Act can only be restored to a level of practicability through extensive changes of the law. Specifically, we urge the Committee to consider the following areas as essentials:

1. Coverage of the Act

There is a need for legislative definitions of "maritime employment" and "adjoining area" to clarify the jurisdiction problems that have existed since 1972 and which are responsible for a high degree of litigation. The Supreme Court has now ruled on a number of cases involving jurisdictions and has adopted an expansive view of the shore side coverage. However, on a number of occasions, the Court has gone out of its way to beg Congress to clarify the existing law. We believe that the Act should only apply only to "longshoremen", "ship repairmen", "ship builders", "ship breakers" and "harbor workers". Furthermore, the extension of the Act to these workers should only apply to the extent that they are beyond the constitutional reach of state workers' compensation laws. With respect to longshoremen, coverage under the Act should terminate once the cargo has reached its initial "point of rest" shore side.

Such definitions would remove much of the confusion which remains with respect to coverage, especially as to those engaged in ship building, ship construction, bridge building and longshoremen activities.

2. Limitation on Escalation of Future Benefits

Section 10(f) of the act requires that each October there be an annual adjustment to the compensation of death benefits payable in permanent total disability and death cases. This adjustment indexes those benefits to annual

increases in the national average weekly wage . The cost effect of the escalation feature of the Act has already been described and the uncertainties resulting from such escalation have also been demonstrated.

The uncertainty of the future increase in national average weekly wage and the resulting inability to estimate the losses the companies may ultimately have to pay is, as we have mentioned, a major reason insurance carriers and reinsurance companies have retreated from this line of insurance coverage.

From an actuarial or insurance standpoint, we believe that the problems related to the unpredictability of future benefits would be substantially eliminated if the escalation be "capped" at no more than three percent per year. We recognize, however, that from the standpoint of cost even this "cap" might well create serious affordability problems for employers. However, such a "cap" would restore some element of predictability of future losses.

3. Nonscheduled Permanent Partial Disability

We have already described the problem being generated by the application of the law to nonscheduled permanent partial disability. We do not believe that there is any justification for the payment of unscheduled permanent partial disability when there has been no loss of wages. We suggest that the only solution to this problem is legislation amending section 8(c)(21) of the act to require that there be actual loss of earnings before an award can be made.

4. Elimination of Non-Industrial Life Insurance Benefits

The 1972 amendments for the first time extended benefits to survivors of employees who died from causes other than the injury, while receiving nonscheduled permanent partial disability or permanent and total disability compensation benefits. The purpose of workers' compensation is to replace wages lost as a result of industrial accidents. There is no valid reason whatsoever to

provide for the payment of life insurance benefits to survivors whose spouses died from causes totally unrelated to employment. The costs generated by this provision can be awesome. Consider the following actual case history:

In March 1975, a 46-year old electrician sustained a fracture of his fourth lumbar vertebra. His average weekly wages were $374, entitling him to $249.33 in workers' compensation benefits. Temporary total disability benefits were paid the injured until he died of cancer of the colon in May 1979. At the time of death, $35,500 in indemnity benefits had been paid.

A claim has now been filed by the widow requesting that her husband be declared, posthumously, a permanent total disability and that she be awarded widow benefits for life. Under the Act, the administrator can make a finding of posthumous permanent total disability. If the widow prevails in this action, she will be entitled to an additional $327,276. Keep in mind that the cancer causing the death had no relation whatsoever to the industrial accident or the deceased's employment. In fact, no such relation is claimed. Such a ludicrous provision is unique. It cannot be found in any of our 50 state compensation laws. Yet, it is an expensive drain on the system which can only be corrected by Congressional action.

5. Settlements

Section 8(i) of the Act was broadened to permit settlement upon the approval of deputy commissioners. It was recognized that compromised settlements would form a useful function in the workers' compensation system when there are legitimate doubts concerning the employer's liability and the worker might receive nothing if he pursues his claim. The Act also provides that an administrative law judge has the same power as a deputy commissioner. Nevertheless, a law-judge-approved compromised settlement of a fatal case was appealed by the Solicitor of Labor on

behalf of the OWCP. The Benefit Review Board rescinded the settlement award and, on appeal, the U.S. Court of Appeals, Seventh Circuit, held that neither deputy commissioners nor the law judges had the authority to approve settlements of fatal claims. As a result of this holding, a large number of fatal cases, including heart and cancer cases involving legitimate medical questions of causation now have to go through the litigation process. Not only does this contribute to the administrative backlog of claims to be adjudicated, but it is submitted that it is contrary to the intent of Congress to broaden section 8(i). Corrective legislation should be enacted.

6. Medical Care

The entire section 7 on Medical Services and Supplies should be amended to restrict doctor care under the Act to those who are qualified and prepared to cooperate with the Administrator. This was the original Congressional intent. Presently, every licensed physician is given the authority to render services under the blanket authorization granted by OWCP. As a result, deputy commissioners find it difficult to actively supervise the medical care rendered to the injured employees as required under the law.

It is widely believed that "free choice of physician" as interpreted by OWCP is a primary cause of a large number of questionable and exaggerated claims being pursued. With no effective control over medical services, the periods of temporary, total and partial disabilities have lengthened and have resulted in substantial disability awards in situations involving no objectively supported impairment. Furthermore, employers should be afforded the opportunity to request that a claimant be examined by a doctor selected by the employer unless the request is clearly unwarranted. It is recommended that the Act be amended to restore effective medical control to the Deputy Commissioner and to provide for

medical examination by doctors of the employers choice.

7. Death Benefits

Income benefits under the Act are subject to a maximum, amounting to 200 percent of the national average weekly wage. Death benefits are not subject to such a maximum. Thus, survivors benefits range from 50 to 66-2/3 of the deceased actual pre-accident earnings and these benefits are indexed each year. Keep in mind that these benefits are free of taxes and that they are indexed each year.

It is generally recognized that failure to apply the "maximum" to survivors benefits was a drafting oversight. The legislative history, both in the House and in the Senate, is clear that the intent was to subject survivors benefits to the same maximum applicable to disability benefits. However, the Supreme Court has stated that the responsibility for correcting this technical oversight is Congress' and not the courts. Thus, until Congress acts, the Longshoremen's and Harbor Workers' Compensation law shall remain the only workers' compensation program which does not put a limit on the benefits which survivors may receive.

8. Special Fund

Section 8(f) provides that when the employer can demonstrate the exist nce of a permanent disability a covered accident resulting in a fatality or a permanent disability claim, the employer and his insurance company shall only be responsible for the payment of benefits for the first 104 weeks of disability and that the balance of the benefits shall be paid from a Special Fund financed through assessments on insurance carriers and self insurers. This Special Fund is not prefunded. It subjects insurers each year to an assessment sufficient to pay the next years benefits. This "pay as you go" basis is similar to the funding of our Social Security system. We believe that the Special Fund

is presently paying on approximately 300 cases and that 20 new cases per month are added to this load. We are very concerned that this Fund is acquiring future liabilities which will be difficult to meet.

The rapid increase in the obligation of the Special Fund is illustrated by the payments which it has made these past four years:

1976 - $80,000 (approximate)

1977 - $295,822

1978 - $1,468,784

1979 - $3,678,136

The Department of Labor, as we have said, is unable to estimate the present value of the future liability of the Fund. We believe that it is close to one half billion dollars and increasing by millions of dollars each month.

Keep in mind that these liabilities are not prefunded. They represent a substantial burden on future generations of employers covered under this act.

The rapid growth in the number of cases being absorbed by section 8(f) is due to a number of factors, many of which relate to a failure of the Department of Labor to defend the Special Fund.

Frankly, we would support legislation abolishing the Special Fund altogether. We think that it is an unnecessary reinsurance and redistribution mechanism. Its growing unfunded liabilities present overwhelming problems with which Congress will need to wrestle in years to come.

If this Fund cannot be eliminated, give us at least an opportunity to protect its liabilities. Not only is the Fund inadequately represented and defended by the Department of Labor but the Department has established a "no settlement" policy in Special Fund cases.

We suggest that if this Fund is to continue in existence that its administration be shifted to insurers and self insured employers. After all, the function of the Fund is to redistribute losses among insurers and self insureds and in no way does this affect the benefits payable to injured or survivors. In a number of states, New York and Michigan, for instance, the function of administering similar Funds has been turned over to insurers and self insureds, under the jurisdiction of the state administration. We believe that similar procedures would be helpful in controlling the number of claims which ultimately end up in the Special Fund. It is imperative that we consider controlling the future financial liabilities of this Fund today and this can only be done through Congressional legislative action.

The Department of Labor has expressed considerable concern with the operation of the Fund in its testimony before the House Subcommittee on Labor Standards. In a response to a question raised by Congressman Erlenborn as to the Department's position on the conservation fund concept, Mr. Elisburg stated that the present law does not provide for an advisory committee or a conservation committee similar to that operating in New York. Mr. Elisburg went on to explain that " the LHWCA would have to be amended to allow the establishment of either type of committee." It is imperative that we consider controlling the future financial liabilities of this Fund today and this can only be done through Congressional legislative action.

Conclusion

In conclusion, we believe that the Longshoremen's and Harbor Workers' Compensation Act is in need of major revisions. Congressional inactivity has already led to major dislocations in both industries covered by the Act and the insurance business providing coverage under the Act. Complete chaos can only be avoided if Congress takes action. The roots of the problem are with the law itself. Neither the administration nor the courts, nor employers or insurers can do much until Congress acts.

STATEMENT OF

AMERICAN INSURANCE ASSOCIATION

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

SEPTEMBER 16, 1980

My name is Charles Coakley. I am Associate Counsel with the American Insurance Association, an organization comprised of 150 property and casualty insurance companies. Our member companies write approximately 45 percent of all workers' compensation insurance written throughout the country, which includes coverage under the Longshoremen's and Harbor Workers' Compensation Act. We greatly appreciate this opportunity to present our views at this oversight hearing regarding this Act.

Since this is an oversight hearing we should like to make a general statement regarding some of the features of the Act which create reluctance on the part of many companies to voluntarily insure this coverage. I wish to note, however, that the industry, through a pooling arrangement, provides a market for all who need this coverage.

MAXIMUM WEEKLY BENEFITS FOR DEATH CASES

The Supreme Court of the United States in the Rasmussen case has interpreted the Act in such a manner so that there is no maximum weekly limitation on death benefits. In cases of disability,weekly benefits are limited to a maximum of 200% of the national average weekly wage, which is today $426.26. Not so with death benefits. Multi-million dollar catastrophic losses, particularly in light of the escalation provisions of the Act (which we shall)

comment on later), are inevitable. We believe that the Congress intended to keep maximum weekly death benefits at the same level as disability benefits. The maximum weekly benefits for death and disability were clearly the same prior to the 1972 amendments. There is no indication in the record of the proceedings at the time the 1972 amendments were under consideration that the Congress intended to change this situation. Furthermore, in all state workers' compensation laws, weekly maximums are applicable in both death and disability cases. This Committee should act promptly to reverse the Rasmussen decision.

COST-OF-LIVING ADJUSTMENTS

The present disability and death benefits are adjusted annually to reflect any increase in the average national wage. As you know, we are experiencing a period of double-digit inflation. It is not at all uncommon in permanent total disability or death cases for benefits to be paid from 15 to 25 years, or longer. The insurance industry has no means of predicting what the inflationary trend will be over such a longer period of time. Such annual adjustments can require reserves in individual cases involving millions of dollars. When a case occurs, the reserve is established, yet how can a company fix the reserve without any knowledge of the rate of inflation? Accordingly, to provide more certainty in this Act, we recommend that benefits be adjusted annually at either a fixed rate or that a maximum limit on the increase be established. We do not believe that this in any way denies an injured worker or his survivors a fair compensation level. Workers'

compensation benefits are to replace lost wages. Obviously, the wages of a worker do not increase annually with the cost-of-living over a 40 year or so life span spent in employment. Accordingly, by having fixed annual adjustments or a limit on the adjustment a more realistic situation will result. This will still provide fair compensation. Furthermore, our industry will be capable of determining a rate commensurate with the exposure under this Act.

DEATH BENEFITS FROM NON-WORK RELATED CAUSES

Under the 1972 amendments,when a permanently, totally disabled worker dies the survivors are entitled to death benefits regardless of the cause of death. The workers' compensation system is intended to provide benefits for death or injury arising out of and in the course of employment. This fundamental concept has been set aside in these circumstances and, in effect, a life insurance policy has been worked into the workers' compensation system. From our point of view, this is not an appropriate expansion of the workers' compensation system. If we are to pay high benefits to those injured workers or their surviviors, we must realize that proper parameters must be established or the cost of the system will become prohibitive.

JURISDICTION

When the Longshoremen's Act was initially enacted, it was to fill a void resulting from a court decision which held the state workers' compensation system was not applicable on navigable waters of the United States. The 1972 amendments greatly expanded the jurisdiction of this Act inland beyond the water's edge. It is still extremely unclear just where the Longshoremen's Act exposure exists. Nearly five years after the enactment of the 1972 amendments,the U.S. Supreme Court handed down its decision in the case of

Northeast Marine Terminal, Inc. v. Caputo. This has provided a certain degree of clarification with regard to stevedoring operations. There is, however, still a large degree of uncertainty with regard to other types of operations, in particular, recreational boat building and marinas. These, of course, are usually small operations and it is hard to believe that anyone envisioned such operations as coming within the scope of the Longshoremen's Act when it was originally enacted in the 1920's. A great deal of uncertainty would be removed if this Committee provided a more specific definition of maritime employment and clearly established the scope of this Act.

EMPLOYERS' LIABILITY

When the 1972 amendments were passed, greatly increasing benefit levels, many of us thought that there would be no additional liability on the employer. The exclusive remedy provisions of our workers' compensation laws provide the quid pro quo for the benefits workers or their survivors receive without regard to blame for the injury. Court decisions, however, have held that where the employer has possession of the vessel the injured employee can sue the vessel for negligence as well as collect benefits under this Act. The Act should be amended to provide clearly that the benefits paid under the Act are the sole and exclusive remedy of the employee or his survivors.

ABUSES OF THE SYSTEM

One of the most difficult problems confronting all workers' compensation systems throughout the country is keeping the system limited to providing benefits for work-related injuries only. Our Association has endorsed the

essential recommendations of the National Commission but we are concerned over the rising cost of workers' compensation where high benefit levels have been introduced. We are concerned that they tend to be an impediment to the injured worker returning to work as soon as is medically sound to do so. The individual and society as a whole are best served by everyone who is physically capable of being engaged in gainful employment. We realize it is extremely difficult to legislate good administration. Nevertheless, the philosophy of "give as much as possible to as many as possible" must go if the system is to pay high, but adequate benefits to those truly deserving. The parameters of the system must be clearly delineated. If the system supplements unemployment insurance and retirement programs and provides a comprehensive workers' health insurance program which pays benefits for disability resulting from the normal wear and tear of life, the cost must continue to rise and will possibly outprice the capacity of small employers. On the other hand, if kept within the scope of the social objectives the system was intended to meet, we are sure adequate benefits can be paid and at the same time insurance rates will be affordable to the overwhelming majority of employers.

I thank you for this opportunity to allow me to present to you the views of the American Insurance Association. As in the past, the Association stands ready to provide whatever assistance you or your staff may feel desirable in your further deliberations on the subject of the Longshoremen's and Harbor Workers' Compensation Act.

Respectfully submitted,

Charles Coakley

Charles Coakley, Associate Counsel
AMERICAN INSURANCE ASSOCIATION

The CHAIRMAN. Is that all on direct, gentlemen?

Mr. HUFF. Yes, sir.

The CHAIRMAN. I think on most of these questions, if anybody has a comment, we would welcome it.

This whole question of the availability of insurance, I get the impression that there is an easing of the situation; is that impression correct, incorrect or partially one or the other?

Mr. HUFF. I will start, Mr. Chairman.

Our market, of course, is in the gulf coast and so that is what we are familiar with. I would say in Texas our competition, we are the only carrier in the Texas gulf coast to any extent, and our competition would be against, say, brokers setting up some sort of insurance program for the stevedores.

In Louisiana, I think the same would basically be true. I think there are some stevedore companies that are setting up some sort of self-insured plans. We have lost two recently to a company I believe that is a member of the NAII, called Midland Insurance Co. of New York, so they apparently are in the market down there.

I would say if a large stevedore came to us that was on the gulf coast, we would consider writing them at this time.

The CHAIRMAN. You would?

Mr. HUFF. Yes, sir, a large stevedore.

The CHAIRMAN. I think the improved situation is suggested by California experience and that came from Elisburg. He talked about California where the State fund picked it up, picked up the coverage and then it now is getting some competition.

Mr. MAISONPIERRE. If I could address the California situation.

When the market dried up, and the companies withdrew from the market in California, the business community was faced with an untenable situation. In California, we do not have an assigned risk program which accommodates employers that are unable to find insurance in the private market.

The California State fund at that time was not authorized to—legally authorized to write workers' compensation insurance under Longshore. It was strictly a State program.

As a result, the insurance industry put together a temporary assigned risk program and with cooperation from the State fund and the State legislature ultimately were able to get the law amended so as to allow the State fund to write Longshore coverage. When that occurred, then the assigned risk program went out of existence. Mr. Elisburg indicated that there were some private carriers writing the business. I am aware of one insurance company that has made some offers in California, but that company is restricting its operation, to my knowledge, to what we call the small boat builders and to my knowledge, the large stevedores in California, et cetera, are insured in the State fund or are self-insured and I do not believe that there is any market for them as yet in California.

I have made a check with our member companies as to their willingness to reenter the market and I seem to be getting the same refrain from all of them. That is, that the two issues which are particularly troublesome are the jurisdiction issues and this one was covered amply in the report, in the consultant report to the Department of Labor. The Department of Labor had a consul-

tant firm looking into insurance and Longshore. I am surprised that Mr. Elisburg had not provided the report for the record.

The CHAIRMAN. Is that the Cooper report?

Mr. MAISONPIERRE. This is the Cooper report and the Cooper report made it very clear that the jurisdictional issue was very troublesome for insurance carriers.

As Mr. Huff has indicated, the indexing factor is another extremely troublesome factor because of one's inability to project what the future losses will be and very importantly the very great difficulties for primary carriers of securing reinsurance as a result of the indexing problem. So I do not really see any serious break in the market constraint and I have some doubt whether any of them will appear in the near future.

Mr. HUFF. Mr. Chairman, could I say one more thing?

The CHAIRMAN. Sure.

Mr. HUFF. We write before our stevedores what we call a guaranteed cost program so that the maximum premium they would pay in Texas would be the standard premium less the discount. What else is being written around there would be either—of course, self-insureds would be some sort of a program wherein the employer was ultimately going to assume all or most of the liabilities under the plan. So we do not frankly consider it much competition as against our contract. We are not interested in expanding outside of the gulf coast area.

Now what Mr. Elisburg might have been referring to, there have been, I think, more carriers that have filed under the Longshore Act simply because in many jurisdictions you do need to provide an endorsement to protect our insureds or our subscribers should their employers go into navigable waters situation; so that they are covered. We automatically issue that endorsement for our insureds in Texas and Louisiana because of the access to water. Companies might have filed for that reason, but I do not think they are actually writing under the Longshore Act.

The CHAIRMAN. His statement specifically says—this is Mr. Elisburg—he jumps off from his interpretation of the California experience where he says there is competition for the State fund coverage.

Now, this development can be seen as indicative of a growing awareness of the private insurance carriers that Longshore coverage can be written profitably. Rates in California have actually decreased over the last year and it is expected that the experience in the California market will be reflected in other areas, notably the high cost in the States of the northeast.

Now, what is—I am sure that Mr. Huff is geographically limited to the gulf coast—Mr. Maisonpierre and Mr. Bunn, you can address yourself to this too—what is the national picture?

Mr. MAISONPIERRE. The rates in California, it is correct, when the State fund began, to write the Longshore business, has as primary objective to provide coverage to the small operators, small business people, those who were unable to—that were not large enough to self insure. The initial rates charged by the State funds were—I think ultimately found to be too high and the State fund has reduced its rates, particularly for boat builders, small boat builders to a level which is much more comparable to those insur-

ance companies are offering on a nationwide base. So there was a reduction because the State fund went in there probably with too high a rate.

The CHAIRMAN. Now address yourself to the national picture. The carriers are getting out of the business, staying in the business?

Mr. MAISONPIERRE. It is remaining—the companies—let me start and say this, that even prior to 1972, the Longshore picture was a specialized line of business. It is only—some of the largest carriers were providing coverage under the Longshore coverage and I would daresay that only maybe about 10 or 15 companies were really competing for the business. Most of those companies have withdrawn from the business, if not altogether. At best maybe some may have one or two risks for business reasons. But I do not sense any reentry on the part of any of our companies into the Longshore business at this time. I have made, as I have said, I have made a survey of the companies toward their attitude toward the longshore business.

Mr. BUNN. I would concur in that statement.

In talking to our member companies, which are the ones that I am principally familiar with, I do not see any significant reentry into it and I see basically the two principal points that we have made, and that is the escalation and jurisdiction provision. So I do not see any significant change.

Mr. COAKLEY. There may be one or two instances where, because of the administration of the law, companies are more willing to write. For example, my companies tell me that the law is much better administered in the Rhode Island area than it is in New York or in the Philadelphia area. The same thing can be said of the Albany area.

The CHAIRMAN. In where?

Mr. COAKLEY. In Albany, N.Y., as opposed to the New York-New Jersey area. In fact, I believe a few years ago United Fruit relocated its unloading facilities in Albany, rather than New York because of the cost, even though they had to send the boats 250 miles up the river to Albany. Again, it is the same law coast to coast; it is just applied differently in different places.

Again, the Rhode Island area seems to have a somewhat better atmosphere. So you may find some companies in different parts of the country more willing to write than others, but I agree with my two colleagues from the two trades that the national picture is not improving on the whole.

The CHAIRMAN. You really represent the whole spectrum of insurance coverage, do you not; stock companies, the independents, the alliance? Any aspects of insurance coverage not represented by this panel?

Mr. MAISONPIERRE. There are a number of companies, Mr. Chairman, and some rather important workers' compensation writers that are not affiliated with any trade association; CNA in Chicago is a good example, Continental Insurance in New York. But I am not aware that those companies are writing this business either.

I should emphasize one thing, however, and that is that even though the companies are not writing the business voluntarily, companies through assigned risk mechanism have made the cover-

age available to the business community, so that there is no single employer that desires coverage for longshore that cannot find the coverage because it is available through this assigned risk operation.

The CHAIRMAN. Is this assigned risk mechanism set up in the Longshore Act, or is this an application of the State?

Mr. MAISONPIERRE. It is an operation, it is an extension of the State, Mr. Chairman. But—so that—again, let me say this. In States where we do have assigned risk plans, operative, in those States, they will pick up longshore coverage as they pick up State coverage. There are some States such as California which do not have assigned risk mechanism, but which have State funds, that will pick up the coverage. New York has a competitive State fund and the New York State fund will pick up the coverage under longshore.

The CHAIRMAN. In New Jersey, we have an assigned?

Mr. MAISONPIERRE. In New Jersey, you would have an assigned risk program.

We had a serious problem in the State of Ohio which has a monopolistic State operated fund and where the insurance carriers are just not authorized to write workers' compensation. So we could not set up a formal assigned risk program since we were not in there. A company did until recently provide coverage in Ohio; however the company withdrew from the market and ultimately I believe this year the Ohio legislature amended the law so as to allow the Ohio monopolistic State fund to pick up the coverage. So efforts are being made to provide the coverage, but it is not a very satisfactory market.

The CHAIRMAN. A couple of things here now.

The same act, evidently a dramatic difference in administering the Act. You indicated that Albany, N.Y., is different from New York City; Rhode Island is different from some of the other areas.

What is the nature of the difference in the handling of these longshore compensation claims?

Mr. COAKLEY. As we point out in our statement, Mr. Chairman, even though the act is the same, there are abuses of the system which are condoned. In some of the areas where there is a determination of scheduled loss, there is no real correlation between the actual schedule which is approved and the real degree of disability. For a number of years I tried longshore cases. A scheduled loss was a horse-trading session. You had a doctor on one side who said you had 5 percent of the little finger and the other side said 10 percent of the hand. Neither one was right. The reason for the high ball and the low ball was so that someone could arrive at something that was acceptable to both sides, but was not in fact descriptive of the injury.

There are provisions in the Longshore Act whereby the deputy commissioners may appoint impartial doctors who would examine and assess the schedule. This, for example, is the way it is done in New York under the State law, where you have physicians who are employed by the State who set the schedule which more times than not it is not followed. It is rare that there is any kind of horse trading or appeal from the schedule found by that doctor.

So that in other areas where the deputy commissioners have discretion to monitor treatment of the claimants by doctors, there is discretion to not permit certain doctors to treat, if they are found to be overtreating or if they are found to submit bills which reflect treatment which was not in fact actually given. There were a series of hearings in 1977 before the Waterfront Commission in New York which detailed many of these practices of overtreating, not treating, billing for visits not given. So it is a question of ethics, it is a question of policing, it is a question of acting in fact in the best interest of the claimant to see that he is treated properly and resumes work as quickly as possible.

I note Mr. Elisburg said this morning that they are going ahead with rehabilitation. That is all to the good. It may be that rehabilitation is working in some areas and is not working in other areas.

The CHAIRMAN. So the approach to finding the extent of the disability, as it is now, rests on the deputy commissioner listening to both sides, the claimant, the employer and their experts; is that it?

Mr. COAKLEY. That is correct. Many times testimony is not actually taken. Reports are submitted into evidence showing—well, not evidence, really, just showing the extent of scheduled loss found on both sides. Where the claimant is represented, and in the New York area, port area, I would say over 90 percent of the claimants are represented. What it amounts to is the attorney for the insurance company or the self-insured and the claimant's attorney sit down outside in the anteroom and try to arrive at a schedule, try to agree on a scheduled loss.

The CHAIRMAN. Now, you have only mentioned the partial situation.

In the total disability area of injury, what is the situation there?

Mr. COAKLEY. Well, it depends on what you call total. There is obviously someone injured, and if there is a quadriplegic, there is no problem with that. Those cases are paid.

The problem with total disability would occur at some point where there is a transition from total disability to partial disability. So take for example someone who injured his back and he is out, maybe he had been in the hospital for a week, he is in traction, obviously he is disabled. There will come a point in which there may well be a dispute. Is he now partially disabled or totally disabled? Can he do some work or can he not do some work? That is where the problem would arise there.

Again, this sort of controversy could be ameliorated somewhat by appointing impartial doctors who would evaluate the disability and whose opinion would be accepted.

What I am trying to point out is that excessive litigation is ruining the system and if we litigate over everything, the scheduled loss of the finger or hand or loss of hearing or the difference between total and partial, that is what is costing the dollars. I do not believe that the death cases, except for the problems of escalation which have been pointed out, cause problems. I do not believe that the extent of total/permanent disability is a problem. It is the so-called nickel and dime cases that nickel and dime you to death.

Mr. MAISONPIERRE. Mr. Coakley mentioned before that Rhode Island and the climate in Rhode Island appeared to be better.

The CHAIRMAN. Will you say that again, please?

Mr. MAISONPIERRE. The climate in Rhode Island appears to be better than in New York. I do not have the data with me.

But the last I checked the rate in New York, that is for insurance companies, the rate in New York was I believe $87 per every $100 of payroll and this was contrasted to Rhode Island which was either $24 or $26 per $100 of payroll. Now, we are dealing here with the same law, the same benefits and the same general administration coming out of the Department of Labor. I think that in addition to the points that Mr. Coakley has made as to the reason for the difference is a difference in the attitude of the employees and the ability of the employer to control the workforce. It is very difficult in New York City, for instance, for an employer to institute a sophisticated safety program, because he does not really have that much control over his employees.

On the other hand, in Rhode Island we tend to see considerably more sophisticated safety programs on the waterfront and as Mr. Leonard testified earlier, safety pays. But safety requires cooperative efforts between employers, unions, employees, insurance carriers and this requires a certain climate which is not necessarily present on all waterfronts. As the waterfront, the New York waterfront investigation certainly made it quite clear.

The CHAIRMAN. I wonder if we could recess for a moment. Any time problems?

Mr. BUNN. No, sir.

The CHAIRMAN. I will be right back.

[Short recess.]

The CHAIRMAN. I wonder if we could bring this together in a more generalized attention to problems we face here.

You have had a long-standing relationship as a witness before our committee, and we have certainly looked to you, Mr. Maisonpierre, for leadership in solving workmen's compensation problems on a broader scale and we have done it through your appearances here.

Our latest bill is S. 420, which represents to me a broader and I will say, well thought out approach. I know we have devoted a lot to time on it and given it our best efforts, so I will claim for it to be well thought out in its approaches to establishing workers' compensation minimum standards. This, by the way, is where we now stand with a broad bill that no longer draws the support it once had from the AFL–CIO; their reservations now go to the fact that it does not do enough in their view.

Where you sit, Mr. Maisonpierre, you still do not endorse it as the moderate, useful approach to minimum standards, as I understand it; is that right?

Mr. MAISONPIERRE. That is right, Mr. Chairman.

I recognize the tremendous amount of effort which you and your staff have given to this and certainly comparing the S. 420 with the initial legislation introduced back in 1972—or 1974. We think it is a substantial improvement. The problem that we see with the concept in S. 420 or the problem we see with S. 420, to a large degree, is a matter of concept. There are a great many problems with compensation laws, not only of Federal and Longshore Act, but some of our State laws. We have run into some serious prob-

lems at the State level in many States, New Jersey, Illinois, Pennsylvania, for instance, and we need to balance out benefits and responsibilities in all types of compensation programs. We not only do not believe that S. 420 balances out the equities in the system, but it would make it difficult in the future to balance out equities.

Furthermore, we do not believe that there is any single approach that would balance out equities; that differences between the State programs are very vast so that we do not—we cannot identify one, two or three items which are creating the cost overrun in different State programs. They vary from State to State. So a single Federal approach just does not—it is not a practical way of getting at the correction, both the upgrading of benefits where needed and the correction, the ways of benefits are distributed in some of the States.

I think what we have here with the Longshore Act is a rather clear example of what the different application between regions in workers' compensation—we have a law with identical benefits, but with an administration which varies substantially from locality to locality because of the built-in traditions that have arisen around the compensation programs. But still the policies of administration are all emanating from on high in the Department of Labor. Look at the major differences in the way compensation is handled or the cost of compensation among the different districts administering the Longshore Act. So to try to achieve uniformity in cost among the different States is, I think, beyond reach. I think that each State must be looked at, each State compensation law must be looked at in great depth the way you are looking at the Longshore Act today. Those areas which should be left alone, which are good, should be left intact and those that need upgrading should be upgraded. It is a hard job to do on a State-by-State basis.

But we believe this is the only method that will ultimately achieve our common goal, yours and ours.

The CHAIRMAN. I have got a list here of the problems you all cite in the Longshore Act that you would have the Congress act to correct: Unclear definition of covered employees, no limitation on future benefit increases, unscheduled awards for permanent loss of wage earning capacity, unrelated death benefits, no supervision over physicians, no maximum on weekly benefits for survivors, and the abuses that you have cited in the second injury fund. These seem to be the most significant problems under the act as you have presented the problems. Am I accurate in that listing?

Mr. COAKLEY. Yes.

Mr. BUNN. Yes.

The CHAIRMAN. That leads me back to our comprehensive compensation coverage through national minimum standards in the bill as it is now, S. 420. You know, none of those problem areas that you see in the Longshore Act are part of S. 420. You realize that, Mr. Maisonpierre?

Mr. MAISONPIERRE. Yes, that is correct.

The CHAIRMAN. It would seem to me that out of all of your experience, out of all our examining experience and then trying to apply it in a rational way, that we should have with S. 420, a sound base to start working here on a new rationalization of workers' compensation in this country.

Mr. MAISONPIERRE. But S. 420, Mr. Chairman, is not an act in itself. S. 420 represents a number of provisions which are to be either added or—which are superimposed on existing State laws. We know that in many of the States some presently existing provisions which are not contained in S. 420, which are not corrected by S. 420, are creating mammoth headaches. If we were to superimpose S. 420——

The CHAIRMAN. Could I just interpose there?

Mr. MAISONPIERRE. Yes.

The CHAIRMAN. Is one of them the permanent/partial question?

Mr. MAISONPIERRE. To some degree. In some States, it is definitely. In some States, we have indexing.

The CHAIRMAN. That is one area where we do not come to the whole subject matter with a national minimum standard proposal?

Mr. MAISONPIERRE. This is right. Now Florida had a serious problem with permanent/partial disability and also had very serious problem with inadequate levels of benefits and the State legislature took the bull by the horn. It did so, to a large degree, by eliminating payments from permanent/partial disability, by putting the system on what is pretty close to a wage loss concept. Thus, when an injured person has a disability he is not entitled to benefit when he is working and earning an adequate living.

Over the past 1½ years when this occurred, many of the past problems in Florida have been corrected.

Now, we are convinced that what brought about the change in Florida was an ultimate realization by both the business community and by labor that the situation just could not continue to exist. The benefits were totally inadequate so that labor felt frustrated with this inadequate level. Employers felt costs were running way out of sight because of the misuse of permanent/partial disability and ultimately they recognized that there was a need to come together and bring their differences to the table.

If S. 420 had been enacted, or one of the predecessors, S. 2018, whatever it was, what would have resulted is that the Congress would have imposed on the State of Florida a very high benefit level by way of Federal standards. The ability of the business community to negotiate would have evaporated. There would have been no quid pro quo left in the system. So that what we would presently have in Florida would be a very expensive system, not because the weekly benefits would have been excessive; the weekly benefits under S. 420 are not excessive. But it would have been high weekly benefits with a very wasteful permanent/partial system.

Now what we have in Florida is a good benefits system—I say we, the Florida Legislature has been able to curtail the abuses under the system. Everything I have read about Florida, the employers and labor are delighted with it. The lawyers are very unhappy and that makes me feel good.

The CHAIRMAN. That was a very helpful analysis of the situation; you responded with Florida's experience.

Quite frankly, I am not up to date on the effect of the changes in the Florida law. They have made a dramatic change in this permanent partial; have they not?

Mr. MAISONPIERRE. They have made a dramatic change in permanent/partial. They have eliminated most of the permanent/partial cases and they have also eliminated——

The CHAIRMAN. Well, no, they have just changed the test, have they not?

Mr. MAISONPIERRE. The test has been changed.

The CHAIRMAN. The benefits tests for permanent partial?

Mr. MAISONPIERRE. Yes.

The CHAIRMAN. Really, an estimate of the percentages that now applies, 5 percent of something or other?

Mr. COAKLEY. Not quite, Mr. Chairman.

The way the Florida permanent/partial—I will make it as brief as possible, because I could talk for half an hour and explain it in detail. Minor scheduled losses are detailed. You must have a serious amputation of a member or 80 percent or more loss of vision. If I am in the State of Florida and I have a compound fracture of my right arm which might entitle me from 15 to 25 to 35 percent use of my arm because I cannot wave it around as much as I used to before, in Florida I get nothing for that fracture; compound fracture. However, if I am unable to go back to my job and earn as much as before, I am going to get what is called a wage loss. It is a complicated form that figures out what the wage loss is. But if I go back to work and I am earning a significant amount less than I did before, I will get a percentage of that difference paid.

If, on the other hand, I go back to work with what would have been my 20 percent scheduled loss and I am earning as much or more as I did before, I get nothing. The rationale behind this is that if I am earning as much or more, I do not need compensation. If I am earning less, than of course, I do. What the situation was in Florida, as it is in many States, 10, 15 percent of fingers have no loss; while they are getting treatments, they go back to work and get paid. Whereas the people who had serious losses who might suffer an amputation of the arm at the elbow, say someone who operated a jackhammer, he would have to be content with whatever the scheduled loss was for 100 percent and get no more. That system, by the way, was considered last year in Delaware. The bill almost passed. It will be considered next year in Oregon. So this is a concept that is spreading.

The CHAIRMAN. Wait a minute.

On the loss of a member, is that still——

Mr. COAKLEY. If you suffer a loss by amputation, there is still a schedule. But there was no schedule for partial loss of use as there is in, I believe, every other jurisdiction.

Now I agree with Mr. Maisonpierre, that had we had S. 420 or one of its predecessors in effect, it would not have—such a reform would not have come to Florida, nor would this concept be considered in the State that I mentioned. It is for this reason that we, the AIA, agree with the alliance that each State should be left to work its problems out as best it can without having imposed upon it directives by the Federal Government.

The CHAIRMAN. Another way that could be looked at is that, until Federal law is truly comprehensive, it will not have the desired beneficial effect for the total picture of compensation.

In other words, cover benefits for a total disability without dealing with permanent partial, we have a problem. That is what I interpret your observations to mean.

Mr. MAISONPIERRE. This is right, Mr. Chairman.

You know the preamble of S. 420 says that one of the major objectives of workers' compensation or one of the objectives of workers' compensation is to provide replacement for loss of wages. This is what Florida has done. But what S. 420 does, it provides the replacement of loss of wages and superimposed this upon an existing system which is not necessarily directed at loss of wages.

The CHAIRMAN. How long has this Florida system been in effect?

Mr. MAISONPIERRE. About 1½ years I believe.

The CHAIRMAN. Not long enough for these questions to have reopenings—where there was no wage loss, no permanent partial award, and the injury did not dictate a loss of wages at the time, but later on the complications of that injury might. Is there a reopening provision within the State law for those who lost no wages early but might well, through the nature of the injury, reopen later on?

Mr. MAISONPIERRE. Yes, I know they can, Mr. Chairman. There are some provisions in the law for reopening of cases. If the case is reopened following a specific time since the date of last treatment, then certain rules apply. If the date of reopening is 5 or 10 years thereafter, the burden of proof shifts. We would be glad to provide the law for the record. But there are specific rules made for the reopening of cases. Obviously, any State that goes in that direction must provide for reopening of claims.

The CHAIRMAN. Now, could I come back for a moment to the question of coverage here?

One of the reasons it was felt back in 1972 that it was necessary to cover the whole waterfront with the Longshore Act was the inadequacy of many State laws. We did not want workers walking in and out of adequate coverage depending upon their work assignment, and then the complications of working part of the day in the old-fashioned sense, on the longshore job, then coming up on the dock and getting into an area that was not clearly in the longshore——

Mr. MAISONPIERRE. I believe that in 1972 that the advantage was to walk out of the longshore coverage into the State coverage. Because in many States, the State's benefits, were substantially higher than the longshore benefits, up to 1972. This was the case in New Jersey. It certainly was the case in New York, it certainly was the case in California.

So that looking at it today, yes, there is an advantage walking from a State into the Longshore Act but in 1972, the advantages were just the opposite.

The CHAIRMAN. In terms of compensation benefits?

Mr. MAISONPIERRE. Compensation benefits.

The CHAIRMAN. But then there was the third-party situation.

Mr. MAISONPIERRE. Yes, the third-party situation was an important thing. If I may say one thing with reference to coverage, Mr. Chairman, your question to Secretary Elisburg about the coverage of a small boat builder—I believe that the Secretary was partially erroneous in his answer.

The operations of the small boatbuilders that were on land, that is the land operation, the construction of the boats on land, those were clearly covered under State compensation laws even though the operation was done adjacent to the water's edge. People working, doing some work on board the ship on navigable waters, if they were injured, they would have been covered under the Longshore Act. Most of the accidents in those industries occur on land. They do not occur when the boat is in the water. Most of those accidents occur when the boat is under construction, in the shops, in the factories and what have you. So that prior to 1972, the insurance rates for the small boat builders was the rate prevalent under the State compensation law, not the Federal Act, because this is where most of the accidents would occur on laws, and those were covered by State laws.

Now under—there is a question as to what has happened under the 1972 amendments. The matter is in litigation. The Department of Labor has issued a ruling; I believe it is rule 22 which implies that all of the operation, land and water, are brought under the coverage of the Longshore Act.

This matter has been in dispute before the courts in California and ultimately the matter will have to be resolved by the Supreme Court of the United States. The problem that we face, as insurers, is that we do not know what to charge those people. If we listen to the Department of Labor, we must charge them longshore coverage. Secretary Elisburg made it clear that he believes those people are covered totally under the Longshore Act. But it is a real question as to whether they come under State or Federal coverage

I have inquired of some of our companies as to whether they would be prepared to get back into the market and provide the coverage if this were State coverage and two of our major workers' compensation writers said no problem with it. They would. So it is not the nature of the occupation, the nature of the employers, the employees involved. It is the uncertainty as to whether this is State or Federal.

Mr. BUNN. I would like to endorse that, too. Because looking at it from a coldly insurance point of view, that is where the retreat from the market has developed. Whatever advantage points or whatever points you decide to delineate between State and Federal jurisdiction is the fact right now that the insurance industry is not where it stands and when you try to sit down and underwrite a risk, you are not certain which of the acts applies. So because of this, the total lack of predictability, the almost ruling of the dice as it were, when it comes to try to decide what to charge and it is not just in this one area. This happens to be a very serious area but it also applies to the escalation provision.

I would also like to ask if I could and comment briefly on the point that was raised awhile ago about permanent/partial disability before we totally leave that.

The NAII that I am associated with opposes and has opposed S. 420 and continues to do so. I think there are several reasons, in addition to the permanent/partial disability that raise concerns without getting too far into that piece of proposed legislation, and that is the fact as the National Commission did, that legislation in its latest version as I recollect it, sets aside for the time being

dealing with several of the problem areas like occupational disease, escalation and permanent/partial disability and assigns those to a study and that leaves just a big question mark as to how they are to be dealt with.

As you may recall, Mr. Chairman, I directed the interdepartmental workers task force for the Government and we concluded that wage loss similar to that enacted in Florida was the way to deal with that.

As Mr. Coakley indicated, there are now three or four States that are trying different versions of that to see which one works best. I think that is one of the prime examples to the State system is the amount to experiment with different variations on the theme. Also, a piece of research that was done for the task force was done on permanent/partial disability by John Burton who was the chairman, and he recommended wage loss. Arthur Larson, who is the generally acknowledged dean of treatise work in workers' comp is proceeding in the same direction. So I think that insofar as this troublesome aspect of workers' comp, at least for the foreseeable future, that seems to be the tendency or the trend that States are looking at and I would suggest that some sort of system similar to that is what is needed in the Longshore Act and generally in the Federal programs.

I think though that when you look at a wage loss approach that something that is generally glossed over or not emphasized enough in discussing it, is the factor that Florida when it passed its bill generally significantly increased its administrative capabilities and for wage loss to operate and to function well, it needs a strong administration of the system and that is something that when you frequently get to looking into the program as to what was done in Florida is not emphasized enough. But I think that is a trend in dealing with permanent/partial disability, at least for the time being and, as you indicated earlier, it is too soon to know for sure how well that is going to work out. All of the early indications are that it is working out, that litigation has substantially been reduced and that the program is functioning well.

There is, however, a constitutional challenge to the bill in Florida which is yet to be ruled on by the courts and so it is a sort of a tentative general feeling, if that is the direction that the system in this problem area is going to go.

The CHAIRMAN. We have had a good attendance at this hearing this morning. I noticed earlier some Howard University students were in attendance this morning. I do not know if they still are. But we welcome them. We are pleased that they were here and I think we are going to recess now and if there are any informal comments by anybody, we will be here for a moment. We will be glad to hear them.

Very productive morning, and I appreciate all your thoughts and observations. We will put them into our computers here and see how we can advance the causes that we have embarked upon.

Thank you very much.

All right, I did not announce the time that we will return. It will be at 1:30.

[At 1:05 p.m., a luncheon recess was taken.]

AFTERNOON SESSION

The CHAIRMAN. We will now return to our hearing.

I see everybody is in place.

Mr. Robert Nolan, president, National Association of Stevedores; Mr. Dennis Lindsay, Master Contracting Stevedore Association of the Pacific Coast, Inc., and the rest of the panel are available for statements, questions, observations, right?

STATEMENTS OF ROBERT NOLAN, PRESIDENT, NATIONAL ASSOCIATION OF STEVEDORES, WASHINGTON, D.C.; THOMAS WILCOX, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF STEVEDORES; DENNIS LINDSAY, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC.; JERRY McMANUS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SHIPPERS STEVEDORING CO.; F. D. (RICKY) SMITH, PRESIDENT, SEATTLE STEVEDORE CO.; JOSEPH N. BARBERA, PRESIDENT, GLOBAL TERMINAL AND CONTAINER SERVICES; JOHN M. WALTON III, VICE PRESIDENT, LAVINO SHIPPING CO.; AND WALDO BRIDGES, SHIPPERS STEVEDORING WORKERS' COMP CLAIMS ADMINISTRATION, A PANEL

Mr. NOLAN. If I may, I would like to introduce my colleagues here.

From your right, Waldo Bridges, who is the workers' compensation claims administrator for Shippers Stevedoring in Houston.

Next, John Walton, vice president, Lavino Shipping Co.

Jerry McManus, president and chief executive officer, Shippers Stevedoring Co.

Joseph Barbera, president, Global Terminal and Container Services.

My name is Bob Nolan; I am president of the National Association of Stevedores and executive vice president, International Terminal Operating Co., Inc., and a happy resident of New Jersey.

Then, we have Tom Wilcox, executive director and general counsel of the National Association of Stevedores.

Rick Smith, president of the Seattle Stevedore Co. and, of course, Dennis Lindsay, counsel for the Master Contracting Stevedore Association of the Pacific Coast.

Mr. Chairman, I thank you for keeping your promise to hold these hearings, which should answer any remaining questions and clear the decks for the necessary changes in the Longshoremen's and Harbor Workers' Act, which for the sake of convenience, I will refer to as the act from here on.

I have prepared a written statement on behalf of the NAS, as have my colleagues here today. All statements have been previously delivered to the committee. I would request that these statements be included in the hearing record. My colleagues are prepared to answer any questions that the committee may have.

I know the time is short, and I will try to state the essence of our suggested changes as succinctly as possible.

There are five basic problems with the act as presently written. First, the act is unclear. One of the reasons for the 1972 amendments was the congestion in the Federal court system caused by third party litigation; that congestion was eliminated. But the

vagueness of the new amendments spawned a flood of new lawsuits by claimants with questionable rights. The flood and the controversy continue unabated even after the Supreme Court has handed down eight decisions, each critical of the draftsmanship of the amendments and each adding further fuel to the fire.

The question of jurisdiction and extent of coverage is still being debated in courts all over this country and whole industries are being swept into the act's coverage regardless of a total lack of any evidence of congressional intent to include them. The jurisdictional thrust of the act must be clearly defined.

We believe that proposed changes to sections 2 and 3 in S. 1511 and H.R. 7610 will properly and fairly establish the jurisdictional limits of the act and begin to restore some order into a chaotic situation.

Second, the act has saddled our industry with a form of compulsory life insurance known as unrelated death benefits. The act provides that if an injured worker is receiving compensation benefits for permanent total or permanent partial disability at the time of his death, his survivors are entitled to get benefits, even if the death be totally unrelated to injury or employment. No one knows where this concept originated. There is no precedent for it. We cannot afford it and neither can our insurance carriers. The concept exists in no other Federal statute. Its effects have not yet been felt but its potential cost is staggering. The effect on our industry in time will be catastrophic.

Third, the imprecise working of the act has produced an interpretation permitting the survivors to receive higher benefits than an injured man and his dependents would have received had he lived. This premium on death is wrong on many grounds and should be removed.

We were pleased to hear Secretary Elisburg say this morning that there should be a cap on death benefits.

Fourth, the high level of benefits creates a disincentive to return to work. An injured man who has recovered to the point that he can rejoin society as a productive member frequently refuses to do so when his tax-free compensation benefits plus disability and social security exceeds his gross pay before the injury. People with minor injuries often refuse retraining and rehabilitation so as to take advantage of this system.

Once again, this is wrong on many grounds and should be corrected.

Secretary Elisburg said this morning that obviously if we are getting more from compensation than from work, there would be a disincentive. It is our contention, despite some things that were said this morning, that that is the situation and it is hurting us badly.

Finally, we have the question of insurability. Many of our members cannot obtain insurance because of the excessive costs and those who can are paying excessive premiums for setting up outlandish sums of reserves. The problem is caused partially by all the factors mentioned earlier, but primarily by the annual escalation of benefits for death and permanent total disability. We have no quarrel with the payment of substantial benefits to a man who cannot work because of an injury sustained in our employ. On the

other hand, we object strenuously to the payments of full benefits to a man who is as capable as anyone else of performing almost any job except the one in which he was injured. A longshoreman who can no longer lift 150 pounds because of a subjective bad back can collect up to $424 per week for the rest of his life and get a raise every year through the escalation provisions of the act with increased benefits to reflect inflationary changes.

For example, the increase in October will raise the maximum to an estimated $456 per week. There is no way that an actuary can predict the cost of this annual adjustment. As a result, most insurance companies have left the market. Those who remain are wary of the future and the premiums have become the second highest element of cost to our members after wages and fringes.

Secretary Elisburg said this morning that some people wish to turn the clock back to preworkers' compensation days. That is not our intention, Mr. Chairman. Please believe us. We are conscious of our social obligation, we are conscious of the hazards of our industry and we sincerely believe that a man who is injured is entitled to compensation and to adequate compensation.

On the other hand, we think that those who try to beat the system should not be able to do so. There are many problems with the act. The witnesses today will tell you about most of them. Almost everyone with knowledge of the disastrous effect of the 1972 amendments will agree that the act must be changed without delay.

I suggest to you that S. 1511 and H.R. 7610 provide a carefully studied equitable solution to this problem. I recommend that your committee give them careful and positive consideration.

One other thing I would like to say is that with reference this morning, Senator, to the State-sponsored assigned risk pool in New Jersey, it is strictly a temporary solution, because I am not—I am certainly not an insurance expert but it is my understanding that the cost of the accidents, the longshore accidents which are assigned to the New Jersey assigned risk pool are spread out over all the insured and disguises the excessive cost of Longshore Act expense in the State.

Thank you very much, sir.

[The prepared statement of Mr. Nolan follows:]

STATEMENT OF

Robert J. Nolan, President
National Association of Stevedores

and

Executive Vice President
International Terminal Operating Company, Inc.

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

THE LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT

September 16, 1980

My name is Robert J. Nolan. I am president of the National Association of Stevedores (NAS) and Executive Vice President of International Terminal Operating Company, Inc.

The NAS welcomes this opportunity to appear before the Senate Committee on Labor and Human Resources to present its views on the Longshoremen's and Harbor Workers' Compensation Act (29 USC § 901 et seq.) as amended in 1972 by Public Law 92-576, and to urge this committee to comprehenstively review the Act and make substantial changes in it before the industries subject to it reach the point where they can no longer exist. To be blunt -- the Act as now written, administered and interpreted is virtually uninsurable and if insurable -- unaffordable.

Mr. Chairman, my colleagues here today have prepared detailed written statements concerning the Act which have been delivered to the Committee, and I request that those statements and this be included in the hearing record. My colleagues are prepared to respond to any question the Committee may have.

At the outset, let me take a few moments to explain what the NAS is and what it does, as well as to point out that, although founded in 1933, the present organization did not come into being until mid-1973. Some believe the NAS was resurrected because of the 1972 amendments to the LHWCA, but the truth is that the primary impetus was the Wage and Price Congrol Program then in effect and the government's complete lack of understanding

of the stevedore's role in the national transportation system.

The NAS is a nationwide, membership trade association whose sole purpose is to further and support the stevedoring and marine terminal industry of the United States. It is presently composed of 64 member companies, which are privately owned and which do business on all four major seacoasts plus the States of Alaska and Hawaii and the Commonwealth of Puerto Rico. The NAS is a not-for-profit corporation organized under the laws of the District of Columbia (29 D.C. Code § 1001 et seq.). It has tax-exempt status under 26 USC § 501 (c)(6) and under 29 D.C. Code § 1005 (b).

As I stated, the NAS has been in existence since 1933 but was largely dormant for many years. It was revitalized in 1973 and since then has grown to its present membership, which represents approximately 80% of the industry. The NAS provides a forum and means whereby members can exchange ideas and discuss mutual problems and interests. The NAS represents the inudustry before Congress, the federal courts and executive departments and independent agencies. All activities are done within the parameters set by U.S. law. For example, any exchange of information among members can in no way restrict, limit or monopolize trade or commerce. The NAS does not engage in collective bargaining. Neither does the NAS participate in the operations or management of any member company or group thereof.

LEGISLATIVE ACTIVITIES TO DATE

As the members of this committee and its staff know, efforts have been made to amend the LHWCA ever since the 95th Congress, when, late in the session, H.R. 13593 was introduced. Early in the 96th Congress, H.R. 2448 was introduced in the House and S. 1511, a similar bill, was introduced by Senator Nelson and co-sponsored by Senator Morgan. In the 95th Congress, the Subcommittee on Compensation, Health and Safety of the House committee on Education and Labor held 17 days of hearings on the LHWCA. A brief report of those hearings was published in the Congressional Record; Saturday, October 14, 1978, beginning at page E 5959. That report accurately reflects the concerns of all industries involved with the LHWCA. The subcommittee also has printed and distributed two volumes of hearing testimony in excess of 1,800 pages.

In the 96th Congress, the Subcommittee on Labor Standards to which LHWCA jurisdiction had been transferred in February 1979 held an additional five days of hearings on the LHWCA. That hearing record has not yet been printed. On June 18, 1980, following those hearings, another more extensive bill, H.R. 7610, was introduced to amend the LHWCA and a section-by-section analysis was printed in the Congressional Record, July 21, 1980 beginning on page E 3486.

I should also like to point out that in January 1979, all affected industries met here in Washington to discuss the LHWCA and to reach a common agreement on the changes needed for the

survival of all industries. We did so on the understanding that organized labor would do the same, and, that labor and management would subsequently meet to attempt to work out mutually agreeable changes. That meeting has never taken place, although we in industry have been ready and willing to do so ever since early 1979. We have so advised organized labor on several occassions, but, to date, it has shown no inclination to seriously discuss the problems which, in the end, will affect their own jobs.

THE ACT IS UNINSURABLE

In 1978 the Department of Labor in response to industry complaints about the unavailability and unaffordability of LHWCA insurance undertook a study and awarded a contract to Cooper & Company, of Stamford, Connecticut. Well beyond the contract completion date the Department reluctantly released the contractor's report to the Subcommittee on Labor Standards, and it is now included in the record of those hearings. That report, in the main, supports the contentions of insured and insurors alike and completely rejects the notion that the exorbitant cost of LHWCA insurance is attributable to the fault of the insurance industry. The report, in sum, assesses the blame squarely on the Act itself. For example, we have seen nothing to date that indicates that the LHWCA manual insurance rate of $87 per $100 of payroll for the category of general stevedoring in New York as approved by the New York State Compensation Board is inaccurate.

LHWCA insurance premiums have become so high since 1972 that those stevedore companies large enough to do so and which are able to comply with the comprehensive regulations of the Department of Labor have become self-insured. Many of those who could not do so have been forced into assigned risk pools. According to the Department of Labor 200 employers since 1972 have been authorized to self-insure and of those, 87 in 1978 and 1979. A great number of those employers are engaged in business other than stevedoring. One reason for this trend was stated by the DOL to be "the relatively high cost of insurance under the Act."

Notwithstanding these high costs and the Department of Labor's knowledge of them and the crisis in obtaining insurance protection, the Department has no published statistics concerning the causes, nature, extent or type of injuries for which claims have been filed under the LHWCA. Some attribute the high cost of LHWCA to the industry's inherent dangers and hazards, but they do so without any reliable statistical data published by the one entity which has all the date within its possession. The Department cannot, or will not, state which injuries occur in what employment or what type of injury or what frequency. The Department only refers to an ever increasing number of claims being filed under the Act, but it does not attempt to make any analysis of those claims. Without such data, industry is denied any opportunity to reasonably address itself to the reported claims or of the causes over which it might have some

control.

The uninsurability crisis exists today even with exorbitant insurance rates approved by the various state insurance commissions. With such a high level of approved rates one might think that the insurance industry would be eager to underwrite LHWCA risks. The fact is that the insurance industry is not eager to underwrite LHWCA risks and is in fact withdrawing from voluntary underwriting. Even the DOL recognizes this as is evidenced by the following statement of Assistant Secretary Elisberg.

> "There are currently 335 insurance companies authorized to write coverage under the Longshoremen's and Harbor Workers' Compensation Act and Extensions. Approximately one-half this number generally do not write any busines under the Act and a majority of the rest write a limited amount of business or only incidental coverage. A small number of carriers account for a large percentage of Longshore Act insurance. For example, in a recent year ten insurance carriers accounted for more than 40% of total compensation and medical payments under the Act."

The Act must be made insurable and affordable. Affordable to the self-insured employer and affordable to the employer who cannot support a self-insurance program. If an employer can afford neither, it must cease doing business. The cost of providing LHWCA insurance has become the stevedore company's highest cost, after direct wages and fringe benefits.

OTHER EFFECTS OF THE HIGH COST OF THE LHWCA

In addition to the direct impact on employers who must pay the high LHWCA costs there are other adverse effects.

Obviously, if the stevedore is to remain financially solvent it must attempt to pass on its increased operating costs

to its customer -- the steamship company which in turn must, for the same reason, increase its charges to the American shipper. Another alternative available to steamship companies is to operate at lower cost ports such as those in all too nearby Canada and Mexico. According to a recent study by the Maritime Administration of the Department of Commerce, cargo handling costs of American-flag subsidized vessel operators is now 24 percent of total, vessel-operating expense. Approximately 60 percent of the 24 percent is accounted for in cargo handling at U.S. ports, or 14 percent of total vessel expense. Thus, any substantial increase in U.S. cargo handling costs has an immediate and substantial effect on the cost to vessels serving U.S. ports.

The other alternative, the movement of U.S. import and export cargoes via Canadian ports, where costs are significantly lower than in U.S. ports, is in use today. An efficient Canadian rail system, which includes ownership of trackage in the U.S., makes the diversion of U.S. cargoes to Canada both easy and efficient. The high cost of LHWCA benefits or insurance premiums has contributed to the diversion of United States cargoes away from this country's ports to the readily available and lower cost ports in neighboring Canada. That diversion has reduced the income of the U.S. cargo handling industry, and has contributed to the constant reduction in work available for U.S. longshoremen and related trades which are dependent upon port industry.

For example, the Canadian ports of Montreal, Quebec, St. John, New Brunswick, and Halifax, Nova Scotia are in direct competition with U.S. ports on the Great Lakes and the North Atlantic for the handling of U.S. origin and destination cargoes carried by ships. According to a recent report by the U.S. Department of Commerce for the period of 1974-1976 some 1,644,461 tons of U.S. origin cargo valued at $1,391,511,000 was exported from the United States via land transportation (truck and rail) and loaded onto vessels at Candian ports. Another report of the U.S. Department of Commerce indicates that because of the diversion U.S. port industries lost some $90,445,355 in direct and indirect revenue. That is only as to exports!

Other data reported by the U.S. Department of Commerce in U.S. Merchant Marine Data Sheets, Maritime Administration, discloses that from June 1, 1975 to September 1, 1978 the number of longshoremen, clerks, checkers and allied crafts available to work each day dropped from 64,000 to 56,773 -- an annual reduction of 15,032,160 man-hours. By the end of 1979 that number fell to 49,103. Admittedly, there may be contributing factors other than the loss of U.S. cargoes to neighboring Canada and the substantial reduction in U.S. dock labor work, but the high cost of LHWCA which U.S. employers must pay is a significant factor. For example, the manual rate established by the New York State Rating Board for general stevedoring is now over $80 per $100 of payroll. In Halifax, Nova Scotia the equivalent rate established by the Province

of Nova Scotia is $2.25 per $100 of payroll, and in St. John, New Brunswick $3.50. The U.S. and Canadian wage scales are almost identical. That cost advantage can only enhance the competitive position of Canadian port interests vis-a-vis their U.S. competitors. For example, the NAS has been informed that it costs considerably more in labor and workers' compensation costs to move one container of cargo across the docks in New Jersey than it does to move it across the docks at Halifax, Nova Scotia. The diversion of cargo and loss of productive U.S. job opportunities increases daily.

There are also more tragic effects of the high cost of the LHWCA which were discussed in The Special Report of the Waterfront Commission of New York Harbor Concerning Fraudulent Workmen's Compensation Claims in the Port of New York-New Jersey, dated December, 1976. According to that report "spiraling fraudulent" workmen's compensation claims in the Port of New York-New Jersey are "seriously threatening the competitive position and economic health of the Port." In 1980, four years after the report, it was revealed that the ultimate tragedy of the LHWCA was the trial and convictions of one management and one union official involving payments made for the purpose of reducing LHWCA claims.

The facts are not disputed. The LHWCA has become a financial disaster for employers and an inducement for some employees to exaggerate or fraudulently file claims for compensation. Rehabilitation of injured workers is discouraged, because

the tax free benefits are so high that they remove any incentive to return to gainful, and taxable, employment. Even the Department of Labor has acknowledged that, under the current LHWCA formula, " some higher income employees could receive more in LHWCA benefits then their regular pay."

The Department has also stated that, in fiscal years 1978 and 1979, of those injured workers being compensated under the LHWCA who were eligible for rehabilitation "forty percent refused rehabilitation services."

Another unforeseen effect of the high costs of the LHWCA began to emerge in 1977 when an extraordinary increase occurred in the number of cases being placed in the second injury, or Special Fund, pursuant to section 8(f) of the Act (29 USC § 908 (f)). According to Department of Labor statistics there were 19 cases in the Fund in 1976. At the present time there are 535; (27 new cases in 1977; 91 in 1978; and 204 in 1979). The Department of Labor correctly views this situation as being the result of two factors: (1) the employer's desire to limit its overall financial drain by obtaining relief from the Fund, and (2) an unclear statute which allowed distortion of the original purpose of the Fund.

THE CAUSES OF THE CRISIS

The major causes of the current LHWCA crisis are readily identifiable and most arise out of the 1972 amendments.

1. Coverage Jurisdiction

The amendments extended federal LHWCA coverage shoreward of the water's edge divider which had separated state and federal jurisdiction since the law was originally enacted in 1927. The amendments to sections 2 and 3 of the Act (29 USC § 902 and 903) which redefined the terms "employee," sec. 2(3)); "employer," (sec. 2(4)); and "geographic area of employment" (sec. 3) are so imprecise that no one, not even the U.S. Supreme Court, knows for sure which employees shoreward of the water's edge are to receive LHWCA benefits and in what occupation.

In the last of three cases which the Supreme Court has decided on the jurisdictional issue a unanimous Court stated:

> "The line that circumscribes the jurisdictional compass of the LHWCA -- a compound of 'status' and 'situs' -- is no less vague than its counterpart in the pre 'twilight zone' Jensen era."

In the same case the Court described the 'pre twilight zone' era as "a jurisdictional monstrosity," Sun Ship, Inc. v. Pennsylvania _____ U.S. _____ No. 79-343 decided June 23, 1980. The Court held in that case that the LHWCA is not exclusive but is supplemental to state workers' compensation law and that a new twilight zone that begins at the water's edge and extends shoreward some unknown distance has been created. Within this twilight zone benefits may be sought under both federal and state law.

In the first case the Court decided on the jurisdictional issue, the Chief Justice during oral argument remarked that the Act is "about as unclear as any statute could conceivably be." And the Solicitor General's representative replied "It leaves something to be desired." Northeast Marine Terminal Co. et al. v. Caputo, et al. 432 U.S. 249 (1977) transcript pages 49-50.

The statutory imprecision, plus the Department of Labor's announced policy that it "has an obligation to determine coverage in the maritime industries to protect the greatest numbers of persons," creates such uncertainty and such extensive litigation that no one can reliably predict what his liabilities are under the Act.

The jurisdictional thrust of the Act must be clearly defined. We believe that the proposed changes to section 2 and 3 now in S. 1511 and H.R. 7610 will properly and fairly establish the jurisdictional limits of the Act and begin to restore some certainty to a chaotic situation.

2. Unrelated Death Benefits

In some manner which has never been explained, the concept of life insurance was added to the LHWCA in 1972. It is a concept which even the National Commission on State Workmens' Compensation Laws did not discuss, much less recommend, in its 1972 report.

Section 8(d)(3) and 9(a) of the Act provide that if an injured worker is receiving compensation benefits for permanent total or permanent partial disability at the time of his death,

even if the death be totally unrelated to injury or employment, the survivors are entitled to death benefits.

In the case of permanent partial the survivors are to receive 150 percent of the compensation payment. If permanent total benefits are being paid, the survivors receive death benefits equal to those they would receive had the death been job related.

There is no way an employer or insurance company can predict its liability for unrelated death cases. We are aware of no workers' compensation law containing a similar provision in any of the 50 states. We are equally unaware of any report that recommends the marriage of life insurance and workers' compensation. The report of this committee, No. 92-1125, does not give any indication of the origin or purpose of the unrelated death provision. The NAS believes that life insurance or pension benefits are properly covered under other laws such as Social Security and ERISA. They must be removed from the LHWCA. Both S. 1511 and H.R. 7610 would accomplish that result.

3. No Uniform Limit on Death Benefits

It was generally assumed by all, and the Department of Labor so argued before the Supreme Court in Director, OWCP, et al. v. Rasmussen et al., 440 U.S. 29 (1979), that survivors' death benefits under section 9 were subject to the same maximum limitation (200 percent of the national average weekly wage) as for compensation paid to injured workers under section 6(b).

Unfortunately, the Supreme Court disagreed and said that Congress in 1972 intentionally removed any limitation on the survivor's death benefits, except the employee's own average weekly wage. This has created what one court referred to as a "premium on death" in that the surviving spouse could receive more benefits than the permanently totally disabled employee could receive during his life. There is no explanation in the Committee reports on this subject, and we cannot understand why a survivor should receive more compensation than the person who sustained the injury. S. 1511 and H.R. 7610 would correct this disparity and the same maximum limitations for permanent total disability and death benefits to survivors would apply.

4. The High Level of Benefits

We agree with the statement of the Comptroller General of the United States in his letter to this Committee of September 14, 1978 (A-14508, A-14803) commenting on S. 3060 that:

> "Figures will vary according to circumstances; but the conclusion is inescapable that if benefits levels are set at a constant fraction of an employee's former gross earnings, and are nontaxable, many persons will have little financial incentive to return to their former jobs."

The Comptroller General then, at page 5, urged that workers' compensation levels be set at 80% of spendable earnings.

As pointed out earlier, the high benefit levels of the LHWCA; i.e., 66 2/3 of the employee's average weekly wage but not in excess of 200% of the national average weekly wage,

does present situations where LHWCA benefits, which are non-taxable, do exceed the employee's regular after-tax earnings. Thus, there is no incentive to return to work: no incentive to seek rehabilitation; and, for some, an incentive to file a compensation claim.

Taken a step further, when LHWCA benefits are added to Social Security disability benefits, plus pension and welfare benefits, the post-injury income of many employees greatly exceeds their gross earnings while working. This combination, we believe, leads an employee nearing retirement age to attempt to seek LHWCA compensation benefits, regardless of whether an actual employment-related injury occurred.

Accordingly, we recommend, and H.R. 7610 provides, that combined compensation payments (LHWCA, Social Security, disability under ERISA) shall not exceed 80% of spendable earnings, and that if they do, the LHWCA compensation benefits shall be reduced by the amount of the excess.

We believe that the LHWCA should not be an inducement to early retirement, and an invitation to seek additional compensation for "injuries" which may never have actually happened in the workplace.

5. Annual Escalation of Benefits

The annual escalation of benefits for death and permanent total disability benefits, as provided in section 10(f) of the Act, is perhaps the greatest cause of unpredictability of risk and that goes further to make the Act uninsurable. The

escalator also brings into focus the relative ease of obtaining a ruling of permanent total disability. That term usually brings to mind a severely injured person who is physically incapable of performing any work whatsoever. According to IRS regulations that assumption would be correct.

However, under current Department of Labor interpretations, one need not be so seriously injured. A person may, for purposes of the LHWCA, be permanently and totally disabled if his employer cannot find and offer him a job acceptable to the employee at the full pre-injury rate of pay and at a place of the injured worker's choosing.

According to the Benefits Review Board, "Even a relative minor injury must lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified" (BRB Longshore Desk Book Section 8(a)). But, since the Act does not require rehabilitation and since 40 percent refuse it when offered, permanent total disability now is, as the Board states, "not measured by physical condition alone. Consideration must be given to claimant's age, education, industrial history, and the availability of employment he can perform after the injury." The burden of proof is completely on the employer to disprove a claim of permanent total disability.

When attempting to assess the financial burdens of the annual escalation provision, industry is faced not merely with the relatively few death cases and the relatively few actual,

physically permanent, total disability cases, but with the many, alleged permanent total cases, which become "permanent" only because an over-generous Department of Labor says they are. The Act does not define what permanent total disability is nor does it suggest any guideline to be followed. The Internal Revenue Code, 26 USC § 105(d)(4) defines the term as an acutal inability to "engage in any substantial gainful employment," and not a refusal to accept a job at a lower rate of pay than earned before the injury. The Internal Revenue Code also provides that the burden of proof is on the one claiming the permanent total injury. We believe the LHWCA should provide the same tests.

The annual rate of escalation of the national average weekly wage cannot be predicted by anyone. The Department of Labor has stated that the major reason it cannot reliably assess the present liability of the Special Fund (second injury fund) is that it cannot guess what the annual escalation factor will be. Neither can a self-insured employer or insurance carrier. Similarly, no one can guess when a "relatively minor" injury will become a permanent total disability case subject to the escalator. Those two unknowns are devastating, and it is small wonder that the insurance industry is unwilling to underwrite a risk which it cannot begin to understand or measure.

6. The Department of Labor

To any employer the total LHWCA is overwhelming. The Act provides untaxed benefits at levels so high that it

can be said to invite attempts to partake of the benefits. The presumptions in section 20; the Department's announced policy to award benefits to the maximum number of workers; the notion that compensation acts must be liberally interpreted; the free choice of physicians; the payment of claimants' attorneys' fees by the employer; the lack of adequate supervison of medical treatment by the DOL; an overly-generous Benefits Review Board, whose members are accountable to no one but the Secretary of Labor--all come together to virtually assure that LHWCA benefits will be awarded, no matter how spurious the claim.

The general thrust is that, if a person says he is injured, he is now presumed, not only to be injured, but injured in the course of employment and entitled to LHWCA bneefits, if his work is in any way related to the undefined term "maritime employment." The law, as now interpreted, requires the employer to disprove each allegation by overwhelming evidence. In many cases, the employer has no knowledge of the alleged injury until well after it is alleged to have happened. In such a climate, the odds are so favorable that an award will be granted by the Department, that any enterprising longshoremen would be foolish not to try for one. The law does provide for prosecution of any one presenting a false claim, but the DOL "does not have the staff" to investigate such matters.

Judicial review at the Court of Appeals level, as now provided under section 21, is not really adequate. Courts of Appeals have consistently held that they can only decide

matters of law and may not substitute their own judgement for that of the trier of facts -- the ALJ or the Benefits Review Board. The Benefits Review Board has adopted that philosophy for its own review in most cases.

What then does the employer face? The employer first faces an administrator of the Act, the Secretary of Labor, whose announced policy is to extend LHWCA benefits to the maximum number and class of workers. The Secretary appoints the Deputy Commissioner who runs the programs day to day. The Secretary of Labor appoints the Director, Office of Workers' Compensation Programs, who has primary responsibility for the program, and the Deputy Commissioner. The Secretary appoints the Administrative Law Judges who try contested cases. The Director utilizes the Solicitor of Labor's attorneys to represent the Director in contested cases. The Secretary appoints the members of the Benefits Review Board. If a Board decision is contested in the Courts of Appeals the Solicitor of Labor represents the Board, using the same attorney who represented the Director. In addition, the employer also faces the claimant and his attorney, whose fees the employer must pay if the claimant prevails.

The system is demonstrably unfair and must be changed. The free choice of physicians must be limited to those who are actually qualified in workers' compensation matters. The presumption of coverage must either be eliminated or restated so as to restore equity to the system. The Benefits Review Board members should be appointed by the President for fixed terms and

subject to confirmation by the Senate. Their qualifications must be carefully scrutinized -- conflicts of interests should not be tolerated -- and they must have some experience in workers' compensation matters prior to their appointment. The Director, OWCP, must be restricted to administering the Act and should not be an active litigator at any level of the proceedings.

CONCLUSION

To conclude -- it has been stated that the 1972 amendments to the LHWCA were directly influenced by the "Report of the National Commission on State Workmen's Compensation Laws" published on July 31, 1972. However, as previously mentioned, the unrelated death benefit provisions of the 1972 amendments were not even discussed in the Commission's Report. Also, the Commission recommended that death benefits for surviving dependents should be subject to the same maximums as temporary total disability benefits. Either by design or neglect, but certainly without explanation, the 1972 amendments have resulted in maximum survivors' benefits being greater than maximum benefits which the injured employee would have received.

The Commission also recommended that, by 1975, workers' compensation benefits should have reached a maximum of at least 100% of the state average weekly wage. The Longshore Act provides an overly-generous maximum of 200% of national average weekly wage.

The Commission did not recommend as essential an annual escalation of benefits, yet the Longshore Act contains an annual open-ended tax-free escalation of benefits, which makes the Act

unpredictable and therefore uninsurable.

Finally, and perhaps the most damaging of all, is the fact that the LHWCA contains no definition of permanent total disability, which allows for such benefits to be paid when the worker is in fact not totally disabled. The Commission specifically recommended that:

> "Permanent total disability benefits should be paid to a worker who experiences a work-related injury or disease which leads to a permanent impairment that makes it impossible for him to engage in any substantial gainful activity for a prolonged period. If a worker earns income subsequent to his injury, he may be eligible for the permanent partial disability benefits. . ."

The Act has gone far beyond the recommendations of the Commission. It has gone beyond the competence of the Department of Labor to administer it. It has gone beyond the capabilities of the insurance industry to predict its liability. It has gone beyond the competence of the Courts to interpret. And it has gone beyond the capacity of this industry to live with it. The Act needs reform now.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Nolan.

Mr. Lindsay, for the next presentation.

Mr. LINDSAY. Good afternoon, Senator.

We meet again in a familiar context of one of these hearings. We put in a rather extensive statement. Of course, we will not cover it. If I might in the next 10 minutes or so available, I would like to cover three or four things; tell you who we are on the west coast, tell you the difference between 1972 and 1980, tell you about our problems and then get down to some specifics with respect to the medical delivery system, which I think you would be interested in.

I, of course, appear as the counsel for the Master Contracting Stevedore Association of the Pacific Coast. Our firms are the ones that provide the stevedore and the terminal operations in all the major ports in the west coast. We are the employers of about 10,000 active ILWU longshoremen and we are supporting about an additional 10,000 retirees through our fringe benefit contributions on the pensions and on the welfare.

The direct payroll out there last year ran about, oh, $350 million. This is just the direct wages. If you were to take a figure, a very low figure for the cost of longshore coverage, which is not available as I will come to, but if it was in terms of the smaller employers of around $31, that would give you about $100 million, 31 into the $315 million, $3,100 available for premiums. A very tidy sum, which you would think the insurance industry would just jump at and want to get on board. Yet, the fact of the matter is you cannot get longshore coverage for a stevedore on the west coast from a private insurance company. That is just the fact of the matter.

Now, let us get back to 1972. We were in here, as the Senator will very much remember, in the late 1960's and early 1970's on the third-party problem, the problem where the longshoremen sued the ship for an absolute unseaworthiness. The ship then turned around and sued the stevedore in an indemnity action. The result being that the stevedore not only got to pay the compensation, but he also was the recipient of the third-party damage action. Well, the 1972 amendments did put an end to that. It did not quite go all the way. You still left a third-party action which should be cleared up in the moment in terms of what happened this morning. You, of course, can still sue the ship now for negligence. But what happened in the 1972 amendments, you precluded the ship from coming back over against the stevedore and that part of the 1972 amendments has held up. But along with it, there is a lot of other things that have happened.

Now here we are 8 years later and why are we back? We are back really for two fundamental reasons. One, because our experience under the act and what happens indicated that it apparently is not insurable.

Two, there are a couple of features to it that as we have come to live with them are really—oh, social security-type of programs that do not belong in a compensation act. Norm Leonard, the general counsel for the ILWU this morning was telling you that it was a bargain, they give away to the third party and they got the rest of it. If they are asking for changes now, we have to go back and give

them the third party. I do not think two wrongs make a right, Senator.

There was a real wrong at that time and what we are suggesting to you today is that experience, 8 years of it, indicates that there is some more things that need to be cleared up. They really relate to this business of being insurable. You ask: Why is that relevant? All the authorities, Professor Larson and the rest of them, will tell you that compensation is just—insurance is just an essential feature of any insurance scheme. It is the only way that the employer can in effect get a handle on the thing and pass it along with the cost of his product and his services. The essential feature to insurance, as everybody in this room knows, is a reasonable degree of predictability and that is what has happened. I am going to talk about it when we come to our problems.

So that—and by 1974 after we have been in this thing for about 2 years, it turned out I think, the records shows that about better than 35 of the 43 companies that were writing it dropped out of writing it. The situation today is that you will find every stevedore on the west coast cannot get this primary coverage. In effect, he has had to become self-insured, get it otherwise and what he is talking about they have to have a retainage of—it jumped from 100 to 200 to 300 and now it is about 500,000 that he has to cover himself and then he has got to go out and buy this excess, and that is where our problems are really coming in, getting that excess. Now you can very well ask what are the problems?

I listened to the insurance industry talk this morning. I am talking about from the point of view of the consumer, the employers here that are trying to go out and buy it. The proof of the pudding is that they have not been able to. You ask why not? Then you are met with this familiar litany that you have been listening to that you will hear a great deal more. The factors that they have come out with, the annual escalation is an unknown amount. They tell you that there are no limits like on the death. There should be limits on the death like in a permanent/partial, the way that the unscheduled disabilities have really taken off this whole field.

Originally, we thought there would be the schedule for the arm or the leg and then the unscheduled. But now you have the best of both possible worlds and you can move from being a schedule on the same injury to an unscheduled.

They have a bunch of other things they start telling us about. The unrelated death benefits, whereby someone has got a bad back, goes on unscheduled disability and then dies from something, nothing to do with his work, all of a sudden his widow and his kids come in under the death benefits. Again, a sort of insurance feature.

We are into the second injury fund. They tell us this is so unpredictable, and the real reason I think is the whole move into the occupational disease field. We are starting to see it out on the west coast now, the asbestos doses. All of the shipyard workers, there are some coming into the stevedore industry, the fellow at the end of the line, the last employer is going to have to pick it up immediately but then is thrown back into your second injury fund and as I see it in the future, that second injury fund, like one of the witnesses was talking about this morning, is just going to grow

and grow by reason of this big reservoir of unfunded—of the occupational diseases.

You hear a lot about coverage. Well, for us, that has not been so much of a problem as such—the stevedores. But what it has caused is so much uncertainty in the market in other features in terms of the shipyard, above all else, that has affected the ability of insurance companies to want to get into this field. We have a number of solutions set forth in our written statement as to I think ways that you can come at this, if you want to make it more insurable.

The other aspects of this 1972 amendment that bothers us are, of course, the sort of the social security of the retirement aspects of it, on the one hand, the unrelated death benefits. I do not know where that ever came from and I do not know what it is doing in a compensation act. Then, we are also stuck with this business that you have been hearing about at the end of the line. The workforce is getting older. The fellow near the end of the line just before he retires, in effect, picks up an unscheduled disability. He retires, he then gets his unscheduled disability, he picks up the union pension, he picks up social security and he ends up making more money than when he was working. That does not make much sense to us.

We have given you some specific examples in the written statement in precise cases and what we are suggesting there is that there really needs to be an offset, so that when you are into that situation, the account does not have to be paid after the normal retirement age.

Now, I am running right near the end of my 10 minutes, but I did want to talk a word about the medical delivery system.

Eight years of living under it indicates to us that there are some real needs for reform. It is easy enough to generalize and say that it is too expensive, it is too slow, it does not really give the men the best care, and the solutions probably in changing some of the act and in the way it is administered. These are set more in detail in the picture.

I think you would be much more interested in a specific situation. Out our way, one of the members of the association put together an analysis which is entitled "An Analysis of Current Abuses in Rendering Medical Treatment and Furnishing Evaluations in Southern California Under the Longshore Act."

It is a long analysis; it cites names and it sets forth specific examples which add up to what they consider to be overtreatments, or overcharging, too much extended temporary total disability and too much overexaggerated permanent partial disability. I have a copy of it here and it perhaps might be helpful to your counsel if I left it with the record because it goes into detail in specific instances.

Of course, the company involved draws certain conclusions; the conclusions that we draw generally on a national level is that we strongly recommend going back to the panel method of selecting physicians rather than allowing any doctor to be involved in this. We also feel that there has to be much more extensive use played of the independent medical examination, rather than the current fashion. There are a number of other suggestions which we can go into as need be.

Thank you for the 9 minutes.

[The prepared statement of Mr. Lindsay follows:]

STATEMENT OF DENNIS LINDSAY

COUNSEL FOR THE MASTER CONTRACTING STEVEDORE
ASSOCIATION OF THE PACIFIC COAST, INC.

BEFORE THE COMMITTEE ON
LABOR AND HUMAN RESOURCES
OF THE UNITED STATES SENATE

HEARINGS ON THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT

Washington, D.C.
September 16, 1980

My name is Dennis Lindsay. I am the senior partner in the law firm of Lindsay, Hart, Neil & Weigler, of Portland, Oregon. I appear as counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

THE STEVEDORE ASSOCIATION

The Association is composed of the firms providing stevedoring and terminal services at San Francisco, Los Angeles, Seattle, Portland, and almost all other ports in the West Coast states of California, Oregon and Washington. Virtually all of the $313 million paid during 1979 to workers engaged in longshoring and related terminal and warehouse activities in California, Oregon and Washington was paid by Association members. At current manual rates, that direct labor payroll would generate a premium for Longshoremen's and Harbor Workers' Compensation Act primary insurance coverage in excess of $100 million, nearly $10,000 per person employed during 1979.

Whether incurred as direct expense or established as a reserve against future liability, it is clear that the annual cost of providing the benefits of the Longshoremen's and Harbor Workers' Compensation Act to West Coast longshore laborers is very substantial, nearly equaling the cost of all negotiated employee fringe benefit plans.

The lesson is clear: Longshoremen's and Harbor Workers' Compensation Act expense is a very major fact of life for Association members and their employees. Increases in those expenses and declining insurance availability are matters directly and immediately affecting all Association members.

SUMMARY OF STATEMENT

Administrative changes and improvements are simply not sufficient to correct the major problems caused by the Act's shortcomings. Legislative change is essential.

At a time when insurers are competing vigorously for high-risk medical malpractice and products liability accounts, Association members can locate no companies willing to provide either primary or (assuming a less than $500,000 minimum "retainage") excess Longshoremen's and Harbor Workers' Compensation Act insurance coverage. The insurance crisis facing Association members is rapidly worsening. Recent developments threaten to speed that deterioration and the loss of the few remaining insurance alternatives available to Association members.

Association members have lived nearly eight years with a compensation system touted by many as a "model" against which all other systems should be measured and found wanting. In a very real sense, the waterfront and its industries have served as a workers' compensation laboratory. The results of the experiment are now apparent and demonstrate an immediate need for real and substantial change.

In an effort to deliver reasonable benefits to injured workers, the participants in the 1972 amendment process created substantial uncertainty which nearly eight years of litigation has failed to adequately clarify. What clarity emerged from the litigation process did little to lessen uncertainty and, in many cases, has served only to magnify the fears and concerns of insurers and maritime employers.

The fact that Longshoremen's and Harbor Workers' Compensation Act insurance is unavailable at a time the private insurance industry actively competes for medical malpractice and products liability accounts can support only one conclusion: The potential expense of an injury compensable under the Act in an amount determined within its administrative and adjudicatory systems is more unpredictable than is the range of potential verdicts from juries empaneled to decide malpractice and products liability actions.

Insurability is an essential element to any compensation system. Predictability is the critical prerequisite to insurability. A compensation system burdened with greater unpredictability than than present in adversarial litigation cannot long survive.

Insurers willing to provide primary coverage for the Act's risks have left the market, forcing the employers to adopt various forms of self-insurance. The excess insurers essential to the only insurance alternatives remaining to Association members are now themselves departing. Legislative action sufficient to draw the private insurance market back into the system is essential.

THE PROBLEM: NO INSURANCE

All employers subject to the Longshoremen's and Harbor Workers' Compensation Act are required to obtain insurance from an insurer approved by the Office of Workers' Compensation Programs or receive self-insurance authorization. No Association members are large enough to wholly self-insure and, therefore, must obtain either "primary" or "excess" compensation insurance.

Before 1972, the primary and excess insurance alternatives available to Association members were numerous. Many insurers competed for Association accounts. By 1976, 32 of the 43 formerly competitive compensation insurers had withdrawn totally from the market, leaving only 4 private carriers willing to provide primary coverage for Longshoremen's and Harbor Workers' Compensation Act risks. At present, we know of no private insurance carriers willing to provide primary Longshoremen's and Harbor Workers' Compensation Act insurance for Association members. Some form of self-insurance has become essential for member firms' survival.

Available excess insurance is an absolutely essential prerequisite to continued compliance with the insurance requirements of the Longshoremen's and Harbor Workers' Compensation Act. In 1973, an Association member willing to "self-insure" the first $30,000 of potential exposure could locate a ready market for the balance of its insurance needs. By 1975, few excess insurance carriers would consider less than a mandatory $100,000 "retainage". By 1977, the minimum retainage figure had reached $200,000, had progressed to $300,000 by 1979, and now hovers at the $500,000 level. In effect, Association member firms have no alternative and must bear the first half million dollars of risk arising out of each employee injury.

Mr. John Cox, President of insurance giant INA, recently advised a group of professional risk managers that a

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"restricting" insurance market was probable within the next year, with workers' compensation areas presenting the greatest problems. In short, without legislative relief, a bad current insurance situation will worsen.

Professor Arthur Larson has underscored the fact that an unwilling private insurance market threatens the existence of any workers' compensation system:

> "Of course, insurance of many kinds of tort liability is a familiar feature in modern law, and we do not, in theory, allow the presence of insurance to alter our conception of the rights and liabilities of the actual parties. But compensation insurance is a little different, for it is normally an integral part of the whole scheme. Most insurance, even where semi-compulsory, is exclusively concerned with providing a fund for possible plaintiffs. Compensation insurance, too, has this primary object, but it is also designed to provide the route whereby the cost of the compensation system is passed along to the consuming public in an orderly fashion.
>
> * * *
>
> "Of course, under an experience-rating system, the employer may directly feel some impact of frequent or large claims in the form of increased insurance premiums, but apart from this, the American compensation system, unlike the tort system, at the moment of creating liability also creates the means of relieving the employer of the real burden of that liability." (Emphasis added)
>
> (Arthur Larson, The Law of Workmen's Compensation, Vol. I, §2.70 (1972 Ed.)

In effect, the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act imposed upon waterfront industries an increased liability while at the same time removing the means of obtaining relief from that liability by injecting such unpredictability that insurance has become unavailable.

THE CAUSES OF UNINSURABILITY

We are convinced that three factors underlie the current insurance crisis:

(A) The 1972 amendment process created five major sources of uncertainty sufficient to foreclose any opportunity for accurate cost prediction;

(B) The 1972 amendment process engrafted onto a compensation system elements of a social insurance program bearing little or no relationship to the hazards of waterfront employment; and

(C) Amendments designed to substitute increased compensation benefits for uncertain results and social costs of litigation have, instead, vastly increased the costs and delayed the process of delivering appropriate medical care and compensation benefits to injured workers and their survivors.

A. The Major Sources Of Uncertainty.

We believe there to be five major uncertainty-causing deficiencies in the current version of the Act:

(1) The presence within Section 10(f) of an annual compensation and benefit escalation feature;

(2) The absence of any ceiling on permanent partial disability and the accompanying administrative erasure of the distinction between "scheduled" and "unscheduled" awards;

(3) The method established in Section 44(c)(2) for the funding of the Act's Special Fund;

(4) The uncertain jurisdictional limits created by the Act's vaguely defined "status" and "situs" requirements; and

(5) The imposition of responsibility for death benefits payable to recipients of unscheduled permanent partial disability and permanent total disability compensation, even when there exists no relationship between the work and the cause of death.

(1) Annual Escalation Of Benefit Levels.

Section 10(f) was enacted in 1972. That provision provides as follows:

> "Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under Section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1."

A similar annual adjustment feature was enacted for those cases involving permanent total disability and death arising prior to the 1972 amendments (Section 10(h)(1)).

All of the annual escalation costs for post-amendment cases and 50% of those costs for pre-amendment cases were imposed upon employers.

The obvious intent of the annual benefit increase provisions was to prevent inflation eroding currently adequate payment levels without need for continued Congressional oversight and revision.

The effect of the annual increase provisions has been to impose upon insurers and self-insured employers the literally impossible burden of making accurate long-term projections of this nation's inflationary spiral -- a condition over which the waterfront industry and its insurers have no meaningful control.

Many persons have computed the future costs of the annual benefit increase provisions. Those projections have been made on the assumption that inflation and the national average weekly wage would increase at a certain annual rate, often a presumed but now clearly unrealistic 6.5% figure. Even with that assumption, very high 7-figure cost estimates are not uncommon.

The major problem is that no insurer or employer can accurately predict a future inflationary rate. There is, therefore, no way to accurately predict the ultimate cost of total disability and death benefit claims and, without that essential element of predictability, no method to pass the costs of the Longshoremen's and Harbor Workers' Compensation Act through to the consuming public in an orderly fashion.

(2) Absence of Ceilings on Death And Partial Disability Cases.

The United States Supreme Court has decided that the 1972 amendments erased the earlier statutory maximum on death benefits. The legislative history of the 1972 amendment process clearly demonstrates that the death benefit maximum erasure was inadvertent. Even if that particular issue is corrected, however, the future expenses of partial disability awards remain not subject to reasonable actuarial forecasting. That situation arises from a combination of two factors:

(A) The fact that the Department of Labor, the Benefits Review Board, and one reviewing Court of Appeals have now concluded that the schedule of partial disability awards appearing at Section 8(c)(1)-(20) is not exclusive where the employee's earning capacity impairment is greater than that which would be fully compensated by application of the schedule.

(B) The facts that (1) the Department of Labor insists that all of the injured workers' earnings, even those earned from sources outside the covered industry, are to be included in the pre-injury average weekly wage computations performed in accordance with Section 10 of the Act; and (2) that the amended Act contains limits only on compensation rates, not limits on the levels of earnings utilized in establishing those rates.

The Section 8(c) Schedules Are No Longer Exclusive.

Prior to the 1972 amendments, several federal courts concluded that the scheduled benefits of Section 8(c)(1)-(20) were clearly exclusive. Benefits could not exceed those established by the schedule.

As introduced, Senate Bill 2318 (which was ultimately enacted as the 1972 amendments, Public Law 92-576) proposed a new section, Section 8(c)(21), which provided as follows:

> "With respect to any period after payments under paragraph (c)(1) through (c)(20) have terminated, compensation shall be paid as provided in subsections (a) and (b) of this section if the disability is total, or, if the disability is partial, two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment."

The proposed new section would clearly have entitled the injured worker to the higher of (a) the amount provided by the schedule or (b) an amount based upon the presumed decrease in the employee's wage-earning capacity.

The proposed section was not enacted into law.

Despite this clear Congressional rejection of the concept, the Benefits Review Board and one reviewing Court of Appeals have, nevertheless, concluded that the Section 8 schedules are not exclusive whenever wage-earning capacity impairment is proven. The issue now lies before the Supreme Court.

Under the present situation, an employee who sustains a 20% impairment to an arm, but maintains his job and therefore experiences no lessening of wage-earning capacity is entitled to 62.4 weeks of compensation benefits. For workers earning $450 per week, the value of that scheduled impairment is $18,720.

If, however, that same worker persuades a Deputy Commissioner, an Administrative Law Judge, or the Benefits Review Board, that his relatively minor injury to the arm has precluded his former longshore employment and, considering all facts such as age, education, etc., he has lessened his overall earning capacity by 50%, that employee will be held entitled to compensation benefits of $150 per week for the balance of his life. With a life expectancy of 30 years, the total compensation expense, exclusive of unrelated death benefits and medical care expenses, will approximate $234,000.

As a result, the single remaining partial disability "ceiling" -- i.e., that established by the Section 8(c) schedule -- is no longer meaningful. "Impairment of wage-earning capacity" has become the single basis for determining disability and, therefore, the unpredictability of claims cost and consequent unavailability of insurance have been greatly increased.

"Wages" Are Not Limited
To Industry Earnings.

"Unscheduled" or earning-capacity based disability awards suffer from yet another forecasting difficulty because of the current requirement that the employee's pre-injury average weekly wage include all earnings, even those earned outside the covered industry.

For example, we had a case in our office involving a full-time 37-year old longshoreman who, in the year preceding his injury, earned slightly in excess of $15,000 from water-front work. Those earnings served as the basis for the insurance premium computation. However, in addition to his longshoring, the injured worker "moonlighted" -- earning nearly $14,000 from commercial fishing activities.

On his longshore earnings alone, and assuming a 30% permanent partial disability, the worker would be entitled to a compensation rate of $57 per week. If, as the Director, Office of Workers' Compensation Programs, contends, all earnings are to be included, the worker's compensation rights leap to $112 per week. Over the worker's life expectancy, the compensation increment caused by inclusion of the moonlighting income will exceed $97,000.

The insurer "on the risk" at the time of the injury did not know that the worker was also a fisherman. The insurer's liability was doubled as a result of that outside work activity. The previously determined premiums simply do not reflect the true ultimate liability.

There is virtually no way for a self-insured employer or any insurer to accurately base premiums or anticipated costs on other than the employer's payroll data. The inclusion of non-industry earnings in the determination of pre-injury average weekly wage and, therefore, in the computation of the degree of earning capacity impairment, injects a substantial degree of uncertainty into premiums and reserve setting practices, magnifying the uninsurability of the Longshoremen's and Harbor Workers' Compensation Act risks.

(3) Unlimited Assessments For Special Fund Liabilities.

Section 44(c)(2) was enacted in 1972 and provides as follows:

> "At the beginning of each calendar year, the Secretary shall estimate the probable expenses of the fund during that calendar year and each carrier or self-insurer shall make payments into the fund on a pro-rated assessment by the Secretary in the proportion that the total compensation and medical payments made on risks covered by this Act by each carrier and self-insurer bears to the total of such payments made by all carriers and self-insurers under the Act in the prior calendar year in accordance with the formula and schedule to be determined from time to time by the Secretary to maintain adequate reserves in the fund."

We are informed that current assessments exceed 7% of each insurer's and self-insured employer's compensation and medical payments. The amount of assessment is largely dependent upon the Secretary of Labor's determination of the amounts needed for Special Fund purposes and upon the frequency of successful attempts to gain Special Fund relief in accordance with Section 8(f) of the amended Act.

The potential assessments for the Special Fund are as impossible to accurately predict as are potential increases in the nationwide rates of inflation. The current Special Fund assessment mechanism imposes upon insurers and self-insured employers a potential liability which is both unknown in amount and subject to factors over which they have no meaningful control.

The potential future Special Fund assessment liability is enormous. Occupational disease claims are becoming more and more frequent. Most occupational diseases are progressive in nature, rooted in exposures occurring during long past employments and accompanied by gradually deteriorating physical conditions. Very frequently, the company held responsible for the payment of benefits is the most recent employer, the company which has done the most to prevent toxic substance exposure and the least to cause the worker's physical ailment.

Without the prospects of Section 8(f) relief, employers would be foolhardy to hire workers with past toxic substance exposures unless those prospective employees could provide a "clean bill of health." Many workers able to continue in gainful employment but unable to provide the necessary "clean bill" would be denied work opportunities.

Through Section 8(f), the Special Fund provides an essential way of permitting employers' avoidance of monetary liability wholly unrelated to current employment practices and, therefore, an essential aid to the continued employability of many older American workers. Section 8(f) relief must remain available in appropriate cases. The method of funding that relief must change to restore significant actuarial predictability.

(4) Uncertainties Regarding The Act's Coverage.

Until the 1972 amendments, a determination of the Act's jurisdictional reach was relatively simple. If the injury occurred seaward of the "water's edge", the claim was compensable under the Act. If the injury occurred ashore, other remedies were available.

Eight years of litigation and several Supreme Court cases have brought some clarification to the issue of the Act's inland reach. In the longshoring industry, it is now relatively clear that the Act's benefits are available to all workers injured while engaged in any waterfront activity "integral" to the process of transferring cargo between vessels and land transportation systems. The jurisdictional picture facing the shipbuilding, ship breaking, and ship repair industries is somewhat foggier. The jurisdictional disputes in the "marine" construction field are just beginning.

If the benefits gained by increasing coverage certainty in the longshoring industry are somewhat tempered by a continuing lack of clarity in the other potentially covered occupations, the insurers and self-insured employers faced with the necessity of accurately assessing future compensation exposures have been totally stymied by several recent decisions, including two opinions from the Supreme Court of the United States.

As a result of the Court's decisions in Sun Ship, Inc. v. Commonwealth of Pennsylvania and Thomas v. Washington Gaslight Co., as well as the decisions from various Circuit

Courts of Appeal regarding the overlap of the Act and the maritime law, there no longer is any clear demarcation between and/or among the various remedies available to injured workers. A vessel-owning employer engaged in loosely defined "maritime" activities must obtain adequate protection against each of the following types of liability: State compensation system; Longshoremen's and Harbor Workers' Compensation Act; general maritime law; and Jones Act. All risks must be insured against because all options are available to many workers. The uncertainties and waste created by the current jurisdictional problems are obvious.

(5) Unrelated Death Benefits

Although discussed at greater length in the portion of this Statement dealing with the social insurance aspects of the Act, it must be noted that the 1972 enactment of Section 8(d)(3) and the amendment of Section 9 created a situation in which all unscheduled partial and total disability awards gave rise to a lifetime pension entitlement extending throughout the worker's life, the lives of his spouse and incapacitated dependents, and the period necessary to complete the education of his remaining dependents.

Normal and customary premium or reserve-setting practices cannot be applied to future exposures involving so many individuals and so much time. The "unrelated death" benefit provisions must be repealed if reasonable actuarial certainty can be achieved.

B. The Social Insurance Problem.

Professor Arthur Larson has commented on the relationship of the American workers' compensation scheme with other forms of social insurance:

> "While the objective of American workmen's compensation -- the protection against wage loss -- classes it with other forms of social insurance, such as old-age and unemployment insurance, it differs from them in its utilization of the mechanism of employer liability. This distinction has some important practical consequences.

* * *

> "The principal practical consequence is that the coverage of an American-type compensation act cannot necessarily be expected to follow wherever the Social Security Act, for example, might lead, . . . without some thought on whether the domestic employer's liability can be made both predictable and insurable."
>
> (Larson, The Law of Workmen's Compensation, Vol. I, §3.40, (1972 Ed.))

As noted earlier, many of the 1972 amendments were achieved without apparent thought as to whether the employer's liability could be made both predictable and insurable. This failure struck hard at compensation concepts:

> "The American workmen's compensation system is distinguishable from public social insurance in its essentially private nature, in the question of qualification for and measure of benefits, in the allocation of the burden of payment, in its retention of some relation between hazard and liability, and in its mechanisms of unilateral employer liability."
>
> (Ibid., §3.00)

The current Act contains two provisions which greatly diminish the distinguishing compensation feature of a direct relationship between employment and liability, causing many observers to conclude that the Longshoremen's and Harbor Workers' Compensation Act has become a social insurance program for waterfront employees.

(1) The Act Has Become A Retirement Program.

In its present form, the Act requires that compensation for permanent total disability be two-thirds of the worker's average weekly wages and that benefits be paid "during the continuance of such total disability."

In unscheduled permanent partial disability cases, benefits again continue throughout the disability but are paid at a rate equal to two-thirds of the difference between the worker's pre-injury average weekly wage and his post-recovery wage-earning capacity.

Modification of an existing permanent total or unscheduled permanent partial disability award is clearly permitted only upon the basis of change in medical condition. Modification or termination of benefits may not be permitted because of change in economic conditions. Indeed, at least one felon has continued to receive benefits throughout imprisonment. Presumably, the steel bars did not lessen his "earning capacity".

The prevalence of claims filed by workers approaching mandatory retirement age and seeking to augment their retirement income through compensation benefits is of especial importance to an industry, like stevedoring, with an increasingly aging work force.

Magnifying the burdens of the current lifetime benefit duration, the Act contains no authority for offsetting Social Security benefits or payments from employer-funded pension plans and other retirement sources against the benefits otherwise payable under the Act. Receipt of these multiple payments has increased the frequency of claims and the degree of alleged disability.

The Social Security Act expressly authorizes an offset provision. The fact that workers' compensation is designed to be a wage-replacement -- not a retirement mechanism -- provides a sufficient legal foundation for a Congressional offset of benefits provided through employer-funded and federally regulated pension programs.

The current practice of requiring continuation of benefits throughout the worker's life expectancy and the absence of any offset provisions for other retirement income violates traditional concepts of American workers' compensation schemes, increases the incidence of fraudulent or exaggerated claims made by workers nearing mandatory retirement age, and substantially increases the costs of Longshoremen's and Harbor Workers' Compensation Act benefits beyond those which would result from a recognition that a worker's full earning capacity does <u>not</u> extend for his full life expectancy.

The full impact of the current situation may be best appreciated by example. Assume a longshoreman working within an industry having a customary age 65 retirement. At age 62, with a fully vested pension entitlement of $450 per month and a potential Social Security entitlement of $700 per month, the longshoreman becomes permanently and totally disabled as a result of work-related injury. At the time of his injury, the longshoreman was earning $400 per week, $1733 per month.

As a result of his disability, the worker now is entitled to the following payments: (1) Longshoremen's and Harbor Workers' Compensation Act benefits of $264 per week, $1,144 per month, increasing annually; (2) $450 per month pension benefits; and (3) $700 per month Social Security benefits, again increasing annually.

The total initial "retirement income" available to the worker is $2,294 per month, over $550 greater than his gross pre-injury earnings, substantially in excess of his earlier take-home pay, and fully protected against inflationary impact.

If the worker lives out his normal life expectancy, he is assured of receiving nearly $200,000 in future workers' compensation, exclusive of the annual benefit increases, the value of his survivors' death benefits, his pension, and his Social Security. Had he not been injured, he would have earned only $60,000 to $65,000 during the remaining three years of employment available to him.

A $140,000 post-retirement "bonus" is a substantial spur to fraudulent or exaggerated claims.

For so long as compensation rates are sufficient to approximate the worker's take-home employment pay, as they now are, there can be little justification for continuing full compensation benefits into the worker's retirement years.

(2) Pensions For Unrelated Deaths.

As noted earlier, survivors of workers receiving compensation for unscheduled permanent partial disability or permanent total disability are entitled to continued benefits regardless of the cause of the worker's death.

In addition to greatly magnifying the uncertainties of the amended Act, the "unrelated death" benefit provisions

bear no rational relationship to the purposes or underlying social policies of workers's compensation. There can be no "compensation" justification for a Congressionally mandated requirement that waterfront employers provide the families of disabled workers with a fully-paid lifetime annuity.

C. The Increases In Cost And Delay.

In its current form, the amended Longshoremen's and Harbor Workers' Compensation Act cannot accomplish its paramount goal of efficiently delivering appropriate compensation and medical services to injured employees and their families.

Two major causes underlie this problem:

(1) An absence of an effective means of controlling excessive time loss and medical expenses; and

(2) The presence of an ineffective and slow disputed claims resolution procedure.

Each apparent cause is discussed more fully below.

(1) Time Loss And Medical Expenses Are Not Controlled.

This source of the excessive loss problem is, probably, the most significant. Despite the publicity generated on the East Coast, the major cause of excessive time loss and medical payments in our area is not fraudulent claims. Rather, the problem is that of exaggeration. The Association's and our own experience has demonstrated that time loss benefits are now extended and medical expenses disproportionately heightened as compared to the situation just before the amendments. Two reasons exist for this current situation.

First, the increased benefit levels in 1972 removed nearly all of the economic pressures which hastened the injured employee's return to work. For example, under the pre-amendment Act, an injured worker received only $70 per week. When compared to average previous earnings in excess of $200 per week, that amount was insufficient, and, in many cases, hastened the return to work.

With benefits at their current maximum level of $426 per week, return to work is delayed until, and in many

cases beyond, the point of full recovery. Faced with a choice between working with slight discomfort or waiting until even that slight discomfort has resolved, even an honest employee often waits.

The former medical "panel" procedures might have balanced this problem. Now, however, the employee has free choice among all physicians authorized by the Secretary of Labor to render medical care under the Act.

Section 7(c) of the Act states that:

> "The Secretary may designate the physicians who are authorized to render medical care under the Act. The names of physicians so designated in the community shall be made available to employees through posting or in such other form as the Secretary may prescribe."

Section 7(c) is discretionary. The designation has not occurred in seven years. Treatment and authorized time loss are being given by family physicians unfamiliar with the nature of the work involved and, often, wholly without appropriate medical training or experience.[1]

This problem is worsening as occupational disease claims become a more and more frequent matter. A large portion of the extended time loss problem could be relieved by the designation of physicians and by limiting that designation to Board-certified specialists proficient in treating the type of injury or ailment suffered by the worker.

Second, until 1977, many maritime employers found independent medical examinations almost impossible to obtain

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1 Some of the problems are clearly attributable to factors other than "unfamiliarity" or "lack of experience". One Association member has recently submitted an extensive report documenting conditions in one West Coast port area. The conditions and practices described in the report clearly demonstrate the absolute necessity of change to current "medical care" provisions.

with any speed at all. This problem is no longer as severe; it does, however, remain. Two reasons for this difficulty exist:

First, the Act states, at Section 7(i):

> "Unless the parties to claim agree, the Secretary shall not employ or select any physician for the purpose of making examinations or reviews under subsection (e) of this Section who, during such employment or during the period of two years prior to such employment, has been employed by, or accepted or participated in any field relating to workmen's compensation claims from any insurance carrier or self-insurer."

Obviously, nearly all Board-certified physicians have, at some point within two years of the date of the scheduled examination, received a fee for workers' compensation examinations. This provision should be deleted and the Secretary should be authorized to select as an Independent Medical Examiner any physician who is Board-certified within the required specialty who has not previously examined or treated the injured worker.

Second, problems with the independent medical examination procedures are magnified by the Section 7(f) requirements that the examining physician not be aware of any conclusion of prior examining or treating physicians. The current regulations issued by the Office of Workers' Compensation Programs require that the Deputy Commissioner or his designate review all medical reports and delete all conclusions prior to the independent medical examination.

The various districts do not have sufficient manpower to perform this function within the 2-week period required by Section 7(e). Moreover, the districts do not possess sufficient expertise to actually review and evaluate prior medical reports. Medical advisers to the Deputy Commissioners continue to spend nearly all of their time on Federal Employees Compensation Act cases.

The substitution of free choice of physicians for the former employer "panel" approach to medical care and the substantial increase in benefits have, in the absence of effective

controls over inadequate medical care and effective means of resolving disputed medical questions, greatly increased the costs and inefficiencies of delivering the Act's benefits. The problem is severe.

(2) The Claims Adjudicatory Process Is Too Slow, Expensive And Ineffective To Resolve Disputed Claims.

Many observers early concluded that the absence of effective claims adjudication procedure was a dominant problem with the amended Act.

Specific problems included the following:

(A) The creation of the Administrative Law Judge/Benefits Review Board claims adjudication procedure removed all "clout" from the Deputy Commissioner's recommendations;

(B) The method of resolving disputes took far too long and imposed far too great an additional expense; and

(C) Neither the Administrative Law Judges nor the Benefits Review Board were viewed by industry as true "judges", i.e., impartial arbiters of bona fide disputes.

Two of these earlier identified problems remain and continue to be as severe as ever. One problem -- the perception of the Benefits Review Board -- has improved substantially.

The Deputy Commissioners Have No Real Power To Resolve Claims.

The creation of the Administrative Law Judge/Benefits Review Board review procedure and the simultaneous downgrading of the Deputy Commissioners to a point where formal hearings at the initial level are not possible has, when coupled with the potential for assessed attorneys' fees, rendered the Deputy Commissioners and Claims Examiners powerless and reduced informal conferences to time-consuming exercises.

The Regulations governing informal conferences preclude the use of witnesses and prevent any stenographic re-

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porting. This informality, coupled with the requirement that the Deputy Commissioner's recommendation, if rejected by either party, not be forwarded to the Administrative Law Judge, has reduced the Deputy Commissioner and his Claims Examiners to mere onlookers at an informal bargaining session.

The amended Act was designed to provide some "clout" to Deputy Commissioner recommendations. Section 28(b), governing the assessment of claimant's attorneys' fees against insurers and self-insured employers, was intended to provide the following in all cases (except those involving denied claims):

> (1) If the employer or carrier accepted the Deputy Commissioner's recommendation, the employer would not be liable for the claimant's attorneys' fees in a later proceeding.
>
> (2) If the employer or carrier rejected the recommendation and offered to submit the case for independent medical evaluation and to tender an amount of compensation based upon that evaluation, later liability for claimant's attorneys' fees could be avoided.
>
> (3) If the employer or carrier rejected the recommendation and offered the additional compensation, if any, to which it believed the employee entitled, then the carrier or employer's further exposure for claimant's attorneys' fees would be limited to an amount
>
> ". . . based solely on the difference between the amount awarded and the amount tendered or paid. . . ."

The minimal bargaining leverage afforded employers and carriers by Section 28(b) has been greatly eroded by the Benefits Review Board's decisions regarding attorneys' fee assessment and particularly that decision holding that the phrase "based solely upon the difference between the amount awarded and the amount tendered or paid" means only that the ultimately assessed attorneys' fees shall bear a "reasonable relationship" to the amount obtained as a result of the attorney's services.

The current near-certainty that claimant's attorneys will have their fees assessed against the employer/carrier in all cases involving disputed claims and the fact that the fees awarded are exceeding $100 per hour in our area has substantially increased both the time and cost necessary to resolve claims arising under the Longshoremen's and Harbor Workers' Compensation Act.

The Current System Is Inherently Slow And Expensive.

Additional delays and expenses are inherent in the current structure. The current process of adjudicating claims and resolving appeals can be broken down into five "delay" phases:

(1) The period from the request for informal conference before the Deputy Commissioner to the actual conference date.

(2) The period from that informal conference to issuance of the required Memorandum and Recommendation.

(3) The period from either party's rejection of that Recommendation until referral to the Office of Administrative Law Judges for formal hearing.

(4) The period from the referral for formal hearing to actual issuance of a decision by the Administrative Law Judge.

(5) The period from the issuance of that decision and until issuance of the Benefits Review Board's final decision on review.

The data contained in the Report to the Senate Committee on Labor and Public Welfare by the Comptroller General of the United States, January 12, 1976, and the OWCP Task Force Report of December, 1976, disclosed that parties then faced the prospect of approximately a 2-year period from the request for informal conference to decision by the Benefits Review Board. Between 1977 and 1979, there was some improvement. However, the current backlog at the Benefits Review Board has again lengthened the delay. There is little prospect for improvement without legislative action.

In addition to the approximate 2-year period required to process a case through the basic administrative levels, serious disputes requiring a decision from the appropriate United States Court of Appeals will involve at least an additional 18 months. In the Ninth Circuit, a minimum of two years will elapse from the time the Benefits Review Board opinion is appealed until the date of the Circuit Court's decision.

The amended verion of the Act does not meet its stated goal of reducing

> ". . . the social costs of lawsuits, the delays, crowding of court calendars, and the need to pay for lawyers' services . . . ."
>
> (S.Rep. 92-1125, p. 5)

and has hindered the delivery of the increase in actual benefits to the injured workers.

THE CURE: PROPOSED AREAS OF CHANGE

Eight years of laboratory experience with the current version of the Longshoremen's and Harbor Workers' Compensation Act has convinced the Association that massive change is needed. We are convinced that all of the following is essential if private insurance is to return to the waterfront compensation insurance market with at least the vigor demonstrated in other high-risk markets such as medical malpractice and products liability insurance.

Revisions Necessary To Correct Current Major Uncertainties.

(1) Current provisions permitting unlimited "cost of living" escalation of permanent disability awards must be either repealed or amended so as to impose clear limits on the potential escalation.

(2) Death benefits must be subjected to the same maximum limits as are applicable to cases of permanent and total disability.

(3) A dollar ceiling on permanent partial disability awards must be reintroduced and, if the distinction between "scheduled" and "unscheduled" awards is to be maintained, the distinction should be made clearly exclusive.

(4) Compensation benefit levels must be based solely upon wages actually earned or available within the industry in which the worker was employed at the time of his injury.

(5) The Special Fund funding mechanism must be altered and a ceiling placed upon the assessments potentially facing employers and insurers.

(6) The current jurisdictional situation must be clarified with clear demarcations established among the various remedies now available injured "maritime" workers.

(7) Those provisions providing "unrelated death" benefit entitlements must be repealed.

Revisions Necessary To Assure The Necessary Relationship Between The Act And Employment Hazards.

(1) The "retirement system" aspects of the current Act must be erased by provisions either (a) lowering compensation benefit entitlement at customary retirement age to an amount representative of post-retirement "earning capacity" or (b) assuring that "retirement" benefits actually received by disabled workers are credited against the amounts otherwise payable by the former employer.

(2) The fact that current maritime employers are being saddled with many costs -- such as those arising from asbestos-related disease primarily attributable to World War II shipyard employment -- more properly allocable to society as a whole must be recognized by increased federal participation in the liabilities of the Special Fund.

Amendments Necessary To Speed The Claims Resolution Process And Prevent Abuse And Unnecessary Expense.

(1) The pre-1972 Act's former medical "panel" provisions must be re-enacted or rigorously enforced standards governing both the sufficiency and cost of medical care adopted.

(2) The instances in which claimants' attorneys' fees may be assessed against employers must be narrowed to restore some "clout" to proceedings before the Deputy Commissioners.

(3) Provisions designed to assure that the Act is administered in a manner coincident with Congress' intent must be introduced.

On this issue, the Association notes Assistant Secretary Elisburg's recent statement that

> ". . . The Department of Labor . . . [has] . . . an obligation to determine coverage in the maritime industries to protect the greatest number of persons. . . ."

Mr. Elisburg's statement reflects the source of much that is wrong with this Act. The Department's proper role is that of implementing those policies determined appropriate by Congress. The Department has no other "obligations".

Developments since 1972 have clearly demonstrated that Congress' policies must be expressed in precise language if Congress' intent is to survive later administrative action.

CONCLUSION

Recent legislative proposals would go far to resolving many of the problems currently facing Association members. Additional work is, however, necessary.

The situation has worsened constantly since 1972. Experts predict future deterioration. Action is needed.

The CHAIRMAN. Thank you very much, Mr. Lindsay. I did not have a chance to read your statement, I will confess, before the hearing. But I will turn to it later.

Thank you for it and for the study you have. If you want to leave that—I trust you have copies still in your——

Mr. LINDSAY. This is the only one I have. This has been submitted to the Department of Labor to Mr. Elisburg and all the Deputy Commissioners involved. That was given to them about a month and a half ago.

The CHAIRMAN. All right.

Other statements?

Mr. NOLAN. Mr. Chairman, I would like to ask you to hear from Waldo Bridges, who will tell you about a situation he encountered in Houston, Tex., which illustrates our problem. I do not think it is altogether unusual, as we would like it to be, but we would like you to hear about it.

The CHAIRMAN. Mr. Bridges?

Mr. BRIDGES. Mr. Chairman, my name is Waldo Bridges, workers' compensation claims administrator with Shippers Stevedoring in Houston, Tex.

I have a case here that I would like to refer to and it is nothing out of the ordinary. I would like to illustrate what we are faced with here in dealing with the L. & H. program. This is an individual who was working in the hold of a ship where a lift machine was being used and the lift machine was dripping oil, and it developed a problem with traction.

Another longshoreman picked up a bag of corn starch, spread it out on the floor and this longshoreman complained of respiratory problems. He went up and was seen by an internist and a pulmonary specialist. His attorney got him to a psychiatrist. His psychiatrist testified that he was suffering from an anxiety reaction; the judge placed him on temporary total disability. He stayed on temporary total disability from September 13, 1974 to approximately October of 1979. At this time, the psychiatrist testified that he would never be able to work in the hold of the ship again. So the claim was ultimately referred for a second formal hearing.

On the morning of the second hearing, it was decided that the claim should be settled, due to the uncertainty of the outcome. The same claim was settled for $95,000 to the claimant, $5,000 to the attorney. This was conveyed to the administrative law judge and an order was issued; the claim was disposed of. However, during conversation with the administrative law judge, he said that it was fortunate that the claim was settled for he would have found the claimant to be permanently disabled.

After the man got the $95,000, he returned to work in approximately 6 weeks. From the time he returned to work, until July 1980, he worked 36 weeks and maintained a subsequent average weekly wage of $511.60.[1] This is the same individual that the administrative law judge would have found permanently and totally disabled, the same individual who a psychiatrist testified would have never been able to work in the hold of a ship again. However, on July 16, this man reported another injury. He said he was in the hold of a ship working and slipped in some water and hurt his

[1] As compared with a prior average weekly wage of $296.03.

back. He got the same attorney representing him. This claim is on the same claimant and it will cost probably another $95,000 before it is disposed of.

This is what we are dealing with. We are not here to ask you to take away any benefits; we are asking you for assistance in the areas where we see a great abuse.

Mr. Elisburg made several statements this morning, with which I personally do not agree, about rehabilitation. Rehabilitation, in order to be effective, must be mandatory; if a claimant refused to be rehabilitated, we have no recourse. The burden of proof is upon us to show that there is alternate employment available for a man within his geographical area and well within his restrictions and limitations.

Section 7—medical—it is being abused. Physicians are treating well out of their practice, stating that they are rendering treatment that is actually not being rendered. A chiropractor is recognized as a physician. We have cases where a chiropractor treats a knee injury, an elbow, and so forth. Section 10(f) of the act should be capped at some realistic figure.

Another area of great concern is section 8(d) of the act—unrelated death benefits. If a man is found permanently—temporarily disabled, walks across the street, is struck by a truck, another car, we should not have to pay death benefits on those cases. We're not in the life insurance business.

Jurisdiction is just as complicated as it was 4 years ago. Section 31—well, the investigative office indicates that they will give us some assistance in the prosecution of fraudulent claims. I find that to be untrue. Section 8(c) (1) through (20) specific injuries. If a claimant collects his money for a specific injury, he can then come back under 8(c)(21) for loss of wage earning capacity. Individuals will willfully hold themselves off the job market in order to build up a greater loss of wage earning capacity—we need assistance in these categories.

Also, I believe Mr. Leonard indicated this morning that there is very little being done in regard to safety. We think safety is of great importance—loss control and loss prevention. We stress this each and every day. These are just some of the areas that we seek assistance, and I appreciate your time.

Any inquiry I will be more than happy to answer. I deal with claims on a day-to-day basis and hopefully I should be able to give some input, helpful input.

The CHAIRMAN. What is your position now, Mr. Bridges?

Mr. BRIDGES. I am claims supervisor, claims manager with Shippers Stevedoring in regard to longshore claims and I also handle some property claims.

My background: I spent 4 years with the Texas Employers Insurance Co. I was a claims examiner with the Department of Labor in Houston for approximately 3 years.

So I have seen claims from both sides.

The CHAIRMAN. Do you ever go to the initial hearings on any of these claims?

Mr. BRIDGES. I represent Shippers Stevedoring before the Department of Labor at the informal conference level, the prehearing level, and then at the formal hearing I turn it over to counsel.

The CHAIRMAN. You are in on the—in the first stages of the perfection of a claim?

Mr. BRIDGES. I am in on the claim from the day it happens, up until it is concluded. In a severe injury, I am notified the minute it takes place.

The CHAIRMAN. Have you studied these bills that have been introduced that respond to some degree—in some degree to the problems that you people are presenting?

Mr. BRIDGES. Not in its entirety.

The bills that you referred to, S. 420——

The CHAIRMAN. How many bills do we have that deal with these?

Mr. BRIDGES. OK. Yes.

The CHAIRMAN. The two that I mentioned this morning: Congressman Erlenborn has a bill, Senator Nelson from this committee has a bill. You are familiar with those?

Mr. BRIDGES. Yes.

The CHAIRMAN. This is not specifically a legislative hearing. Do they deal in good measure with the situations that are so troublesome to you?

Mr. NOLAN. We believe they do, Senator.

Mr. LINDSAY. On the west coast, we think Erlenborn II very much does.

Mr. NOLAN. Senator, if we may, I would like Mr. Rick Smith to address the committee.

The CHAIRMAN. Fine, Mr. Smith.

Mr. SMITH. Thank you, Senator.

My name is Rick Smith, and I previously testified before the House committee last October with regard to our problems of securing the type of insurance coverage for L. & H. Act on the west coast.

I am here now on behalf of the NAS and the situation is getting worse and not better. Mr. Elisburg commented this morning that in California now there are two new carriers entering the market. That may be true with regard to the small boat owners or small shipyards but not anyone who has substantial L. & H. coverage. It is going exactly the other way.

In October when I testified in front of the House committee, there were approximately four carriers left on the west coast of the United States who would write L. & H. coverage. By that, I mean ground up. You could go to that carrier and say to him: "What will it cost me per $100 of payroll to insure my men?" Today, we recently were in the marketplace in August of this year for a rather large container operation in the Port of Seattle. We handle all of the Japan six lines, many of the foreign lines, and including two American lines. We went to the total marketplace. Only one carrier would quote L. & H. coverage to us. That carrier was INA, a very large carrier in the United States. The only problem is they would quote it on a cost-plus basis. So in effect, no insurance.

What I am trying to get back and across what Mr. Elisburg is addressing, is small carriers coming into the market to insure very minor coverage but not the major L. & H. coverage that comes under this act.

In 1972, approximately 90 percent of the west coast was insured. Today, 85 percent is self-insured and the other 15 in effect are. We

have an insurance policy but it is on a cost-plus basis. So 10 years down the road from today we will still be paying for losses that were sustained and we cannot buy insurance for that.

Thank you.

Mr. Chairman, if I could comment slightly on the Canadian diversion comment that was made earlier this morning.

One of our major competitors is Vancouver, Canada, and it is true that there is cargo being diverted through Vancouver, Canada, that currently could move through our U.S. ports. This is not just United States origin cargo; this is also Canadian origin cargo. It depends upon, of course, the railhead connections.

But at the present time, if you look at the Canadian insurance cost, with the exact same union—the ILWU in Vancouver, Canada—and look at our insurance costs or self-insured cost, they are almost triple for the exact same wage base. The Vancouver longshoremen receives almost the exact same wage as our Seattle-based longshoremen with the same ILWU union representing them. But their compensation costs—and I do not know how they arrive at it—are about one-third of ours in the lower area. So for this 20-percent cost differential, there are instances when cargo is diverted.

Thank you.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF F. D. (RICKY) SMITH, PRESIDENT, SEATTLE STEVEDORE CO.

I am appearing today as President of Seattle Stevedore Company and our related stevedoring firms. As President, I handle on a daily basis the offering of stevedore services to various steamship lines in the ports we serve in the Pacific Northwest. My comments will be made from the viewpoint of the stevedore company's ability to provide stevedoring services in our area and how they are drastically affected by the costs of the Longshoremen's and Harbor Workers' Compensation Act.

I joined Seattle Stevedore Company in 1962 upon graduating from the University of Washington Law School. With my background, I became immediately involved with our insurance programs and for the last 17 years I have negotiated our insurance rates on behalf of Seattle Stevedore with various carriers who have quoted on our L & H Act coverage.

When the USL&H Act was amended in November, 1972, as stevedores we were under the impression that our insurance costs would be reduced or would stabilize due to the removal of the third party lawsuits which had become commonplace in our industry.

From 1972 until about 1975, our rates were somewhat stable and increased in about the same proportion as did the rate of inflation. In 1975, the insurance companies who had been providing us

coverage for 20 years started to review the effects of the 1972 amendments and their reserves for this so-called long-tail business, and raised dramatically their reserves on all of our outstanding injury claims.

Since 1975, for all practical purposes, the large stevedoring companies, with substantial payrolls, have therefore become uninsurable for our primary workmen's comp. insurance.

The result has been that most of us have gone to a self-insured status for the primary coverage and in some cases, in the excess area, not insured at all.

As the primary carriers withdrew from the market, the excess carriers also would only quote in the higher ranges which resulted in our excess markets also disappearing. We have been self-insured for the last six years. In that time we have had seven different excess carriers with a very limited market within which to solicit business. In four instances, our excess insurance was cancelled by these carriers who simply stated they were no longer accepting L & H Act risks. In every instance except one they had not received a single claim from our company for losses, but upon reviewing their exposure under the L & H Act, they said they could not charge us sufficient premium for the disastrous potential of a multiple-death accident.

Prior to 1972, for 15 years, Seattle Stevedore had used only two carriers for our L & H Act coverage with a substantial market available with good companies who had strong track records, such

as Fireman's Fund, Hartford and Liberty Mutual. Today these companies will not even quote on our business and we are insured by carriers such as Bellvediere, Mentor, and Pinetop. I am sure many of the people seated here have never even heard of these insurance companies.

In summary, the 1972 amendments have made the stevedoring industry uninsurable in the primary benefit area, and in the excess market insurable only to set limits. But as I am sure you are aware, the L & H Act has no limits and for that reason most stevedores are uninsured in the higher excess areas. It is not that we want to be in this position of jeopardizing our firms. It is simply that since the changes in the Act, the insurance carriers refuse to quote statutory coverage and insist upon maximum dollar limits.

With the above background, I appreciate the opportunity to testify here today to try to explain to this committee the difficult burden that has been placed upon the stevedoring companies in our area, and, I assume, throughout the United States, by the drastic costs of our insurance coverage.

As a stevedore in the Northwest, we are quoting services for handling cargo to and from vessels and barges, which primarily trade between the Northwest and the Far East, and to and from Alaska. When we are quoting rates to our various customers, we include in those rates the cost of our labor, the insurance and taxes on that labor, the equipment that is needed to complete the operation, and the administrative load to supervise the operation, with a profit to the stevedoring company. When we are bidding a

job, due to the insurance aspects of our business, we are at times only guessing at what our costs will be to provide our stevedoring services because our insurance costs are not fixed. We cannot go out in the market place and purchase insurance like most industries can, as it is simply not available. The result is we must quote our stevedoring services and gamble the insurance costs, which is opposite to almost any other industry that is providing services to its customers. The result is we provide our stevedoring services and hope that our insurance costs will not reduce the margins in the rates to the point that we experience an out-of-pocket loss.

As an example, Seattle Stevedore Company is competing for the movement of pipe and miscellaneous equipment to the North Slope. We quote our stevedoring services to barge lines in the Northwest, who, along with their barge costs, quote an overall rate to the oil companies who are doing the drilling and various exploratory work in the North Slope of the Artic. Our competitors are the Canadian truckers and barge lines who also quote to the same oil companies the movement of these materials over Canadian roads to Hay River, and then barge the material down the McKenzie to the North Slope. The stevedoring costs of the overall movement is probably 30% of the total costs, and between our costs for labor and insurance, we are probably 50% higher than a Canadian competitor in the same business. The result is that for the last two years we have, in effect, lost this busines . Even though this is American

oil and American companies who need these materials, the American stevedoring costs have made our industry uncompetitive vis-a-vis our Canadian counterpart. Almost all of this cargo now moves to the North Slope through Canadian ports, instead of United States ports.

Another more tragic example of high stevedoring costs is the case of apples from the Northwest to Saudi Arabia. In this instance, in effect, it is our apple growers who suffer the lost business because the transportation services that are absolutely essential to proper delivery of apples to the Middle East are becoming uncompetitive with other countries, such as Chile and France. Even though we have a better quality product, it is becoming prohibitively expensive to deliver it to the Middle East. Apples are perishable and are a hand-handling type commodity. We therefore employ a lot of longshore labor and must hand stow each box of apples in refrigerated vessels. The stevedoring costs approach 20 to 25% of the original price on the box of apples. Therefore, when we quote rates for services, which must include almost a $5.00 per hour insurance cost, this increases the price of the apples delivered by as much as 25% just for our portion of the services. In many instances, the Chilean apples then get the business and our cargo simply does not move to the Middle East.

Living in the Northwest, we commonly discuss with the various growers of agricultural products our problems in our port areas. When they are paying 20 to 30 cents per hour for their insurance

costs to their laborers and truckers, and we tell them we are paying $4 to $5 per hour for our insurance costs, they simply cannot believe it. The difference in exposure to accident is not our major problem. Our major problem is we have an Act so liberal in benefits, and in some instances without limits of exposure, which has resulted in a tremendous loss potential, and therefore a hedging by all stevedoring companies to try to avoid this potential high expense. The result, though, is that our agricultural products, which were originally very competitive in the world market, become uncompetitive when they must be loaded at a United States seaport, versus their competitors from Canada, Chile, France, or many other countries throughout the world.

I point out to you who the real loser is when stevedoring costs become prohibitive, as we are only servicing the transportation industry. When our rates become uncompetitive, it is the product that suffers the ultimate costs of our insurance problems. It is well known in the water transportation business that agricultural products are the biggest users and the most vulnerable to high longshore costs in the U. S., due to the nature of most agricultural products requiring substantial longshore labor to be properly delivered to an overseas market.

The above two instances I have detailed to the Committee are to point out to you the very competitive nature of our services to the world transportation business. It is therefore imperative

that we not legislate ourselves into a completely uncompetitive position, as the ultimate burden is borne by the commodities that need to be exported and the various jobs in not only the transportation business, but also the producing and raising and the inland transportation of our agricultural products; in the case of materials to the North Slope, the loss of barge and tugboat jobs, along with the longshoring services, which go to our Canadian competitors.

The second item I would like to briefly touch upon is my earlier comment that most stevedores are uninsured at certain levels of our potential liability. In today's market place, it is almost impossible to get any carrier in the United States, London, Bermuda, or any other world market to quote L & H Act coverage above $20 million for any accident or occurrence. Under the current L & H Act, the potential losses, if we had a Texas City type explosion in one of the ports served by Seattle Stevedore Company, would substantially exceed our coverage and our company would potentially be bankrupt. We cannot, for all practical purposes, buy insurance above a $20 million level, even though we commonly will have 60 to 100 workers on one vessel in one exposed work place. We are reasonably certain the day is going to come when a stevedoring firm will be bankrupt by such a catastrophic accident. It is unique to our industry that we cannot buy insurance for a catastrophe that most prudent businessmen would consider the very area that everyone secures insurance coverage. The primary reason we cannot purchase this insurance is that our L & H Act has so many areas of undiscern-

ible limits and an escalation factor that makes today's claims climb to unbelievable amounts in the future.

In summary, as a stevedoring company, we are offering our services in a competitive makret where we are hedging our costs because of an unknown insurance factor, thus making our services very expensive and in some cases not competitive. This is resulting in loss of business. At the same time we are fully aware that if we have a catastrophe, we would quite easily bankrupt ourselves. The men and their familiies would not be covered by insurance.

My testimony before the House Committee on Education & Labor last October detailed these same areas of concern that we have, as a stevedoring contractor with payrolls in excess of 30 million dollars. We want to protect our workers and provide the proper compensation when they are injured, but we have been given an Act for which major insurance companies refuse to provide insurance -- insurance which is available to all other industries who have mandatory workmen's compensation for their workers.

Thank you for this opportunity to present the business side of our insurance problems to you. If I can provide any further data or can answer any questions to clarify these points, I would be most happy to do so.

The CHAIRMAN. Now, this committee in another of its responsibilities looks to Canada to learn approaches and read their experience. National health insurance is one of the subjects before us here, and I know Senator Kennedy has been to Canada and learned a great deal from their national health insurance program there. I was up there yesterday on another matter but heard some very favorable reports on their response to individual needs through government programs of insuring health care.

Would you recommend we go up and look or ask them to send to us a report of their compensation coverage?

Mr. SMITH. Of course, only speaking of one individual company, we would not encourage national health care possibly because we might look at how they treat permanent/partial disability, how they treat different deaths, and how they treat the same situation.

I think you will find many other things that we are complaining about that in Canada they do not have the open-end.

The CHAIRMAN. What is their basic system of workers' compensation coverage?

Is it province or national?

Mr. WILCOX. It is provincial. Each province has its own law and administers its own law. There is no national law in Canada that covers all Canadian workers. But every worker in that province is covered by the same law.

The CHAIRMAN. What is the most western province where Vancouver is? What benefits do they pay for workers' comp on disability?

Mr. SMITH. British Columbia is the western province for all their west coast ports.

The CHAIRMAN. Do you have any idea what their basic level is?

Mr. SMITH. No; this I do not.

The CHAIRMAN. You do have their premium rates though?

Mr. SMITH. Yes.

The CHAIRMAN. One-third of yours?

Mr. SMITH. Approximately one-tenth of the payroll, which is about one-third of ours; yes. We see this on many invoices to the customer that we handle in the U.S. port.

Mr. NOLAN. Mr. Barbera in his prepared statement has commented on the level of benefits.

The CHAIRMAN. Tell us about it.

Mr. BARBERA. This is on the east coast. I would just go into that part.

Prior to 1972, U.S. stevedores and terminal operators were competitive with their Canadian neighbors. Since then, many insurance companies have retreated from the market and those few which are willing to offer coverage are forced to charge enormously high rates. Alternative programs such as assigned high-risk programs are not remedies. Since the cure is not in the structure of the insurance plan but in restructuring of the legislative plan. Our industry has witnessed escalating premiums which have been translated into higher rates for shippers served in the New Jersey-New York port facilities and ultimately higher consumer costs. Our rates have been unrealistically burdened by workers' compensation costs under the amendments resulting in diversion of cargo to Canadian ports. In an industry where competitive advantage is

measured in pennies per ton of cargo, we have forced a situation where our cost-per-container lists are dollars over our Canadian counterparts. A recent informal study revealed that our container costs are 30 percent greater than those charged by Canadian ports. Virtually all of the differential is attributable to workers' comp costs. A major factor is that under Canadian law the Ports of Halifax and St. Johns, the northeast competition, experience a maximum benefit of $216 versus $426 for U.S. ports. This abnormally high level of U.S. benefits combined with the problems cited above make workers' compensation costs our greatest expense element after wages, in our case representing approximately 8 percent of our total costs.

That is all I have on that.

The CHAIRMAN. These are maximum figures, at least $426 for U.S. ports, that is the maximum rate?

Mr. BARBERA. That is the current maximum, sir.

The CHAIRMAN. How about $216?

Mr. BARBERA. That is the maximum currently there.

The CHAIRMAN. How do they cover theirs? Is it private coverage or government coverage?

Mr. BARBERA. I cannot answer that, Mr. Chairman.

Mr. WILCOX. It is government program run by the Province of Nova Scotia; all payments are made to the Nova Scotia Worker Compensation Board. They administer the program.

The CHAIRMAN. Why did you pick the Ports of Halifax and St. Johns? What about Montreal? Is not that a major shipping center?

Mr. BARBERA. It is becoming one, Mr. Chairman. Heretofore the Port of Montreal was protected in tariffs through the Port of New York but it is becoming each day a more competitive aspect from the northeastern sector. Presently Halifax and St. Johns are the fiercest competitors that we have in the northeast sector on the Canadian side.

The CHAIRMAN. It would be interesting to see whether the injured worker is covered under the national health insurance program, too. You might find something that you would like about national health insurance. Lindsay got a very glum face at that point.

Mr. LINDSAY. I did not get a glum face. I was thinking of Norm Leonard this morning telling about the great productivity achievement that we achieved on the coast. Last year, the average longshoreman made $30,000. Going back from 1970, he was making about $11,000. So in line with productivity increases have come rather good wage increases.

The CHAIRMAN. Which you approve of?

Mr. LINDSAY. Certainly do.

Mr. SMITH. To show you what cargo gets diverted, I will give you an example.

In Seattle, we handle almost all the containerized inbound cargo that is going to Vancouver, Canada. The reason for that is because we have substantially better facilities and containerized cargo is a very low man-hour item and a very high equipment terminal and vessel cost. But in the exact opposite, we had about 300,000-ton-per-year customer who brings cargo in a break bulk type vessel. That is about a 75-percent labor factor cost diverted to Canada. So this is

what is happening to us and it is primarily due to the problem we have with workmen's compensation and that therefore increased our cost per man-hour. Our productivity is very similar to Vancouver, Canada, but our cost is 20 percent more and for 20 percent they can afford to take the ship to Vancouver and then ship the steel by rail to the midwest parts of the United States.

The CHAIRMAN. Any more statements?

I am interested in so many things here and I have to keep an eye on the clock too.

Mr. Nolan, you described a situation of the unrelated death. It puts you in the situation, as you say, of being a life insurance provider; that can arise out of both the total disability situation and the partial permanent.

Mr. WILCOX. Right.

The CHAIRMAN. The partial permanent—and either in scheduled or unscheduled partial permanent, either way.

Mr. LINDSAY. Unscheduled.

The CHAIRMAN. Unscheduled.

What would be the situation in a scheduled?

Mr. LINDSAY. Then you would have to pay it out. It is a number of weeks times a certain amount of dollars.

The CHAIRMAN. Until the individual had switched over, it would be a payment of—to the survivor—of the balance under the scheduled amount?

Mr. LINDSAY. Yes.

The CHAIRMAN. But if the individual is in the unscheduled, payments go on for how long?

Mr. LINDSAY. During his life expectancy. It does not end at his normal retirement age.

The CHAIRMAN. In other words, how is that permanent partial unscheduled described? Is it in terms of a percentage of the usefulness of the body; is that right?

Mr. LINDSAY. Theoretically, it has to do with none of the given specific arms, legs. It has to do with the difference between the so-called impairment of the earning capacity. You arrive at what you thought he did before. Call it x, and now he has the injury he can only do y; you subtract y from x and take two-thirds of it and that is how he gets compensation benefits.

The CHAIRMAN. And that reduces itself down to a weekly amount and is paid out as a weekly benefit?

Mr. LINDSAY. Yes.

The CHAIRMAN. There are other systems where that is described in terms of the usefulness of the individual, call it earning capacity, and maybe the individual is 5 percent less effective. Then that is put into, not a weekly benefit, I think it is put into a total number and paid out on a weekly basis until the total number is exhausted.

Are any of you familiar with that approach on permanent partial?

Mr. LINDSAY. The permanent partial does not go on forever under State compensation law. The only one I am familiar with is New Jersey. It is paid; it reaches a terminal point. It is not forever.

But under this act, it is forever. We are suggesting that it either gets cut off at the normal retirement age or give it the same

weight you would with respect to the scheduled one which is the maximum of 312 weeks. But to put a cap on it so that these people can make it more predictable in terms of giving us insurance.

The CHAIRMAN. What is the maximum weeks again?

Mr. LINDSAY. 312.

The CHAIRMAN. Where does that appear?

Mr. LINDSAY. That is the most that you can get for a scheduled injury.

The CHAIRMAN. That would relate to what I was describing?

Mr. LINDSAY. Yes, it would, total.

The CHAIRMAN. Percentage of the total?

Mr. LINDSAY. Yes.

The CHAIRMAN. That is the total?

Mr. LINDSAY. Yes.

The CHAIRMAN. You could make a judgment of what percentage of effectiveness is lost?

Mr. LINDSAY. Yes.

The CHAIRMAN. Are there any cases that you know of; is this happening all the time where a permanent partial unscheduled is producing a life insurance policy for the survivor?

Mr. NOLAN. It will.

The CHAIRMAN. Has it?

Mr. NOLAN. Everybody has to die some time.

The CHAIRMAN. But has it? Do you know of any cases?

Mr. NOLAN. Whenever there is a surviving spouse or minor child, there will be in the death benefits.

The CHAIRMAN. Has this then been raised in any way? Do you know of any cases?

Mr. NOLAN. There are instances of it, yes. But it is like a time bomb, as the men get older it will happen in every case that exists.

The CHAIRMAN. Someone said that this bill, the 1972 amendments, were worked out at midnight one night and then went into law. I guess there were some midnight meetings, were there not, Mr. Lindsay?

Mr. LINDSAY. Yes, sir.

The CHAIRMAN. I guess there were some that went on until 4 o'clock in the morning; am I right on that?

Mr. LINDSAY. You are right.

The CHAIRMAN. But there was a long period of development of the 1972 amendments. I was not in on any of those late night sessions, but it was a long period of development and all interested parties were gathered; am I right?

Mr. LINDSAY. You are right. Although you should recall—or Mr. Leonard was present there from the ILA—some things were sort of worked out in the so-called late night session but then the bill that resulted had language I think some of us had never seen before. To this day, I do not know where the unrelated death benefits came from.

The CHAIRMAN. No staff here can take credit for that.

Mr. LINDSAY. No, no. Jerry Fader and Don Elisburg have all the credit.

The CHAIRMAN. I think it is some of Senator Javits' former staff.

Mr. LINDSAY. Yes; he was very much present.

The CHAIRMAN. First, coming to the jurisdiction question.

The Assistant Secretary has stated that Supreme Court decisions in the *Caputo* case and the *Ford* case have largely settled questions of coverage.

Are you familiar with the *Caputo* case and the *Ford* case?

Mr. LINDSAY. Yes.

The CHAIRMAN. In the consolidated case involving Caputo and Blundel, according to Mr. Elisburg, the court conclusively rejected the point-of-rest concept in longshoring.

Then, in the *Ford* case, again Mr. Elisburg says the court resolved the question of what is encompassed by the term "longshoring operations." In Mr. Elisburg's view, the import of these decisions is that coverage of all operational line employees in the industry is now established and coverage of employees remains unresolved only with respect to the incidental waterfront workers involved with recordkeeping and with maintenance repair and scrapping of equipment used in cargo handling.

I wonder if you would agree that the court has now largely clarified the scope of the act with regard to the question of coverage of operational line employees?

Mr. WILCOX. I would say no.

What the Supreme Court did in the second case—what it said was that longshoring included, or maritime employment included, the handling of cargo from the vessel to inland transportation. They specified the handling of cargo.

Now, if you stick with that decision, you think you would understand what longshoring is at least as of the latest Supreme Court decision. But the Department insisted on making benefits be paid to people who do not handle cargo between the ship and inland transportation. They include repairmen, forklift painters—people who do this type of work. If the Department would follow the Supreme Court decision, I think we would understand what is going on. But each time there is a Supreme Court decision, the Department takes the next series of cases, the next layer off the pier. Secretary Elisburg has said his function is to include as many workers as he can under the definition of maritime employment, whether they be fully engaged in maritime employment or not. As long as that process of the Department continues, you will never know where jurisdiction begins or ends.

The CHAIRMAN. Which case is it that you see as describing the longshore employment when it reaches the land transportation; is that what you are saying?

Mr. WILCOX. It is the *Diversion Ford* case and it is cited in our statement.

The CHAIRMAN. The *Ford* case?

Mr. WILCOX. Yes, sir. I can get you the citation for it. I do not think we referred to that one specifically, but the Supreme Court in a later decision decided that it was probably not worthwhile to decide jurisdiction, so they reinvented the twilight zone, which now covers everything from the water's edge to wherever. The Supreme Court has said we will let the worker file State or Federal and then let somebody else figure out which benefit he gets, but he can only keep the higher of the two. He cannot keep both.

The CHAIRMAN. Which case is this?

Mr. WILCOX. *Sun Ship* v. *The Commonwealth of Pennsylvania,* which is a strange case in which the Pennsylvania law provided higher benefits than the Longshore Act did for a facial disfigurement. So the intelligent attorney then filed his claim under Pennsylvania law and the shipyard defendant said no, it is covered by longshore. It preempts State law. The Supreme Court said no, Congress did not intend in 1972 to preempt State law. What Congress intended in 1972 was to dump the Longshore Act on top of State law and let the claimant decide which one he wanted to go under, and he could go under both and he could keep the benefits that were higher. This is the situation that we are in now.

The CHAIRMAN. That is the last Supreme Court statement on jurisdiction?

Mr. WILCOX. That is the last Supreme Court statement on jurisdiction. It was decided June 23 of this year.

The CHAIRMAN. What was the actual work assignment of the individual in that last case?

Mr. WILCOX. I think the *Sun Ship* case is clearly a Longshore Act. He was working somewhere in the shipyard in Chester, Pa. I do not know what the exact occupation he had. We can get a copy of the decision and send it to the committee if they would like.

On page 11 of our statement, the Supreme Court's reasoning is the same as ours. The line that circumscribes the Longshore Act, the situs and status test which they have held since 1972, is no less vague than its counterpart in the pre-twilight-zone Jensen era. Then they go back and describe how their view of the pre-twilight-zone Jensen era was. They describe it as a "jurisdictional monstrosity."

What the Court has done is to superimpose everything together, and said fight it out and decide which jurisdiction later. We, the Court, have just about washed our hands of it.

The CHAIRMAN. Whose opinion was it?

Mr. WILCOX. I think it was a 9 to 0 decision.

The CHAIRMAN. Who wrote it? Do you have any idea?

Well, we will look it up.

Mr. WILCOX. I am not sure, but I can get a copy of it for you.

The CHAIRMAN. How does the Second Injury Fund work in practice? Who is the moving party to get into the Second Injury Fund? Anybody know?

Mr. LINDSAY. The employer.

The CHAIRMAN. What does the employer say?

Mr. Bridges can offer on this too.

What does the employer say when he comes into the Deputy Commissioner, I guess, and moves to put it into the Second Injury Fund?

Mr. BRIDGES. Yes.

The CHAIRMAN. What does he say?

Mr. BRIDGES. There are several requirements that you must satisfy. No. 1, there must be a preexisting disability.

The CHAIRMAN. Say that again?

Mr. BRIDGES. There must be a preexisting——

The CHAIRMAN. Must be; OK.

Mr. BRIDGES. That contributes to the overall disability.

The CHAIRMAN. Known to him at the time of employment; right?

Mr. BRIDGES. Say what now?

The CHAIRMAN. I thought it was the sort of thing that had to be known to the employer at the time of the employment.

Mr. BRIDGES. There must be manifestation or availability of records.

Mr. WILCOX. It was changed by decision of the third circuit about 3 years ago. The special fund arrangement is patterned after the New York law which requires prior knowledge or knowledge of the preexisting injury.

The third circuit came down 3 or 4 years ago and said no, you do not have to have knowledge. If you have the opportunity of obtaining that knowledge, you have it—special fund. So in essence now for anybody who has any kind of a preexisting condition, the employer would have the opportunity somehow to find out. Therefore, that qualification——

The CHAIRMAN. Somewhere there was a record?

Mr. WILCOX. Right. Somewhere there is a record and you have the opportunity of finding it. The Benefits Review Board has gone so far to say: "A record in a doctor's office, and you do not know who the doctor was, you would have the opportunity to know about this record; therefore, it qualifies as a preexisting condition.

The CHAIRMAN. This now is the national situation?

Mr. WILCOX. Longshore Act; yes.

The CHAIRMAN. It started out in the third circuit; that kind of reasoning applies in the other areas?

Mr. WILCOX. The Labor Department, like most Federal agencies, will pick the circuit which is most favorable to their position, and if the fifth and seventh said no and the other said yes, the Labor Department will say yes.

The CHAIRMAN. Is it at the first level that the Deputy Commissioner makes this determination and normally makes it Second Injury Fund?

Mr. BRIDGES. You draw up an application and it is submitted to the Deputy Commissioner's Office for consideration. They then in turn will forward it to the national office and a determination will be made whether to accept or reject, and then it could go to a formal hearing for a determination from the administrative law judge.

The CHAIRMAN. So, at the time of the second injury, the employer's liability then becomes limited in some way?

Mr. BRIDGES. You are liable for 104 weeks from the date maximum medical recovery is achieved. Say, if a man has an operated back, the doctor must determine the date that he reaches medical recovery and then you are liable for 104 weeks thereafter. You cannot get into the Second Injury Fund if your injury was sufficient enough to cause an individual to be permanently and totally disabled.

Also, the preexisting condition must be a contributing factor. It must make the subsequent inju y greater than it normally would have been.

The CHAIRMAN. If that is the situation, then it can qualify for the fund?

Mr. BRIDGES. Yes.

The CHAIRMAN. But if it is wholly unrelated——

Mr. BRIDGES. And did not cause the injury to be greater, then no, you do not have a Second Injury Fund claim.

The CHAIRMAN. If it becomes a total?

Mr. BRIDGES. Right.

The CHAIRMAN. What will be the answer from where you work in handling the Second Injury Fund? What would you have included in a reform of law?

Mr. NOLAN. One thing we would suggest, Mr. Chairman, is that there should be someone defending the fund. Right now, the fund is defenseless. Anybody who first gains access to it, there is no one arguing against it. The New York State plan has provision for that and it could be used as a model to correct our situation.

The CHAIRMAN. Any other ideas?

On what basis are your contributions to the fund?

Mr. NOLAN. The percentage of the payments which we make either as a percentage of premiums which we pay to an insurance company or, if we are self-insured, a percentage in proportion to the amount of claims that we actually pay during a given year; so that the higher our claims, the higher we pay to the Second Injury Fund.

The CHAIRMAN. What else would you suggest in addition to someone representing the fund?

Mr. WILCOX. I think Secretary Elisburg's answer to one of the inquiries from the House committee as to the problems, is to tighten up the definition of the preexisting injury to preexisting compensable injury that is known to the employer to try to get around the third circuit decision and back to where the law is supposed to be; that you have to have knowledge of the injury before you can take advantage to the fund.

Mr. SMITH. As an example, Senator, we hire a man at 3 o'clock in the afternoon to go to work tomorrow morning at 8 o'clock. They are casual workers. We do not even know his name until he goes on the job at 8 o'clock in the morning. If he has a medical record that we theoretically could have found, than that is preexisting and something that we could have known about; therefore, he is entitled to go under the Second Injury Fund.

The CHAIRMAN. This is not the kind of employment procedure where you would have an application and a question on whether the employee had any prior injuries. This is almost like a hiring hall.

Mr. LINDSAY. It is a hiring hall on the west coast.

The CHAIRMAN. You take what is delivered to you from the hall?

Mr. SMITH. From the hall, and he then could be coming from the State employment service, the Fisheries Union. The hall never sees him. We do have a joint employee there who could look at him. But in this case, he is dispatched to a job by telephone. Twenty-six men show up, they are signed on to the record. Their names become part of our employees as of 8 o'clock in the morning. If he had a preexisting injury, we then theoretically had to go back and find who his doctor was and if he had an injury.

The CHAIRMAN. Who do you rely on to know that those who show up can do the job and know what they are supposed to do as longshoremen?

Mr. SMITH. All we can rely upon is our foreman or superintendents. Our foremen are union members who look at the man and say: Can he do it? They are reluctant even with a man with one arm to say he cannot do the job. But if he did not have anything that would appear—like you and I are looking at each other today, I am sure both of us have had some preexisting injury, there is no way to tell. The man will say: "No, I am fine."

The CHAIRMAN. You have given us an awful lot to think about. Excellent.

Thank you.

[The prepared statements of Mr. Barbera, Mr. Waltan, and Mr. McManus follow:]

STATEMENT OF JOSEPH N. BARBERA, PRESIDENT, GLOBAL TERMINAL & CONTAINER SERVICES

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

HEARING BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

Tuesday, September 16, 1980

My name is Joseph N. Barbera. I am President of Global Terminal & Container Services, Inc., a stevedore and terminal operator situated in the Cities of Jersey City and Bayonne, New Jersey.

At our facility located in New York Harbor, Global provides services to seven steamship lines. Built in 1972, Global is one of the newest and most modern privately-owned container/cargo facilities in the world. It is in the heart of one of the economically depressed urban areas in the Northeast, and since its inception, has provided jobs directly for 650 people and countless of others by our purchases in the area.

I am also President of the Hudson County Chamber of Commerce and Industry representing approximately 800 business, industry and community leaders mobilized to concentrate on issues and opportunities confronting our County. Those specific areas with which our Chamber is concerned include the business climate and taxes, Countywide development, crime and safety, energy, governmental relations, international trade, manpower and education, transportation and business insurance.

My purpose in being here today is to testify to the deleterious affects of the 1972 amendments of the Longshoremen's and Harbor Workers' Compensation Act to our nation, the Port, and to my company.

A brief history of the Act is as follows:
The Act (LHWCA) is a federal law passed in 1927 to provide compensation and medical benefits to maritime employees injured while working on navigable waters. On October 27, 1972, this Act was amended to extend coverage to maritime workers employed on shoreside areas such as piers and wharves, customarily used by an employer (stevedore/terminal operator) in the loading or unloading of vessels.

The language of the Amendment is ambigious and liberal interpretation has served to expand the program from a worker's compensation concept to one that effectively provides benefits normally associated with life insurance, pension plans and other supplemental income programs. Much has been written about workers who receive benefits while continuing to work at full pay, or receive benefits that exceed pre-injury take-home pay, and survivors' benefits payable even though the death is absolutely unrelated to the deceased's employment injury.

Amendments contained in H.R. 2448, H.R. 7610 and the Senate bill 1511 would help to rectify these major problems and would contribute towards making the Act (LHWCA) a fair system. These problems are outlined below:

JURISDICTION - A great deal of ambiguity has arisen as to exactly which workers are covered under the Act. This has led to almost endless litigation, which ultimately reached the Supreme Court. Their decisions, however, have left many unsettled aspects and the probability of years of further controversy and litigation. The bills before both houses would specifically deliniate those workers who are covered under the Act as opposed to those whose remedy is State Jurisdiction.

COST OF LIVING ESCALATION - Currently, all permanently disabled workers, as well as survivors collecting death benefits, are automatically granted an annual cost-of-living increase. The percentage of increase is based on the increase in the national average weekly wage. While we are not opposed to a cost-of-living escalation in principle, the fact that such increase is open-ended and unpredictable, has made it virtually impossible for many employers under the Act to obtain insurance.

It is easily understood why an insurance carrier would not want to assume an underwriting with uncertain and unlimited benefit liabilities.

The bills before both Houses will maintain the concept of cost-of-living escalation but, at the same time, set a specific percentage amount for such increase so that the escalation will be predictable to the insurance carriers.

UNRELATED DEATH BENEFITS - Under the current act, if a permanently disabled worker dies of causes unrelated to the original, work-related injury, the survivors are nevertheless entitled to death benefits. While it may be commendable that the government is concerned with the well-being of widows and orphans, the fact remains that a workers' compensation program is not the proper vehicle to provide for these circumstances. This is, in effect, nothing more than a life insurance policy.

The bills currently before both houses will properly allow death benefits in those cases where the death comes as a result of the work activity.

MAXIMUM ON DEATH BENEFITS - While the 1972 Amendments put a dollar maximum on the amount payable for disability benefits, no such maximum was placed on death benefits. A recent Supreme Court decision upheld this obvious discrepancy. It is apparent that the omission of the maximum for death benefits was merely an oversight, but, based on the language of the law, the Supreme Court had no alternative but to reach its decision that maximum death benefits do not exist.

The bills before both houses would put the same limit on death benefits as is placed on disability benefits, thereby eliminating a "Premium on Death".

Until we amend the provisions of the Act, we are guilty of promoting an environment in which it is economically attractive for an injured worker to prolong his recovery period, or for an uninjured worker to feign injury. This in itself is counter productive to efforts to increase national productivity.

Prior to 1972, U. S. stevedores and terminal operators were competitive with their Canadian neighbors. Since then, many insurance companies have retreated from the market, and those few which are willing to offer coverage are forced to charge enormously high rates. Alternative programs, such as assigned risk plans or self insurance, are not remedies,

since the cure is not in the structure of the insurance plan, but in the restructuring of the legislative plan. Our industry has witnessed escalating premiums which have been translated into higher rates for shippers served in the New Jersey/New York port facilities, and ultimately higher consumer costs. Our rates have been unrealistically burdened by workers compensation costs under the amendments, resulting in the diverting of cargo to the Canadian ports.

In an industry where competitive advantage is measured in pennies per ton of cargo, we have fostered a situation where our costs per container lift are dollars over our Canadian counterparts. (A recent study indicated that our container lift rates are nearly 30% greater than those charged by Canadian ports.) Virtually all of the differential is attributable to workers' compensation costs. A major contributing factor is that under Canadian Law, the Ports of Halifax and St. Johns, the U. S. Northeast Canadian competiton, experience a maximum weekly benefit of $216 versus $426 for U. S. Ports. This abnormally high level of U. S. benefits, combined with the problems cited above, make workers' com-compensation costs our greatest expense element after wages, representing approximately 8% of our total costs.

Impact On Global

We at Global are engaged in the same battle for economic survival as other stevedore and terminal operators in the port. A significant portion of this battle is directed at achieving a high level of safety at our terminal. Through a combination of capital investment and management involvement in safety projects, we have been successful in providing a safe work place and reducing our average annual injuries by nearly 27% since 1973 (our first full year of operation). In spite of this improved accident record, we have suffered a 300% increase in premium costs over the same period. Unless remedial legislative steps are taken to amend the Act, we foresee a continuation of the diversion of cargo from the Port of New York, with the resulting reduction in jobs for the workers the Act has sought to protect. We therefore urge your support for immediate amendments to the LHWCA as an integral step in revitalizing the Port of New York.

STATEMENT OF JERRY MCMANUS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SHIPPERS STEVEDORING CO.

Thank you, Mr. Chairman, for the opportunity to share our thoughts with you about the Longshoremen's and Harbor Workers' Compensation Act. I am Jerry McManus, President and Chief Executive Officer of Shippers Stevedoring Company which operates marine terminal and stevedoring businesses primarily in the Port of Houston.

As a Director and immediate past President of the National Association of Stevedores, I have been actively engaged in the past four years in an effort to inform members of Congress of the problems with which the Act as amended in 1972 has burdended our industry. Countless time, effort, and money have been expended to communicate these problems. There is a real need for remedial legislation.

Our efforts have been supported by expert personnel from other industries. We and many others have testified before Subcommittees of the House Committee on Education and Labor. From all the information gathered in those hearings it is clear that problems with the LHWCA should be addressed as quickly as possible. Astounding increases in the cost of financing this program is proof enough of the need for amendments to the LHWCA.

My testimony will be directed toward the problems of the stevedoring and terminal business in the West Gulf area, mainly Texas. Accompanying me today is Mr. Waldo Bridges, our workers' compensation Claims Administrator. Mr. Bridges deals daily with the Act, claimants, legal profession, as well as the medical

and rehabilitation profession. Prior to joining our firm, he was employed by the Department of Labor as a claims examiner for three years and before that was a senior claims examiner for Texas Employers Insurance Association. His experience in the daily administration is invaluable and perhaps, if time permits, questions to him would help you to better understand the problems of the Act.

Three years ago, our company went into a semi-self-insured program in the workers' compensation area. This was done primarily because of the high costs in the commercial markets and the withdrawal of certain underwriters' coverage, brought about by the 1972 amendments. We were trying to become more competitive. Certainly we were not eager to assume more financial liability, but for the future felt that with more control and responsibility, we would control costs. It might better be termed an act of survival.

Following are examples of cost escalations from the year 1970 through 1979:

Compensation Rate for Texas - Manual Rate 7309F
General Stevedoring in Dollars per $100.00 of Payroll
Year 1970 - Rate $21.28 Year 1979 - Rate $51.69
Increase - 142.9%

Trend of Longshore Injury Costs - Average Cost per Claim for the West Gulf Area.
Year 1970 - $890.00 per Claim Year 1979 - $3,904.00 per Claim
Increase - 338.65%

Maximum Benefits Set by the Dept. of Labor for Injured Workers
Year 1970 - $70.00 per Week Year 1979 - $426.26 per Week
Increase - 508.94%

National Average Weekly Wage
Year 1970 - $119.46 per Week Year 1979 - $213.13 per Week
Increase - 78%

Wages for Longshoremen
Year 1970 - $4.60 per Hour Year 1979 - $10.40 per Hour
Increase - 126%

The maximum benefits, the cost per claim in our area, and compensation insurance premiums have escalated dramatically. These are a direct result of the 1972 amendments. Compared to the National Average Weekly Wage, longshoremen's wage negotiators have performed very well.

Claimants are now abusing the system, and the following are the main contributing factors:

1. Loose and liberal administration by the Department of Labor, and in some instances a total lack of management mandated by law.

2. Attorneys taking advantage of the ambiguities, as well as the liberal terms of the Act.

3. Medical practitioners overtreating either for financial gain or fear of malpractice suits, resulting in prolonged compensation payments as well as added medical treatment costs.

4. Freedom of choice of physicians.

In order to substantiate these statements, the following cases are submitted:

Claimant A - Date of Accident: 11/15/78

Claimant A twisted his right ankle on 11/15/78, while walking across a railroad track. Claimant was initially seen in the hospital emergency room in Conroe, Texas. He was later seen by Arnold J. Wolf, Podiatrist, (claimant's doctor) who performed surgery on the claimant for a "chronic lateral right ankle instability". On 7/31/79, Dr. Wolf recommended additional surgery,

"dwyers osteotomy". At this Point, we refused hospitalization and requested an examination under Section 7 of the Act by Dr. McReynolds. Dr. McReynolds submitted a report which indicated, "no instability, no need for additional surgery, initial surgery not needed, only need to wear high top, lace up boots".

The Department of Labor referred claimant to Dr. Baxter for an independent evaluation and Dr. Baxter found "maximum medical recovery achieved, no need of additional surgery and 5% impairment to the foot as a result of the surgery".

When the dispute came about as to disability, compensation was suspended. However, we had paid temporary total disability from 4/14/79 to 9/7/79 (21 weeks) at $396.78 per week for a total of $8,332.38.

Just as soon as compensation was suspended, claimant returned to work and earned $471.75 for the week ending 9/14/79, $566.10 for the week ending 9/21/79, $1,177.62 for the week ending 9/28/79, $675.40 for the week ending 10/5/79, $1,011.50 for the week ending 10/12/79, $565.25 for the week ending 10/19/79. Total subsequent wages for 6 weeks amount to $4,467.62, which produces a subsequent average weekly wage (a.w.w.) of $744.60, compared to a prior a.w.w. of $662.25.

As a result of this unnecessary surgery, we paid claimant $8,332.38 in compensation, $5,685.00 in medical, and are still faced with permanent partial impairment (p.p.i.) to the foot. The p.p.i. rating settlement is estimated to run some $2,500.00.

Claimant B - Date of Accident: 1/4/79

Claimant was injured on 1/4/79, when a boomer jumped and hit

his face. Claimant reported to Park View Clinic on 1/5/79, and Dr. Valle gave a diagnosis of "contusion of face", with no disability from work. Claimant was again seen at Park View Clinic on 1/19/79, and at this time, he was "discharged from treatment, no lost time with no permanent partial disability".

For the year prior to accident, claimant earned $5,564.52, which produces an a.w.w. of $107.01, and a compensation rate of $99.20 (the statutory minimum at that time).

Claimant was paid temporary total disability from 1/4/79 to 1/29/79 (2 and 3/7 weeks) for a total of $240.91. On June 6, 1979, the Department of Labor recommended claimant be paid $175.00 for disfigurement, which was paid to claimant on the next day.

On September 14, 1979, claimant employed a law firm to represent him. The lawyer contacted us on 9/14/79, said the claimant "wanted more money for his S.F.D. (serious facial disfigurement)" and that, if we "would not pay he would seek additional medical attention and possible plastic surgery". On 9/26/79, we had the lawyer send claimant by our office for evaluation of his disfigurement. It is our opinion that claimant's disfigurement should certainly not exceed $175.00.

Further, after checking subsequent wages on claimant, we found that he earned $114.42 for week ending 1/12/79, and $64.67 for week ending 1/19/79. So based upon the fact that the doctor gave "no disability and claimant continued to work", we requested credit for the $240.91 payment made on temporary total disability.

On 8/30/79, claimant was to have seen Dr. Jenkins, an ophthalmologist, an appointment which he failed to keep. The lawyers are not

requesting a conference on the issues of medical treatment and serious facial disfigurement. They also state we "cancelled claimant's appointment with Dr. Jenkins on 8/30/79". On 10/23/79, claimant was seen by Dr. Jenkins, "completely normal eye examination".

Based upon all medical and factual information, we will decline to make any additional payment to this claimant and will request reimbursement for our $240.91 overpayment. The lawyers on the other hand will probably get their client to say he has headaches, loss of vision, and request medical referral.

All of this is a result of claimant being unhappy with his $175.00 serious facial disfigurement recommendation, and hopefully the Department of Labor will see this at conference.

Claimant C - Date of Accident: 12/3/77

Claimant C alleged that he injured his back on 12/3/77, while working bagged corn. For this accident, claimant was initially seen by Dr. Aubry Douglas. We had claimant examined by Dr. Frank Barnes. An electromyelogram was performed on claimant on 1/23/78 and 6/7/78. A lumbar myelogram was done on 6/21/78, and an epidural venogram was done on 6/30/78. All diagnostic study on claimant was found to be within normal limits.

Dr. Aubry Douglas released claimant for regular duty on April 3, 1978. Dr. Frank Barnes released claimant for regular duty 5/15/78, and again on 8/29/78. Claimant was last seen by Dr. Barnes on 8/29/78.

On February 13, 1979, this matter was the subject of an informal conference. The claimant's attorney made claim for temporary partial disability based upon an actual wage loss from

9/1/78 to 1/8/79, and referral to another physician. Based upon the fact that claimant received no medical attention from 8/29/78, payment of compensation was not supported by medical evidence. However, the Department of Labor referred claimant to another doctor. Dr. Southern "found nothing that would prevent claimant from performing his regular duties as a longshoreman". He went on to state, "I feel there is a great functional overlay in this individual and he is making a conscious effort to create the impression of a physical condition that does not exist".

Claimant now has requested that he be allowed to return to Dr. Frank Barnes. We will now take the position that all reasonable and necessary medical care has been provided claimant by the employer/carrier.

The claimant is going back for additional medical attention solely for the purpose of obtaining a settlement.

For the year prior to the accident, claimant maintained an a.w.w. of $212.81, and a compensation rate of $141.88. He received temporary total disability (t.t.d.) from 12/4/77 to 5/27/78, and temporary partial disability from 5/28/78 to 9/1/78. Total compensation paid is $4,402.20, and total medical incurred is $6,485.00

Claimant D - Date of Accident: 11/23/77

Claimant D alleges that he injured his back on 11/23/77, while moving a piece of timber, 10 x 10 and about 14 feet long. Claimant received conservative treatment for about 6 months and, thereafter underwent surgery for a herniated nucleus pulposis L-5, S-1 and L-4, L-5. This surgery was carried out on 7/13/78 by Dr. Stanley J. Hite, and the fusion was done by Dr. Donald Nowlin. Claimant

continues to be treated by Dr. Hite and Dr. Nowlin.

We had claimant evaluated by Dr. Antonio A. Moure on 8/6/79, and Dr. Moure felt there could have been a recurrence of a herniated disc and claimant was hospitalized for diagnostic study. Claimant had a normal myelogram, solid fusion, no evidence of nerve root compression, and claimant's pain could be caused by postsurgical scar tissue. Insofar as work, Dr. Moure indicated claimant should engage in light work with no lifting in excess of 60 pounds.

Claimant has made no attempt to return to work and will not make one. He states that he is "unable to drive, wears back brace, uses transcutaneous nerve stimulator, and has constant back pain".

Prior to working with Shippers, claimant worked at Ellington A.F.B., (1953-1955), as a "wash rack attendant". From 1955-1959, claimant worked with Texas Ice & Fuel. While with Texas Ice, claimant hauled ice to the Port of Houston, loaded and unloaded blocks of ice ranging from 75 to 300 pounds. As a result of claimant's work with Texas Ice & Fuel, he developed narrowing at the disc space, and also has degenerative disc disease involving the three lower lumbar discs. So all of the claimant's problems are not a result of his alleged 11/23/77 accident; however, we are totally responsible.

For the fifty-two weeks prior to this accident, claimant earned $32,964.88, which produces an a.w.w. of $633.94, and entitled him to a maximum compensation of $367.22. While working, the claimant's take home pay was about $412.06 (65% of 633.94). We found that 6 days prior to accident, claimant purchased a new

automobile and took out disability insurance through M.I.C., which pays his car note in the amount of $300.92 monthly. With compensation and car payment, claimant has a net income yearly of $22,706.48. While working, claimant had a net take home income of less than $21,500.00. So from a financial standpoint, claimant has no incentive to return to work. Let's not forget, claimant's wife is a registered nurse, so their taxable income is less, another plus for claimant.

Total Compensation Incurred:	$ 36,722.00
Total Medical Incurred:	17,450.00
Total Estimated Reserves:	
Compensation:	350,000.00
Medical:	30,000.00

This accident happened on Saturday with no witnesses observing the occurrence. The claimant had at least ten fork-lift trucks available to use instead of attempting to lift by hand.

Claimant E - Date of Accident: 5/22/78

Claimant E was pinned by a load on 5/22/78, which resulted in internal injuries, and a ruptured biceps tendon, left arm. The claimant is 52 years of age, "A" classification, and about 340 pounds in weight. Claimant has basically recovered from his internal injuries, however has some atrophy in the left arm due to the ruptured bicep tendon. Claimant has refused surgery to have the bicep tendon repaired, and Dr. Awaitan has awarded claimant some 45% to 50% permanent partial impairment to the arm. Due to the claimant's obesity, hypertension, diabetes, bicep tendon damage, and prior injuries, claimant will never return to long-shore work.

On 7/28/73, claimant received a hand injury which resulted in partial amputation of his 2nd and 3rd finger. As a result of this injury, claimant was awarded 30% permanent partial disability to the right hand due to weakness in grip.

On 10/14/76, claimant received a left leg injury, which resulted in a 45% permanent partial disability rating to the leg.

Based upon claimant's prior injuries, there appears to be good Section 8(f) possibilities. If Section 8(f) is found to be applicable, we will still pay about $55,000.00 to $60,000.00 in compensation, $50,000.00 in medical, and about $3,000.00 in legal expense. On the other hand, if 8(f) is found not to be applicable and claimant be declared totally disabled, our exposure would then jump to $283,666.24, not considering the adjustments under Section 10 of the Act.

Claimant realizes the financial security offered in this claim, and he is playing it up to the fullest. The claimant refused to have the tendon repaired, states he has spells and speaks Apache to physicians, threatens claims people about being a professional killer.

A complete copy of all information has been requested from social security, although not received to date. We do know that claimant is receiving social security, exact amount unknown. In all probability, claimant will file a claim with I.L.A. Maritime Insurance for disability retirement. Compensation, social security, and disability retirement would net claimant much more money than working. We cannot believe the system was meant to be abused this way. Each and every individual able to work should be working and be

a productive member of society. Before long we will have more individuals on compensation than in the work force.

Claimant has an average weekly wage of $371.92, which produces a compensation rate of $247.96. Compensation paid to claimant to date amounts to $18,844.96 which represents 76 weeks of temporary total disability. Medical paid to date on this claim is a little better than $40,000.00.

The longshore work force in the Port of Houston is hired on a daily call out basis. Therefore, the advantages of controlling claims by loyalty or individual efforts of each stevedoring company is impossible. It is common knowledge that injuries received off the work site are construed to have occurred "on the job" resulting in a virtually impossible situation for the employer to disprove.

Efforts have been made to establish a stabilization program which will require persons applying for jobs through the unions to undergo physicals and other qualifications, jointly administered by the employers and unions. However, it will have hardly any effect on persons who are fraudulent in their claims or malingerers. It will have effect on new workers who have physical impairments disqualifying them from being referred for employment.

Our company is extremely safety minded. The record for the past year shows we reduced the incident rate 33% below the Port of Houston average, and 49% below the West Gulf area. These statistics are compiled and recorded by the West Gulf Maritime Association. This has resulted in no cost reductions. In fact, we have raised our cost level for 1979 almost 30% over 1978 to be

adequately funded in our compensation retention and safety programs.

The burden of this escalation is passed ultimately to the consumer, making employers of I.L.A. Union personnel non-competitive with other terminal and stevedoring operations employing non-union personnel. These types of operations are now developing in the port area. The excessive costs of the Act cannot be calculated entirely in rate structures and leave the employer or carrier liable to these tremendous financial liabilities without recovery in many instances.

There should be grave concern from all involved to address the needed changes to the Longshoremen's and Harbor Workers' Compensation Act. Legislators, union leaders, and employers must join together to enact these.

Thank you.

WEST GULF
MARITIME ASSOCIATION
COTTON EXCHANGE BUILDING
HOUSTON, TEXAS
77002

HOUSTON
GALVESTON
CORPUS CHRISTI
BROWNSVILLE

BEAUMONT
PORT ARTHUR
ORANGE
LAKE CHARLES

October 29, 1979

Mr. Jerry McManus
Shippers Stevedoring Company
P. O. Box 645
Galena Park, Texas 77547

Dear Jerry:

As you can see from the attached data, there has been a 22% reduction in the West Gulf incident rate over the prior contract year resulting in 516 fewer reported incidences while the manhours increased 3%.

The incident rate for your company was 33% below the Port of Houston incident rate for all stevedores and 49% below the West Gulf accident incident rate for all stevedores. This is the type of improvement that is needed since we all know that the costs are escalating every year.

Jerry, if we can assist you at any time with your continued accident loss prevention activities, please let us know.

Sincerely,

SAFETY AND HEALTH DEPARTMENT

Hal Draper
Vice President

HD/sp

Attachment

ACCIDENT STATISTICS
West Gulf
78/79

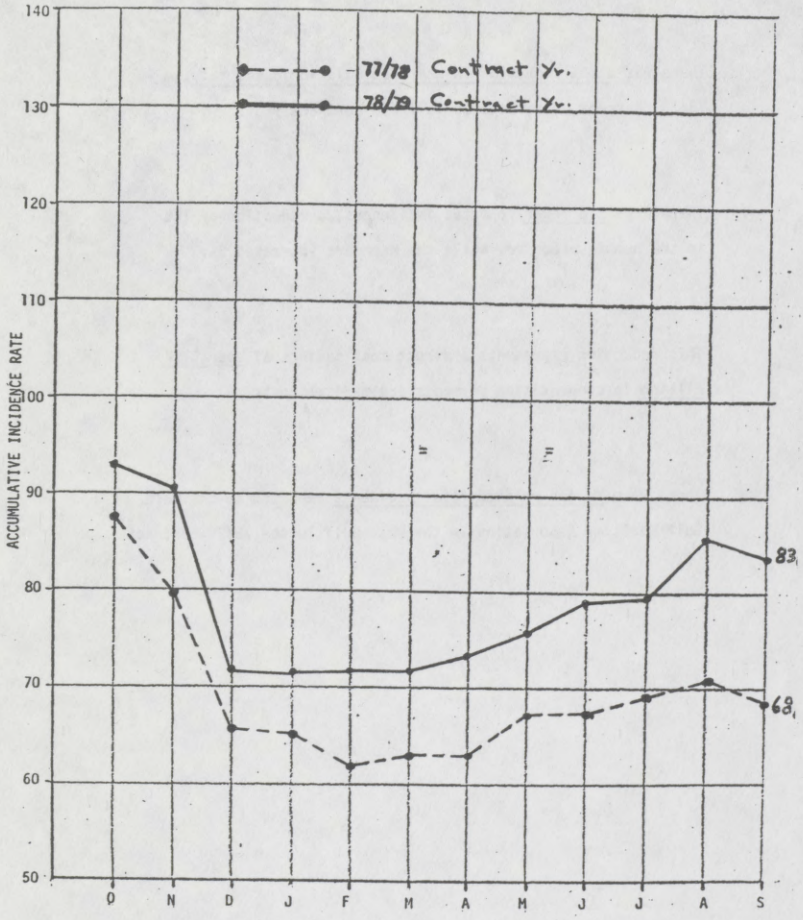
There was a 22% reduction in the West Gulf incidence rate, 78/79 contract year compared to 77/78 contract year.

There were 516 fewer reported incidences, a reduction of 18% in the number reported, while the manhours increased 3%.

This reduction represents a direct cost savings of over $1.7 million in compensation payments and medical costs.

There were no job related fatal accidents reported to the West Gulf Maritime Association in the West Gulf in the 78/79 contract year.

INCIDENCE RATE for West Gulf
(Number all reported injuries per 200,000 manhours)



-AACU60 PERSONAL INJURY ACCIDENT ANALYSIS PAGE 1
TOTAL WEST GULF PORTS
SEPTEMBER 1979

	NUMBER ACCIDENTS			FREQUENCY	
	CURRENT MONTH	YEAR TO DATE	%	CURRENT MONTH	YEAR TO DATE
OTAL WEST GULF PORTS					
BEAUMONT	10	177		60.0	95.1
BROWNSVILLE	3	39		45.4	73.5
CORPUS CHRISTI	5	101		33.6	72.0
FREEPORT	7	89		91.7	103.2
GALVESTON	28	509		52.5	76.7
HOUSTON	153	1,713		55.9	61.5
LAKE CHARLES	6	261		24.5	79.8
ORANGE		44			76.2
PORT ARTHUR	7	80		75.0	87.2
PORT LAVACA	2	9		175.1	94.2
TEXAS CITY		8			109.9
TOTAL	221	3,030		53.4	68.8
PRIOR YEAR	267	3,546		61.2	83.6

	NUMBER ACCIDENTS		
	CURRENT MONTH	YEAR TO DATE	%
OCATION			
ESSEL/BARGE	153	2,126	70
OCK/WAREHOUSE	55	767	25
ERMINAL		13	
EAR ROOM/SHOP	11	98	
FFICE		1	
THER/UNKNOWN	2	25	
	221	3,030	
GE			
8 - 24 YEARS	39	554	18
5 - 34 YEARS	58	803	27
5 - 44 YEARS	43	663	22
5 - 54 YEARS	43	541	18
5 - 64 YEARS	19	236	
5 AND OVER	3	20	
NKNOWN	16	213	
	221	3,030	

ILAAC060 PERSONAL INJURY ACCIDENT ANALYSIS PAGE 2
TOTAL WEST GULF PORTS
SEPTEMBER 1979

	NUMBER ACCIDENTS CURRENT MONTH	YEAR TO DATE	%
EXPERIENCE			
0 TO 1 YEAR	24	279	
1 TO 5 YEARS	69	736	24
5 TO 10 YEARS	31	449	15
10 TO 15 YEARS	26	422	14
15 YEARS AND OVER	71	889	29
UNKNOWN		255	
	221	3,030	
ACCIDENT TYPE			
CAUGHT IN, UNDER, OR BETWEEN	24	313	10
CONTACT WITH (CHEMICAL, HEAT, COLD, ECT.)	5	56	
FALLS FROM ELEVATION	5	82	
FALLS FROM SAME LEVEL, SLIP, TRIP	38	502	17
FLYING PARTICLE, SPLASH	17	210	
INHALATION, ABSORBING, SWALLOWING	2	67	
LIFTING, PUSHING, PULLING, BODILY REACTION	23	451	15
STRUCK BY FALLING OBJECT	24	301	10
STRUCK BY MOVING OBJECT	44	530	17
STRIKING AGAINST, STEPPING ON, JUMPING	26	391	13
OTHER/UNKNOWN	13	127	
	221	3,030	
LOCATION OF INJURY			
EYE	22	222	
HEAD, FACE, NECK	9	175	
TOP OF HEAD	8	63	
BACK	42	477	16
TRUNK, INTERNAL	11	178	
ARM, SHOULDER, ELBOW	15	284	
HAND, FINGER, WRIST	41	526	17
LEG, KNEE, HIP, THIGH, BUTTOCKS	30	488	16
FOOT, ANKLE, HEEL	30	417	14
TOES	3	38	
GENERAL BODY	1	28	
UNKNOWN	9	134	
	221	3,030	

ILAAC060 PERSONAL INJURY ACCIDENT ANALYSIS PAGE 3
TOTAL WEST GULF PORTS
SEPTEMBER 1979

	NUMBER ACCIDENTS CURRENT MONTH	YEAR TO DATE	%
AGENCY			
CARGO *	71*	1,184*	39
CARGO (HANDLING) 66/ 1,035			
CARGO (WORK/WALK SURFACE) 5/ 149			
WORK/WALK SURFACE (DECK, DOCK, FLOOR, TABLE	14	188	
SPILLAGE ON WORK/WALK SURFACE	10	119	
SHIPS CARGO HANDLING GEAR AND/OR EQUIPMENT	20	94	
STEVEDORE GEAR &/OR EQUIP. (EXCLUDING MOBILE)	20	279	
MOBILE EQUIP. (FORKLIFT, CRANES, RD/RR VEHIC.)	21	277	
MEANS OF ACCESS (LADDERS, STAIR, GANGWAY)	6	97	
PALLETS	5	88	
SECURING MATERIALS	12	101	
DUNNAGE	5	106	
HANDTOOLS	6	83	
OTHER/UNKNOWN	31	414	
	221	3,030	
* TYPE CARGO			
SACKS/BAGS	17	351	30
GENERAL/CRATES	6	77	
STEEL/PIPE	10	165	14
HEAVY LIFT	3	21	
CONTAINERS	1	45	
DRUM	13	243	21
COTTON	15	159	13
BULK/GRAIN		9	
AUTO/TRACTOR	1	6	
BALE (NOT COTTON)		15	
NEWSPRINT		5	
HIDES		8	
LUMBER/PLYWOOD	1	26	
REFRIGERATED	1	6	
SCRAP	2	2	
OTHER/UNKNOWN	1	46	
	71	1,184	

ILAAC060 PERSONAL INJURY ACCIDENT ANALYSIS PAGE
TOTAL WEST GULF PORTS
SEPTEMBER 1979

COMMENTS ON SOME (CURRENT MONTH) ACCIDENTS:

MAN RECEIVED FRACTURED SHOULDER AND MINOR HEAD INJURY WHEN LOAD STRUCK PLYWOOD FENCING AND PIECE OF PLYWOOD FELL FROM U.T.D. TO L.T.D. MAN WEARING HIS HARD HAT.

MAN RECEIVED MASHED FOOT WHEN PICK-UP LOAD LOWERED SUDDENLY AND PIPE ROLLED. FOOT LATER PARTLY AMPUTATED.

MAN LUCKILY NOT INJURED WHEN LIFT MACHINE REAR WHEEL DROPPED INTO DITCH CAUSING MACHINE TO TURN OVER ON ITS SIDE.

MAN STRUCK ON BACK BY FALLING PIECES OF HIGH BOOM HEAD BLOCK THAT BROKE.

MAN STRUCK ON HIP AND BACK BY PREVENTOR WIRE THAT BROKE WHILE TAKING IN A LIFT MACHINE.

TWO (2) MEN INJURED WHEN THREE HIGH PALLETIZED TAPE FELL OVER IN WAREHOUSE. SEVERE FACIAL AND BACK BRUISE TO ONE MAN.

MAN STRUCK ON ARM BY SHIPS CARGO HOOK THAT FELL ABOUT 4' WITH LOAD OF DUNNAGE WHEN SHACKLE PIN FROM FALL TO HOOK BECAME UNSCREWED.

MAN FELL 10 TO 15 FEET OFF COTTON TABLE ATOP CRATES IN HOLD INJURING RIBS.

COMPARISON DATA

	INCIDENCE RATES		
	TOTAL CASES (1)	LOST WORKDAY (2) CASES	LOST (3) WORKDAYS
Total Private Sector (B.L.S.1977)	9.3	3.8	61.6
West Gulf Maritime Ass'n (1978 Study of membership OSHA 200 Forms) *	65.1	38.4	1,819.0

(1) Number OSHA reportable cases per 200,000 hours
(2) Number lost work day cases per 200,000 hours
(3) Number lost work days per 200,000 hours

* excluding doctor treated first aid cases and cases where person never went to doctor.

1978 O.S.H.A. INJURY AND ILLNESS STUDY FOR WEST GULF MARITIME ASSOCIATION

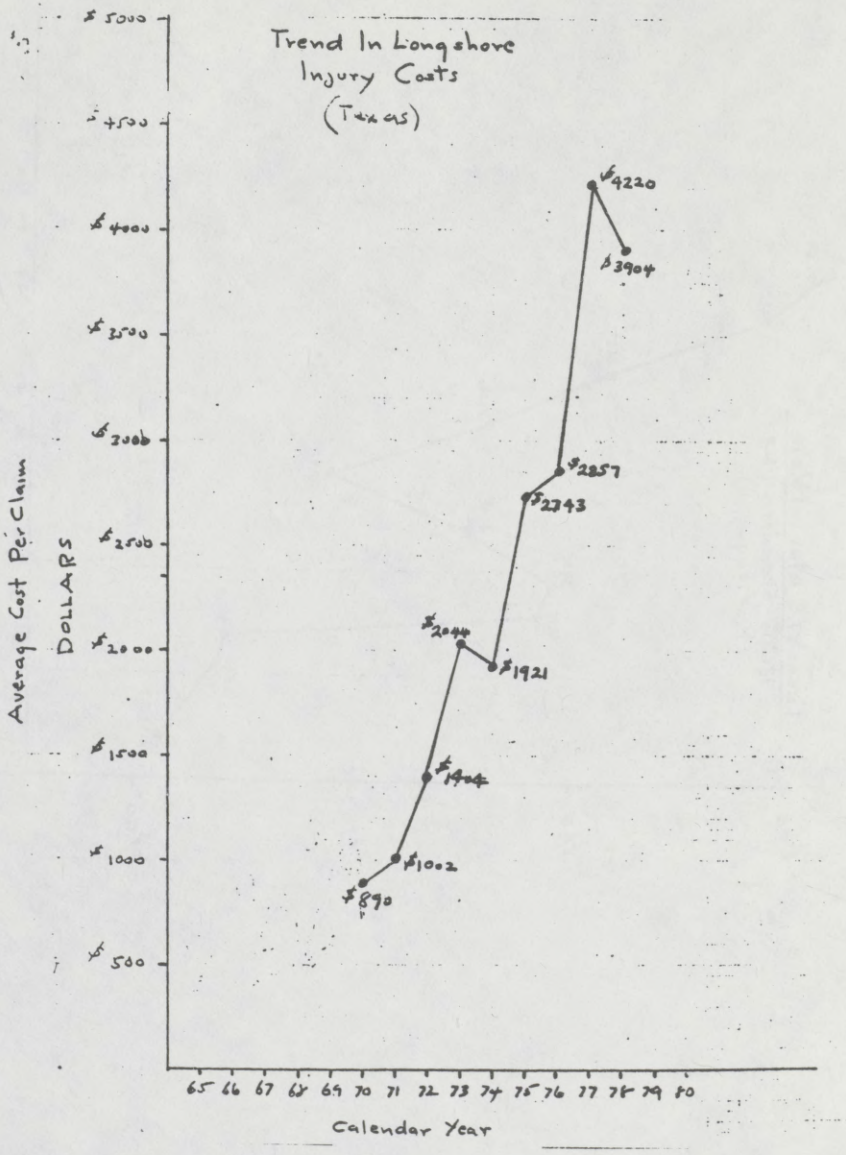
A study was made of 65 W. G. M. A. member's OSHA Form 200 summaries for 1978. These companies worked over 8 million manhours.

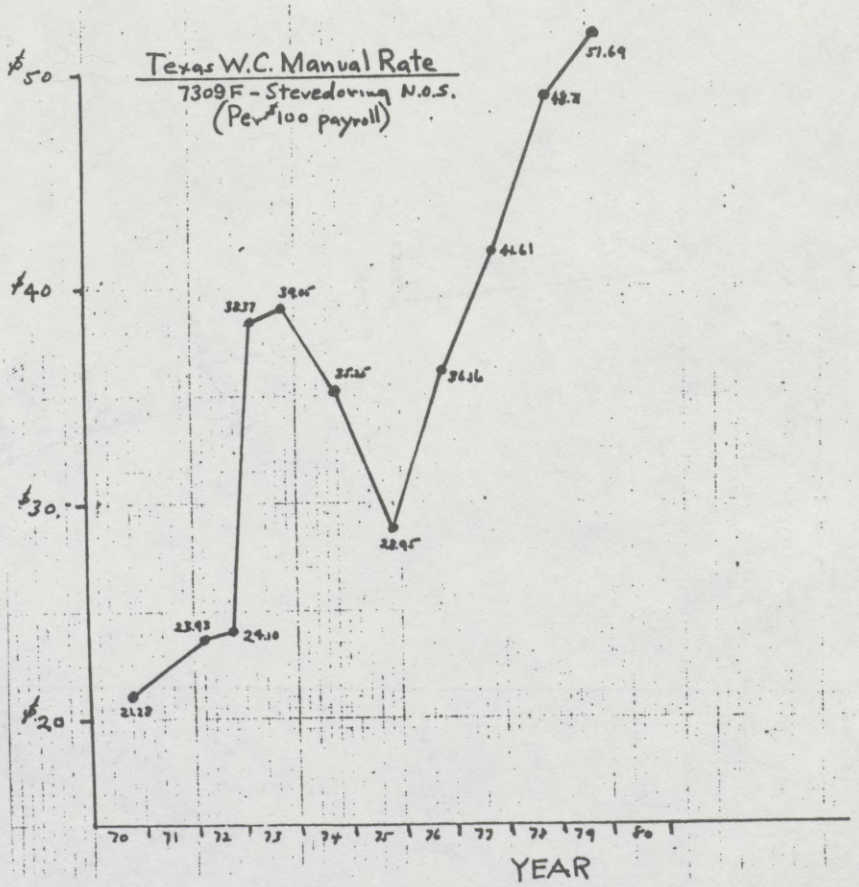
There were 65.1 reportable cases per 200,000 hours, 38.4 lost work day cases per 200,000 hours, and 1,819 lost work days per 200,000 hours.

59% of all reportable cases were lost work day cases.

There were 47 lost work days per case.

2.7% of all cases were reported as illness cases.


Trend In Longshore Injury Costs (Texas)
Average Cost Per Claim DOLLARS
$5000
$4500
$4000
$3500
$3000
$2500
$2000
$1500
$1000
$500
$4220
$3904
$2857
$2743
$2044
$1921
$1494
$1002
$890
65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80
Calendar Year


Texas W.C. Manual Rate
7309F - Stevedoring N.O.S.
(Per $100 payroll)
$50
$40
$30
$20
21.29
23.93
24.10
38.37
39.05
35.25
28.95
36.16
41.61
48.7
51.69
70
71
72
73
74
75
76
77
78
79
80
YEAR

ILAAC100 PERSONAL INJURY ACCIDENT ANALYSIS PAGE 297
SHIPPERS STEVEDORING CO
HOUSTON
SEPTEMBER 1979

	NUMBER ACCIDENTS			FREQUENCY	
	CURRENT MONTH	YEAR TO DATE	%	CURRENT MONTH	YEAR TO DATE
WEST GULF PORTS	221	3,030		53.4	68.8
HOUSTON	153	1,713		55.9	61.5
SHIPPERS STEVEDORING CO	7	79		49.3	46.3
HOUSTON					

)23%) 49%

	NUMBER ACCIDENTS		
	CURRENT MONTH	YEAR TO DATE	%
ACCIDENT TYPE			
CAUGHT IN, UNDER, OR BETWEEN	2	13	16
CONTACT WITH (CHEMICAL, HEAT, COLD, ECT.)		1	
FALLS FROM ELEVATION	1	6	
FALLS FROM SAME LEVEL, SLIP, TRIP	2	13	16
FLYING PARTICLE, SPLASH		5	
INHALATION, ABSORBING, SWALLOWING			
LIFTING, PUSHING, PULLING, BODILY REACTION	1	7	
STRUCK BY FALLING OBJECT		3	
STRUCK BY MOVING OBJECT		19	24
STRIKING AGAINST, STEPPING ON, JUMPING	1	11	14
OTHER/UNKNOWN		1	
	7	79	
LOCATION OF INJURY			
EYE		6	
HEAD, FACE, NECK		9	11
TOP OF HEAD		2	
BACK		12	15
TRUNK, INTERNAL		1	
ARM, SHOULDER, ELBOW	2	10	13
HAND, FINGER, WRIST	2	22	28
LEG, KNEE, HIP, THIGH, BUTTOCKS	2	11	14
FOOT, ANKLE, HEEL	1	6	
TOES			
GENERAL BODY			
UNKNOWN			
	7	79	

LAAC1QO PERSONAL INJURY ACCIDENT ANALYSIS PAGE 298
SHIPPERS STEVEDORING CO
HOUSTON
SEPTEMBER 1973

	NUMBER ACCIDENTS CURRENT MONTH	YEAR TO DATE	%
AGENCY			
CARGO	1*	17*	22
CARGO (HANDLING) 1/ 16			
CARGO (WORK/WALK SURFACE) 0/ 1			
WORK/WALK SURFACE (DECK, DOCK, FLOOR, TABLE	2	5	
SPILLAGE ON WORK/WALK SURFACE	1	7	
SHIPS CARGO HANDLING GEAR AND/OR EQUIPMENT	1	4	
STEVEDORE GEAR &/OR EQUIP. (EXCLUDING MOBILE)		8	10
MOBILE EQUIP. (FORKLIFT, CRANES, RD/RR VEHIC.)		7	
MEANS OF ACCESS (LADDERS, STAIR, GANGWAY)	1	4	
PALLETS		2	
SECURING MATERIALS	1	5	
DUNNAGE		6	
HANDTOOLS		5	
OTHER/UNKNOWN		9	
	7	79	
* TYPE CARGO			
SACKS/BAGS		1	
GENERAL/CRATES		2	12
STEEL/PIPE		5	29
HEAVY LIFT	1	1	
CONTAINERS		3	18
DRUM		1	
COTTON		1	
BULK/GRAIN		1	
AUTO/TRACTOR			
BALE (NOT COTTON)			
NEWSPRINT			
HIDES			
LUMBER/PLYWOOD		2	12
REFRIGERATED			
SCRAP			
OTHER/UNKNOWN			
	1	17	

ILAAC100 PERSONAL INJURY ACCIDENT ANALYSIS PAGE 299
SHIPPERS STEVEDORING CO
HOUSTON
SEPTEMBER 1979

		NUMBER ACCIDENTS CURRENT MONTH	YEAR TO DATE	%
SUPERINTENDENT				
B	SKILLERN		7	
R	LILIENTHAL		4	
E	JASINSKI		6	
R	LEVENTHAL		2	
	UNKNOWN	1	8	
B	LILIENTHAL	2	12	
R	MORTIMER		14	
N	STRATIGAKIS		2	
T	DUGEY JR		1	
N	STUATIGAUES		1	
T	DUGEY	1	6	
B	LILIENTHALL		1	
B	SKILLEN		3	
T	DUGES	1	1	
T	DUGEX		1	
N	STRATIGIKAS		2	
R	LILIEWTHAL	2	2	
R	LILLENTHAL		1	
E	JASINSKY		1	
N	STRATAGAKIS		1	
B	BIGLER		1	
D	MORTIMER		1	
B	LILLINHALL		1	
WALKING FOREMAN				
A	FONTENOT	2	17	
A	OLBRYCH		14	
E	BURK		6	
	UNKNOWN		11	
W	JOHNSON		1	
A	VALENTINE		3	
D	BLACKWELL	1	2	
P	GREEN	3	13	
A	OLBRYCH		1	
R	HUDSON	1	3	
P	SIMIEN		1	
S	NELSON		1	
E	KELLY		3	
A	FONTENOT		1	
P	GREEN		1	
W	PRESTON		1	
NAME OF SHIP				
GALEA		1		
PENTOS MARINER		1		
GRAND FELICITY		1		
ELOIA		1		
EWO VENTURE		3		

COMMENTS ON SOME (CURRENT MONTH) ACCIDENTS:

STATE OF TEXAS
CODE 7309F STEVEDORING WORKERS COMPENSATION
PREMIUM COSTS

CALENDAR YEAR	DOLLARS PER $100.00 OF PAYROLL
1970	$ 21.28
1971	23.93
1972	38.37
1973	39.05
1974	35.25
1975	28.95
1976	36.16
1977	41.61
1978	48.71
1979	51.69

A monetary increase of $30.41 or 142.9%.

MAXIMUM COMPENSATION BENEFITS ALLOWED UNDER LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT

DATES	BENEFITS
1961 to 1972	$ 70.00
11/26/72 to 9/30/73	167.00
10/1/73 to 9/30/74	210.54
10/1/74 to 9/30/75	261.00
10/1/75 to 9/30/76	318.38
10/1/76 to 9/30/77	342.54
10/1/77 to 9/30/78	367.22
10/1/78 to 9/30/79	396.18
10/1/79 to 9/30/80	426.26

A monetary increase of $356.26 or 508.94%

WEST GULF AREA

TREND IN LONGSHORE INJURY COSTS

AVERAGE COSTS PER CLAIM

COMPILED BY WEST GULF MARITIME ASSOCIATION SAFETY DEPT.

CALENDAR YEAR	COST PER CLAIM
1970	$ 890.00
1971	1002.00
1972	1404.00
1973	2044.00
1974	1921.00
1975	2743.00
1976	2857.00
1977	4220.00
1978	3904.00

A monetary increase of $3,014.00 or 338.65%.

I.L.A. WAGE INCREASES
PER CONTRACT NEGOTIATIONS

CALENDAR YEAR	BASIC WAGE PER HOUR
1970	$ 4.60
1971	5.15
1972	5.55
1973	5.95
1974	6.80
1975	7.40
1976	8.00
1977	8.80
1978	9.60
1979	10.40

A monetary increase of $5.80 or 126.08%.

NATIONAL AVERAGE WEEKLY WAGE

CALENDAR YEAR	WAGE
1973	$140.36
1974	149.14
1975	159.19
1976	171.27
1977	183.61
1978	198.39
1979	213.13

monetary increase of $[illegible] or 51.84%.

PREPARED STATEMENT OF JOHN M. WALTON, 3RD, VICE PRESIDENT, LAVINO SHIPPING CO.

Mr. Chairman and members of the Committee:

My name is John M. Walton, 3rd. I am Vice President of Lavino Shipping Company, a fully integrated steamship agency, stevedore and terminal operator headquartered in Philadelphia, Pennsylvania, with operations in ports along the North and South Atlantic plus the Great Lakes.

I thank you for the privilege of testifying today as we are faced with a situation that is of grave concern not only to my Company but to the entire maritime industry. The '72 Amendments to the Longshore Act have made the Act uninsurable and unaffordable. It is as simple as that.

The Subcommittee on Compensation, Health and Safety of the House Committee on Education and Labor held oversight hearings on the Longshore Act during 1977 and 1978. I had the privilege of testifying at those hearings and I sincerely hope that this committee will carefully study the transcripts of those hearings. There is one theme that runs through all of the testimony--the Longshore Act as it stands today is uninsurable and unaffordable and all employers covered by the Act need prompt relief.

In 1962, our Company became a qualified self-insurer under the Longshore Act. For ten years the program ran well and posed no significant difficulties to us even though during the middle and late '60s we were involved in an increasing number of third

party suits. By 1972, third party activity was beginning to have an adverse cost effect on our program. We, therefore, fully supported the proposed amendments to the Longshore Act, which would relieve us of these third party suits. As a trade-off to balance the scale, we supported an increase in the weekly benefits paid to injured longshoremen together with an extension of coverage to the members of the deep water gang working on the pier. We were unaware that a number of additional provisions were to be incorporated into the amendments which would unbalance the scale to the detriment of our Company and our industry. These included, among others, unrelated and uncapped death benefits, an unlimited benefits escalator, elimination of the panel of physicians, and poorly worded coverage provisions which have been interpreted by the Supreme Court to mean that practically everyone working on the pier or terminal is covered by the Act. In addition, the adjudication process was radically changed by diluting the role of the Deputy Commissioner and transferring appeal procedures to Administrative Law Judges and the Benefits Review Board.

What effect did the '72 Amendments have on our ability to determine who is covered under the Longshore Act versus state workers' compensation, on our ability to provide prompt, professional medical care to the injured longshoremen, on the availability of excess insurance and on the cost of our self-insurance program?

What about jurisdiction?

The Longshore Act was amended to fill a vacuum created by

court decisions holding that state workers' compensation acts could not be applied to maritime accidents on navigable waters. When Congress passed the original Act in 1927, it intended that Federal jurisdiction should be extremely limited, and by 1969 the courts had, for the most part, delineated the jurisdiction issue between the state and Federal laws. In 1972, Congress substantially broadened the jurisdiction of the Act by expanding coverage to land operations. At the same time, they attempted to restrict coverage to maritime employment. However, no clear definition of employment was provided in the Act. The issue of jurisdiction which had taken many years to settle was all of a sudden unsettled. Hundreds of employees traditionally covered by state workers' compensation were suddenly brought under Federal coverage.

The shoreside extension of coverage was only intended to reach those members of the ship's gang who were working ashore during loading and unloading operations. Terminal or warehouse workers whose employment does not involve working on the ship or loading or unloading its cargo were never intended to be covered by the Federal Act. Their remedy was to be the same as other shoreside workers performing the same function involved, namely, state workers' compensation laws.

To show you how ridiculous the interpretation of coverage under the Act has been, let me give you a first-hand example.

For many years our stevedore gear and equipment was maintained in a gear locker about one-half mile from the piers. Injuries

to any of the mechanics or gear men, unless an injury occurred while working on board ship, were covered by state compensation laws. We relocated the locker at the back end of our 115 acre container and breakbulk terminal to facilitate the dispatching of gear and equipment to the vessels. Because the locker is within the fence line of the terminal, the Labor Department takes the position that all of the mechanics and gear men are covered under the Federal Act and not state workers' compensation. They take this position regardless of the fact that there has been no change in occupation, only a change in the location of the work place.

What about our ability to arrange prompt, professional medical care?

Prior to the '72 Amendments, the injured longshoremen would be treated by a physician chosen from a panel of physicians approved by the Deputy Commissioner. The panel was made up of local doctors who had special expertise in treating work related, water front injuries and who were familiar with Department of Labor regulations relating to the reporting of medical information. There was good communication between the treating physician, the Deputy Commissioner and ourselves. The '72 Amendments removed the panel of physicians procedure and permitted the injured longshoreman to be treated by a doctor of his own choice. Unfortunately, in many instances the longshoreman was treated by his family doctor who usually was a General Practitioner and not the specialist needed to properly treat the injury. In some

instances this has caused a delay in the longshoremen's return to work and many of these family doctors are not familiar with Department of Labor medical reporting procedures. Medical reports are not only late in being filed but often do not contain the full information regarding the type of injury and treatment. All of this has made it most difficult for the Deputy Commissioner to supervise the medical aspects of each case thereby encouraging malingering and either over treatment or lack of treatment by the physician.

What about excess insurance?

From 1962 until the '72 Amendments were adopted, our self-insured retention was $25,000.00. We bore the cost of the first $25,000.00 of each accident with the excess insurance carrier paying the balance. During that same period many insurance companies, both domestic and foreign, were interested in writing our excess coverage. When our excess policy came up for renewal in March, 1973, just four months after the '72 Amendments became effective, we were unable to find an insurance company that would write the coverage unless we increased our retention to $50,000.00. By the end of 1976, the insurance market insisted on a $150,000.00 retention and in 1979 it went to $250,000.00. Imagine, we must assume the first $250,000.00 of each claim. Adverse loss experience would quickly put us out of business.

During the same period, 1972 to 1979, the number of insurance companies willing to entertain our risk diminished substantially. Prior to 1972, over 20 insurance companies were interested in

writing our excess insurance. This year there were only three and two of the three quoted such high rates that it was obvious they were not genuinely interested. The one carrier that did write our insurance indicated that at the expiration of their policy they would be requiring us to maintain a retention of at least $500,000.00 but probably $1,000,000.00. Upon questioning the insurance companies as to their reasons for requiring such high retentions in addition to charging substantial premiums, we find that the provisions that were incorporated in the '72 Amendments, especially the automatic cost-of-living benefits escalator and the unrelated death benefit, make it difficult if not impossible for them to actuarially determine their exposure. Therefore, they must hedge by requiring high retention levels in addition to high rates.

What about cost?

In 1971, our average cost per accident was $1,378.00. By 1979, even though we had been relieved of third party suits, the average cost per accident had risen to $5,840.00, an increase of 324%. During the same period, the CPI (Consumer Price Index) increased 78%. This means that after stripping out a factor for inflation the changes made by the '72 Amendments have created a 246% increase in the cost of our average claim. Despite a reduction in the number of claims, the cost of our self-insured program has risen from approximately $700,000.00 in 1971 to $3,750,000.00 in 1979. In the last three years alone our costs have escalated over 107%.

Here is a startling statistic. A survey conducted by Risk Planning Group, Inc. in 1978 of corporations similar in size to ours but in other industries determined that the cost of their workers' compensation insurance as a percentage of revenues was less than 4/10 of 1% (.325%). This compares to our total cost of insured and self-insured workers' compensation insurance of 4.6% of total revenues or 5.4% of stevedore and terminal revenues.

In December 1979, members of an ad hoc coalition seeking reform of the Longshore Act published an article entitled "The Longshoremen's And Harbor Workers' Compensation Act--A Federal Program In Crisis," and I quote:

"The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act have created many more problems than they solved. Designed to provide a balanced trade-off of increased benefits for re-establishment of the 'exclusive remedy' principle, they have instead produced excessive costs, uninsurability, more administrative delays, court confusion, and an unnecessary additional need for legal services."

Finally, the Office of Workers' Compensation Programs, U. S. Department of Labor, commissioned Cooper And Company of Stamford, Connecticut to conduct an in-depth study of insurance rates and availability of coverage under the Longshore Act. The study was conducted from October 1977 to October 1978, and on August 1, 1979, Phase I Draft of the Final Report was released, and I quote from the conclusions set forth in the Executive Summary:

"In substance, there exist serious problems under the Act. There is clearly a tightening of availability of insurance, accompanied by very high costs. These are fundamentally caused by high underlying accident rates, very liberal benefits, a propensity to make and exaggerate claims, and a rating process which is responsive to the uncertainties caused by unclear jurisdiction. Unless a concerted effort is made to reduce some of these problems, their intensity is apt to worsen, undermining the entire system."

Uncertain jurisdiction, payment for deaths unrelated to employment, absence of a ceiling on death benefits, uncapped escalation of benefits geared to increases in the national average weekly wage, the free choice of physicians and institutional shortcomings in the placement of the Benefits Review Board under authority of the Secretary of Labor must all be addressed by this committee. The Act must be amended to correct these deficiencies so as to make it fair to all parties and the liabilities under it insurable, predictable and affordable to the employers subject to it.

I sincerely appreciate the opportunity of appearing here today, and, of course, I shall be pleased to answer any questions from the committee.

The CHAIRMAN. Now, we welcome this panel of the Shipbuilders Council of America and American Waterways Shipyard Conference, and others.

Who is in charge here?

Let us get all introduced.

STATEMENTS OF STEWART E. NILES, JR. (JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE), ACCOMPANIED BY EDWIN M. HOOD, PRESIDENT, SHIPBUILDERS COUNCIL OF AMERICA; JACK PIROZZOLO, RYSCO SHIPYARD, ROCKPORT, TEX.; EDWARD RENSHAW, PRESIDENT, ST. LOUIS SHIP; REAR ADM. W. H. LIVINGSTON, U.S. NAVY, RETIRED, PRESIDENT, LOUISIANA SHIPBUILDING & REPAIR ASSOCIATION; HERMAN J. MOLZAHN, VICE PRESIDENT, AMERICAN WATERWAYS SHIPYARD CONFERENCE; AND JOHN RIVERS, VICE PRESIDENT OF SHIPBUILDERS COUNCIL OF AMERICA, A PANEL

Mr. NILES. Thank you, Mr. Chairman.

I am Stewart Niles. I am special counsel for the American Waterways Shipyard Conference and the Shipbuilders Council of America, and general counsel to the Louisiana Shipbuilders & Repairers Association.

I have only just determined today that we would have some of our Louisiana representatives in attendance and I have asked them to join the panel, with the chairman's permission. Considering the press of time and the divergent number of individuals, however, I will serve as the general spokesman for the group and respond to all questions which the committee may pose this afternoon.

I would like to take this opportunity to introduce, starting from my immediate right, Mr. John Rivers, who is the vice president of the Shipbuilders Council of America; Mr. Ed Renshaw, who is the president of the St. Louis Ship and who is also the immediate past president of the American Waterways Shipyards Conference; Mr. Jack Pirozzolo, who is the vice president of RYSCO Shipyard.

To my far left, Mr. Herman Molzahn, who is the vice president for the American Waterways Shipyard Conference; Admiral Livingston, who is the president of the Louisiana Shipbuilding & Repair Association; and Ed Hood, who is the president of the Shipbuilders Council of America.

Mr. Chairman, we would like to thank the committee for scheduling these hearings which cover the interests of the various parties.

We have been in attendance throughout these hearings today and we appreciate your perception of the problems and the very intelligent and indepth questions which you have had occasion to pose.

In that same vein, I would invite questions at any time. If you would like to interrupt my remarks, I would entreat the committee to do so to assure perfect clarification at any time the committee believes such clarification is needed.

At this time, I would request Mr. Hood, on behalf of the Shipbuilders Council of America, to make a brief statement indicating overall problems that the SCA has had with the Longshore Act to date.

The CHAIRMAN. Right.

Mr. HOOD. Thank you, Mr. Chairman.

As Stewart has said, I am Edwin M. Hood, president of the Shipbuilders Council of America, a national industry association, composed of major shipbuilders, ship repairers, and ship component manufacturers.

The magnitude of the cost impact of the 1972 amendments of the Longshore Act on our shipyards has reached a point of deep concern to the entire industry. A projected 850-percent increase in benefits for 1980 as compared with 1970 should underscore the need and the necessity for early solution to the confusion and abuse which now prevail.

Mr. Chairman, we too appreciate you taking the time to delve into this very important subject. It has vast economic consequences to our industry.

The CHAIRMAN. Where are you located again?

Mr. HOOD. Right here in Washington, D.C., Senator.

The CHAIRMAN. And your position is——

Mr. HOOD. I am president of the Shipbuilders Council of America.

The CHAIRMAN. Does that council include most of the shipbuilders of the country?

Mr. HOOD. Yes, sir. Most of the major shipbuilders; and with your permission, I would like to file for the record a listing of our membership.

The CHAIRMAN. I would like to see that.

Mr. NILES. We will mark that as appendix II and ask that it be attached and made part of the record.

[The following was received for the record:]

APPENDIX II

AWSC AMERICAN WATERWAYS SHIPYARD CONFERENCE
1600 WILSON BOULEVARD • ARLINGTON, VIRGINIA 22209 • TELEPHONE: (703) 841-9300

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

OVERSIGHT HEARINGS

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION

Tuesday, September 16, 1980

Jack O. Pirozzolo, Vice President - RYSCO Shipyard, Inc.; Chairman, American Waterways Shipyard Conference

George Fegert, Vice President - Gretna Machine and Iron Works; Chairman - Louisiana Shipbuilding and Repair Association

Dan Duplantis, Vice President - Service Machine Group

Bill Finger, Manager - McDermott Shipyards

Robert Gardebied, Vice President - Halter Marine

Robert Greene, III, President - Jeffboat, Incorporated

Cecil Keeney, President - Equitable Shipyards, Inc.

Charles Patten, Group Vice President - Dravo Corporation

Edward Renshaw, President - St. Louis Ship

Walter Rody, President - Port Allen Marine Service

Alain Seligman, President - Southern Shipbuilding

Charles Wall, Sr., President - Wall Shipyard

R Adm. W. H. "[illegible]" Livingston, U.S.N. (Ret.); President - Louisiana Shipbuilding and Repair Association

Herman J. Molzahn, Vice President, American Waterways Shipyard Conference

The CHAIRMAN. Thank you.

Are there any other spokesmen?

Mr. NILES. Yes, Mr. Chairman.

You have heard a number of the problems today, and I would like to review, in summary, the major problems which beset the shipbuilding and ship repair industry.

I would also ask that the statement of the Shipbuilders Council of America and the American Waterways Shipyard Conference, including the various appendixes, be included for purposes of the record.

The CHAIRMAN. They will be.

Mr. NILES. I think it might be best, in light of the backdrop of the stage that has been set by other speakers today, to break the act down to component parts.

The heart of the act is the disability section, section 8. Section 8(a) defines permanent total disability. The permanent total disability, prior to 1972, did not cause the Department of Labor or any of our courts of appeal difficulty in the determination of who was in fact permanently totally disabled. If a person could not work and could not be engaged in any gainful employment, he was permanently totally disabled. This is in keeping with the statements that you heard from some of the prior speakers today.

Subsequent to this 1972 amendment, however, this section was not amended but it was reinterpreted by the Benefits Review Board. To date, the Benefits Review Board may allow an individual to be held permanently totally disabled even in the event that the individual can engage in gainful employment. We find that the current definition imposed by the Benefits Review Board is unduly broad and abrasive and contrasts the prior jurisprudence.

The longshore unions have from time to time indicated that if a worker can work, they want to see him back in the workplace. It is not their avowed intent, as I would understand it from their position, to have adjudications of permanent total disabilities for individuals who can return to work. Yet, pursuant to the Benefit Review Board's current interpretation, the possibility of a person working and yet being found permanently disabled actually occurs. This new definition is only a part of this problem.

Once an individual is adjudicated to be permanently totally disabled, then each year his benefits are escalated. The annual escalation problem is automatic as soon as the adjudication process is final. Automatically, that individual is also given the life insurance program which has been so ably described, the unrelated death benefits. So from the reinterpretation of permanent total disability by the Benefits Review Board—a body which has not appeared in these hearings today, which as Mr. Elisburg has indicated in terms of the administrative process is separate and distinct in terms of DOL not having direct control over the Benefits Review Board—repercussions in the form of two automatic provisions multiply the impact of the act. This understanding is even more important when considered in conjunction with unscheduled disabilities.

Under section 8, subsection (c), we have the permanent partial disability section. Now section (c), (1) through (20), is like a catalog of disabilities for arms, fingers, and hearing losses, things of that nature. It sets forth in very precise detail the formula to determine

amount of compensation an individual would receive for sustaining a certain percentage disability to that listed bodily member. However, section (c)(21) is the loss of wage-earning capacity section. It is commonly referred to by some as unscheduled permanent partial disability. This section has also been subject to the vast reinterpretation by the Benefits Review Board.

Section 8(h) of the act defining wage-earning capacity has been coupled with 8(c)(21) to fabricate a framework whereby an individual can actually return to work after injury, at wages which exceed his preemployment earnings, and the Benefits Review Board will find a fictitious loss of wage-earning capacity. It is this fictitious wage-earning capacity which causes a monumental problem. The Benefits Review Board takes the position that although the individual may be employed at wages exceeding his preemployment wages, there may come a time in the future when he can no longer perform at a given level. Thus, compensation for this speculative, unrealized loss is avoided. Since compensation starts at the time of judgment, the employer must pay compensation forever, although the speculative, unproven circumstances never come to fruition, and the situation of actual wage loss never arises.

We would suggest again that the only way to handle this problem is to amend the act to redefine section 8(c)(21) in accordance with the original interpretation of the act and thereby take away from the Benefits Review Board this untoward position which they have taken.

I might also note that 8(c)(21), the unscheduled permanent partial disability section, also triggers the multiplier effect.

If any individual has a loss of wage-earning capacity, he is also entitled to death benefits for death unrelated to employment, which was previously discussed.

Earlier today, you heard the Department of Labor indicate that there were no meaningful statistics with regard to premiums generated from 8(c)(21). This fact was somewhat confirmed by the insurance industry. The reason for lack of statistics, as was pointed out in the stevedoring panel, is that these thousands of individuals who have been held either permanently totally disabled or disabled pursuant to section 8(c)(21) have not yet died. As a consequence, the unrelated death benefit has not been triggered, but from an actuarial standpoint, from an expense standpoint, the self-insured employer, many of whom are members of these associations, must make arrangements today to pay off those guaranteed awards in the future. It is a guaranteed payout at the time death occurs from whatever cause.

Another problem that we would suggest is the ambiguity in the act. The act, as we have indicated in our position paper, and which has been confirmed by many, and as the chairman is aware, was hammered out over a several-day session. The 1972 amendments were finally completed in what has been styled a midnight session, which actually may have ended around 3 or 4 o'clock in the morning before its passage. During those hours of discussion back and forth, technical problems were overlooked. Accurate determinations of the Secretary's powers, versus powers of the Deputy Commissioner, or the powers of the administrative law judge or the powers of the Benefits Review Board were improperly reviewed or

actually were not considered at all. Those areas have to be totally rewritten, sir.

If you read the act in realistic terms, a number of oversights become apparent. In furtherance of this condition, it is well known by all, including the Department of Labor, that the cap on death benefits was an oversight. The same limitation for maximum disability benefits should have applied to death benefits.

Another problem which we are beset with is a lack of coordination of benefits. Since benefits are paid for life, as you have already heard, there are many instances where it is more advantageous for an individual to retire on compensation, social security, a pension program, and other disability funding programs. It may be more advantageous to retire with utilization of those benefits as opposed to returning back to some form of employment.

As regards to medical care, more power must be given to the Deputy Commissioner in order to assure that employees are obtaining, seeking, and receiving medical care from qualified practitioners. S. 1511 would assist this process by designating a qualified panel from which employees would select physicians. In addition to which, we believe a mandatory medical examination would be very, very appropriate.

One provision that all parties have agreed upon is the need for mandatory rehabilitation. At this time, rehabilitation is not working. Rehabilitation can only be handled to the best interests of all parties by mandatory rehabilitation, along the lines set forth in the most recent bill submitted by Congressman Erlenborn. Currently, if an employee rejects rehabilitation, his claim may be enhanced. The suggestion of Mr. Gleason, of cutting the employee's compensation in half after certain procedures are followed, would also be very appropriate.

Shipyards, Mr. Chairman, are also unique in two other ways, from a benefits standpoint.

First of all, shipyards may now be sued for a maritime tort action under section 905(b). This maritime tort action would allow the employer to be sued when he has constructive control over the vessel or he is the owner pro hoc visa. Under this tort theory the employee who is receiving compensation benefits may in turn proceed against his employer in an action in tort. We would suggest that, given the great liberality of benefits set forth in the act, the inclusion of a tort remedy to the employee is unjust and burdensome.

The second unique problem of shipyards was addressed in one of your earlier questions—jurisdiction in shipyards. Shipbuilders were not a party to the midnight sessions in 1972. They were not invited to participate in those discussions in 1972. They were not aware of those discussions in 1972. If you will refer to the 1972 hearings of the Subcommittee on Labor, of the U.S. Senate, you will note, at page 177, the only question regarding extension of shoreside jurisdiction in shipyards. The question was posed by Mr. Middleman to Mr. Hartman. Mr. Middleman assumed that if the Longshore Act were extended shoreside, and if duality of benefits was avoided, what would be Mr. Hartman's position with regard to covering additional workers who perform ship repair work?

Mr. Hartman's response was, "I can only speak as an individual, not as a spokesman for the Shipbuilders Council, not as a spokesman for my own company. I would suggest that that is something that could be considered for ship repairmen under the circumstances that you describe."

That testimony was followed the next day by a letter, which is also in today's hearing, a letter by Mr. Ed Hood, explaining that in the absence of statutory language or specific proposals, the Shipbuilders Council of America could not confirm extension of jurisdiction shoreside for shipyards.

Let us retreat for just a minute, if we may—and I know I am taking considerable time—but to capsulize the jursidictional problem, this country faced a morass of unrelated worker's compensation issues prior to 1917. The States were developing individual compensation programs. In 1917, the U.S. Supreme Court, in the *Jensen* case, held that a worker who was injured over navigable waters and engaged in longshoring operations could not be covered under the State act. Congress, in its wisdom at that time, said we do not want the compensation program. So Congress twice attempted to empower the States to provide compensation benefits to longshoremen injured over navigable waters, and twice the U.S. Supreme Court struck that legislation down. Then Congress enacted, of necessity, the Longshore Act in 1927.

The Longshore Act covered only longshoremen injured over navigable waters. The Longshore Act covered shipyard workers injured over navigable waters, but only in conjunction with the repair of a vessel, not new ship construction. The repair of the vessel was deemed to arise under the Admiralty Clause; however, new ship construction was deemed a matter of State law as a contractual right.

In 1962, however, the Supreme Court moved again. In the *Calbeck* decision, the Supreme Court said, look, in order to get rid of the jurisdictional problems, we are going to cut a clear line of demarcation. We are going to say that a shipyard worker engaged in new construction over water, may elect longshore remedy. So we will now allow, for the first time a shipyard worker engaged in new ship construction over navigable water to recover under the Longshore Act.

After 1962, the scholars, the jurists and those persons knowledgeable with the act, all agreed that jurisdiction was well settled. A clear line of demarcation was established both in shipyards and for longshoremen.

The impetus for change again came from the longshore side. In 1972, as the chairman knows the history therein, longshoremen were seeking to increase benefit levels; shipowners were attempting to avoid third-party claims. As a consequence, the 1972 amendments were metted out. But shipyards were not a part and parcel to these decisions and negotiations.

The record on the Senate and House side does not contain any evidence to support any suggestion of any impact of shoreside extension of jurisdiction in shipyards. There is no information available whatsoever. To the 1972 amendments, which in part was a grand experiment dealing with various untried benefit levels, were coupled expansion of shoreside jurisdiction in shipyards in

totally undefined fashion. The test merely states that jurisdiction is extended to an adjoining area. The test is even more ill-defined than from the stevedoring side.

As a consequence, the impact has been to draw within the ambit of coverage more shipyard workers after 1972 than there were longshoremen covered under the act before 1972. Because most of the shipbuilding and ship repair work is done over land, tremendous amounts of litigation have ensued. This explains in part, the reason why this act is still being tinkered with and fine tuned by the Department of Labor. It has taken 8 years to get where they are because of the problems concerning jurisdiction and coverage.

If you look at the analysis of shipyards, Mr. Chairman, you will see that they are indistinguishable from any other large manufacturing process in an industrial setting. The only time anyone can walk into a shipyard and find certain work looking like maritime work is at the time work is being done over water. A hull being completed over water or repairing something that has been towed to the pier are the only circumstances. Workers in shops, workers in storage areas, workers throughout the facility, are using the same types of equipment found in automobile plants, aircraft plants, railroad boxcar construction; and the skills employed are essentially the same.

I would like to briefly return to jurisdiction after highlighting two other problems.

There exists numerous administrative problems with the act. The Office of Workers Compensation programs has been criticized repeatedly because of inefficiency, and the criticism is justified. In 1976, the Department of Labor promulgated a report which noted 56 different areas which had to be corrected. Yet, that report, failed to offer any suggestions to correct any of those areas of deficiency. To date, the Department of Labor has worked on some of those areas, but all 56 have not been remedied and in some instances the remedy has not been an effective, truly proper way to correct the involved issue.

The CHAIRMAN. Whose 56 points were these, again?

Mr. NILES. This was a report done by the Department of Labor. It was concluded in December of 1976 and the name of the report was the "Office of Worker's Compensation Programs Task Force." That report listed 56 specific areas where the Department of Labor had been deficient from 1972 to 1976. It was the architect of the plan which Secretary Elisburg has attempted to implement hereafter. The entirety of that plan has not been completed.

Another problem with the Department of Labor, and I am not taking these in any particular order, is the administration of the special injury fund. It is a problem from the following standpoint, in addition to others that have been pointed out by the stevedores. Currently, the Department of Labor invites abuse of the fund because by regulation the Department requires that for the employer to apply for an application of the second injury fund, permanent total disability of the employee must be stipulated. The employer must stipulate disability before he can actually have a determination on the real key issue of existence of preexisting disability aggravated by this accident, which preexisting disability was

known by the employer sometime during the employment contract?

By regulation the Department of Labor prohibits submission of an application for reviewability until the employer confirms that the employer was permanently, totally disabled.

If the employer feels he has a sufficiently strong enough case on preexisting disability, he will be tempted not to contest the extent of the disability. Some employees would seek application of second injury fund relief and forgo further contest, after paying 104 weeks of disability. That regulation alone, we feel, is very burdensome.

The Department of Labor also has difficulty in the settlement sphere. They will deny settlements agreed upon by parties after protracted negotiation and study. These denials of settlement are often done without cause or explanation.

The Department also takes the position that it will not settle death claims. A death claim cannot be projected out on life expectancy as the entitlements that survivors would receive and then give that money to the recipients in lump sum. Employer and insurer are required to bear the costs of continued payments on this type of claim well into the future.

The Department also refuses to allow 4 percent discount. The act states specific terms a 4 percent discount can be used, and yet the Department refuses to honor that specific provision.

Today, the Department took great pride to indicate that the elapsed time from the request for informal conference to the completion of the formal conference had been cut by 50 percent. One inquiry which might be made to the Department of Labor is, how many more cases are now pending at the next level, and that next level is the administrative law judge level. How many cases have been moved from the holding files in the Department of Labor up to the holding files before the administrative law judges? It is strictly a numbers game. The claims are still there. The problems are still there.

We do appreciate the fact that the Department has attempted to take efforts to expedite the administrative process. Improvements must be recognized, but the improvements fall short of those necessary to reform the administrative problems.

One last comment with regard to the adjudicatory problems. The Benefits Review Board, prior to the chairmanship of Judge Smith, created an atmosphere which led an employer or insuror to believe that there was no sense in filing an appeal unless an appeal to the U.S. Court of Appeals was intended, because the Benefits Review Board would either rubber-stamp the opinion by the administrative law judge or even go further in attempting to provide the broadest and the most liberal assessments, divorced from fair and even-handed decisions.

To some extent the Board has been brought back to perspective under Chairman Smith's guidance. The problem lies in the fact that this change may be transitory. With change of personnel, the Benefits Review Board could again embark on a period whereby the act is reinterpreted to provide the most benefits in spite of reason, equity, or the clear intent of the act.

We are not suggesting that an employee should be recompensed for his occupational diseases or injuries. Conversely, there does

come a time where one has to ask the question: Is this decision really reflective of what the act intended? Many decisions rendered by the Benefits Review Board which transcend reasonable interpretation of the act.

I come before this committee in multiple roles today. The Shipbuilders Council of America, the major shipbuilders, concerns are primarily with the statutory, the administrative and the adjudicatory problems from the benefits levels and the problems which have caused the economic havoc described in our position paper and in the actuarial reports. On the other hand, in representing the American Waterways Shipyard Conference, there is basically only one issue. That issue is the same as the American Boating Association, it is the same as the small boat builders, it is the same as persons who are involved in parks and recreation facilities that are now covered under that act, and that issue is jurisdiction.

We submit that the Congress must take action to establish jurisdiction as it was originally intended under clear lines of demarcation at the water's edge. We do not request that jurisdiction be affected for stevedores or longshoring operations. That is not our concern, although shipbuilders are in harmony for the need to bring clarity and definition to stevedore jurisdiction. But as concerns the shipbuilding process, we just ask that jurisdiction be returned to the water's edge. It is the only line of demarcation that will work; it is the only line that will insure clarity as to who is or who is not covered.

The first jurisdiction case reviewed by the U.S. Supreme Court was the *Sun Shipyard* decision, which was rendered June 23 of this year. That case was provoked by Sun Shipyard attempting to invite the courts to make the Longshore Act all embracive and to exclude States' worker's compensation programs. The Supreme Court refused. In other shipyard cases, the Court has not seen fit to review the issue of jurisdiction; and I would suggest that the issue of jurisdiction in shipyards is no more certain, no more definite, no more clear today than it was after the enactment of the amendments in 1972.

For these reasons, we feel that the amendments set forth in S. 1511, the amendments set forth in H.R. 7610, are appropriate and strike a reasonable balance, and intend not to take benefits away from those who are deserving.

Correction of an oversight affecting jurisdiction for shipyards in 1972 will serve to prevent exaggerated benefits for a few while striking at the vitality of the entire compensation system.

We would be more than glad to respond to any questions. I appreciate you affording me the opportunity to go beyond the time allotted herein, especially considering my diverse role this afternoon. The SCA and AWSC are separate organizations with separate goals and aims with an overlapping of common interests.

The CHAIRMAN. Thank you very much, Mr. Niles. Very clear, forceful statement. I appreciate it.

We do not have the American Waterways Shipyard Conference. Do you have a listing of the membership there?

Mr. NILES. We do not have it this afternoon, but we will send the listing of all 64 members and have that attached as appendix 4 to the AWSC statement, please.

[The prepared statement of Mr. Niles and the information referred to follows:]

STATEMENT OF STEWART E. NILES, JR.
SPECIAL COUNSEL FOR AMERICAN WATERWAYS SHIPYARD CONFERENCE

Mr. Chairman, members of the Committee:

I.

Introduction

My name is Stewart E. Niles, Jr. I am a partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, of New Orleans, Louisiana. My practice primarily embraces personal injury litigation, including workers' compensation laws under state and federal statutes. In the area of workers' compensation, I have represented claimants, self-insured employers, and insurance companies. It is a privilege and an honor to appear as special counsel to the American Waterways Shipyard Conference in these Oversight Hearings.

The American Waterways Shipyard Conference is a national industry trade association composed primarily of 64 intermediate to small shipbuilders and ship repairers from throughout all regions of the country.

The American Waterways Shipyard Conference was created as a direct result of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Most of its members had few, if any, employees covered under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act prior to 1972. Shoreside extension of jurisdiction has been the primary concern of the Conference.

II.

Shoreside Extension of Shipyards in the 1972 Amendments to the Act was Included Through Oversight

The Longshoremen's and Harbor Workers' Compensation Act was conceived, created and enacted for longshormen, not shipbuilders or ship repairmen. The development of coverage and expanded jurisdiction for longshoremen is an overriding fact which must be considered throughout any discussion of the problems which beset shipbuilders and ship repairment. In fact, because shipbuilders and ship repairmen were "orphaned" into the Act, problems and difficulties for shipyards have been magnified beyond those encountered by other maritime interests.

A. Shipyards were "Orphaned" into the Longshoremen's and Harbor Workers' Compensation Act.

Originally, the problem at issue was whether a longshoreman injured over navigable water could recover under a state workers' compensation statute. In reviewing the problem presented by longshoremen, the United States Supreme Court in Southern Pacific Company v. Jensen,[1] decided in 1917 that the states were without power to extend a state workers' compensation remedy to longshoremen injured over navigable water. The Jensen ling was established at the water's edge to divide shoreside

[1] 244 U.S. 205.

injuries to longshoremen from amphibious injuries to longshoremen. The immediate repercussions of this decision did not directly involve those engaged in the shipbuilding industry.

Subsequent to Jensen, Congress twice enacted legislation to authorize the states to apply their compensation statutes to injuries over navigable water. Twice, the United States Supreme Court disallowed such legislation as unlawful delegations of Congressional power.[2]

Following its second futile attempt to empower state workers' compensation remedies coverage to longshoremen injured over navigable water, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. The purpose of the Act was to provide a compensation remedy to longshoremen injured over navigable water and employees of maritime interests who could not be covered by state workers' compensation statutes.

In shipyards, the Act applied to a limited number of employees. Only employees engaged in the repair of a ship and injured over navigable water had to receive a workers' compensation remedy provided by the LHWCA.[3] Any shipyard worker,

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2 Washington v. W.C. Dawson & Company, 264 U.S. (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

3 Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924); New Bedford Dry Dock Company v. Purdy, 258 U.S. 96 (1922).

irrespective whether engaged in new construction or ship repair, had to receive workers' compensation benefits pursuant to state law. Likewise, workers engaged in new ship construction and injured over navigable water were covered under state law, since contracts for new ship construction are not under admiralty jurisdiction.[4]

For 35 years after enactment of the Longshoremen's and Harbor Workers' Compensation Act, the provisions of the Act applied to only a limited class of employees in the shipbuilding industry--ship repairmen engaged in the performance of maritime contracts of repair and injured over the navigable waters of the United States.

Expansion of jurisdiction in shipyards arose from the courts, not the Congress. In 1962, the United States Supreme Court expanded the coverage of the Act to embrace shipyard workers engaged in the new construction of vessels over navigable waters.[5] The Supreme Court, interpreting Congressional intent formulated for enactment of the original statute concerning longshoremen, extended coverage to shipyard

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4 Grant-Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922); Thames Tow Boat Co. v. The Schooner McDonald, 254 U.S. 242 (1920).

5 Calbeck v. The Travelers Insurance Company, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962).

workers injured over navigable water while engaged in the construction of new vessels. Albeit Calbeck was an act of "judicial legerdemain," the coverage test in conformity with the Jensen line was praiseworthy. For subsequent to Calbeck, all shipyard workers injured over navigable water could be covered under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act. Those workers engaged in new ship construction could also be covered under state compensation law. These clear lines of demarcation coupled to the election of remedies doctrine arising from the "twilight zone" concept removed all confusion and inequity regarding jurisdiction and coverage.

An injured employee was often confronted with a delemma: Was his injury covered under state workmen's compensation law or the Longshoremen's and Harbor Workers' Compensation Act? The United States Supreme Court resolved the issue recognizing that some workmen were afforded an election to receive benefits under either the Longshoremen's and Harbor Workers' Compensation Act or a state's workers' compensation law. The injured worker was afforded an "election of remedy" if his injury occurred within an area of concurrent state-federal jurisdiction, commonly referred to as the "twilight zone."[6]

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6 Davis v. Department of Labor, 317 U.S. 249 (1949).

Today, since state workmen's compensation law can cover certain classes of shipyard workmen injured over navigable water, the "twilight zone" remains a viable doctrine in the shipbuilding industry.[7] Hence, subsequent to Calbeck, jurisdiction and coverage issues were eliminated. Application of LHWCA was clearly delineated. This idyllic situation was to last for only ten years.

B. Longshoremen Sought Change In Jurisdiction and Coverage.

Longshoremen were dissatisfied with the coverage and jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, and longshoremen again approached the courts for extension of the jurisdiction shoreward. However, the United States Supreme Court in Nacirema Operating Co. v. Johnson[8] interpreted the Longshoremen's and Harbor Workers' Compensation Act as not providing coverage to longshoremen on the shoreward side of the Jensen line even though injured while loading or unloading a vessel. In concluding the opinion in Nacirema, Justice White wrote:

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7 Territo v. Poche, 339 So.2d 1212 (La. 1976), writs of cert. denied, 98 S.Ct. 31 (1977).

8 Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969).

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the longshoremens act would not affect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the act. In construing the longshoremens act to coincide with the limits of admiralty jurisdiction-whatever they may be and however they may change-simply replaces one line with another whose uncertain contours could only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line must be addressed to Congress, not to this Court."[9] (Emphasis supplied.)

In 1972, Congress accepted the Court's invitation to extend jurisdiction shoreward for longshoremen. The Court's invitation had been prompted by longshoremen, and Congressional action was likewise prompted by longshoremen. The impetus for the 1972 Amendments resulted from a tripartite compromise among longshoremen, ship owners and stevedores. Each party received a substantial benefit. Longshoremen received greatly exapnded benefits in return for removal of the right to sue a vessel for unseaworthiness. The ship owner was relieved from suits by longshoremen for the vessel's unseaworthiness. The stevedore was relieved of its dual

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[9] Id., 396 U.S. 224, 90 S.Ct. 354.

obligation of having to pay both workers' compensation benefits and indemnity to the ship owner for claims brought by its longsoremen for the vessel's unseaworthiness.[10]

The Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor of the House of Representatives has received testimony from various participants in the compromise negotiations. Hon. Donald E. Elisburg,[11] Ralph M. Hartman,[12] and Dennis Lindsay[13] have each testified that the shipbuilding industry was not involved in the protracted negotiations which resulted in the compromise leading to the 1972 Amendments to the LHWCA.

C. Shipyards Included In 1972 Jurisdiction Amendments Through Oversight.

The 1972 Amendments represent the first Congressional

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10 §905(b) has been interpreted to allow recovery by a longshoreman or shipyard employee for maritime negligence against his employer who is also the owner or owner pro haec vise of a vessel. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Smith v. The M/V Capt. Fred, 546 F.2d 119 (5th Cir. 1977); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1977), cert.den. 423 U.S. 1054. A shipowner may also be sued for maritime negligence. Since 1972, the theory of maritime negligence has been expanded such that it closely resembles the strict liability principles of unseaworthiness.

11 Assistant Secretary of Labor for Employment Standards.

12 Director, Office of Workers' Compensation Programs.

13 Counsel for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

action to specifically extend coverage to shipbuilders engaged in new construction of vessels and the first Congressional action to extend coverage for shipbuilders and ship repairmen beyond the water's edge, i.e., the Jensen line. However, a thorough review of the Hearings on the 1972 Amendments failed to reveal any testimony assisting the House or the Senate in establishing reasonable jurisdictional parameters for shipyards. The bills then under consideration did not contain proposed language to alter jurisdiction in shipyards. The sole reference to the shipbuilding industry was a letter by Edwin M. Hood, President of the Shipbuilders Council of America, who declined to take a position on a jurisdictional change in shipyards in the absence of amendatory language. Moreover, since the LHWCA was created for longshoremen, the information amassed, the examples afforded and the general discussions concerned longshoremen. Examples of jurisdictional inequities offered during the Hearings on the 1972 Amendments were drawn exclusively from longshore employment.

As a result of a "midnight meeting," wherein representatives of longshoremen, ship owners, stevedores and Department of Labor negotiated a previously discussed tripartite compromise, the jurisdiction provisions of the Act were inadvertently amended. This Committee has not received testimony from any individual which has indicated that it was the intent of Congress in 1972 to amend jurisdiction for shipyards. To

the contrary, the evolution of the 1972 Amendments regarding jurisdiction reveals that coverage for longshoremen was to be extended shoreward for ship owner and stevedore relief from unseaworthiness claims. Shipyards, shipbuilders and ship repairers were not part of the conferences or negotiations which gave birth to the shoreward extension of the LHWCA in 1972.

The oversight occurred in a staff conference between House and Senate Committees. In the process of attempting to implement the negotiated compromise among longshoremen, ship owners and stevedores, the conferees failed to exclude shipyards from the provisions extending jurisdiction shoreside. As might be expected from action lacking deliberate consideration, utter havoc has been caused, and continues to be caused, in the shipbuilding industry.

The 1972 Amendments failed to define "shipbuilders" and "ship repairmen". Confronted with the necessity to determine which shipbuilders and ship repairmen are covered under the LHWCA, the courts have been compelled to employ far-reaching efforts. Consequently, the results have conflicted. Moreover, the United States Supreme Court has refused to hear and to bring clarity to jurisdiction and coverage in shipyards.

The confusion resulting from attempts to define jurisdiction and coverage, with resultant increase in litigation of jurisdictional issues, confirms that shipyards were included

in extension of shoreside jurisdiction in 1972 through an oversight, not by design.

D. Shipyards Are Indistinguishable From Other Industrial and Fabricating Plants.

Shipyard workers, other than ship repairmen injured over navigable water, have received their workers' compensation remedy under the remedies provided by the several states. These traditional remedies were effected by the 1972 Amendments for one reason. Since ship repairmen injured over navigable water can obtain workers' compensation only under the LHWCA, it has been assumed, without hearing from informed parties or discussion, that all shipyard workers perform similar work, are exposed to similar hazards, and are similarly situated. As a consequence of this erroneous assumption, it was apparently concluded that if ship repairmen injured over navigable water must be covered under the Act, all shipyard workers must be covered under the Act. The facts do not justify such conclusion.

The work performed in small to intermediate shipyards is similar to work performed in industrial and manufacturing plants throughout the United States. In many such shipyards, most of the work is performed in shops or in closed buildings. In many such shipyards, most of the component fabrication is performed in shops and assembly is performed on buildingways, either at ground level or a few feet off the ground.

Attached hereto as Appendix I is an overlay of a shipyard depicting the typical components of a shipyard. [For purpose of the record, a copy of each page of the overlay is provided.] Review of these components will confirm that the work performed in shipyards is similar to work performed in industrial and manufacturing plants throughout the United States. First, administrative and office space is designated. Generally, under the Act, administrative personnel are not covered.

Second, storage areas for raw materials and components received from suppliers is identified. Such storage areas are essential to any type of industrial and manufacturing process.

Third, fabrication shops are shown. These shops include workers engaged as machinists, electricians, pipefitters, painters, component fabricators, and related shop workers. The types of equipment used by these employees, the methods employed, and the skills utilized are the same as those found in shops and manufacturing plants utilizing one or more of these skills. In fact, work in these shops has produced many products and components which have not been incorporated into vessels. Finally, it should be noted work performed in these shops is in closed buildings which could be located anywhere in the country.

Fourth, the sub-assembly area is shown. Sub-assembly is the combination of one or more components. In some shipyards this work is performed, at least in part, inside buildings. In other shipyards, the work is performed outdoors. Again, the type of work is similar to the fabrication of railroad boxcars, mobile trailer homes, building construction and innumerable building and manufacturing processes.

Fifth is the erection area. Virtually all shipyards have what is known as a "buildingway." Again, the building-way in some shipyards is indoors. However, most shipyards have a buildingway or final erection area outdoors. It is interesting to observe that the erection area in modular assembly shipyards looks similar to the erection and attachment of apartment buildings or office buildings.

To this point, there is nothing in the process which makes it uniquely maritime in nature.

Sixth, the final component is outfitting. Outfitting is performed over water after the vessel is launched. It is only after the vessel is launched or in the final stage of erection that the materials being worked upon appear to be a vessel. More importantly, workers engaged in outfitting over navigable water generally remain in that area.

The work in small and intermediate shipyards is performed in a typical, manufacturing assembly line process. Indeed, until the final stage of assembly, the nature of

the operation and the work performed are indistinguishable from any other process. Only in the last stage of construction is it possible to determine that the work product is a vessel.

Since contracts for new ship construction are not under the admiralty and general maritime law, since construction resembles the industrial and fabricating process of plants throughout the United States, and since repair work, which is covered by admiralty law, is generally performed over navigable water, shipyard workers working on land should not be covered under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act.

III.

The American Waterways Shipyard Conference Proposes a Substitute Jurisdictional Amendment

The American Waterways Shipyard Conference wholeheartedly endorses the jurisdictional amendment proposed in S 1511. The "water's edge" concept is the only workable line of demarcation which can avoid unnecessary litigation and provide the clarity and precision of coverage which is desperately needed.

The American Waterways Shipyard Conference would propose a substitute bill for Sections 2 and 3 of the Act. This bill would further clarify the jurisdictional language contained in S 1511. The proposed bill is attached herewith and marked for identification as Appendix II.

The American Waterways Shipyard Conference bill confirms three classes of workmen who are covered by the Act. Each classification is defined. The definition is clear, concise and easily understood and administered by all parties.

The coverage provisions of Section 3 have been expanded to provide further clarification. Administrative personnel and others engaged in activities not directly related to ship repair, shipbuilding or shipbreaking would not be covered.

The proposed changes to S 1511 would assure that the "water's edge" concept is maintained and optimum precision and clarity are assured.

IV.

The Cost Impact of the Provisions of The United States Longshoremen's and Harbor Workers' Compensation Act is Unpredictable and Unreasonable

The American Waterways Shipyard Conference concurs in the plea for Congressional action urged by the Shipbuilders Council of America. Only Congressional redress of the jurisdictional oversight enacting the proposed Amendment proposed by the American Waterways Shipyard Conference and the Shipbuilders Council of America can correct the catastrophic problems besetting the Act. On the other hand, jurisdiction is not the only problem besetting the Act. Since members of the American Waterways Shipyard Conference, as a general rule, are not self-insurers, and since these shipyards do not administer their workmen's compensation programs, the best evidence of other statutory and administrative problems should emanate from self-insured shipyards and insurance companies. However, small and intermediate shipyards do urge

this Committee to review several areas for possible reform.

Benefits are paid during the recipient's lifetime. The concept of workmen's compensation is to replace an employee's earnings, or stated another way, to provide compensatory reparations. Hence, it is suggested that this Committee consider an Amendment which would provide benefits to a recipient during his or her work-life expectancy.

Benefits are not awarded as a wage replacement system. Award or compensation for most injuries comes under the provisions of §8(c)(1-20), commonly referred to as "scheduled benefits". However, where an employee has an actual loss of earnings which is below his average weekly wage at the time of his accident, §8(c)(21) provides that the employer shall pay two-thirds of such actual loss. However, this provision has been liberally interpreted by the Benefits Review Board, and claimants are receiving awards under §8(c)(21) when the employee has not sustained actual loss of earnings. This Committee should consider an amendment which would provide that an employee could receive an award under §8(c)(21) if he sustains an actual loss of wages; thus, an employee's earning capacity would not be less than his actual earned wages.

The LHWCA does not contain incentives for an employee to return to work. This Committee should undertake revision to provide for the coordination of benefits from all sources. An injured employee should be provided an adequate remedy;

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however, the LHWCA should not be a retirement system. Positive incentives for a recipient to return to work must be established.

The LHWCA must be amended to promote an employee's participation in rehabilitation.

Death benefits for death unrelated to employment should be removed from the Act. An employer should not be compelled to pay a death benefit unless an employee dies from causes related to the employment. If this Committee believes all workmen who die from causes unrelated to employment should receive compensation under the LHWCA, these costs should be borne by the populace as a whole.

The rate of the annual escalation clause should be established at a fixed rate, not to exceed 3%. It is impossible for employers, self-insurers and insurance companies to predict the ultimate cost impact of compensation for recipients entitled to receive an annual adjustment under the escalation clause. The insurance industry calculates that a rate of escalation in excess of 3% would be unaffordable. Moreover, since workers' compensation benefits are not taxable, a 3% escalation rate would achieve the intended purpose.

The Act should be amended to confirm that death benefits are subject to the maximum and minimum limitations of the Act. Through an apparent oversight, the 1972 Amendments failed to include death benefits in the maximum limitation provisions.

The test for permanent total disability should be clarified. The Benefits Review Board has allowed employees to receive benefits for permanent total disability although the employee may be actually employed. An employee who is capable of gainful employment or who is actually engaged in gainful employment should not fall within this classification.

This Committee should assure that the Department of Labor follows clear Congressional mandate in the application of §8(f), Injury Increasing Disability. If an employee has a pre-existing disability and the disability is worsened, the employer pays compensation pursuant to §8(f). Although the statutory mandate is clear, employers have had an increasingly difficult burden to obtain reimbursement for injuries falling within the purview of this section.

The Benefits Review Board should be entirely restructured. The Benefits Review Board should be removed from the Department of Labor. Alternatively, the Benefits Review Board should be abolished and appeal from the decisions of the Administrative Law Judges should be lodged directly to the United States District Courts, with jurisdiction for review afforded magistrates.

This Committee should reconsider the panel physician concept. An employee should be entitled to free choice of physician from a panel designated by an employer and approved by the Deputy Commissioner.

Employers have had difficulty in obtaining independent medical examinations by a physician of the employer's choosing. Since this right is clearly specified in the LHWCA, this Committee should assure that the Department of Labor follows this provision.

The parties should be allowed the opportunity to settle claims. Presently, the Department of Labor refuses to approve settlements submitted by the parties. The parties are in the best position to appreciate the difficulties and intricacies of the claim. Accordingly, the Department of Labor's action to accept or reject a proposed settlement should be made timely, should be made in writing, and should be appealable.

The LHWCA provides for four percent discount on settlements. The Department of Labor consistently refuses to allow any discount on settlements. This Committee should assure that the clear provisions of the LHWCA are followed by the Department of Labor.

Procedures should be implemented for full discovery of information at the informal level. The parties are compelled to assess a claim without review of all documents or benefit of the testimony of all witnesses. The parties should be allowed to obtain this information in the informal claims handling process, prior to referral to formal hearing.

The attorneys' fees provision of the Act is abused. Attorneys' fees should be awarded only if it is determined the employer or its insurer's refusal or failure to pay a claim in dispute was arbitrary, capricious, not in good faith

and without substantial basis in fact or in law.

Penalties are assessed arbitrarily. The employer may not have knowledge of injury or disability within fourteen days of an accident. Penalties will automatically be imposed if notice of controversion is not filed within fourteen days of the accident. Obviously, if the employer is unable to determine whether an injury will result in a claim for latent developing disability or the employer does not have actual knowledge of the accident, penalties should not be imposed. The penalties section should be amended to provide a penalty if the employer does not file notice of controversion within fourteen days of each claim for particular benefits, or the penalties should be deleted.

V.

Election of Remedies versus Double Recovery

The practical effect of jurisdiction transcends mere questions of coverage. Claimants are attempting to receive full benefits under state workers' compensation systems and then obtain supplemental awards pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Many argue that the Supreme Court pronouncement in Thomas v. Washington Gaslight Company, 48 U.S.L.W. 4930 (June 27, 1980) controls election of remedies. In fact, Thomas

does not address the issue of election of remedies. Thomas, supra, analyzed the full faith and credit clause vis-a-vis state-state compensation. The Thomas decision has left unanswered the issue of state-federal compensation and the election of remedies doctrine.

This issue is under submission in Landry v. Carlson Mooring Service, No. 79-1274 (5th Circuit).

In any event, Congress should confirm its intent to make the Longshoremen's and Harbor Workers' Compensation Act benefits exclusive. Double recovery is not a proposition which should be endorsed by the Congress. Moreover, since no two compensation systems are exactly alike, a "set off" or a "credit" cannot be provided between the state workers' compensation system and the entitlements and requirements under the Act.

VI.

Conclusion

The American Waterways Shipyard Conference adopts its former testimony in the House Committee on Education and Labor. Considering the time constraints of this presentation, the specific substantive abuses and ills, other than jurisdiction, have not been addressed. The American Waterways Shipyard Conference, however, confirms its unqualified support for the analysis, proposals and recommendations of the Shipbuilders

Council of America.

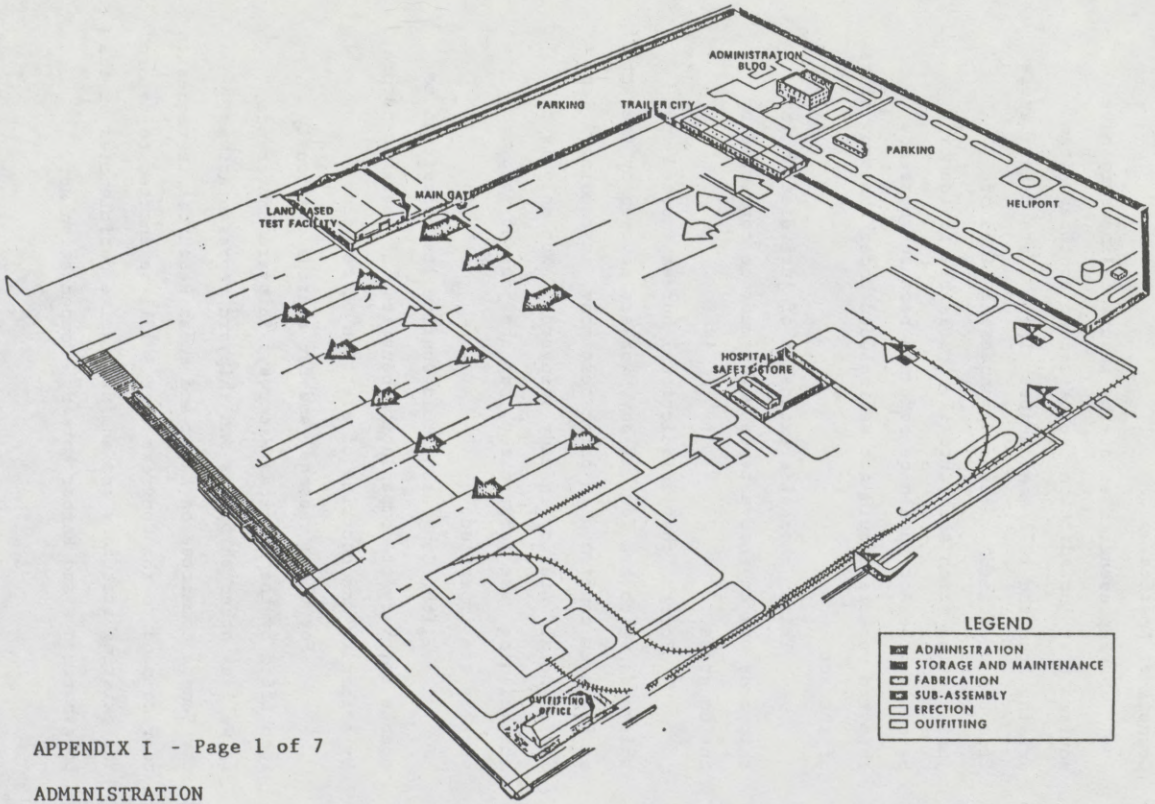
Representatives of the insurance industry have advised that jurisdiction is the second costliest item arising from the 1972 Amendments. These costs mainly arise from the undefined, vague and meandering lines of jurisdiction which are virtually impossible to identify. Secondly, the Act should be reformed because shoreside shipyard workers should not be included under the provisions of the Act.

Third, shoreside extension of jurisdiction in shipyards was an inadvertence which must be corrected by the Congress.

Fourth, the jurisdictional burden imposed upon shipyards which had few, if any, workers covered by the Act, as has been confirmed in prior testimony, is causing a loss of financial vitality in many shipyards. Not only is the shipbuilding base jeopardized, but the jobs of shipyard workers are imperiled.

Fifth, Congress should confirm its opposition to double recovery of compensation benefits, of whatever nature, by affirming the doctrine of election of remedies.

For these reasons, and for reasons previously identified by the American Waterways Shipyard Conference, as well as other shipyards and shipyard representatives, the Senate Committee on Labor and Human Resources is requested to recommend to the Congress that S 1511 be enacted to reform the existing statutory and administrative deficiencies of the Longshoremen's and Harbor Workers' Compensation Act.



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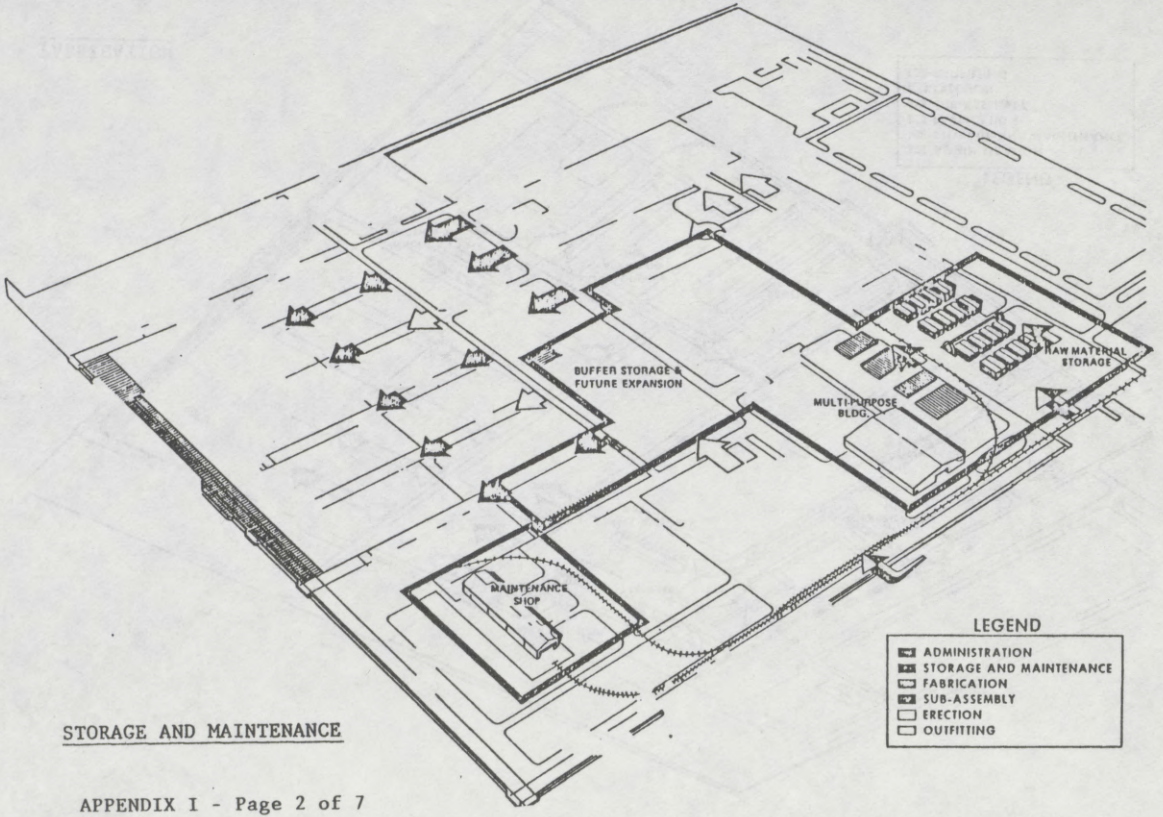
ADMINISTRATION



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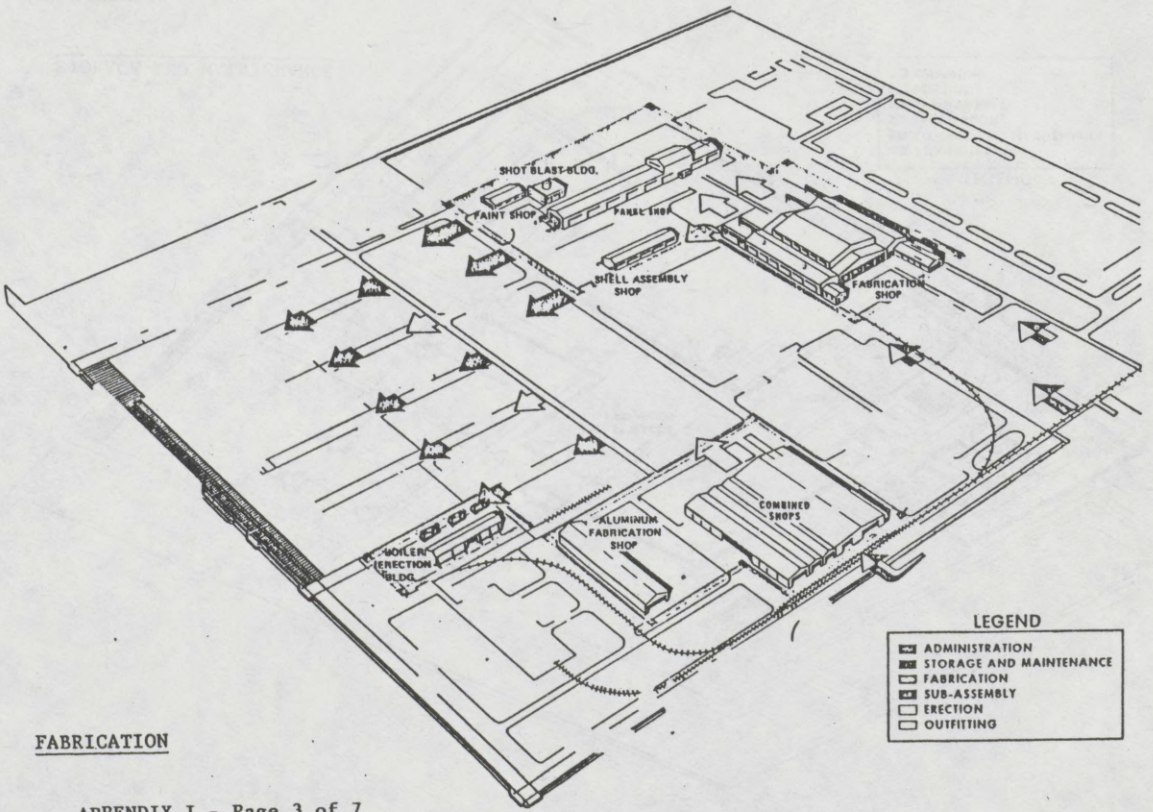

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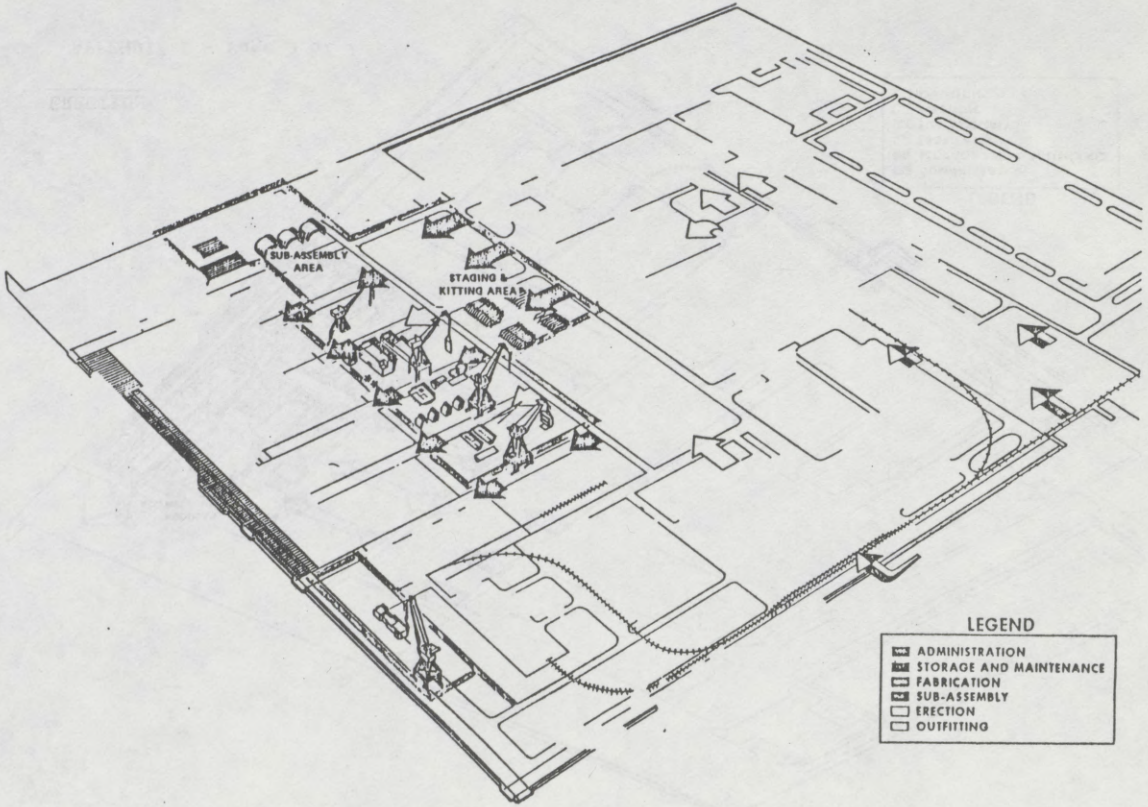

SUB-ASSEMBLY

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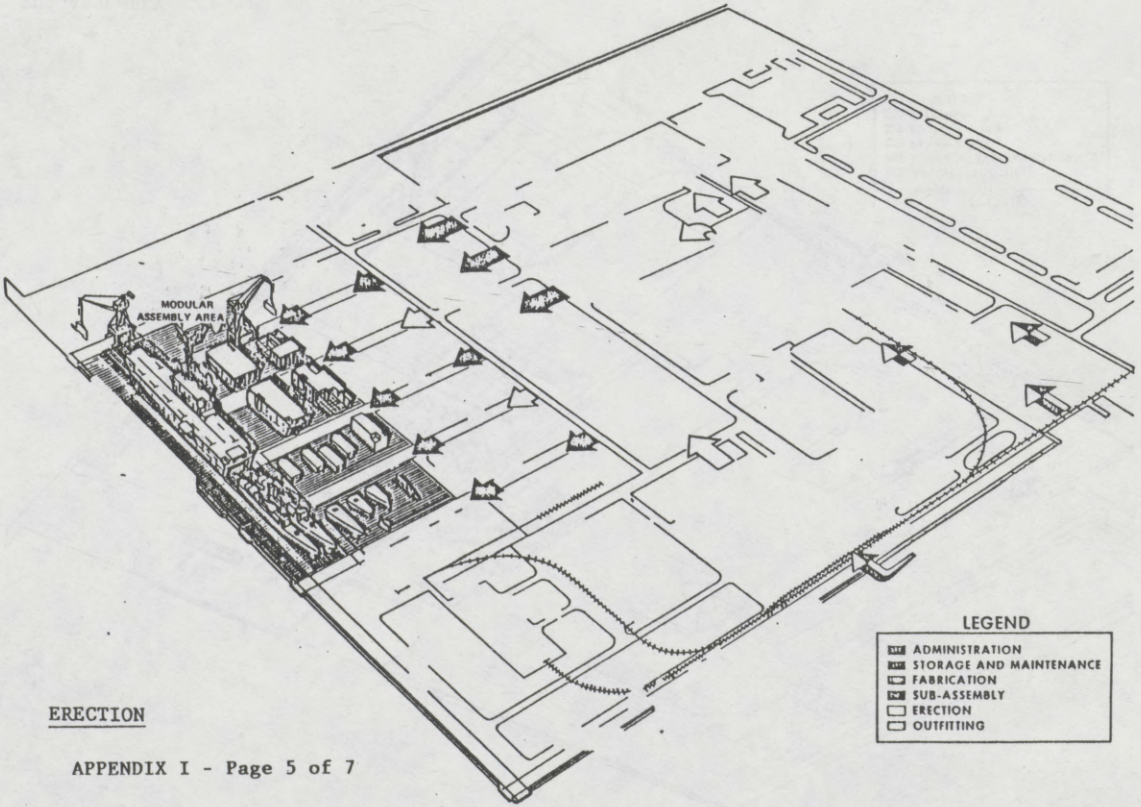
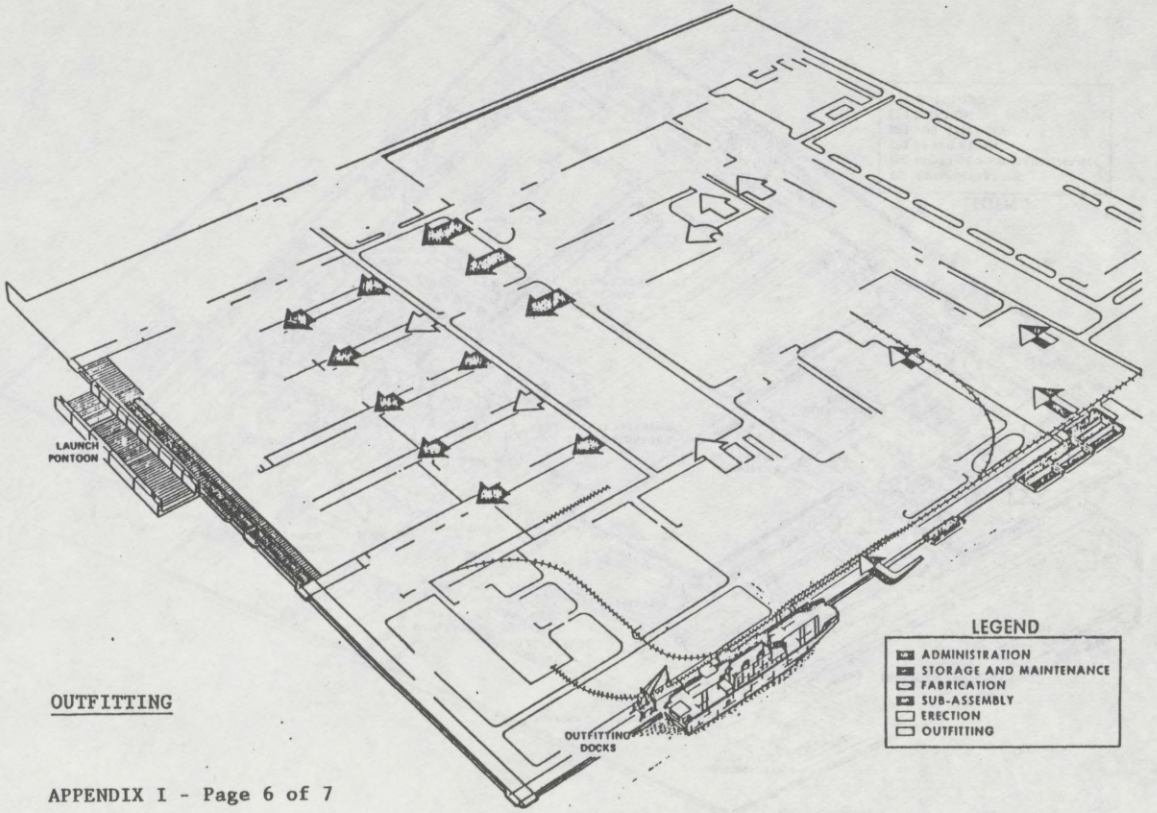
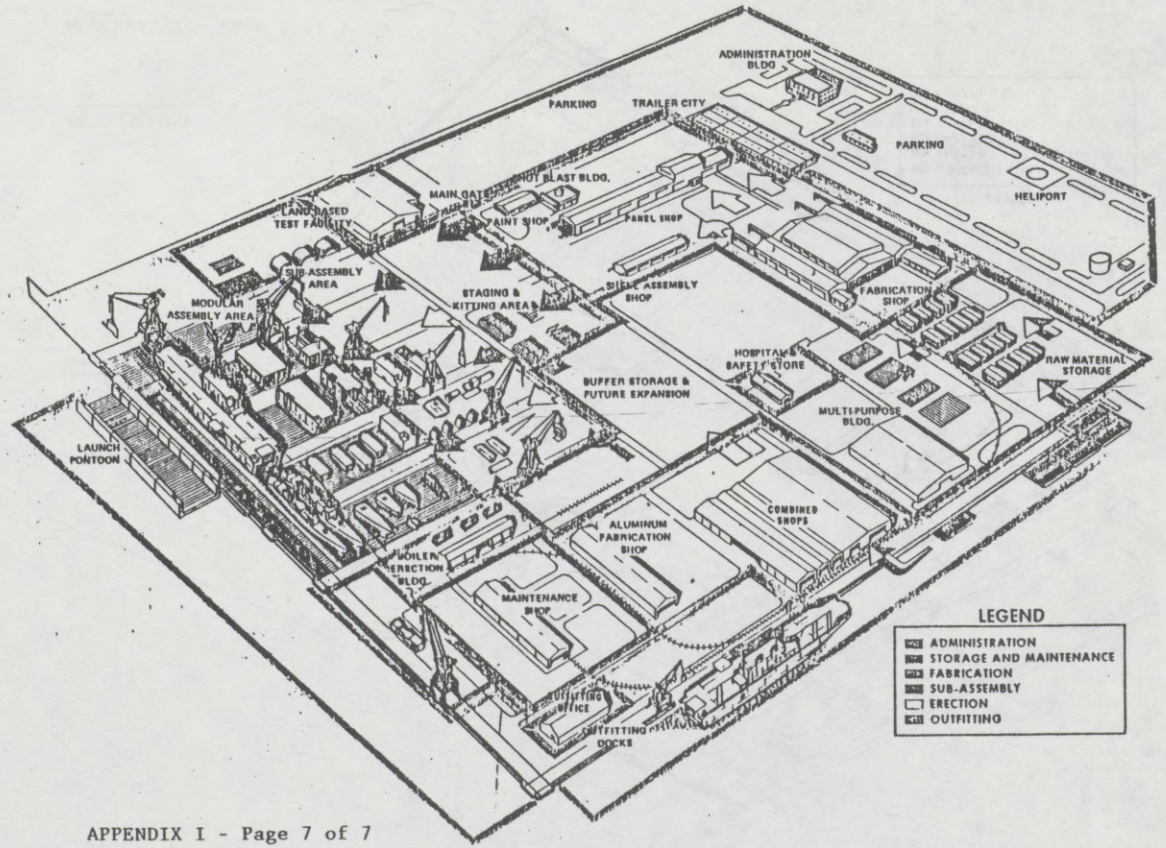

MODULAR
ASSEMBLY AREA
LEGEND
ADMINISTRATION
STORAGE AND MAINTENANCE
FABRICATION
SUB-ASSEMBLY
ERECTION
OUTFITTING

ERECTION


LAUNCH PONTOON
OUTFITTING DOCKS
LEGEND
ADMINISTRATION
STORAGE AND MAINTENANCE
FABRICATION
SUB-ASSEMBLY
ERECTION
OUTFITTING

OUTFITTING


ADMINISTRATION BLDG.
PARKING
TRAILER CITY
PARKING
HELIPORT
MAIN GATE
HOT BLAST BLDG.
LAND BASED TEST FACILITY
PAINT SHOP
PANEL SHOP
SUB-ASSEMBLY AREA
MODULAR ASSEMBLY AREA
STAGING & KITTING AREA
SHELL ASSEMBLY SHOP
FABRICATION SHOP
HOSPITAL & SAFETY STORE
RAW MATERIAL STORAGE
BUFFER STORAGE & FUTURE EXPANSION
MULTI-PURPOSE BLDG.
LAUNCH PONTOON
COMBINED SHOPS
ALUMINUM FABRICATION SHOP
BOILER ERECTION BLDG.
MAINTENANCE SHOP
OUTFITTING OFFICE
OUTFITTING DOCKS
LEGEND
ADMINISTRATION
STORAGE AND MAINTENANCE
FABRICATION
SUB-ASSEMBLY
ERECTION
OUTFITTING

CHANGES IN EXISTING LAW MADE BY THE PROPOSED BILL

In compliance with Clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the Bill are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is underscored, existing law in which no change is proposed is shown in roman):

DEFINITIONS

Sec. 2. When used in this Act--

***

(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, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.] employed at the time of the injury as a longshoreman, ship repairman, ship builders, ship breaker, or harbor worker, as those terms are herein defined.

(4) The term "employer" means any employer of "employees". [any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States

(including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).]

***

(23) The term "longshoreman" means any person who, at the time of the injury, was employed and directly engaged in the loading or unloading of cargo to and from vessels upon the navigable waters of the United States and the point of rest as herein defined.

(24) The term "ship repairman", "ship builder", "ship breaker" means any person who, at the time of injury, was employed and directly engaged in the construction, repair, or dismantling of a vessel while such person is upon the navigable waters of the United States or floating drydock thereupon, but not while such person is upon piers, wharves, building ways, marine railways, graving docks, shops, or all other facilities or areas over land customarily used in ship repairing, ship building, or ship breaking.

(25) The term "harbor worker" means any person who, at the time of injury, was employed and directly engaged in the performance of services on or for a vessel upon the navigable waters of the United States and not covered by a state workers' compensation law.

***

COVERAGE

Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an "employee"[,] as herein defined. [but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).] No compensation shall be payable in respect of the disability or death of --

(1) A master or member of a crew of any vessel [,]; or [any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or]

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof[.]; or

(3) An employee who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance or repair of gear or equipment, security, timekeeping, rail car loading and unloading, mechanical, truck loading or unloading, warehousing, or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking; or

(4) An employee who, at the time of injury, was providing services on or for any vessel less than 36 tons net.

72-745 O—81——21

AWSC AMERICAN WATERWAYS SHIPYARD CONFERENCE

1600 WILSON BOULEVARD • ARLINGTON, VIRGINIA 22209 • TELEPHONE: (703) 841-9400

September 23, 1980

Honorable Harrison A. Williams, Jr., Chairman
Senate Committee on Labor and Human Resources
Room 4230, Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Waterways Shipyard Conference, thank you for the opportunity to testify at the oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act.

At your request, a copy of the American Waterways Shipyard Conference roster is enclosed, along with a list of about 100 shipyards that have left this segment of the shipyard industry since 1972, either through bankruptcy or by terminating their shipyard operations.

The American Waterways Shipyard Conference was founded in 1976, and it is composed of 64 small and medium sized shipyards located on the East, West and Gulf Coasts, the Great Lakes and the inland rivers. Our segment of the industry builds and repairs the barges, tugboats and towboats which provide our country with low-cost, fuel efficient water transportation: the crewboats, supply boats and other specialized vessels for our offshore oil and mining industry and vessels for our reviving fishing industry.

This segment of the shipyard industry's economic contribution to the nation far exceeds its size. However, the Longshoremen's Act is preventing this industry from competing in non-maritime construction, especially during economic down turns, thereby depriving companies of a means for survival when maritime business falls off. Also, the exhorbitant costs of the Longshoremen's Act is diverting funds from capital investment which will eventually lead to lost jobs because of antiquated shipyard facilities.

Small and medium sized shipyards have already experienced more than an 800 percent increase in Longshore Act costs per employee during the years 1972 through 1979. During the same period, wages have increased by about 200 percent.

Prior to 1972, only about 10% of the employees in these shipyards were covered under the Longshoremen's Act, and the rest were under state coverage. After 1972, about 90% were under the Longshoremen's Act, and the rest under state coverage.

In 1972, the small and medium sized shipyards were inadvertently swept into Longshoremen's Act coverage without having an opportunity to consider or testify on the effects of shoreward extension of the jurisdiction.

The simple amendment returning coverage back to the water's edge line of 1972 in shipyards offered at the oversight hearing would provide this industry with tremendous relief from the burdens of the Longshore Act while other more complex changes are subsequently considered. This amendment will provide equity to both workers and to the industry.

I would also like to bring to your attention the health and safety programs being developed by this part of the industry. We were recently awarded an OSHA "New Directions" grant. This money will be used to establish training programs for the new employee to educate him about safety and health hazards in the shipyard before he encounters them on the job; and a guide for the shipyard manager that will explain how to use the program effectively, how to adapt the training materials to individual shipyards, and how to evaluate the impact of the training on new employees.

The American Waterways Shipyard Conference looks forward to working with you and your staff on resolving the many problems inherent in the Longshoremen's and Harbor Workers' Compensation Act.

Sincerely yours,

Herman J. Molzahn

Herman J. Molzahn
Vice President - Shipyard Operations

Enclosures

cc: Stewart E. Niles, Jr.
AWSC Steering Committee

Updated 5/13/80

AMERICAN WATERWAYS SHIPYARD CONFERENCE

ACADIAN SHIPYARD, INC.
P. O. Box 298, Highway 24
Bourg, LA 70343
(504) 594-4123
Rep: J. Fletcher Wallace
Alt: James W. Pate

ALGIERS IRON WORKS
& DRY DOCK CO., INC.
434 Powder Street
New Orleans, LA 70114
(504) 362-7960
Rep: Childs E. Dunbar, Jr.
Alt: Sewell Williams

AMERICAN BRIDGE DIV. - U.S. STEEL
Park Road
Ambridge, PA 15003
(412)266-2270
Rep: Ralph A. Frederick, Jr.
Alt: Robert E. Bestwick

AVONDALE SHIPYARDS, INC.
P. O. Box 50280
New Orleans, LA 70150
(504)436-2121
Rep: J. M. Garrett
(504)341-4211, x271
Alt: Albert L. Bossier, Jr.
Alt: Clarence Geier

AZALEA FLEET, INC.
P. O. Box 537
Ama, LA 70031
(504) 431-7368
Rep: Curtis L. Anderson

BLUDWORTH BOND SHIPYARD, INC.
8114 Hockley
Houston, TX 77012
(713)923-2001
Rep: Harold M. Bludworth
Alt: Leonard M. Bond

JOHN BLUDWORTH MARINE, INC.
P. O. Box 6504
Pasadena, TX 77506
(713)473-5561
Rep: John Bludworth
Alt: C. Ray Etheridge

C & C MARINE MAINTENANCE CO.
P. O. Box 118
Georgetown, PA 15043
(412)573-9863
Rep: Clifford H. Crain
Alt: R. E. Scatterday

CHANNEL SHIPYARD CO., INC.
3711 San Felipe Road
Houston, TX 77027
(713)622-6232
Rep: Mrs. Pearl M. Sample
Alt: M. E. Rushing,
(P.O. Box 55,
Highlands, TX 77562

COLONNA'S SHIPYARD, INC.
400 E. Indian River Road
Norfolk, VA 23523
(804)545-2414
Rep: Phillip Moberg
Alt: Roy Deacon
Alt: W. W. Colonna, Jr.

DELTA SHIPYARD
(Chromalloy American Corp.)
P. O. Box 7036
Houma, LA 70361
(504)868-7240
Rep: R. A. Arceneaux
Alt: Christian Olivier

DRAVO CORPORATION
4800 Grand Avenue, Neville Island
Pittsburgh, PA 15225
(412)771-1200
Rep: L. E. Greene
Alt: N. B. Mortimer
Alt: C. A. Patten
Alt: E. D. McMurry
Alt: Donald Courtsal
Alt: R. F. Smail,
(One Oliver Plaza,
Pittsburgh, PA 15222)

DUWAMISH SHIPYARD, INC.
5658 Marginal Way, S. W.
Seattle, WA 98106
(206)767-4880
Rep: Daniel J. Larsen
Alt: Arthur J. Larsen
Alt: Oswald E. Meberg

EQUITABLE SHIPYARDS, INC.
P. O. Box 8001
New Orleans, LA 70182
(504)835-0398
Rep: C. M. Keeney

FORKED ISLAND SHIPYARD, INC.
P. O. Box 219
Kaplan, LA 70548
(318) 642-5646
Rep: E. A. Ray, Jr.

GALVESTON SHIPBUILDING COMPANY
P. O. Box 2660
Galveston, TX 77553
(713)744-0491
Rep: Nat McClure
Alt: Dan Jones

GEOSOURCE INC.
Marine Services Division
P. O. Box 24
Harvey, LA 70059
(504) 368-7600
Rep: D. M. Gordon
Alt: Vincent Moore, Jr.

GRETNA MACHINE
& IRON WORKS, INC.
P. O. Box 215
Harvey, LA 70058
(504)367-8080
Rep: George J. Fegert
Alt: D. Kenneth Boothe
Alt: Martin de Matteo

HARRISON BROTHERS DRY DOCK
& REPAIR YARD, INC.
P. O. Box 1843
Mobile, AL 36601
(205)432-4607
Rep: W. H. Harrison, Jr.
Alt: W. T. Ames

HELENA MARINE SERVICE, INC.
P. O. Box 428
Helena, AR 72342
(501)338-8311
Rep: Jim Walden
Alt: C. Blake Robertson

HILLMAN BARGE
& CONSTRUCTION CO.
P. O. Box 510
Brownsville, PA 15417
(412)785-6100
Rep: Robert E. Kenny, Pres.

THE INGALLS MARINE
Marine Division
P. O. Box 368
Decatur, AL 35602
(205)353-1962
Rep: R. S. Byers
Alt: George W. Hall
(P.O. Box 2527,
Birmingham, AL 35202)

INTRACOASTAL CITY DRYDOCK
& SHIPBUILDING, INC.
Route 3, Box 196-K
Abbeville, LA 70510
(318) 893-4184
Rep: Lewis J. Faciane
Alt: William E. Faciane

JANOUSH MARINE, INC.
Port of Rosedale
P. O. Box 640
Rosedale, MS 38769
(601) 759-3526
Rep: Joe W. Janoush
Alt: Paul Janoush

JEFFBOAT, INCORPORATED
1030 East Market Street
P. O. Box 610
Jeffersonville, IN 47130
(812)288-0100
Rep: Robert W. Greene, III
Alt: Wayne La Grange

LEMONT SHIPBUILDING & REPAIR CO.
P. O. Box 370
Lemont, IL 60439
(312)739-5000
Rep: Anton Drabik

MCDERMOTT SHIPYARDS
P. O. Box 188
Morgan City, LA 70380
(504)631-2561
Rep: F. W. Finger
(P.O. Box 60035,
New Orleans, LA 70160)
Alt: V. J. LeBlanc
Alt: F. San Miguel

M/G TRANSPORT SERVICES, INC.
111 East Fourth Street
Cincinnati, OH 45202
(513)721-3795
Rep: David T. Sheehy
Alt: Richard A. Hain

MAIN IRON WORKS, INC.
P. O. Box 1106
Houma, LA 70361
(504)876-6302
Rep: Lawrence Mazerac, Jr.
Alt: Le Roy J. Molaison

MAINSTREAM SHIPYARDS
& SUPPLY, INC.
P. O. Box 1559
Greenville, MS 38701
(601)335-8700
Rep: J. L. Williams
Alt: Stanley Walters

MANGONE SHIPBUILDING CO.
819 South 80th Street
P. O. Box 5446
Houston, TX 77012
(713)926-9451
Rep: Don L. Godeau
Alt: John W. Jordan

MARATHON SHIPBUILDING COMPANY
P. O. Box 870
Vicksburg, MS 39180
(601)636-9161
Rep: Charles Franck
(LeTourneau Rural Station
Vicksburg, MS 39180)
Alt: Jackie A. Tohill

MARINETTE MARINE CORPORATION
Foot of Ely Street
Marinette, WI 54143
(715) 735-9341
Rep: Charles L. Nord
Alt: Roger Derusha

MERRITT SHIP REPAIR COMPANY
321 Embarcadero
Oakland, CA 94606
(415)893-7020
Rep: R. G. Hartsock

MISENER INDUSTRIES, INC.
5353 W. Tyson Avenue
P. O. Box 13625
Tampa, FL 33681
(813) 837-8522
Rep: R. E. Goerlich, Jr.
Alt: Paul W. Booher

MISSISSIPPI MARINE CORPORATION
P. O. Box 539
Greenville, MS 38701
(601)332-5457
Rep: D. John Nichols
Alt: K. D. Griffin

MISSOURI DRY DOCK
& REPAIR CO., INC.
P. O. Box 700
Cape Girardeau, MO 63701
(314)335-6685
Rep: R. W. Erlbacher II
Alt: Curtis Moore

NASHVILLE BRIDGE COMPANY
P. O. Box 239
Nashville, TN 37202
(615)244-2050
Rep: Richard Buntele

NATIONAL MARINE SERVICE INC.
Shipyard Division
P. O. Box 38
Hartford, IL 62048
(618)254-7451
Rep: E. E. Ahlemeyer
Alt: R. E. Carroll, Sr.
(Foot of Hawthorne)

NEW ORLEANS SHIPYARD, INC.
10825 Watson Road
St. Louis, MO 63127
(504)431-9300
Rep: Joseph W. Rose
Alt: Hugh Hammond
(Box 446, Westwego, LA 70094)

NEWPARK SHIPBUILDING
& REPAIR, INC.
P. O. Box 5426
Houston, TX 77012
(713)928-5051
Rep: John W. Sansing
Alt: James H. Sessions

NEWPORT SHIP YARD, INC.
One Washington Street
Newport, RI 02840
(401) 846-6700
Rep: Neil C. Peirson
Alt: Michael E. Collins

ORANGE SHIPBUILDING CO., INC.
P. O. Box 1670
Orange, TX 77630
(713)883-6666
Rep: Robert M. Clary

PLATZER SHIPYARD, INC.
P. O. Box 24399
Houston, TX 77015
(713)453-7251
Rep: Neal S. Platzer
Alt: Harry L. Sloat
Alt: E. Wiltsie Platzer

PORT ALLEN MARINE SERVICE, INC.
P. O. Box 108
Port Allen, LA 70767
(504)387-5991
Rep: Walter W. Rody
Alt: William H. Swiggart
Alt: Gerald J. Smith

RIVERWAY SHIPYARD COMPANY
P. O. Box 308
Foot of Oak Street
Grafton, IL 62037
(618) 786-3371
Rep: Alan F. Hauff
Alt: Michael Howard

RODERMOND INDUSTRIES, INC.
184 Henderson Street
Jersey City, NJ 07302
(201)332-3300
Rep: Michael J. Gallagher
Alt: James F. Murphy

RYSCO SHIPYARD, INC.
P. O. Box 578
Blountstown, FL 32424
(904)674-5475
Rep: Mrs. Sylvia H. Gates
Alt: Michael A. McMillan

RYSCO SHIPYARD, INC.
P. O. Box 662
Rockport, TX 78382
(512) 729-5431
Rep: Sylvia H. Gates
Alt: Jack O Pirozzolo
Alt: Robert Konvicka
Alt: Michael A. McMillan
Alt: James Dupnik
Alt: T. M. Smith, III

ST. LOUIS SHIP
(Pott Industries, Inc.)
611 East Marceau Street
St. Louis, MO 63111
(314)638-4000
Rep: Edward Renshaw
Alt: Anthony G. Tobin

ST. LOUIS SHIP
(Pott Industries, Inc.)
Canal Place One, Suite 2400
New Orleans, LA 70130
(504)581-2069
Rep: W. R. Cumming
Alt: A. G. Tobin (at St. Louis address)

SAUCER MARINE SERVICE, INC.
P. O. Box 3067 (Bywater Station)
New Orleans, LA 70117
(504)944-3316
Rep: K. D. Saucer
Alt: L. A. Calvin

THE SERVICE MACHINE GROUP
P. O. Box 2664
Morgan City, LA 70380
(504)631-0511
Rep: Daniel J. Duplantis
Alt: B. C. Fernandez

SOUTHERN SHIPBUILDING CORP.
P. O. Box 1089
Slidell, LA 70458
(504)643-3144
Rep: Z. J. Hymel, Jr.
Alt: Alain Seligman

SOUTHWESTERN BARGE
FLEET SERVICE
P. O. Box 845
Highlands, TX 77562
(713)452-5857
Rep: H. T. Hilliard
Alt: H. T. Hilliard, Jr.

SUPERIOR BOAT WORKS, INC.
P. O. Drawer 8
Greenville, MS 38701
(601)378-9100
Rep: Lea Brent
Alt: Bruce Feigley
(P. O. Box 326
Greenville, MS 38701)
Alt: Monroe Barrett

THRIFT SHIPBUILDING & REPAIR
P. O. Box 14
Sulphur, LA 70663
(318) 583-2396
Rep: W. E. Thrift, Sr.
Alt: W. E. Thrift, Jr.

TODD SHIPYARDS CORPORATION
P. O. Box 9666
Houston, TX 77015
(713)453-7261
Rep: Vincent H. Horbelt
Alt: Paul J. O'Keefe
(Foot of Dwight Street,
Brooklyn, NY 11231
Alt: A. W. Stout
Alt: John Meghrian

TWIN CITY SHIPYARD, INC.
P. O. Box 43032
St. Paul, MN 55164
(612) 738-8300
Rep: John Buursema
Alt: John W. Lambert

UNION DRY DOCK
& REPAIR COMPANY
Foot of Pershing Road
Weehawken, NJ 07087
(201)867-0904
Rep: Robert J. Burke
Alt: Robert F. Bond

WALKER BOAT YARD, INC.
P. O. Box 729
Paducah, KY 42001
(502)442-2738
Rep: Paul Walker
Alt: Billy W. Hendon
Alt: Robert Penny

WALL SHIPYARD, INC.
P. O. Box 419
Harvey, LA 70059
(504)394-6230
Rep: Charles W. Wall, Sr.
Alt: Earl Jeansonne, Sr.

ZIGLER SHIPYARDS
(Div. of Lee-Vac Ltd.)
P. O. Box 1190
Jennings, LA 70546
(318)824-2210
Rep: Dennis J. Banta
Alt: Larry Musgrove
(10333 Northwest Freeway,
Suite 336,
Houston, TX 77092)
Alt: Fred Y. Martin

COMPANIES OUT OF THE SHIPBUILDING/SHIP REPAIR BUSINESS 1970 - 1975

(In 1975 the AWSC made its first survey of the industry. The following companies either were no longer in the marine business or the mail was returned indicating that the company was no longer in business.)

ALABAMA

Peterson Manufacturing Company, Mobile

ALASKA

Northern Machine and Marine, Inc., Ketchikan

ARKANSAS

Turner Equipment Rental, Pine Bluff

CALIFORNIA

Berkeley Steel Construction Co., Inc. Berkeley
Los Angeles Harbor Marine Co., San Pedro
McDonough Steel Company, Oakland
Pacific Ship Repair, Inc.
Seimer Ship Repair Company, San Francisco

DELAWARE

Wilson Shipyard, Inc., Wilmington

FLORIDA

Barcone Marine Corporation, Fort Lauderdale
Southport Shipyard, Southport

GEORGIA

Augusta Iron & Steel Works, Inc., Augusta

ILLINOIS

Chicago Bridge & Iron Company, Oak Brook

INDIANA

Ryan Contracting Company, Evansville
Yates Marine Construction Co., Jeffersonville

IOWA

Dubuque Boat and Boiler Co., Dubuque

LOUISIANA

Acme Contractors, New Orleans
Gulf Overseas Service Corp., New Iberia

Horn's Red River Shipyard, Shreveport
Point Landing, Inc., New Orleans
Sewart Seacraft, Berwick
Slidell Marine Fabricators, Inc., Slidell
Taylor Shipyard, Maurice

MARYLAND

Arundel Corporation, Baltimore
N. E. Insley, Inc. Crisfield

MASSACHUSETTS

Hodge Boiler Works, East Boston
Iringale & Sons, Inc., East Boston

MICHIGAN

Harrington Construction Co., Fennville

MISSISSIPPI

Big River Shipbuilding, Inc., Vicksburg
Gulf Boat Building Corp., Biloxi
Industrial Steel and Machine Works, Gulfport

MISSOURI

Standard Boat and Motor Company, St. Louis

NEW JERSEY

O'Kane Marine Repair Company, Hoboken

NEW YORK

Voyage Repair Corp., New York

NORTH CAROLINA

Elizabeth City Iron Works & Supply Co., Elizabeth City
New Bern Shipyards, Inc., New Bern

OHIO

Carlson Steel and Fabricating Co., Astabula
William Ferrel, Inc., Toledo
Frisbie Engine and Machine Co., Cincinnati

OREGON

Coos Bay Steel Fabricating Company, Coos Bay

PENNSYLVANIA

Delaware Ship Repair & Drydock, Philadelphia
Erie Marine, Inc., Erie

SOUTH CAROLINA

Charleston Dry Dock and Shipbuilding Co., Charleston

TEXAS

Andy International, Inc., Houston
Bishop Shipbuilding Corp., Arnasas Pass
Freeport Marine Ways, Freeport
H. C. Hartzog Shipyard, Port Lavaca
Howard Iron & Supply Co., Inc., Brownsville
Neches Intersection Shipyard Company, Inc., Port Arthur
Nueces Shipyard, Inc., Corpus Christi
Texas Maritime Industries, Corpus Christi
United Shipbuilding & Repair, Port Arthur

WASHINGTON

Arcweld Manufacturing Co., Inc., Seattle
Isaacson Structural Steel Company, Seattle
Maritime Shipyards & Petrich Machine Works, Seattle
Reliable Steel Fabricators, Olympia
Tripple & Everett Marine Ways, Inc., Seattle

SHIPYARDS OUT OF BUSINESS
1976 SHIPYARD SURVEY
of the
AMERICAN WATERWAYS SHIPYARD COMMITTEE

Allen Industries
Great Bridge, VA

Allied Marine
Northeast

Alumaship Corporation
Jeanerette, LA

Braswell Shipyard
Brooklyn, NY

Brighton Marine Repair Yard
Hoboken, NY

Canal Marine Repairs
New Orleans, LA

Chrisfield Shipyard
Chrisfield, MD

DACO
Biloxi, MS

Damarriscotta Boatyard
Dammarriscotta, ME

Defoe Shipbuilding Co.
Bay City, MI

Dependa Craft
Pierepart, LA

Fairhaven Shipyard
Bellingham, WA

Fellows and Steward
Terminal Island, CA

Gerrets, J.A. Inc.
New Orleans, LA

Gillette Marine Ways, Inc.
Samoa, CA

Harbor Boat Building Co.
Terminal Island, CA

Jackson Landing Shipyard, Inc.
Pearlington, MS

Marine Industries Co.
Morgan City, LA

Martinolich Shipyard
Tacoma, WA

Port Houston Iron
Houston, TX

Ryder Yachts
Northeast

Sausalito Marine
Sausalito, CA

Serrits, J.S.
New Orleans, LA

South Texas Shipyard
Corpus Christi, TX

Tetraco, Inc.
Louisiana

Tollefsen Bros., Contracting
Brooklyn, NY

Western Marine
Tacoma, WA

SHIPYARDS OUT OF BUSINESS
1977 SHIPYARD SURVEY
of the
AMERICAN WATERWAYS SHIPYARD COMMITTEE

Carolina Marine & Drydock
P. O. Box 1227
Wilmington, NC 28401

F. & B. Marine Service Inc.
P. O. Box 554
Morris, IL 60450

Johnson Shipyard
P. O. Box 615
Helena, AR

Marine Builders, Inc.
P. O. Box 905
Clarksville, IN 47130

Murach Marine Service Inc.
35 Roosevelt Street
Acushnet, MA 02743

Rice Marine Railway Co.
Box 88
Readyville, TN 37131

Tocheboat Builders
Box 407
Ocean Springs, MS 39564

Walker & Sons Inc.
P. O. Box Q
Pascagoula, MS 39567

SHIPYARDS OUT OF BUSINESS

1978 SHIPYARD SURVEY

of the

AMERICAN WATERWAYS SHIPYARD CONFERENCE

Craig Brothers Marine Railway
Norfolk, Virginia

P & M
Newport, Rhode Island

Phoenix Marine
Norfolk, Virginia

Willamette Iron & Steel Company
Richmond, California

SHIPYARDS OUT OF BUSINESS

THROUGH 1979

American Gulf Shipbuilding
Larose, LA

Baltimore Marine Repair Shops
Baltimore, MD

Booz Brothers, Inc.
Baltimore, MD

C. J. & S. Marine Sales
Avondale, LA

Key West Marine Railroad
Key West, FL

Portland Industrial Plastics
Portland, OR

Rice Marine Railway Company
Readyville, TN

South Texas Shipyard, Inc.
Corpus Christi, TX

T & D Shipyard, Inc.
Cut Off, LA

Walkland Marine Works, Inc.
Baldwin, LA

The CHAIRMAN. They are the smaller craft yards?

Mr. NILES. The American Waterways Shipyard Conference is composed of small to intermediate shipyards. It is difficult to precisely define which type of shipyard falls in those categories. They are found primarily on inland waters and deal primarily with barge and towboat business along the Mississippi River, as well as offshore construction along the gulf coast and smaller vessels along—in other areas of the country. There is no one precise or accurate way to distinguish between the AWSC and the SCA, except the SCA is primarily engaged in construction and repair of seagoing ships. Other than that, and notable exceptions exist, the nature of the work is similar, although of different scale.

The CHAIRMAN. The small pleasure craft, where do they fit into the association's structure?

Mr. NILES. At this time, we do not have the small pleasure craft association—members per se. We do have yards, though, that construct pleasure craft as part of their activities. We do have shipyards which fabricate products which are to be used strictly on land.

In the past, we have had shipyards who fabricated machine parts or bridge trustles or parts that would go into tunnel sections or even filling stations. Shipyards are like any other corporation. They attempt to use their facilities to maximum ability and in times of low shipyard contractual obligations, they then, rather than releasing their very qualified workmen, attempt to bid and obtain contracts for land side work. This highlights the point that shipyards are placed in a noncompetitive position with other contractors. If we put in a bid to do machinist work, for a certain contract, and try to compete with a nonshipyard company right across the street from us, who is not covered by the Longshore Act, we cannot compete with him or meet his bid because, and solely because, of the pricing of our longshore coverage.

So the 1972 amendments makes us noncompetitive for everything other than shipbuilding, and this is a position that we did not find ourselves in prior to 1972.

The CHAIRMAN. Looking at the listing of members of the Shipbuilders Council, MacGregor-Comarain, in Cranford, N.J., are they covered under the Longshoremen's Act?

Mr. HOOD. They have coverage with respect to items delivered to the shipyard, and as I read the 1972 amendments, carried to their ludicrous extreme, they could be affected; yes, sir.

As a matter of fact, Senator, we have in a number of our shipyards fabricating plants that are located miles from the waterfront and the subassemblies are transported at night when the highways are closed down just to get them to the waterfront. These facilities are covered by the Longshore Act.

Mr. NILES. This is not to say that we have personal knowledge that that facility is currently accepting longshore jurisdiction. But I think the point is, in light of the recent Supreme Court interpretations, if any one of the employers, employees, goes over navigable waters, under the Supreme Court interpretation, that one employee may make everyone else back in the shipyard, which may be miles and miles from the water's edge, all of those other workers

would be covered under the Longshore Act by its most liberal and expansive interpretation.

The CHAIRMAN. Are you familiar with Transamerica Delaval in Trenton?

Mr. HOOD. Yes, sir. They manufacture turbines, steam turbines for oceangoing vessels.

The CHAIRMAN. They would deliver those turbines to the oceangoing ship?

Mr. HOOD. Right.

The CHAIRMAN. In both of those, there would be interesting questions of coverage within the shop.

Mr. HOOD. Yes.

The CHAIRMAN. I would think. Because they do an awful lot of work other than shipyard work.

Mr. HOOD. That is correct. I just happen to remember Transamerica Delaval up there manufacturing volume in marine work at the moment accounts for only 10 percent.

The CHAIRMAN. Who would be covered under the act?

Mr. HOOD. I do not quite know the answer to that, Senator.

The CHAIRMAN. And the same would apply to the MacGregor-Comarain Co.? They are probably engaged in activity other than ship hatches?

Mr. HOOD. Yes; that is right.

The CHAIRMAN. I do not see any Cleveland or any Ohio yards in your list here.

Mr. HOOD. The American Shipbuilding——

The CHAIRMAN. That is the one I was wondering about.

Mr. HOOD. They have applied for membership, and their application was just approved last Thursday.

The CHAIRMAN. At the next hearing we will have Steinbrenner here.

Mr. HOOD. Yes, sir, he is an old friend of mine.

The CHAIRMAN. Mine, too.

Mr. Niles, let me read you this on page 18.

> This Committee should assure that the Department of Labor follows clear Congressional mandate in the application of section 8(f), Injury Increasing Disability. If an employee has a pre-existing disability and the disability is worsened, the employer pays compensation pursuant to section 8(f). Although the statutory mandate is clear, the employer has had an increasingly difficult burden to obtain reimbursement for injuries falling within the purview of this section.

Mr. NILES. That is correct, sir.

First of all, in the period 1972 to about 1975, it was very difficult indeed to get the Department of Labor to approve any cases for 8(f) applicability. After 1975, the Department began giving more consideration to section 8(f) and, as has been pointed out in previous panels, the emphasis for expanding coverage did not come with the Department of Labor, but it came in cases such as *Hardy* v. *Equitable Equipment* rendered by the Fifth Circuit Court of Appeals; that was in about 1977.

In *Hardy,* the court held that the disability need not be an economic disability. Originally the Department of Labor had taken a position that although an employer had hired someone who has had a 15-percent disability to the leg as a consequence of that previous surgery, and now you put him in the workplace and he again had knee problems, let us say this time he strained liga-

ments which needed to be tightened and this second surgery left him with a 30-percent disability to the same knee, the Department took the position originally that the employer did not have a worker who demonstrated an economic disability. So they denied it on that basis.

The courts overruled that consideration.

The second expansion came, as has been described, by allowing constructive utilization of information. If the employer knew or could have known of the preexisting disability from records that were available to him or could have been made available to him, based on those records, he may use that as the foundation for section 8(f); that expansion also came from the courts and not from the Department of Labor.

However, since the courts have redirected the Department of Labor, the problem is different today. The problem today, as I previously described, is that the Department now requires the parties to stipulate disability which, of course, the employee is generally only looking for permanent total disability when application of this section is considered. The parties are almost enticed to stipulate permanent total disability, which may or may not be reflective of the facts—merely a vehicle to get the issue before the Department of Labor for determination.

From that standpoint, we find that it is repugnant to good administration of 8(f). We would join with others who concur that an independent party should be appointed to defend the fund. We have asked the Solicitor's office on occasion to come down and defend the fund and they have refused to do so, saying they are not empowered to represent the Secretary under these considerations, and yet they will represent the Secretary in all other considerations.

It is somewhat incongruous that the Secretary at this time would not undertake steps to defend a Second Injury Fund and assist in determining whether those provisions should or should not apply.

The CHAIRMAN. There is something missing in our understanding of this, why that second injury has to be stipulated to produce a total situation?

Mr. NILES. I do not understand it either, Senator. That particular section speaks in terms of disability at various levels and the disability must fall within one of those categories.

The Department of Labor has taken a position that the extent of disability must be stipulated. From a practical standpoint, seldom do you find an employee's representative who will come in and say, well, I will stipulate only a scheduled loss. Claimant's want to either stipulate an 8(c) loss of wage-earning capacity or total disability. It is more advantageous, and it is appealing to the employer, not to resist the argument or the extent of disability, to stipulate that the employer is permanently totally disabled, and to avoid the prerequisite which allows the parties to approach the Department of Labor and have the Washington office review the application. The regulation is repugnant to reasonable interpretation of the act and reasonable interpretation in administration of the act.

The CHAIRMAN. Maybe you better give us a supplementary statement on this point, explaining this for our records.

Mr. NILES. I will be glad to.

The CHAIRMAN. In case I jumped around too much in the record in our exchange here and it is not crystal clear.

Mr. NILES. I will make a note of that and be glad to forward this to you.

The CHAIRMAN. There is something here that is troubling to me. If you would include with that any regulations from the Department that apply here.

Mr. NILES. Yes, sir. I think I can locate those, sir.

[The following was received for the record:]

Jones, Walker, Waechter, Poitevent, Carrère & Denègre

TWO TWENTY-FIVE BARONNE STREET

NEW ORLEANS, LOUISIANA 70112

TELEPHONE 504-581-6641

TELECOPIER 504-529-2068

TWX 810-951-5111

CABLE JOWA

3501 NORTH CAUSEWAY BOULEVARD
METAIRIE 70002
TELEPHONE 504-837-5325

ONE AMERICAN PLACE
POST OFFICE BOX 1267
BATON ROUGE 70821
TELEPHONE 504-343-4465

JOSEPH MERRICK JONES (1903-1963)

ARTHUR J. WAECHTER, JR.
J. NORT WALKER, JR.
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AUGUSTO P. MICELI
OF COUNSEL

CHARLES E. LECHE
CATHERINE B. HOWARD
EDWARD D. WEGMANN
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MARK C. ANDRUS
MARIE A. MOORE *
ALEX P. TROSTORFF *
JAMES E. WRIGHT, III

* NOT ADMITTED IN LOUISIANA

December 12, 1980

The Honorable Harrison Williams, Jr.
United States Senate
352 RSOB
Washington, D.C.

RE: Hearings on United States Longshoremen's and Harbor Workers' Compensation Act

Dear Senator Williams:

At time of hearings on the United States Longshoremen's and Harbor Workers' Compensation Act undertaken by the Senate Human Resources Committee on September 16, 1980, the Committee requested that certain Department of Labor regulations regarding the Special Injury Fund be forwarded for inclusion in the record.

Enclosed herewith find Chapter 5 of the OWCP LHWCA procedure manual concerning the Special Fund.

Please refer to Part 5, point 2(3) which states, inter alia:

> "The issue of extent of disability must be finalized before serious consideration can be given to the 8(f) application, and should be done via compensation order. Extent of disability will be determined by the medical and economic facts of the case and not on the condition that a Section 8(f) application will be approved."

I trust this documentation amply supports the testimony previously provided regarding the potential abuses associated with the administration of the Special Fund.

If the Senate Human Resources Committee has any additional questions or desires any additional documentation on this or any other issue, please advise.

Please include this communication and the enclosures in the record of these Hearings.

Very truly yours,

Stewart E. Niles, Jr.
Special Counsel
Shipbuilders Council of America
American Waterways Shipyards
Conference

SEN,JR./bhv
Enclosure

cc: Mr. Ed Hood, President
Shipbuilders Council of America

Mr. Herman Molzahn, Vice President
American Waterways Shipyard Conference

Admiral W. H. Livingston, President
Louisiana Shipbuilding and Repair Association

Mr. Darryl Anderson

1. Purpose and Scope. This chapter describes the uses of the Special Fund, procedures for authorizing its use, and provides reference to chapters which contain additional or specific procedural requirements.

2. Procedures for Utilizing the Special Fund. The fund is used for payment of individual amounts as specified under the sections of the Act providing for payment from the Special Fund. The sections providing for benefits or other payments from the special fund are:

a. Medical Examination Section 7(e). The cost of medical examinations ordered by the deputy commissioner (DC) or designee under Section 7(e) may be charged to the employer/carrier, or the director or designee may charge the cost of the examination to the Special Fund. In the event the DC determines that the cost of the examination should be charged to the special fund, the DC/ADC obtains the examining physician's statement following the examination, prepares a memorandum to the Associate Director, DLHWC, explaining the reason for the examination, and submits for payment of the cost of the examination from the special fund.

b. Payment Under Section 8(f).

(1) General Provisions. In order for an employer's liability to be limited under Section 8(f), several conditions must be met. The claimant must have had a pre-existing permanent partial disability, i.e., a physically or mentally disabling condition sufficiently serious that a cautious employer would be motivated to discharge the claimant because of a greatly increased risk of compensation liability. Section 8(f) applies only if it is determined that the claimant's permanent disability after the subject injury would be less were it not for the pre-existing disabling condition. In other words, Section 8(f) cannot be applied if the subject injury, in and of itself, would have resulted in the same disability. While the courts have held that Section 8(f) applies when an identifiable second injury aggravates a pre-existing disability, the section does not apply when the current disability results from the progression of a pre-existing condition without a discrete, separate, identifiable second injury.

2. Procedures for Utilizing the Special Fund. (Continued)

Finally, it is required that the claimant's pre-existing permanent partial disability have been manifest to the employer. The "manifest" requirement is fulfilled if the employer had actual knowledge of the pre-existing condition or if such knowledge was available to the employer. What constitutes "available" knowledge is the subject of on-going litigation. Nevertheless, cases finding a disability to be manifest have uniformaly involved actual knowledge by the employer. The mere existence of private medical records documenting a pre-existing disability does not make the disability manifest; the fact that a condition is manifest to a physician does not necessarily mean that it is manifest to the employer.

(2) Responsibility for Developing Application for Relief Under Section 8(f). It is the responsibility of the employer/carrier (E/C) to apply for relief from continued payment under Section 8(f). Since success on the employer's part will result in a distinct advantage to the E/C, the district office is not obligated to develop or perfect the application. The E/C has the burden of submitting sufficient evidence to substantiate the application at both the DO and NO level. However, if Section 8(f) is an issue, the DO must address the issue in its informal proceedings before the case can be referred for formal hearing. No case is to be referred if a determination has not been made by the DO.

(3) Action Required for Consideration of Section 8(f) Application. It is the DC/ADC's prerogative to deny Section 8(f) relief at the DO level if the application is not in proper posture. To evaluate such application, the DC/ADC must very carefully review the evidence submitted by the E/C. Unless adequate and persuasive evidence is submitted and contained in the file, and unless the E/C is willing to acept a compensation order defining and establishing all issues except the actual issue of second injury under Section 8(f), the application should be denied at the DO level. Negotiation by the E/C to agree to approval of the application of Section 8(f), is not appropriate. The issue of extent of disability must be finalized before serious consideration can be given to the 8(f) application, and should be done via compensation order. Extent of disability will be determined by the medical and economic facts of the case and not on the condition that a Section 8(f) application will be approved.

2. Procedures for Utilizing the Special Fund. (Continued)

(4) Evidence Required to Support Section 8(f) Application. After a compensation order has been issued (pursuant to stipulations executed by the parties), the E/C may make application for Section 8(f) relief. Documentation of evidence needed to support the application shall include the following:

(a) Factual and/or medical evidence of pre-existing permanent partial disability.

(b) Evidence to show the impact of the pre-existing disability, which combined with the current injury causes greater disability than the current injury would have caused of itself.

(c) Current medical report which establishes the extent of all impairment and the date of maximum improvement. (This may be the medical data used as the basis for the compensation order). If the current disability is less than total, the medical evidence must show that the disability is materially and substantially greater than that which would have resulted from the subsequent injury alone.

(d) Either factual or observable evidence to show that the pre-existing disability was manifest to the employer and in what manner.

(e) Evidence that the permanent disability is not due solely to the subject injury.

(5) Review of Evidence and Recommendation by DC/ADC. Upon receipt of the above data (4)(a) thru (f) the ADC shall carefully review the evidence supporting the application. If key elements are missing the omissions may be called to the attention of the E/C who shall be given an opportunity to furnish it. If the E/C chooses not to do so, or the data furnished does not support the application, the DC/ADC may recommend denial. If in order, the DC/ADC should recommend acceptance. In either case (recommendation for acceptance or denial), the compensation order and all evidence submitted by the E/C in support of its application or that the DC/ADC believes is relevant to the recommendation, should be submitted to the National Office for consideration. Final approval of recommendations for approval or denial must be given by the National Office.

2. Procedures for Utilizing the Special Fund. (Continued)

(6) Action by National Office. After the file, with application and supporting evidence, has been reviewed, the National Office will determine whether approval or denial is appropriate. If approved, the DC will be advised by memorandum to issue a supplementary order, finding Section 8(f) applicable and describing the payments to be made by the E/C. The National Office will initiate payments from the Special Fund when the appropriate notification is received from the DO.

If the application for Section 8(f) relief is denied, the DC/ADC will be advised by memorandum. The DC/ADC shall inform the E/C of the decision. The E/C may then request a formal hearing on the application of Section 8(f). Should the E/C wish, it may apply to the DC pursuant to Section 22 of the Act for modification of the initial compensation order. Issues raised in such an application should be referred along with the issues regarding Section 8(f) for resolution in a single formal hearing.

(7) Awards from Special Fund Under ALJ Decision.

(a) If an Administrative Law Judge awards payment from the Special Fund under Section 8(f) the Award will be paid, even though it may be decided to appeal the decision in the name of the Director, OWCP.

(b) When transmitting an ALJ decision covering such an award, it will be necessary to expedite action so that payments from the Special Fund can begin promptly when due. The transmittal memo should state the date Special Fund payments are to begin and the rate of payment (for all periods of compensation due, including any interest assessed), especially where there are two or more periods which require payments at different rates. If payment by the E/C extends into the future, a call-up card should be used to subsequently review the case, obtain the LS-208, and give notice to the National Office to begin payment. The National Office will advise the claimant by letter of continuation of payments from the Special Fund. The E/C should be encouraged to continue payments to a convenient takeover date so that there is no interruption in benefits. The NO will then reimburse the E/C for any overpayment, upon receipt of a correctly completed LS-208.

Jones, Walker, Waechter, Poitevent, Carrère & Denègre
TWO TWENTY-FIVE BARONNE STREET
NEW ORLEANS, LOUISIANA 70112
TELEPHONE 504-581-8641
TELECOPIER 504-529-2066
TWX 810-951-5111
CABLE JOWA

350I NORTH CAUSEWAY BOULEVARD
METAIRIE 70002
TELEPHONE 504-837-5325

POST OFFICE BOX 4009
TWO HUNDRED TWO WEST MAIN STREET
LAFAYETTE 70502
TELEPHONE 318-235-5255

POST OFFICE BOX 1267
ONE AMERICAN PLACE
BATON ROUGE 70821
TELEPHONE 504-343-4465

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DAVID G. RADLAUER
ROBERT J. OBERFELL

AUGUSTO P. MICELI
OF COUNSEL

GARY E. MERINGER
MATTHEW A. WELLMAN
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JOSEPH J. LOWENTHAL, JR.
MICHAEL L. STONE *
WILLIAM M. BACKSTROM, JR. *
GEORGE R. ALVEY, JR. *

* NOT ADMITTED IN LOUISIANA

September 24, 1980

Mr. Darryl Anderson
Staff of Harrison Williams
352 RSOB
Washington, D.C.

RE: Louisiana Shipbuilding and Repair Association
Our file: C-8-502

Dear Mr. Anderson:

Enclosed herewith find a list setting forth the membership of the Louisiana Shipbuilding and Repair Association. Please include this list in the materials submitted by the Shipbuilding Panel for the LHWCA Oversight Hearings conducted on September 16, 1980.

With kindest regards, I am

Very truly yours,

Stewart E. Niles, Jr.

SEN,JR./bhv
Enclosure

cc: Mr. Herman Molzahn
Mr. John Rivers
Admiral W. H. Livingston

LOUISIANA SHIPBUILDING AND REPAIR ASSOCIATION

SUITE 2936 INTERNATIONAL TRADE MART • NEW ORLEANS, LOUISIANA 70130
TELEPHONE (504) 586-1155

SEPTEMBER 23, 1980

MEMBERSHIP LIST

NAME AND ADDRESS	REPRESENTATIVE	PHONE NUMBER
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ALGIERS IRON WORK & DRY DOCK COMPANY P. O. Box 6068 New Orleans, Louisiana 70114	SEWELL WILLIAMS LUCIEN F. MORAGAS, JR.	(504) 362-7960
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INTERCOASTAL SHIPYARD, INC. P. O. Box 831 Morgan City, Louisiana 70380	ROBERT J. TERREBONNE	(504) 385-0660
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MAIN IRON WORKS, INC. P. O. Box 1106 Houma, Louisiana 70360	LAWRENCE MAZERAC LEROY MALAISON	(504) 876-6302
NEW ORLEANS SHIPYARD, INC. P. O. Box 446 Westwego, Louisiana 70094	HUGH HAMMOND	(504) 431-9300
NORTH AMERICAN SHIPBUILDING, INC. P. O. Box 508 Larose, Louisiana 70373	GARY CHOUEST	(504) 693-4072
SAUCER MARINE SERVICE, INC. P. O. Box 3067 New Orleans, Louisiana 70117	AL SAUCER	(504) 944-3316
S. B. A. SHIPYARDS, INC. P. O. Box 1386 Jennings, Louisiana 70546	LELAND BOWMAN	(318) 824-1519 824-1588
THE SERVICE MACHINE GROUP P. O. Box 2664 Morgan City, Louisiana 70380	DAN J. DUPLANTIS	(504) 524-9784 631-0511
THERIOT-MODEC ENTERPRISES, INC. P. O. Box 359 Larose, Louisiana 70373	JOHN W. ARENDT	(504) 693-4841
THOMAS JORDAN, INC. 800 Whitney Bank Building New Orleans, Louisiana 70130	INGERSOLL JORDAN	(504) 522-4391
UNIVERSAL IRON WORKS, INC. P. O. Box 9056 Houma, Louisiana 70361	RONNIE C. TROSCLAIR	(504) 868-2575
WALL SHIPYARD, INC. P. O. Box 419 Harvey, Louisiana 70058	CHARLES WALL UPTON LEA	(504) 394-6230

Mr. NILES. I might also note this: In representing shipbuilding interests nationwide, when we sit down and discuss these problems, depending upon how a given district, compensation district, is administered, you may not find this problem in all compensation districts. Supposedly, there is a regulation which must be uniformly followed in filing 8(f) regulations to the Department's Washington office. I cannot confirm that this is being followed in all compensation districts. I will attempt to identify it also, if available.

The CHAIRMAN. I thank you for this hearing.

We have now reached the point where we can pause and digest, and thank you very much.

Mr. NILES. Thank you, Mr. Chairman. We appreciate it.

The CHAIRMAN. Very good.

At this point I order printed all statements of those who could not attend and other pertinent material submitted for the record.

[The material referred to follows:]

PREPARED STATEMENT

OF

THOMAS W. GLEASON

International President
International Longshoremen's Association, AFL-CIO

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

PROPOSED AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS'S COMPENSATION ACT AS AMENDED

September 16, 1980

Washington, DC

Mr. Chairman and Members of the committee:

My name is Thomas W. Gleason. I am the International President of the International Longshoremen's Association, AFL-CIO also known as the "ILA".

The ILA represents in excess of 110,000 members working in ports from Maine to Texas on the North Atlantic, South Atlantic and Gulf Coasts of the United States as well as on the Great Lakes and in Canadian ports. More than 80,000 of our members are employed on waterfront docks, piers and terminals by stevedores and vessel carriers in a multitude of related crafts and occupations. Their interests are vitally affected by the present proceedings on amendments supported by their employers and, in turn, by their insurance carriers.

The members of this committee and any other persons who can look at these proposed amendments from a disinterested and objective perspective, can only conclude that they will undo much of what the 1972 Amendments accomplished. But more than that! Through the use of abstract generalities, admittedly unreliable statistics and attempts to generate unwarranted sympathy, the employers and their insurance carriers are now asking this committee and the House for whom it acts to relieve them of the foreseeable effects of a bargain that they made with open eyes back in 1972, while at the same time quietly retaining the very substantial advantages

that they gained in that deal. I will now explain my contentions, in the firm belief that when all the cards are laid on the table, the members of this committee will realize that they are being hoodwinked by a lot of hollow, one-sided, self-interested arguments and transparent figures at the singular expense of the longshoremen and other beneficiaries of the Act. It was enacted with their protection and safety in mind and not that of their employers.

In 1977, the Supreme Court in the Caputo case (Northeast Marine Terminal Co., Inc., et al v. Caputo, 432 U.S. 249) declared that the original Act in 1927

> ". . . was designed simply to be a gapfiller to fill the void created by the inability of the States to remedy injuries on navigable waters."

It called the 1972 Amendments:

> "the first significant effort to reform the 1927 Act and the judicial gloss that had attached to it."

The Court as well as this House and the Senate found that "more of the longshoremen's work is performed on land than heretofore", since modern technology, particularly containerization, had moved much of our members' work from the vessel onto the terminal. The Court noted:

> "unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of a ship as it waits in port, containerization permits the time consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower

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> required to get the cargo on the vessel. In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. . . . Congress's intent to adopt the [Act] to modern cargo handling techniques clearly indicates that these tasks, heretofore done on board ship, are included in the category of 'longshoring operations'."

Congress acknowledged that if coverage were not extended to cover the entire sphere of the longshoremen's daily work, "there would be many workers who would be relegated to what Congress deemed clearly inadequate State compensation systems." Congress wanted a system that did not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water." S. Rep. at 13; H.R. Rep. at 11. In the overriding interest of uniformity and the new realities of the handling of maritime cargo, it therefore extended the situs under the Act to encompass the waterfront areas where the overall loading and unloading process occurs. We are certain that the members of this Subcommittee harbor no illusions that the Act in any way limited or was intended to limit coverage of employees working in the entire gamut of cargo handling operations in the ports.

With all of these considerations in mind, representatives of all of the various longshore and maritime interests met in 1972 to resolve their problems with the content and administration of a then far-outdated Act. Representatives not only of the Union and the Department of

Labor, but also of the stevedores, vessel carriers, and the insurance carriers were present.

I can assure you, Mr. Chairman, that there was no discussion of limitations or "point of rest" that are now being contended for by the employers and carriers. To the contrary! Because of the impact of containerization, because the handling of maritime cargo is no longer was confined to the vessel, the slip, or a finger pier but then and now extends to huge container marshalling yards and terminal sheds where the cargo inside the containers was inserted and removed (known as "stuffing" and "stripping"), to the repair and maintenance of containers, to delivery and receipt of containers and break-bulk cargo from overland carriers at the terminal gates, and to other activities that at one time took place next to the vessel, the parties to those negotiations were fully aware that any attempt to define the dynamic, multi-faceted and constantly changing industry from within was bound to lead to confusion and obsolesence. By 1972, it was understood by all of the parties who were represented at the piers and terminals that the limits of "longshoring operations" fall within the limits of the vessel on one side and the overland carriers on the other. Between these two boundaries, all persons handling the cargo in one or another manner were engaged in longshoring operations, no matter what new or different tasks are required by the present state of the craft.

This view has been vindicated by the Supreme Court. The legislative history, as found by the Court, recognized that

> "the main concern of the Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) ship owners who were discontent with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from ship owners regardless of fault; (2) employers of the longshoremen who, under another judicially-created doctrine, could be required to indemnify ship owners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all the parties. Congress sought to meet these desires by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of "seaworthiness", by outlawing indemnification actions and indemnity agreements, by allowing suits against vessels or other third parties only for negligence, and raising benefits "to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."

The proposals being considered would restrict the definition of the term to the loading and unloading of cargo between vessels and an so-called point of rest (defined separately for containerized and non-containerized). It will confine remedial injuries to those activities encompassed by an employees' category while at the same time eliminating numerous categories of employees whose work is to interrelated with the employees who would continue to be covered, that it would leave a haphazard patchwork of coverage and non-coverage that will be as intolerable and unworkable as the Act was prior to the 1972 Amendments. It takes the guts out of the first bill in 50 years to update the history of the waterfront. It lacks all consistency and realism for those who actually work the docks and terminals day in and day out.

In the 6 plus years since the Amendments came into effect, it is not surprising that the "point of rest" limitation has been rejected by all but one of the Circuit Courts that have considered it as well as by the Supreme Court and by virtually all of the legal and other commentators on the subject. As I just pointed out, stevedores and carriers did not pursue that point in 1972. The Supreme Court likewise found in Caputo, that the theory is:

> "simply too restrictive, failing to accommodate the language or the intent of the Amendments. . . . The theory does not comport with the Act's focus and occupations and its desire for uniformity".

It perpetuates the growing evils of the old Act, which bifurcated coverage for essentially the same employment. As another Court stated:

> "the point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. . . . In addition, the theory fails to accommodate the intent to cover those longshoring operations that modern technology has moved onto the land. Coverage that stops at the point of rest excludes those engaged in loading and unloading the modern functional equivalents of the hold of the ship."

Mr. Chairman, you and the members of this Committee, like the Justices of the Supreme Court, do not have to strain your imaginations to realize that the "point" of initial placement of cargo varies from port to port and with different types of cargo; and that the point can be moved seaward or landward at the whim of the employer. Such characteristics

make it inconsistent and irreconcilable with the uniform system Congress sought to design.

In this regard, I believe that the members of the Committee can join me in rejecting the unrealistic proposition that employees engaged in longshore work can be categorized or divided into covered and non-covered components and classifications. This attempt to distinguish between members of various longshore crafts working with or without their job titles or even temporarily outside the nominal jurisdiction of their functional or union designations

absolutely confounds us in view of the consistent and persistent position taken by the New York Shipping Association and the Council of North Atlantic Shipping Association, of which this representative's principals are members. It flies in the face of their arguments to the Supreme Court as well as to many appellate courts over a continuing series of litigation involving longshore contractual clauses, known as the "Rules on Containers". Those associations explicitly referred to the broad unit certified by the National Labor Relations Board in the Port of New York (Matter of New York Shipping Association, 116 N.L.R.B. 1183 (1956)), which defines the unit as:

> "all longshore employees engaged in work pertaining to the rigging of ships, coaling of same loading and unloading cargoes, including . . . hatch bosses, cargo repairmen, checkers, clerks and timekeepers and their assistants including head receiving and delivery clerks, general maintenance, mechanical and miscellaneous workers . . . marine carpenters, in the Port of Greater New York and vicinity . . .".

They repeatedly stated that ILA members, consisting of longshoremen and related crafts, including checkers, carpenters, coopers, cargo repairmen and maintenance men (to the exclusion of all other workers), have historically performed all work in connection with the loading and unloading of cargo on ships, including all related terminal services such as receipt, storage, sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery.

It is true that much litigation did follow in the wake of the 1972 Amendments, particularly in the area of shoreside coverage. But this litigation is effectively at a close. The Supreme Court has decided two cases on the extent of coverage that concerned precisely how far from the vessel, both geographically and in terms of work classifications, employees are covered under the Act. The present bill is not needed or intended as a clarification; its only object is to constrict the existing Congressional mandate in the narrow interests of certain employers and their insurers.

Mr. Chairman, what you really have here is a concerted and disingenuous effort by the longshore employers to whittle down the benefits that were gained by very arduous negotiations in 1972 when, in return for the benefits that Congress conferred on our members, the employers gained some very significant advantages by the elimination of third-party suits

for "unseaworthiness" together with the cross-over indemnity actions against the stevedores. We find it most interesting - and I am sure you will too - that in the midst of the verbal barrage attacking the scope of coverage under the Act as well as the quality and quantity of the benefits accruing to our members, not one employer or carrier representative that has appeared before you or will appear before you suggests or even hints that in consideration for limiting the present coverage or reducing or containing the cost of the present benefits, third-party suits and indemnification be reinstituted - the quid pro quo for which the ILA bargained. You can add to this their equally conscious failure to apprise this Committee of the immense productivity gains that they have accumulated since 1972, in particular on the backs of and at the expense of the longshoremen.

As an example, I refer you again to the Port of New York, which has been the repeated focus of several employer witnesses who are appearing before this Subcommittee in their references to statistics on costs of premiums and claims.

The carriers' and stevedores' representatives, in their briefs to the Courts in the cases to which I earlier alluded, repeatedly make the point that in 1958, prior to containerization, longshoremen performed approximately 43 million man hours of work handling 12 million long tons of cargo. At that time, productivity in the Port of New York

averaged about 0.3 tons of cargo for every man hour worked. In 1977, approximately 19 million long tons of cargo were being moved in the port in approximately 19.5 million man hours - an increase in productivity per man hour of over 300%.

Containerization, they point out, has also had a severe effect on ILA work opportunities. It has caused a constant loss of jobs and work hours, as further verified by the latest report of the Waterfront Commission of New York Harbor covering the fiscal year 1977-1978. (See Attachment No. 1) The attached exhibit from the report confirms that in the period June 1955 through September 1972, the longshore workforce in the port decreased from 31,574 men to 16,316. In the period September 1972 to March 31, 1978, the registered workforce in the Port of New York further shrank to approximately 12,250 men including warehousemen, container repairmen and other persons presently required to be registered. Of these, an average of a paltry 7,500 men are hired on a daily basis which only rarely reaches the 8,000 man mark. This is further reflected in another chart published by the Commission in its 1977-1978 Report which compares the monthly hirings in the period July 1972 - June 1977 with the following period through June 30, 1978. (See Attachment No. 2).

In dramatic contrast to the plummeting figures on longshore employment is the breakdown on the movement of tonnage for the corresponding period. (See Attachment No. 3) The New

York Shipping Association recorded that in the period 1971-1978 the amount of containerized cargo moving through the port increased from approximately 10 million long tons to 17 million long tons while cargo on roll-on, roll-off vessels increased from 312,000 tons to 528,000 tons and LASH and barge cargo from approximately 95,000 tons to in excess of 200,000 tons. Of course, the amount of break-bulk and other cargo traditionally handled on a piece-by-piece basis, thereby generating man hours of work, dropped in an approximate inverse ratio to the cargo handled by automated procedures. The Association currently estimates that the tonnage for the contract year 1978-1979 will reach in excess of 24 million total tons. This consistent increase in port tonnage parallels the increase in the use of containers and other automated equipment introduced by modern technology. As a result of this productivity, the carriers and stevedores are amassing greater tonnage, yet it costs them less and less per ton for labor.

As you can see then, Mr. Chairman, though the carriers now come to Congress complaining about the effects of the extent of the coverage on their outlays for compensation benefits, they fail to couch their claims in the true perspective of productivity. As I will shortly show, there is also a relationship between injuries, the containers, and productivity. But there are further omissions which I should report to you.

The first is that prior to 1972, a man injured on the job under the inadequate compensation of the Act as it then existed, received no more than $70.00 per week from his employer. The difference between that amount and his wages under the applicable collective bargaining agreement for the Port of New York, which amounted to $212 at the straight-time rate, was paid to him by the GAI Fund, a jointly administered fringe benefit fund to which the carriers and not the stevedores, were required to contribute directly. Under the Act, the direct employers voluntarily undertook to pay all benefits directly to the employees. As a result, there is a $30,000,000 surplus in the fringe benefit escrow funds. This phenomenon is buttressed by a joint statement issued by the parties in October to the effect that there was no increase in the cost of fringe benefits. This substantial savings in controlling labor expenses cannot be disregarded when considering the overall cost impact of labor related outlays, including compensation.

In practical terms, this also means that the assessment rate on cargo tonnage from which the fringe benefit funds are funded, can now be reduced. This, in turn, will have the effect of attracting even further business to the Port of New York which, if consistent past history has any lessons to teach us, will mean even further productivity in the port and higher profits for the employers.

Secondly, the carriers operating through that port such as Seatrain, Sea-Land, Sea Containers, Inc., etc. have been reporting ever healthier quarterly and annual earnings, as evidenced by recent reports in the Journal of Commerce. For example (and this is characteristic, not exceptional), R. J. Reynolds, the parent of Sea-Land Services, Inc., a major carrier, proudly stated in its 1978 Annual Report that Sea-Land's earnings from operations increased 34 percent in 1978, to $118.7 million from $88.9 million in 1977, despite a two-month fourth-quarter strike by longshoremen on the East and Gulf Coasts of the United States. Advances of this calibre have been reported by the shipyards too. Thus, the Journal of Commerce for October 30, 1979 reports that Todd Shipyards Corp.'s second quarter sales amounted to $127 million compared with $94 million in the same interval last year while income rose from $2.6 million to $4.2 million over the same period. First quarter sales were $120 million and income came to $5 million, less 0.9 million capital gain on the sale of land.

Mr. Chairman, the employers in 1972 knew what they were bargaining for. They had no delusions that the costs of running their businesses would not increase as a result of the additional coverage for which they bargained and for which they received more than fair consideration.

The contentions made by the employers that they were suprised or unprepared for the increases in benefit costs is totally unacceptable. You must agree with me that one of the

most important features of the 1972 Amendments was an increase in longshore disability benefits to meet the realities of progressively higher costs of living completely at a variance with the pre-existing benefit levels. They were intended to be a buffer to the impact on longshoremen and their families due to the sudden onset of injuries incurred in the course of their employment. The prior rates clearly reflected the inadequacy of those amounts. In effect, the companies were finally catching up for all the years of their overextended honeymoon. This was stated in one or another way throughout the Committee reports and testimony given prior to passage of the Amendments.

Even here, they trip all over themselves to create an impression on this Committee to camouflage the vital facts. They submit to you reams of statistics to support their position. At the same time, Mr. Wilcox, the Executive Director and General Counsel of the National Association of Stevedores stated (in a speech to the Stevedoring Section of the National Safety Council in October 1979 in Chicago) that there are no reliable accident or injury statistics pertaining to the stevedoring industry or to the Act. He admitted that neither OSHA nor the Employee Standards Administration of the Department of Labor publishes statistics of the type, cause, or frequency of injuries under the Act.

Very much like the situation with the oil companies, it is a known fact that even those statistics that are reported

by the government are based upon data furnished not through government or other independent sources, but through the very employers who now rely on them for support. However, without going into the accuracy of those statistics and reports, and taking them at face value, it is obvious that the employers interpret them exclusively in terms of their own self-interest and advantage to obtain relief from their bargain.

Moreover, the proferring of all types of statistics concerning national average wages, national average claims, average numbers of accidents in industries generally within the United States, and all other references to wages, compensation and accident rates in other industries are totally irrelevant and out of place in this proceeding. I will not take your time to review the reports and related literature that were before the Congress in 1972 on the uniqueness of this industry. By now it has been established beyond all question that longshoring is a very risky business, regarded by most independent observers as the most hazardous in this country. Any recitation of comparisons elsewhere is tantamount to matching apples and oranges.

The employers' statistical information discloses neither the accuracy of the numbers that they offer nor the severity of the accidents and incidents that they inevitably will cite to this Committee. Indeed, the only time that they ever get down to the basic facts is when they go overboard to cite extreme examples

in support of allegations of fraud and abuse, while ignoring the day-in, day-out run-of-the-mill cases which fade into the background.

Mr. Wilcox admitted that the problems of stevedores are not confined to the Longshoremen's and Harbor Workers' Compensation Act. He stated that all workmen compensation systems are struggling under the burdens of increased claims and higher benefit levels. He concedes that exaggerated injuries and fraud must be prevented, and the ILA certainly supports such efforts. However, the moral of the story that they try to relate to this Committee is that because of the few rotten apples in the barrel, we ought to throw the whole lot out. They would have the Committee in effect jettison the benefits of the Act because of the abuses of a few, i.e., throw the baby out with the dirty water.

When the arguments posed by the various employers and carriers are compared, the true basis for the increased number of accidents and claims and related costs becomes self-evident. On the one hand, some employers have in the past contended that they are controlling and containing unjustified claims by effective investigation and careful examination of records and medical reports. These very same employers contend, by charts and other data, that they are reducing the numbers of accidents occurring among their employees, such as in the Gulf states. On the other hand you have employers who, with great pretenses

of alarm, cite the increases in claims in their areas, such as in the Port of New York, with corresponding increases in premiums and outlays. These employers,

hide behind vague and transparent claims and alibis that lay the fault for their own inadequacies and negligence at the feet of the employees.

They have proffered grossly unwarranted presumptions that claims are fraudulent unless proven otherwise; that the benefits of the Act do not provide any incentives to the employees to avoid injuries or to return to work; that the tax laws present inducements to claim disabilities. In their minds, because they cannot disprove an injury that they or their doctors cannot see with their own eyes, it is a sham. Though by their own admission they have conceded the inherently hazardous nature of the industry, they nevertheless have refused to acknowledge that it still has the worst safety record in the nation.

A report prepared for the U.S. Department of Labor Occupational Safety and Health Administration in 1975 typically took note that a "negative incentive" for safety is the push for higher productivity and shorter loading time. It reported that:

> "[s]hipping company managements are eager to make maximum utilization of their capital investments in ships and to reduce their operating costs per shipment by keeping their ships at sea as much as possible. Stevedoring time is regarded as deadtime. Thus, from the view of the shipping company operators, there is pressure to load as soon as possible. . . The real effect of this, however, tends not to be to make operations more efficient and safer, but rather to cut

> corners or to take chances; e.g., if equipment seems to be bad, use it rather than an alternative; if a smaller vehicle or one sling or bridle is handy, use it (at some risk) rather than get one that is larger and safer; or accomplish specific short run tasks in ways that cut corners but may not be the safest, e.g., don't use tag lines or brace a high wall of cargo or clear a space around a 'tween deck hatch before unloading, or close a 'tween deck hatch while carpenters are bracing loads in the holds, under poor light and inadequate access."

It concluded that:

> "perhaps the most subtle not readily perceived concept is the most important, however. The cost of accidents themselves for many stevedores turns out not to be a real incentive against accidents!"

Therein Mr. Chairman and members of this Committee lies the real cause of the escalation of costs and benefits from which the employers and their carriers now seek relief. The employers have repeatedly failed to present any tangible evidence of what their safety programs have accomplished for the $25 million or so a year that they reportedly cost.

Even to the naked eye, it must be apparent that the $25 million cost is all but lost alongside the $160 million plus expended in 1978 as compensation and medical payments by insurance carriers and self-insured employers under the Longshore Act. (See Attachment No. 4) This comparison in and of itself serves as a very appropriate reflection of the lack of interest that the employers, in their concentration on "productivity" and "turn-around time of the vessels", have shown towards preventing accidents and thereby saving lives as

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well as their precious money. From the viewpoint of the ILA and the members that it represents, no man deliberately goes out on the docks looking to come home maimed or in a coffin.

If it were not for ILA's pressuring management, the deaths and injuries on the piers would be even worse than their are from the time that the Amendments were set into effect in 1972. From 1972 to 1978, 32 men died due to accidents in the Port of New York alone. (See Attachment No. 5) The newspapers have recounted stories of ILA men who died in the explosions at the grain mills in Texas and who risk their lives every day when they leave their homes to work in grain docks on the Great Lakes and elsewhere. Now and then you also hear and read about other incidents, such as a large Paceco Crane tipping over in the Port of Baltimore resulting in death and injuries or a ship carrying very volatile cargo blowing up at dockside killing and maiming longshoremen and seamen.

What does not, however, catch the public's attention are the day-to-day hazards that these employers allow to occur, because they have failed to live up to the maritime codes which we have been able to impose on them; because there is no effective government enforcement agency to cite them for violations of existing or non-existing standards; and because their own insurers do not require them to meet the most minimal and basic safety requirements that would prevent accidents from happening in the first place.

The NAS undoubtedly will tell you that the 1972 amendents have caused stevedore employers to be even more safety conscious than in the past and to spend more time and money on safety programs. This statement begs the question, since the mere spending of money on safety programs is not a guarantee that those programs are effective.

Once again, what they are not telling you is what you have to know in order to make a balanced evaluation of their claims. It is that their own negligence and lack of safety programs are causing the number of serious accidents on our docks and terminals. The ILA regularly receives reports of men seriously injured, maimed and sometimes killed when containers that have outlived their projected 15-year lives break in two and spill their contents on dock workers below. They leak noxious chemicals and splash their lethal contents on unsuspecting workers. It is a fact that more than 50,000 over-age containers are being used without the benefit of proper certification. Most of these containers are still in use today, though they should have been removed from the piers long ago and should have been replaced before they became a hazard to those handling them. The Occupational Safety and Health Administration ("OSHA") reports that there is no statute on the books regulating the use of containers and OSHA is without authority to enforce any kind of safety codes for

containers. As far as OSHA is concerned, those who make their living on the docks are "forgotten people".

In addition, the ILA's Safety Director, Mr. Joseph Leonard, has repeatedly proved that ILA members have been asphyxiated and maimed because employers have not been alert to the nature, chemical composition, and interactions of chemicals being handled at the piers. There is no way of knowing even now what potentially dangerous products are standing on our piers, ready to snuff out the lives of ILA members. In many instances regulations do not exist and where they do exist they have been issued by several different government agencies. At least four major labelling systems are currently in use and all are different. There are spills all the time that are not being reported. After a spill, no agency wants to be responsible for cleaning it up because they don't know where they can dump it. As a result, longshore personnel are cleaning up spills when they shouldn't, because they don't know enough about the chemicals. A certain chemical may be harmless until it comes in contact with some other chemical and there may be as many as five or six chemicals in the same hold.

ILA men are working in holds where concentrations of carbon monoxide and other actually and potentially dangerous gases are present. Gas masks either are not provided or are inadequate to protect them from sudden, almost instant death when fumes are released. If it were not for the ILA, fume

levels might never have been reduced and despite the ILA's efforts, even now they are often unsatisfactory.

ILA men are living in an environment where the employers' penny-pinching greed is always evident: throw-away pallets are being used which break up and tip over easily; where all-gas equipment instead of electric hi-lo's are being used in the fourth quarter of the 20th Century; where ILA men are required to sweep up rather than vacuum tons - yes, tons - of asbestos lying around the piers and aboard ship; where they have to sweep up grain dust in atmospheres where the concentrations are so high that they border on the brink of explosion; where nerve gas rockets are required to be loaded onto antiquated, rust-bucket ships; where floating and shoreside cranes are permitted to be used that are improperly tested and are so structurally defective that they hang over our men like the Sword of Damocles.

Gentlemen, the conditions that I have just cited to you are some very few but important examples of the many day-to-day conditions under which ILA members must work. These are conditions which existed in 1972, but which the employers have failed to even begin to remedy since that time. These are conditions that cannot be solved by wearing hard-hats or safety shoes nor can they be attributed to any failure to wear them.

I am appending to this statement certain accident reports and photographs that vividly and tersely illustrate

the gravity of the situation I just described. (Attachments 6A and 6B). The reports are a sampling from a typical week on the New York Waterfront. Though they represent but a small part of the accidents reported for that short period, they are all conditions over which the longshoremen have no actual control and which they could not reasonably anticipate. They are all grounded in procedural irregularities and mechanical defects which the employers alone can protect against if proper preventive measures are taken and enforced.

The photographs bear this out even more graphically: the mounds of litter on decks; the exposed asbestos; the absence of webbing in a hold that resulted in a permanent injury to a longshoreman within an hour of the ILA's Safety Director's admonition concerning this very condition; the twisted wreckage from fallen cranes and exploding grain elevators; the virtually illegible fine-print legends on giant containers and so on.

We do not condone our members' neglect to take all available precautions and to use proper equipment to avoid accidents. At the same time, our employers cannot abrogate their responsibilities where they are in possession of the knowledge, the means, and the opportunity to provide for a safer environment in which our men can work, which is beyond our members' own control. They cannot absolve themselves of responsibility by citing extreme examples of fraud; they cannot

use statistics, which will support practically any point of view, to place the burden on the longshoremen for the rise in accidents and the related costs. That is the fallacy and weakness of their whole argument. If the monies that they have allegedly been spending on safety programs have been effective, then why do so many serious, costly accidents not attributable to individuals continue to occur?

I submit that there are ways that employers could do something to prevent these accidents and reduce their compensation costs. In the independent report to which I earlier referred, the point is made that in the long run reduction in accidents is most likely to come from technological innovations which, by their inherent nature, reduce the exposure of the men who are working. Examples of such technological devices are hydraulic lift gear, electric forklifts, reinforced containers and pallets, devices for handling and stacking drums as individual units without manhandling, new kinds of lashing gear which would eliminate longshoremen having to climb on top of containers with cumbersome gear and lashing lines and a whole list of other equipment. Of course, research and development in these areas would cost money. But the employers cannot see the logic that money spent in <u>reducing</u> accidents and <u>reducing</u> premiums and <u>reducing</u> costs for rehabilitation, disability and death are in

the long run more profitable. They would rather have the best of both worlds: no safety and less liability.

Since unseaworthiness and cross-over indemnification has been eliminated under the 1972 amendments, the employers have less and less incentive themselves to initiate or to promote and follow safety programs to protect the lives and limbs of those persons whose labor are the means for their companies' existence and for their profits. Through the efforts of ILA safety personnel, a safety code governing longshoring activities throughout our jurisdiction has been formulated. All of our efforts to have the employers comply with this code have been unsuccessful.

Inasmuch as voluntary enforcement has proven a waste of time, the ILA has had to look to the government agencies to protect longshoremen and to reduce the numbers and costs of accidents. However, according to Mr. Wilcox, the NAS's General Counsel and Executive Director, OSHA is a paper tiger. He admits that OSHA will not fine or cite employees, just as it will not fine or cite employers for violations of safety standards. Though he argues that employer safety programs are doomed to defeat before they are even instituted because employees tend not to cooperate, in the same breath he states that only 25% of injuries are due to violations of regulations enforceable under present OSHA standards.

Even OSHA has conceded that longshore safety has a low priority in its scheme of things as stated in a 1976 letter from the Assistant Secretary of Labor to our Safety Director (See Attachment No. 7). Nine months before the grain explosion in December, 1978 in Texas, the ILA notified the Assistant Secretary of Labor of the hazards in the grain industry. As you well know, nothing happened. There is a glaring absence of dockside inspectors due to non-funding, lack of interest, or just plain inability of OSHA to handle all of the work that has been assigned to it.

Last year, some of our men walked off the job in Superior, Wisconsin on a grain loading operation because the lateral controls for the spouts that pour the grain into the holds was taken away from them. The controls were being operated by a man way up in a cab, whose visibility could be obstructed and attention is divided when two or more holds were being worked at a time. The National Labor Relations Board simply labeled this a jurisdictional dispute with the grain millers union. But we knew and we are still convinced that our principal defense, that is, the absence of an enforceable safety standard, validly lies at the heart of the controversy. Even an OSHA inspector who was called to the site admitted that it was an intolerable situation, but he was helpless because no standard existed to protect our men.

The ultimate conclusion to be derived from all this discussion is that our members must have a safe place to work. Equipment after a certain age should not be permitted on the pier. Noxious and dangerous chemicals should be properly labeled. If employees are loading fertilizers into hoppers, such as in Tampa, they should be issued masks and be required to use them. If they are required sweep up asbestos, then vacuums should be employed and employees should be properly protected. Equally important, if the employers are not going to enforce the voluntary code entered into in 1970, then we must have federal protection at the pier.

The insurers will emphasize elimating the causes and costs of accidents to employees currently covered by the Act. I earnestly put forward that this Committee must also consider the positive - not just the negative - ways of reducing these statistics. By this I mean that eliminating employee coverage and benefits is neither the only way nor is it the correct way of accomplishing the objectives sought by the employers and their carriers.

I have already pointed out that OSHA's effectiveness has been next to nil. However, I believe that we already have an existing safety enforcement structure in the form of Section 41 of the Act which explicitly provides for the administration and enforcement of safety on the waterfront.

Section 41, at least as written, is a very workable format but unfortunately has no teeth. As you are well aware, it, like so many other laws, depends upon proper funding to make it a reality as well as the motivation and impetus of those who administer the laws to see that they are carried out properly. I cite Section 41 because it so clearly evidences an intent by Congress to promote and enforce safety in our industry.

I therefore urge this Committee to take under advisement the following affirmative measures to strengthen, as opposed to scuttling, the Act:

(1) That a Safety Code, in form or content to one established between the New York Shipping Association and the ILA in the Port of New York, be incorporated verbatim or in its substance into the Act. It would give the Secretary the necessary guidance and sense of clear congressional mandate presently missing from Section 41 of the Act. An enforceable code is the logical and required corollary to the two other features of the Act: viz, it will contain the vicious cycle of accidental injuries and compensation, for which the Act now stands as a cushion but not as prevention or cure.

(2) That Congress mandate the Secretary of Labor, whether under Section 41, OSHA, the Employee Standards Administration or any other component of that department, to promulgate reasonable and achievable regulations consistent with the code addressed to all waterfront activities, whether

aboard ship or at the dock and terminal. It must give him the financial and other means to police and administer those statutory administrative standards by hiring and assigning adequate numbers of dockside inspectors, by proper and diligent inspections, by statistical analyses and other means at his disposal, by citations and substantial fines and other impositions and restraints that will make the employers - no less than the employees - live up to their responsibilities and thereby reduce the incidence of accidents and the costs of their aftermath. It should require the Secretary to periodically report to the Congress whether the employers are living up to their safety obligations and, if not, what his department is doing about it.

The 1972 amendments were enacted with the concurrence of all concerned - union, employers and Congress - to rebalance the compensation system in this industry. The burden to disprove the workability of that new balance (or, "bargain") rests upon those who challenge it. That challenge has not yet been met before this Committee and cannot be met until it is determined that the challengers have met their own responsibilities to make it a workable system. That includes a viable and honest effort to reduce the causes of accidents for which compensation is required to the full.

Moreover, rather than dismantle a landmark achievement of Congress, the ILA further proposes that there is more than

sufficient reason at this time to enact certain additional affirmative amendments to the Act that will close the loopholes and inconsistencies that were left by Congress in 1972. These will correct certain glaring inequities and irrationalities which a uniform compensation system was intended to accomplish in the first place.

Here is a prime example: The ILA firmly believes that the current exception from coverage of state-operated facilites, which especially prevail in the Southern states, should be eliminated. There is no rational basis for excluding a state from coverage under the Act where the state is engaged in what essentially and realistically is a proprietary rather than a governmental function. When a state operates a marine terminal facility it is engaged in a commercial profit-making venture, as distinguished from a non-profit government service such as fire or police protection.

It is no secret that these state-operated docks, characteristically using men not represented for bargaining who work under conditions dictated by the state, are performing work diverted from the private commercial operators in those ports. The state employees work under virtually the same risks and hazards as their brothers who share the same or adjacent facilities. While they are subject to the same injuries for the identical types of accidents they receive ludicrous rates of compensation, again dictated by the state. For example,

though the maximum compensation benefits allowed at the beginning of this year under the federal act during temporary total disability was $426.00, a longshoreman suffering the same injury in Texas at a state dock could then look forward to getting no more than $105.00 per week to tide him over. In Alabama, a longshoremen who incurred such an injury could expect no more than $128.00; if he worked at a state dock in Georgia, he would have to have been satisfied with $110.00; in South Carolina with $85.00; and in North Carolina with $178.00.

Such a state of affairs makes a mockery of the principle of uniformity. Once again, the rejected notion of "fortuitousness" comes into play. Though a state employee's relationship to the vessel and the cargo has no more or less proximity or connection than that of the private contractor's employee, he simply has the "bad luck" of having the state as his employer, though it is the competitor or supplementor to the private commercial stevedore.

So long as Congress is prepared to recognize that longshoring no longer is confined to the hold of the vessel, then it should - indeed must - treat all individuals engaged in the handling of maritime cargo at the docks and piers and ports throughout our country, irrespective of their employer's identity, as the same. As governments tend to engage in proprietary functions with great frequency by intruding into private sectors of activity, they must share the risks and

responsibilities of the private contractor.

Another way of looking at this is to recognize that the lower compensation costs, which are set by state agencies, give the state employers greater opportunity and incentive to wean away work from the nearby commercial facilities, which is not the purpose of government. The state longshoremen and warehousemen should not be permitted to be the whipping boys on whose backs the states are able to take over increasing portions of waterfront work and profits. As as appellate court found, this is not an activity that was intended to be protected under the Eleventh Amendment; states must be on the same footing as their competitors, whether for purposes of bargaining or compensation. We therefore ask this Subcommittee to recommend that the governmental exception be removed from the Act.

Another aspect of the Act's coverage which has been given short shrift since its enactment but is addressed in part by the proposed bill is the subject of rehabilitation. The unions no less than anyone else recognize that rehabiliation is very important not only in getting a man back on his feet and in restoring his dignity, but also in cutting the costs of benefits and the financial effects of disabilities.

Approximately 50% of injured longshoremen rehabilitated by the Office of Workers' Compensation Programs ("OWCP") are returned to light duty employment in the longshore industry. They are rehabilitated as forklift operators, gang

bosses, checkers and light duty longshoremen. The other 50% are trained and placed in physically less demanding occupations outside the industry. Once these men are back on their feet, whether in or out of the industry, the costs to the employers are reduced appreciably.

However, there is no provision in the Act which affirmatively /initially requires an employer to pay compensation to a longshoreman while he is undergoing a rehabilitation program. It is given - or denied - at the pleasure of the employers. Many an injured longshoreman is subjected to additional anxiety in planning for and undergoing rehabilitation simply because of the uncertainty of the length and amount of the compensation payments which he can receive. Indeed, he is discouraged from undergoing rehabilitation under these conditions, even though the employer has as much to gain from the employee's rehabilitation as the man himself, if not more. The employers cannot be heard to complain if their own acts prolong the recovery periods and consequent costs. If the rehabilitation program is ever to be effective, the Act must realistically deal with both aspects of this problem including the injured worker's financial needs and those of his family.

The ILA, therefore, proposes that the Act be first amended to require that temporary total disability be paid /token during rehabilitation. The $25.00 weekly maintenance allowance must be increased so that the injured worker's immediate financial needs are covered. To insure compliance with the

rehabilitation program, the Act can also provide that such benefits should be cut in half for an employee's refusal, without good cause, to undergo or to continue rehabilitation wherever it is found to be feasible.

Other statutory provisions have, in practice, become stumbling blocks to effective coverage of longshore workers by the Act. Under §7(d), an employee is not entitled to recover expenses for treatment or services unless he has requested his employer to furnish such treatment or services or unless he has requested his employer to authorize a provision of those services by a physician selected by the employer. In practice, this provision unjustly penalizes claimants. The sole test should be whether the services or treatment were "reasonable and necessary". Such a standard would permit objective determination of what expenses are excessive and which are properly incurred.

Admittedly, terms such as "reasonable and necessary" cannot be reduced to an exact amount but at least such terms impose some limits on the employer and would effectuate the requirements of §7(a) of the Act that the employer:

> . . . shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus, for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. §907(a)

Section 7(d) also places the burden on the claimant to furnish a medical report within ten (10) days following the

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first treatment. If such report is not furnished, the claim is not valid and enforceable. It is inequitable to require that the claimant furnish this report when the report must be written by a third party, the treating physician, over whom the claimant has no practical control. As long as there is no prejudice to the employer by the failure to submit such report, the claimant should not be penalized for such failure.

Sections 12 and 13 of the Act deal with notice of injury or death and the filing of claims. Section 12(a) states that notice of an injury or death must be given within thirty (30) days after the date of such injury or death or thirty (30) days after the claimant should reasonably have been aware of the relationship between the injury or death and the employment. Section 13 sets forth a time limitation of one year on the filing of claims for disability or death. However the filing must be done within one year of the injury or death and not one year from the date of disability even though the claim filed is a claim for compensation for disability or death and not for injury. The text of the statute as currently in effect means that the time limitation begins running as of the date of injury even though no disability has ensued as of that date. It is logically inconsistent for the time limitation for compensation for disability to be tied to the date of injury rather than to the date of disability.

Any prudent claimant who does not wish to jeopardize the possibility of receiving compensation due to the running of the time limitation finds himself forced to immediately give notice and file a claim as soon as an injury occurs, even though he may not be immediately disabled or even though he may not be immediately able to establish a causal relationship between the injury and his employment. As a practical matter, if an employee files a claim before the onset of actual disability, the employer can request an immediate hearing. The employee cannot yet establish disability, thereby forfeiting any opportunity for compensation at a later date when disability due to the injury occurs.

We urge that the time limitation be eliminated. So long as the employer knew of the source of the injury, the possibility of a fraudulent claim is avoided. In addition, it would seem fair to require that notice be given not within a certain prescribed unit of time (such as thirty days) but rather one based on the point in time when the claimant becomes aware or reasonably should become aware of the relationship between the injury or death and the employment.

Next, §33 provides that acceptance of compensation triggers an assignment to the employer of all rights of the person entitled to compensation to recover damages against a third person. The plain language of this statute is clear: unless the longshoreman brings an action against a vessel owner

within six months he loses the right to bring such action and must rely on his employer, the stevedore, to bring the action, if one is to be brought. In most cirumstances, the longshoreman would be entitled to a portion of any recovery had by his employer.

It has been held in the case of Bandy v. Bank Line Ltd., 442 F.Supp. 882 (E.D. Va. Norfolk Division 1977) that where a conflict of interest deters a stevedore from full pursuit of a claim for injury suffered by a longshoreman and assigned to it under this subsection and therefore does not act to pursue the claim, the longshoreman retains a right to proceed in his own behalf beyond six months after a compensation award. The conflict of interest, the court held, must be established by proof of particular facts in the case at bar that operate to deter the employing stevedore. The court noted that the proof is not limited to establishing a common insurance carrier. Other facts may be shown that contribute to a stevedore's reluctance to pursue a non-frivolous claim against a vessel owner.

It is clearly more fair if the automatic assignment provision is amended to also require that if the employee makes a demand upon the employer to commence an action within thirty (30) days after the assignment and if he fails to do so, then the assigned claim reverts to the employee. It can contain a

condition that any recovery by the employee against the third person will be set off against the compensation received.

In addition, under the present enactment, if an employer refuses to pay a claim and the claimant settles with the third person for an amount less than the amount of compensation to which such claimant would be entitled, the employer is liable for the difference between the amount received and the amount of compensation to which the claimant is entitled, but only if the claimant has received prior authorization for the compromise prior to settlement. A more realistic amendment is needed to provide that if the employer refuses to pay, then the claimant can settle with the third party without employer authorization.

I will not dwell at length on the retrogressive 3% annual increment limit sought by the bill. It is sufficient to remind the proponents that the impetus behind the 1972 Amendments was to bring compensation in line with current living costs without the necessity of revising the Act each and every year and thus eliminate the gross disparities that continually existed prior to that time. The proposed ceilings and wittling deductions would really penalize the injured longshoreman first for his success in achieving meaningful wages and put him at a lower level than his active brothers who escape the impact of accidents. These amendments reduce the longshoreman to second class status. Even more to the point: You just cannot honestly look a disabled and suffering working man straight

in the eye and tell him that the laws and rules apply to others similarly situated and the rising costs of living and inflation do not apply to him and his dependents, any more than you can tell him or them to stop breathing until he is fully back on the job. The present formula is the only sensible and fair one, and must be maintained if we are not to be back here every year or so.

Once again, this is a disincentive to the employer to be concerned about the reduction of accidents. To the extent that his financial burden is lowered, so is his safety consciousness.

Mr. Chairman, I must state for the record that unless the employers and Congress are prepared to turn the clock back to the relationships of the parties involved as they existed in 1927, then the amendments of HR 2448 must be rejected or third-party actions and unseaworthiness must be written back into the Act. Until all of the underlying questions that I have raised in this statement are answered by an accounting on safety and true - not guessed - estimates of costs, any backsliding amendments are premature and unwarranted. To the contrary, there is a great present need for improvements in the coverage and administration of the Act which are totally in line with the sense of Congress in incorporating the amendments in 1972.

On behalf of the 110,000 men (and now women) who I represent and who are the backbone of one of the major national and international industries in this country and on behalf of their families, I urge that you give serious consideration to this statement, as it is they who are caught in the cross-fire of legislation.

In clear contrast, organizations such as the National Association of Stevedores do not have to contend with the everyday realities of the waterfront. They do not negotiate any contracts. The bulk of their constituents' officials do not face first hand the terrors and tragedies of the conditions that they permit to exist. The insurance carriers and their representatives certainly do not have to undergo the pain, suffering and traumatic effects on their families as do our members. Their concerns are purely matters of dollars and cents and they are prepared to leave the injured worker to his own recourse. Their attitude demonstrates for this committee their lack of fundamental social and humane responsibilities. It is an attitude bottomed on the hard-nosed concept that if a loyal and productive worker and his family cannot live on what they are willing to pay, then that is just unfortunate. They would have the taxpayer take-up the welfare burden that they shed.

I am confident that neither the members of this committee nor that the Congress as a whole can be so callous and insensitive to the values of human life and limb and to the resulting drain on the Treasury. I can assure you that I and my colleagues would never reduce ourselves to their level to get out of a fair and freely-made bargain, particularly one over which we have enough control to make sure that it comes out to our equal, if not to our overriding advantage.

Thank you.

(Editor's Note: In the interest of economy certain attachments supplied with Mr. Gleason's prepared statement were retained in the committee files.)

THE NATIONAL ASSOCIATION OF INSURANCE BROKERS, INC.

BETH KRAVETZ
Counsel
Director of Government Relations

ROBERT PETER JURSCH
Public Affairs Manager

October 7, 1980

Honorable Harrison A. Williams, Chairman
U.S. Senate Committee on Labor & Human Resources
Washington, DC 20510

Dear Senator Williams:

The National Association of Insurance Brokers (NAIB) is pleased to submit a statement for the record to supplement your oversight hearings on the Longshore & Harbor Workers' Compensation Act ("The Longshore Act"). We wish to echo those concerns which were raised by both employers and insurers during the hearings on September 16.

The NAIB is a trade association whose member firms provide a full range of professional insurance brokerage, risk management and employee benefits services to industrial, institutional and commercial clients. NAIB member brokers negotiate the major share of the business-related insurance in this country.

For any given insurance need, brokers are uniquely positioned to assess the needs of the insured and determine the availability of a particular insurance market. We are also able to balance both the employer needs and the insurance market with the benefits to the ultimate "consumer" -- in this case, the employee.

We are finding that for our clients who must insure their workers under the Longshore Act, this market has diminished considerably. We are concerned that it may disappear completely unless substantive revisions are made in the Act.

Clarifications are vitally needed to restore the integrity of the Longshore Act. As others have so eloquently pointed out, the pernicious consequences of the 1972 amendments were clearly never intended.

Reply To: 1725 K Street, N. W., Suite 1405, Washington, D.C. 20006 • (202) 861-0370

The two major problems are:

1) BENEFITS -- Benefits do not have to be outrageous to be generous. We believe it is in the best interests of society to fairly compensate workers for work-related injuries, to adequately provide for their families where the wage earner suffers a work-related death.

   Under present interpretations of the Longshore Act, benefits bear little or no relationship to actual wages lost. Benefits are paid even when the worker returns to work. There is no maximum on death benefits paid to surviving dependents. In fact, unlimited death benefits are paid even if the worker died from causes that are not job-related. And benefits increase annually under a large "cost-of-living" adjustment. These factors have made it difficult, if not impossible, for insurers and especially reinsurers, to predict risks and losses, which is essential to the underwriting of any risk.

2) COVERAGE -- Federal courts and the Department of Labor have vastly broadened the scope of workers who must be covered by the Longshore Act. We believe Congress never intended office workers far removed from dangerous water-related activities to be eligible for Longshore benefits. Congress needs to redefine the workers eligible. Only where state workers compensation is unavailable -- e.g., "over water" -- should the Longshore Act be controlling.

The NAIB believes that quick congressional action is needed to correct the excesses and inconsistencies which are rapidly taking control of the Longshore & Harbor Workers' Compensation program. We offer our expertise to you and the committee staff to enact legislation which will provide fair compensation to injured longshore and harbor workers at a reasonable cost to employers. We urge immediate consideration at the beginning of the 97th Congress.

Sincerely,

Beth Kravetz

Beth Kravetz, Counsel
Director of Government Relations

BK:gs

AMERICAN
TRUCKING
ASSOCIATIONS, INC.
1616 P Street, N.W., Washington, D. C. 20036

PRESIDENT
Bennett C. Whitlock, Jr.
(202) 797-5212

October 3, 1980

Honorable Harrison A. Williams
Chairman, Committee on
Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Senator Williams:

American Trucking Associations, Inc. (ATA) has a tangential but important interest in the oversight hearing recently held by your Committee on the problems of the Longshore and Harbor Workers Compensation Act (Act). We are a federation of State Trucking Associations and Conferences, many of whose member companies operate in and around the ports of the United States and in the land areas adjacent to its inland and coastal waters. In addition, trucking companies operate in and through the District of Columbia, where private employers have been covered by the terms of the Act. Consequently, many motor carrier employers and their employees are potentially or in fact subject to the Act's jurisdiction.

Our problems with the Act are of two kinds. First, since the Act's 1972 Amendments, an increasing number of the trucking industry's employees apparently are prosecuting injury claims under this Act rather than under the available and applicable state workers compensation laws. Secondly, since it is not clear whether the new District of Columbia Workers Compensation Statute will survive court review and become law in 1981, we must assume that the problems which plague that Act may continue to have an unfortunate impact in the District of Columbia and its neighboring states.

The jurisdiction problem: Trucking employees in every part of the United States at one time or another are called upon to work in customer facilities and on adjacent land areas where the Longshore and Harbor Workers Compensation Act may apply. Prior to the 1972 amendments, there was absolutely no question that motor carrier employees were not covered by this Act. Instead such employees properly were then and are now covered by the state workers compensation laws. However, the

1972 amendments to the Act and subsequent court decisions have clouded the extent of the coverage definitions of the Act. It has been observed before your Committee - and I believe correctly - that "no one can say with assurance where Longshore coverage ends and where Workers Compensation jurisdiction begins."

The extravagance of the Act's benefits both in amount and duration virtually invites employees to leave the coverage of the state law and to file claims under the more generous federal Act. In fact, claimants have filed claims and received benefits under both.

The insurance systems under which motor carriers protect themselves and their employees against work-related injury, do not contemplate the unreasonable cost burden of Longshore related benefits. Furthermore, once a motor carrier employee successfully obtains a Longshore benefit, other employees, given the opportunity, seek to obtain the same benefits.

In light of these circumstances, ATA urges that any amendment to the Act should include a rollback to the pre-1972 definitions of jurisdiction.

The District of Columbia problem: Those of us who live and operate in the District of Columbia are familiar with the efforts of the District City Council to enact a workers compensation statute which is more appropriate to the types of employment found in the District of Columbia than the Longshore Act. The statute voted by the District Council, which was intended to become effective in October 1981, recently was overturned by the D.C. Superior Court on the grounds that the Congress had taken no action either to approve or disapprove the statute within a 30-day period from passage. In all likelihood, the court's decision will be appealed. Unless and until this matter is disposed of, we must assume that motor carriers operating in the District of Columbia will continue to feel the effects of the Longshore Act's costly benefits and unpredictable administration.

For example, motor carrier employees domiciled in Maryland and Virginia have obtained the Act's benefits simply because their employer's equipment passed through the District or because the employer did business in the District. This has happened in cases in which the injury or accident did not occur in the District and even though the employee never worked in the District.

As an employer located in the District of Columbia, ATA itself has watched our workers compensation insurance costs triple in the last four years, even though we have had but one minor injury claim in that time period. Our compensation costs are now a disproportionate share of our total employment costs. If we were located in the nearby counties, compensation costs would be reduced by two-thirds.

I clearly remember that certain provisions of the Longshore Act were extended to the District of Columbia in 1972 because it was to be a model compensation law for the states. However, the reasons that prompted that change in 1972 clearly do not apply today.

We respectfully urge that the Congress take action to permit the District of Columbia to maintain its own workers compensation statute free and clear of the Longshore Act.

I ask that this letter be added to the record of the Committee's hearing on this subject.

Sincerely yours,

Bennett C. Whitlock, Jr.

Bennett C. Whitlock, Jr.

STATEMENT

on

LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT REFORM

for submission to the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

for the

CHAMBER OF COMMERCE OF THE UNITED STATES

by

Eric J. Oxfeld*

September 26, 1980

The Chamber of Commerce of the United States is pleased to have the opportunity to comment on the Longshoremen's and Harbor Workers' Compensation Act in connection with general oversight hearings on the Act conducted by the Senate Committee on Labor and Human Resources.

The U.S. Chamber is the world's largest business federation, composed of more than 101,000 members, including 97,000 business firms, 2,700 state and local chambers of commerce in the United States and abroad, and 1,300 trade and professional associations.

The serious flaws of the Longshore Act are having an adverse effect on every business member of the Chamber. As employers, many Chamber members now are required to provide workers' compensation coverage for their employees under the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act), and many other members could find themselves in the same circumstance as a result of judicial decisions expanding the Act's jurisdiction. Furthermore, because the Longshore Act frequently is touted as a model for state workers' compensation systems, every business member of the Chamber has an interest in the Act. As a private employer located in the District of Columbia, the Chamber itself is under the jurisdiction of the Act.

This statement focuses on identifying the defects in the Longshore Act. We are cognizant that several bills to amend the Act are pending in Congress, and we will comment on the specifics of those proposals at a later time. Nevertheless,

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* Associate Director, Employee Benefits, Chamber of Commerce of the United States

we do wish to call the Committee's attention to one bill, H.R.7610,which would remedy many of the flaws in the Act.

The multitude of problems that employers presently under the Act are experiencing is of concern to all employers nationwide. The Chamber, which has long been working to maintain a fair and effective workers' compensation system, therefore must ask Congress to enact some sorely needed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

CHAMBER POSITION

The Chamber shares the Committee's hopes for a modern workers' compensation system for the maritime industry and for the District of Columbia, a system that meets the needs of today's work environments. The Longshoremen's and Harbor Workers' Compensation Act, however, does not meet those needs as the Act presently is worded, interpreted, and administered.

The purposes of the Longshore Act are to provide fair, certain, adequate, and prompt job-disability benefits to persons in certain maritime industries -- longshoremen and harbor workers -- and a few groups of workers not otherwise covered by state workers' compensation laws.

As a result of oversights by legislative draftsmen and a misguided notion of fairness and adequacy when the Act was drafted, coupled with maladministration, judicial misinterpretation, and continual double-digit inflation, the Longshore Act has deteriorated from a "model" law to a national scandal. Despite commendable efforts by the Labor Department to reduce the backlog of pending claims and to improve over-all administration, the Longshore program remains notorious for being dilatory in the delivery of benefits, ineffective in weeding out questionable claims, and exorbitantly expensive for employers. These problems have convinced us that if the current situation is left unchanged, some employers may be forced to go elsewhere (i.e., to Canada or Mexico), go "bare" (i.e., fail to insure), or go under (i.e., out of business).

None of this should be news to members of Congress. The Chamber and other employer representatives repeatedly have requested Congress to take action. The General Accounting Office (GAO) in 1976 issued a 68 page report to this Committee criticizing the administration of the Longshore program. The Subcommittee on Compensation, Health and Safety of the House Committee on Education and Labor built up an exhaustive record of the need for change by holding 8 days of oversight hearings in 1977 and 9 days in 1978, supplemented by additional days of hearings in 1979 and 1980 before the Subcommittee on Labor Standards.

Numerous bills seeking to correct shortcomings in the Longshore Act have been introduced in both houses of Congress. Without being exhaustive, the list includes:

H.R. 8878 (Miller, 1977); S. 2020 (Cranston, 1977);
H.R. 12154 (Leggett, 1978); H.R. 13593 (Ruppe, 1978);
H.R. 2448 (Erlenborn, 1979); S. 1201 (Cranston, 1979);
S. 1511 (Nelson, 1979), and H.R. 7610(Erlenborn, 1980).

Despite the long roster of criticisms, we do believe that the Longshore Act still contains the basis for an effective compensation program, and that it can be amended to correct its deficiencies. We urge Congress to address the urgent problems in the Act and its administration, without further delay.

BUSINESS SUPPORT FOR WORKERS' COMPENSATION

The National Chamber has long been vitally interested in assuring the effectiveness of our workers' compensation programs in general and the federal Longshoremen's and Harbor Workers' Compensation Act in particular. As the record clearly demonstrates, workers' compensation -- a nearly 100 year-old concept -- has proven to be a reasonably efficient method of protecting employers and employees against the financial risk of job-caused disabilities, while motivating job-place safety and prompting the rehabilitation of injured workers. Because we believe that no satisfactory alternative is available and that the basically sound workers' compensation system must be strengthened, we have long urged our membership to work for and support needed improvements in both state and federal job-injury laws.

The Longshore Act is an integral part of the workers' compensation system. It serves as the workers' compensation law for the District of Columbia as well as for maritime industries, and should be considered the equivalent of a state program. But in many respects, when compared with the state laws, the Longshore Act is sadly lacking. When the National Commission on State Workmen's Compensation Laws issued its report in 1972, the states' response to their critics was to undertake a comprehensive reexamination of their systems and to plunge wholeheartedly into a major reform effort. Every year the state legislatures work on improving their programs, but the Longshore Act has not benefitted from periodic legislative improvements. The federal response to criticism of the Longshore program has been to make a bad situation worse through poor administration and faulty judicial opinions.

LEGISLATIVE HISTORY

Congress enacted the original Longshoremen's and Harbor Workers' compensation Act in 1927 to provide coverage for certain maritime employees working over navigable waters. A federal law was required because the Supreme Court had ruled that the states lacked jurisdiction in such cases. The following year Congress extended the Act to cover private employment in the District of Columbia. The Act also covers civilian employees on overseas military post exchanges, service clubs, and the like (Nonappropriated Fund Instrumentalities Act, 1952), and employees of firms exploring the outer continental shelf (Outer Continental Shelf Lands Act, 1953). Administration of the Act was placed in the Office of Workers' Compensation Programs (OWCP) of the U.S. Department of Labor.

The most recent statutory extension of coverage, in 1972, applied to persons working in dock areas engaged in loading or unloading of vessels, and persons engaged in shipbuilding or ship repair work on land adjacent to navigable waters.

This last extension was part of a package of amendments that, inter alia, raised the maximum weekly benefit to 200% of the national average weekly wage (NAWW), and set the minimum benefit at 50% of NAWW. The amendments also provided unlimited annual cost of living increases payable to persons receiving

permanent total disability or death benefits; this cost-of-living adjustment (or COLA)was indexed to increases in NAWW. Employees were granted the right to choose their own physician, including a chiropractor.

There have been no further amendments since 1972, but there have been wholesale revisions in the Act through federal judicial interpretation. The courts have broadened Longshore jurisdiction far beyond Congress' intent. The Act has been held to cover the pleasure boat industry, marinas, summper camps, and persons working far from any navigable water.

Perhaps the most astonishing judicial opinion, however, was the Supreme Court's decision in February, 1979, in Rasmussen v. Director of OWCP. In Rasmussen the Court brushed aside 50 years of practice under the Act to hold that no maximum applies to death benefits.

In 1980, the Court has carried on its tradition of questionable decisions involving the Longshore Act. In Sun Ship, Inc. v. Pennsylvania the Court held that a longshoreman can collect benefits under the Longshore Act and under a state program. And in Thomas v. Washington Gas Light Co. the Court ruled that an individual who had exhausted benefits under the Virginia law could then file and continue receiving benefits in Washington D.C.

Despite unsatisfactory interpretations of the Act by the Supreme Court, Congress has refused to take action.

Not so the District of Columbia. Earlier this year the Council of the District of Columbia voted to replace the Longshore law with a new program to be administered by the District government, effective in October, 1981. We think it noteworthy that the one jurisdiction where the Longshore Act operates as the equivalent of a state law has done everything in its power to escape from it.

COST EXPLOSION

Employers' costs under the Longshore Act have risen six times faster than wages over the past 10 years. In the shipbuilding industry, for example, costs to employers have risen 851% from 1970 to 1980 -- contrasted to average wage increases of 124% over the same period. Our own record reflects the same phenomenon of skyrocketing Longshore costs. Between 1972 and 1979, the workforce at the U.S. Chamber has grown by 50%, while our Longshore costs have gone from $17,000 to $215,000 -- an increase per employee of over 760%. Although workers' compensation costs for the nation as a whole have been increasing about twice as fast as inflation, the Longshore program stands out as by far the most expensive workers' compensation system in the country.

The difference in insurance rates is especially noticeable when the rates for the District of Columbia are compared with rates for the same occupations in neighboring Maryland and Virginia. For example, the rate per $100 of payroll for certain types of construction is $19.72 in Virginia and $23.77 in Maryland -- yet it is $83.15 for the District. Rates for many industries are 2, 3, or 4 times higher in the District than outside.

A similar phenomenon may be observed when comparing Longshore Act rates with corresponding rates in Canadian ports. U.S. stevedores at Atlantic and Great Lakes ports operate with Longshore Act rates varying from $25 to $87 per $100 of payroll -- while the Canadian rates are only $2.50 to $13.

The effect of these cost increases is not surprising. New businesses and small employers may find the additional burden of Longshore Act insurance too great to handle. Businesses located in Washington, D.C., may find substantial cost savings by relocating across the District line. Shippers may find it cheaper to ship through Canada than through New York.

An obvious result is fewer jobs available. A less obvious result is the impact on the price of goods and services. In the District of Columbia, where the median sales price of a new house is over $90,000, workers' compensation

costs for a house in that price range are almost $4,000 higher than in Maryland or Virginia, according to statistics compiled by the Greater Washington Board of Trade.

Another example of the pervasive effect of high Longshore costs is the competitive disadvantage for exporters. Longshore insurance can add 25% to the cost of shipping perishable produce, which must be handled manually. Even though the American product may be of superior quality, foreign competitors have a substantial competitive edge.

SERIOUS DEFECTS IN LONGSHORE ACT

The 1979 Cooper* study of the Longshore program confirmed that "very liberal benefits" coupled with "a propensity to make and exaggerate claims" are causing "serious problems." Specifically, employers are experiencing severe problems with benefits, the physician selection process, the lack of vocational rehabilitation, persistent maladministration, and a perplexing set of jurisdictional guidelines. It is not hard to understand why the Longshore program is so exorbitantly expensive.

I Inadequacies of Benefits System

- Wage replacement ratio - Workers' compensation cash benefits are intended to replace a proportion of income lost (wage replacement ratio) because of job-related disability or death. These benefits are provided at the employer's expense, tax-free to the recipient. The wage replacement ratio used almost universally is two-thirds of pre-injury wages, which originally was thought to provide an adequate level of income without creating disincentives to return to work upon recovery.

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*Cooper and Company, Insurance Arrangements Under the Longshoremen's and Harbor Workers' Compensation Act, Phase I Draft Final Report (Stamford: 1979).

At present, however, a replacement ratio of two-thirds results in a windfall for higher paid workers. Inflation, the progressive income tax, and the advent of the dual income family are the reasons -- as family income increases, workers are bumped up to higher tax brackets, and two-thirds of gross wages tax-free can easily exceed pre-injury take-home pay. With other economic savings factored in -- the cost of transportation, meals, etc. -- the incentive to abuse the system is high indeed. When benefits from other sources -- i.e., Social Security, pensions, sick leave, welfare, and so on -- are paid as well, Longshore benefits can become a bonanza for not working.

- Maximum benefit - Only one state, Alaska, has a higher maximum benefit than the Longshore Act. Effective October 1, 1979, the maximum weekly benefit under the Act is $426, which represents the benefit paid to a person whose annual income is well over $33,000. These benefits will be increased again in just a few weeks. The average individual annual income for the United States is $12,144 and $16,145 for the District of Columbia (1978 statistics). The Longshore maximum, therefore, is far out of line with salaries.

- No maximum on death benefits - The Supreme Court, in its wisdom, has ruled in Rasmussen v. Director of OWCP that, contrary to 50 years of practice under the Longshore Act, there is no upper limit on death benefits. The surviving dependents, therefore, receive weekly benefits equal to two-thirds of pre-accident weekly wages, tax-free, no matter how much the deceased worker was earning. No state system pays death benefits without any maximum whatsoever. The absence of any upper limit makes prediction of insurance losses highly speculative, pushing costs up to cover "worst case" situations.

- Unlimited COLA - The Longshore Act is one of a very few workers' compensation systems that automatically grant benefit increases to persons already receiving benefits, to accommodate changes in the cost of living. The cost-of-living adjustment (COLA) is pegged to increases in the national average weekly wage. In order to insure COLA benefits

properly, an insurer must not only predict accident rates and wage levels, but actually estimate the rate of inflation over 15 or 25 years -- a skill that government economists themselves have yet to master. Since a worker's wages do not automatically increase with the cost of living, a COLA departs from the principle of workers' compensation that an injured worker should receive wage replacement benefits. Moreover, the COLA accelerates inflation because the wage replacement ratio is not applied to the amount of the increase. At the very least, a cap should be placed on the COLA.

- Benefits paid without wage loss - Benefits continue to be awarded for nonscheduled permanent partial disability based on anatomical medical ratings and alleged loss of future earning capacity, although the worker has returned to work at full wages -- and despite the fact that the 1972 amendments to the Act were supposed to preclude such awards. Payment of benefits where there is no wage loss is a total departure from principles of workers' compensation.

- Benefits paid to persons who refuse work - Benefits are payable regardless of the fact that the recipient is on strike or even in jail. This situation makes no sense -- it amounts to an employer subsidy for people who choose not to work.

- Unrelated death benefits - Death benefits are payable to survivors of a disabled worker who dies from causes unrelated to the disability. These unrelated death benefits are nothing other than life insurance and have no place in a workers' compensation system. Employers should pay benefits for deaths that are job-related, including deaths that arise out of a job-related disability. But the employer's responsibility should terminate if the death has no connection to the disability.

II The Physician Selection Process Encourages Abuse

The 1972 amendments gave workers the right to choose their own physician. This seemingly innocuous "right" is responsible for many abuses, because it is difficult for OWCP administrators to supervise the medical care given to injured workers. Employers should be given the opportunity to have an injured worker examined by a doctor selected by the employer, unless the request clearly is unwarranted. Without an effective control over medical services, patients' physicians have an incentive to make diagnoses other than on an objective basis.

III Failure to Require Vocational Rehabilitation Means Unnecessary Work Absences

Under the Longshore Act, there is no penalty for refusal of vocational rehabilitation by a disabled employee unable to perform his or her pre-injury job. Workers' compensation should concentrate on restoring a worker's wage-earning capacity through vocational rehabilitation or retraining wherever possible. Studies prove that a sense of self-reliance plays an important part in speeding physical and emotional recovery; rehabilitation allows an early return to productivity and is integral to developing a positive self-identity. A worker who refuses rehabilitation, preferring to draw benefits instead of working, is a burden to family and society. The Longshore Act should be amended to include a provision suspending income benefits for the period during which rehabilitation benefits are refused.

IV Maladministration Has Compounded the Other Problems

The General Accounting Office, in its lengthy report on OWCP's administration of the Act, found that (1) OWCP's national office fails to give guidance to the district offices, causing inconsistencies in procedure from region to region; and (2) the national office lacks effective monitoring of district offices. As a result, "OWCP district offices are not adequately reviewing and monitoring the employers' and their insurance carriers' payments of compensation [and] not levying civil penalties...for failing to meet reporting and other

requirements of the act." The GAO discovered that contested cases are not given prompt attention, there is no time frame for completing the hearing process, and inadequate efforts are made to provide vocational rehabilitation. In fairness to injured workers and to employers, the Labor Department should be required to resolve all cases in a timely fashion, and to give proper emphasis to vocational rehabilitation of all persons with permanent disabilities.

V Federal Jurisdiction Is Far Too Broad

A. Restore State Jurisdiction Over Non-Longshoring Employments

Although it is an extreme example, to a certain extent the Longshore program is representative of problems also faced by employers in the state workers' compensation programs. In one respect, however, the Longshore Act has caused a headache for employers quite unlike any to be found in the state programs -- the perplexing matter of federal jurisdiction.

Federal jurisdiction under the Longshore Act is a hodgepodge of maritime and inland employments. The extraordinary vagueness of the statutory language and its amendments, interpretations, and applications has produced a plethora of litigation. Moreover, confusion as to which employers are required to obtain Longshore coverage has created pressure for higher insurance rates because of the greater magnitude of potential losses where employers are insured.

The Chamber has long maintained that workers' compensation should be a state program, fashioned by each state legislature to meet the particular needs of its own citizens and administered by a state agency answerable to those citizens. This fundamental principle applies to persons presently or prospectively covered by the Longshore Act.

Congress enacted the Longshoremen's and Harbor Workers' Compensation Act to remedy the situation created by the Supreme Court of the United States in Southern Pacific Co. v. Jensen. In the Jensen case the Court refused to allow New York to enforce its workmen's compensation statute insofar as it applied

to a worker killed unloading cargo from a steamship onto a pier. Noting that maritime law is constitutionally the "law of the land" and, therefore, supreme over inconsistent state law, the majority of the sharply divided (5-4) Court found that New York's law was in conflict with general principles of maritime law. The majority's misapplication of maritime law to cover actions against a person (rather than a vessel) is ably explained in Justice Oliver Wendell Holmes' dissenting opinion. We do not believe that the Court could reach the same conclusion in Jensen if the same facts were before the Court today.

While we feel that the Court went astray in issuing the Jensen decision, we certainly are not suggesting that Congress lacked constitutional authority to enact the Longshore Act. What we do wish to remind this Committee is that there is no constitutional reason for that law to apply to the many types of employment to which it has been extended, whether by statute, court decision, or administrative fiat. If there must be a federal workers' compensation law for longshoremen and harbor workers, however, we urge that its jurisdiction be as narrow as possible.

Congress originally passed the Longshore Act to protect workers left outside the protections of the state workers' compensation laws. With respect to longshoremen and harbor workers, this situation was the result of the faulty Jensen decision; with respect to private employment in the District of Columbia, Congress alone had jurisdiction in 1927. In the absence of any constitutional necessity for Congress to legislate for longshoremen, in light of the District's having been granted home rule authority, and because persons employed in the pleasure boat industry, marinas, and summer camps already are protected by state laws, the historical necessity for the present Longshore Act needs to be reconsidered.

The key jurisdictional changes necessary at this time are to relinquish federal jurisdiction over the following:

- District of Columbia - Congress enacted the District of Columbia Workmen's Compensation Act in 1928. Rather than fashioning a new law suited to the District's needs, Congress merely tacked the District onto the existing Longshore program, which was tailored to the specific needs of maritime

industries. Maritime employment in Washington, D.C., is negligible to nonexistent, and it no longer makes sense -- indeed if it ever did -- for the District to operate under the Longshore Act. The high costs of Longshore insurance have hit small businesses in the District particularly hard. Now that Congress has granted the District home rule, there is an agency, namely the elected government of the District of Columbia, that can take responsibility for operating a workers' compensation program. The Council of the District of Columbia has enacted legislation creating a workers' compensation act for the District, as a substitute for the Longshore Act, effective in October, 1981.

• Pleasure craft and small fishing boat industries - The Longshore Act, as now interpreted, has been construed to apply to workers engaged in the manufacture, repair, servicing, and sale of recreational and fishing boats. It is incongruous to lump these employees, who are not engaged in any work-related high risk functions, together with longshoremen and harbor workers, who are engaged in heavy activities. As Senator Cranston has pointed out, these businesses are "normally, completely, and appropriately" covered by state workers' compensation laws. The incidence of injuries in these businesses is very low -- but the high cost of Longshore insurance is contributing to layoffs of workers. In fact, more workdays are lost because of layoffs than from work injuries!

• Marinas, summer camps, and marine museums - Marinas, summer camps, and marine museums have also been placed under the Longshore Act as a result of recent judicial and administrative decisions. As with the small boat industry, these industries experience few major injuries and are adequately covered by state workers' compensation programs. In fact, the American Camping Association states that there is no record of a claim ever being filed from a youth camp in the 10 years camps have been under the Longshore Act.

• Persons working inland are not subject to the special hazards of longshoring - The Longshore Act has been expanded from coverage of persons working over water to include persons working near water. This expansion

includes office workers, construction workers and truck drivers -- persons who cannot be construed as engaging in maritime employment. There is no compelling reason for these employees to be covered by the Longshore Act, when state law already provides coverage.

B. Who Should Continue to be Under The Act

The Longshoremen's and Harbor Workers' Compensation Act should apply only to those persons named in the title of the Act -- longshoremen and harbor workers. Within that category, because of the special hazards, we would include ship repairmen, ship builders, and ship breakers. These are the occupations that logically fall within the purview of maritime employment, if there is a need for a uniform national program of job disability benefits for maritime workers.

VIABILITY OF LONGSHORE SYSTEM

As onerous as the high costs of Longshore coverage are now, the confusion under the present system has more alarming potential. Senator Gaylord Nelson, in his remarks introducing S. 1511, pointed out that the "uncertainty, unpredictability, and ambiguity" of the Longshore Act have made insurance companies reluctant to write coverage at any price. The number of companies willing to write Longshore coverage is dwindling. Only a few are left. If the trend continues, employers who cannot self-insure will be forced out of business or risk financial ruin for themselves and their employees. The Cooper study concluded that "the issue of uncertainty in jurisdiction is extremely threatening to the viability of the whole system."

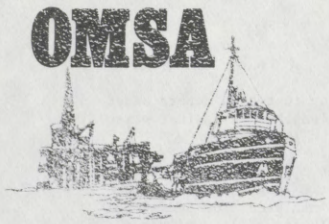
CONCLUSION

The preceding is merely a brief outline of the rapidly deteriorating condition of the Longshore program. The Cooper study warns that "Unless a concerted effort is made to reduce some of [the Longshore program's] problems, their intensity is apt to worsen, undermining the entire system."

The Longshoremen's and Harbor Workers' Compensation Act requires major revisions. Remedial legislation has been introduced in the last few Congresses, as noted above, and two bills, H.R. 7610 and S. 1511, now are pending. Many of the needed changes are contained in H.R. 7610, which can serve as the focus for a comprehensive reform of the Act. Furthermore, Congress should repeal the District of Columbia Workmen's Compensation Act, effective as of the date on which the District government is prepared to administer its own workers' compensation program.

The responsibility for positive action lies with Congress, which has not made a single improvement in the Act since 1972, despite nearly universal agreement that many changes are needed. As Justice Rehnquist observed in the Rasmussen decision, "Congress has put down its pen, and [the Supreme Court] can neither rewrite Congress' words nor call it back 'to cancel half a line.'" Indeed, there is little anyone can do to straighten out the Longshore program until Congress amends the Act.

We commend the Senate Committee on Labor and Human Resources for holding these hearings and thereby taking the first step toward reform. The business community has presented Congress with abundant evidence of the necessity for change. It is vital for the best interests of workers and employers covered by the Longshoremen's and Harbor Workers' Compensation Act that remedial legislation be enacted without further delay.



September 9, 1980

Senator Harrison A. Williams, Chairman
Committee on Labor and Human Resources
352 Russell Senate Office Bldg.
Washington, D.C. 20510

Re: Longshoremen's and Habor
Worker's Compensation Act
Amendments

Dear Chairman Williams:

The Offshore Marine Service Association represents the owners and operators of over 2800 vessels engaged in the service of supporting offshore oil and mineral exploration and exploitation Activities on the Outer Continental Shelfs. Our members' operations are effected by the Longshoremen's and Harbor Workers' Compensation Act and amendments. Outlined below is a suggested amendment to LHWCAct to cure a severe problem in our industry, and a rationale therefor.

The vessels which our members own and operate are "special purpose" vessels as compared to the traditional deep sea liner or tanker. Their activities consist of providing offshore vessel support and supply services to the offshore petroleum, towing, pipelay and construction industries. While offshore working on the OCS, the vessels are required to offload/onload cargo while in close proximity to offshore rigs, platforms and other structures and, in many cases, while they are physically secured to such structures with mooring lines. Thus, third party longshoring personnel who come aboard the vessels to load or unload cargo or supplies or to handle rig, derrick and/or lay barge anchors often are required to work in a more hostile environment than are the traditional longshoring activities that are performed in sheltered waters, at a modern dock-side facility in servicing the traditional blue water ships. It is for this reason that we have confined the relief we are seeking to activities on the Outer Continental Shelf.

We view the 1972 amendments as an effort by Congress to seek a three way compromise between longshoremen, their employees, and vessel owners. The longshoremen benefited by increasing the maximum weekly benefits from $70.00 per week to the current maximum of $426.00 per week. Employers of longshoremen benefited because their exposures were limited to benefits payable under the amendments and third party or "indemnity" agreements or claims were prohibited. The vessel owner was to benefit because the

OFFSHORE MARINE SERVICE ASSOCIATION
INTERNATIONAL TRADE MART 2 CANAL STREET SUITE 2939 NEW ORLEANS, LOUISIANA 70130 TELEPHONE (504) 523-7363

amendments abolished longshoremen's claims against such owners based on "unseaworthiness" and restricted claims by longshormen against vessel owners based on negligence only.

All of the foregoing evidence an intent of Congress for the three parties involved to "give and take" -i.e., the longshoremen obtain much higher benefits; their employers were insulated from additional exposure; and vessel owners were to be liable for their negligence only and not for "unseaworthiness".

However, numerous Court decisions interpreting Section 905(b) of the amended Act have made it clear that the "compromise" was not achieved and, in fact, the vessel owners found they were made "victims" under the 1972 amendments. Followed to a logical extension, these court cases have held that if a vessel owner is one (1%) percent negligent in causing injury to a longshoreman, and the employer is 99% negligent, the longshoreman could recover 100% of the judgment against the vessel owner, and the employer, although 99% at fault in injuring its own employee, is entitled to recover 100% of its compensation and medical lien under the Act. Again, the 1% negligent from the employer even though the latter was 99% at fault. The courts have recognized this injustice, but have refused to "balance the equities" and have repeatedly told vessels owners if they want relief, such must come from Congress alone.

Prior to the 1972 amendments vessel owners could be held liable for "unseaworthiness" (a species of liability without fault), but they could also recover damages from the employers of longshoremen if they caused the unseaworthy condition. However, the right of recovery against such employers was taken away by the 1972 amendments, and now they find ourselves not only responding for their own negligence, but also for the negligence of unrelated third party employers of longshoremen as well. This is quite unique and heretofore unheard of in maritime law whereby a vessel owner, in the absence of any contract, is made to respond for the negligence of unrelated third party employers.

We had hoped that the U.S. Supreme Court would correct this inequity, but that august body refused to do so in the only case on point to be decided to date. (See Edmonds v. Compagnie General Transatlantique, (1979), 99 S. Ct.2753.) There, although the vessel owner was only 20% at fault in the injury of a longshoreman, it was required to pay 100% of the longshorman's judgment and the employer was again allowed to recover 100% of its compensation and medical lien.

To correct this injustice, and to balance the equities, we have and continue to propose an amendment to the Act by adding a new Section 905(c) which would read as follows:

"Sec. 905(c)

"Notwithstanding the provisions of Section 905(b), above, and with respect to vessels, drilling units, pipelaying, construction, and other special purpose vessels engaged primarily on the Outer Continental Shelf in support of the offshore drilling, exploration, production of oil and minerals, or vessels engaged in pipelaying, construction, and related industries on the Outer Continental Shelf, then in the event

of injury to a person covered by this Act, the liability of such vessel owners, operators, or charterers shall be limited to such portion of the covered person's damages as were caused by the degree or percentage of negligence of the vessel's owner, operator or charterer; and, said parties or the vessel shall not be liable to covered persons for claims based on unseaworthiness, or for such portion of the damages caused by the degree or percentage of negligence of the covered person, his/her co-workers, or the employer. The recovery of the employer or of its insurance carrier for benefis paid under the Act from the vessel, its owner, operator or charterer, or from the covered person's judgment shall likewise be limited to such portion of the total benefits paid as were caused by the degree of negligence of the owner, operator or charterer of the Vessel."

We believe that the foregoing amendment would implement the intent of Congress when it enacted the 1972 amendments. Our amendment would apply only to operations on the OCS and thus would not make any change in existing law with respect to dock-side traditional longshoring activities or in shipyards. Our amendment would preserve the right of injured longshoremen to receive full benefits provided under existing law and would retain their right to sue vessel owners, operators or charterers for negligence only. The amendment would, however, limit damage recoveries to the actual percentage of the vessel's negligence, and would restrict the employer's recovery of its compensation and medical lien to the same degree of vessel negligence. In short, covered employees are not adversely affected; vessel owners respond for damages, but only to the degree the vessel is found at fault; and employers still recover their compensation lien, but again, limited only to the degree or percentage of negligence actually attributable to the negligence of the vessel.

We believe that our amendment corrects an obvious existing inequity, and should be incorporated into any revisions of this Act. Thank you for the opportunity to express our views on this most important issue.

Very truly yours,

Offshore Marine Service Assn.

Capt. W. A. Mayberry
Executive Director

WAM/le
cc: Michael Kelley

AMERICAN BOAT BUILDERS & REPAIRERS ASSOCIATION, INC.

715 BOYLSTON STREET BOSTON, MA 02116 AREA CODE 617 266-6800

September 11, 1980

Honorable Harrison A. Williams, Jr., Chairman
Committee on Labor and Human Resources
4232 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Williams:

Thank you for having your aide call me with reference to my letter to you of August 21, 1980, relative to the Senate hearing on the Longshoremen's and Harbor Workers' Compensation Act.

I sincerely regret that a previous commitment prevents my appearing before your committee to testify, but it is hoped that the enclosed statement will be read into the hearing record.

I hope the hearings are successful and that the Erlenborn bill (H.R. 7610) is given favorable consideration.

Sincerely,

AMERICAN BOAT BUILDERS &
REPAIRERS ASSOCIATION, INC.

William H. Potter
Director
Immediate Past Chairman of the Board

WHP:DC
Enclosure

STATEMENT
of
WILLIAM H. POTTER
DIRECTOR & IMMEDIATE PAST CHAIRMAN OF THE BOARD
of
AMERICAN BOAT BUILDERS & REPAIRERS ASSOCIATION, INC.

and

PRESIDENT & TREASURER
of
FAIRHAVEN MARINE, INC.
FAIRHAVEN, MASSACHUSETTS

SEPTEMBER 16, 1980

The American Boat Builders & Repairers Association, Inc. is a national organization of over 150 member small shipyards, boatyards, boat manufacturers, and marinas employing approximately 2,000 persons. Geographically our membership covers primarily the East Coast of the United States, but we do have members in the South and Midwest.

AMERICAN BOAT BUILDERS & REPAIRERS ASSOCIATION, INC.

715 Boylston Street - Boston, MA 02116 - Telephone: (617) 266-6800

72-745 O—81——27

The 1972 changes in the implementation of the Longshoremen's and Harbor Workers' Compensation Act, as detailed in the so-called Rule 21, have created an extremely serious situation with regard to the small shipyards, boatyards, boat manufacturers, and marinas throughout the United States.

Prior to Rule 21 the only impact the Longshore Act had was its application to persons who were injured while working over navigable waters on a vessel, dock, or railway. Currently the Act extends to anyone who meets the status and situs criteria.

The American Boat Builders and Repairers Association members have experienced untold difficulties in securing compensation insurance, and if and when secured, the rates were found to be exorbitant. As an example, I should like to cite my own company's (Fairhaven Marine, Inc.) experience. In 1972 our annual cost for Workmen's Compensation amounted to $21,000, whereas in 1978 the costs skyrocketed to $102,500!

The writer testified before the House Subcommittee on Compensation, Health and Safety in September of 1977. The statement submitted at that time and the attachments which were part of the presentation may be found in the booklet entitled, "Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act - Part 1 - Pages 920-934.

The Association respectfully requests the assistance of your committee in remedying the present critical situation.

STATEMENT OF

NATIONAL MARINE MANUFACTURERS ASSOCIATION

BEFORE THE

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

This statement is submitted on behalf of the National Marine Manufacturers Association (NMMA), the trade association representing the recreational boating industry. Its membership includes over 800 boat, engine and accessory manufacturers, repair yards, and small marinas for recreational craft across the country. NMMA commends the Committee for holding this oversite hearing this year and pleads for prompt action next year on legislation so desperately needed to clarify, among other matters, the scope of coverage of the Longshoremen's and Harbor Workers' Compensation Act.

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 sole message of this statement is that clarifying legislation is necessary to provide long-overdue relief for the recreational boating industry from this erroneous interpretation.

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 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 of 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 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 employees 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 with respect to loading, unloading or repair of such vessels.

A reasonable argument can be made that Congress intended for the 1927 Act to cover only workers in potentially 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, however, 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 jurisdictional requirement that a worker be associated with commercial ships and relied exclusively on where the worker was injured to determine 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.

The 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 longshoreman or other person engaged in longshoring 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 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 do not do any loading or unloading and do not build or repair large commercial vessels.

II. The Need for Federal Legislation.

The recreational boating industry believes that 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.**/

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*/ 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.

**/ When Jeff Napier (then General Counsel of one of NMMA's predecessor organizations, the Boating Industry Associations) President of NMMA, testified on this point in 1977 before the House Education and Labor Committee Subcommittee on Compensation, Health and Safety, several members of the Subcommittee stated that they fully concurred with the assertion that it was not Congress' intent to cover this industry.

Nevertheless, on June 6, 1975, the Department of Labor issued a ruling, designated "Notice No. 21", that recreational boat builders and marinas are "employers" within the meaning of the Act and that employees of recreational boat builders and marinas are engaged in "maritime employment". NMMA contends that Notice No. 21 was based upon an erroneous interpretation of the Act. This Notice, however, 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. Many businesses in this industry have ten or fewer employees. Consequently, the increase in premiums for Longshoremen's Act coverage to which this segment of the industry is currently exposed is an especially onerous burden for these small businessmen.

The Department of Labor has indicated that it will not alter its position stated in Notice No. 21 until the issue has been formally decided by a Federal Court of Appeals. NMMA has participated in two protracted cases in an effort to obtain such a Court decision.*/ Unfortunately, both cases were decided favorably to NMMA's interpretations of the law in the first instance, but then disposed of on appeal upon procedural grounds. Neither court of appeals decision addresses the merits of whether Congress intended that the Longshoremen's Act cover this industry.**/

In BIA v. Marshall, et al., the Ninth Circuit held that Notice No. 21 was only an informal interpretation of the Longshoremen's Act by the Department of Labor. The Court found that the Notice lacked any regulatory significance and need not be relied upon by insurance companies.

The Ninth Circuit's determination that Notice No. 21 lacks binding legal significance eliminated the automatic application of the Act to the industry by insurance carriers. Now each insurance carrier is to disregard Notice No. 21 and itself evaluate the particular operations of the employer to determine whether or not that employer and his employees are subject to the Act.

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*/ Boating Industry Associations, et al. v. Marshall, et al., C-76-2550RHS (January 31, 1978); Napoles v. Donzi Marine, Inc., 5 BRBS685 (April 1977).

**/ Boating Industry Associations, et al. v. Marshall, et al., 601 F.2d 1376 (9th Cir. 1979); Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978).

The Court went on to emphasize that the only way by which the Act could be judicially interpreted was through the claims process initiated by injured employees. This process includes appeal to the Benefits Review Board and review in the Courts of Appeals.

Because the Benefits Review Board can consider the issue only in a piecemeal fashion, colored by the particular facts of each case, its decisions have not clarified the jurisdictional limits of the Act.

Resolution of the issue by administrative and judicial determinations is a time-consuming, expensive and uncertain process and should not be inflicted upon the recreational boating industry.

CONCLUSION

The Ninth Circuit's refusal to reach the merits of BIA, et al. v. Marshall forces the recreational boating industry to look to Congress to resolve the jurisdictional issues created by the Department of Labor's interpretation of the 1972 amendments. Only through a clarifying amendment to the Act can the severe harm caused by the erroneous "advisory" interpretation of the Department of Labor be rectified. NMMA urges this Committee to consider a total exemption for the recreational boating industry in accordance with the intent of Congress. NMMA notes that H.R. 7610, introduced in the House by Congressman Erlenborn on June 18, 1980, does include such an exemption for

vessels under sixty-five feet in length, provided the injured person is covered by a State workers' compensation program. NMMA urges this Committee to adopt a similar approach to the plight of the recreational boating industry when it considers amendments to the Longshoremen's and Harbor Workers' Compensation Act next year.

Council of
American-Flag Ship Operators

1625 K STREET, N.W. SUITE 1200 • WASHINGTON, D.C. 20006

TELEPHONE 202-466-5388
TWX 710-822-1163 "CASO WSH"

26 September 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Senate Labor and Human
Resources Committee
4232 Dirksen
Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

The Council of American-Flag Ship Operators (CASO) is an association representing the majority of the United States flag liner companies operating in the foreign commerce of the United States. Our member companies own and operate 151 vessels built in U. S. shipyards which load and discharge cargo on all four coasts of the United States, including ports in the Great Lakes.

CASO member companies employ longshoremen on either a direct-hire basis or through a stevedore contractor. The existing fleet of vessels are generally repaired in U. S. shipyards and four new vessels for our member lines are currently under construction in two U. S. shipyards. Since the cost burden of workmens' compensation for the longshoremen and the shipyard workers is passed on to the ship operator and ultimately to the consumer, we were vitally interested in oversight hearings on the administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which were conducted by you on 16 September 1980. We have recently affiliated ourselves with an ad hoc Longshore Action Committee to seek legislative reform of the LHWCA. Our name will appear on the next publication of their list of associations and companies actively seeking remedial legislation of the LHWCA.

Rather than repeat each of the numerous concerns that we have with the 1972 amendments to the LHWCA, we would like to

submit for the record our support for the statement that was filed with your committee entitled "The Longshoremen's and Harbor Workers' Compensation Act, A Federal Program in Crisis" which was prepared by members of the ad hoc coalition seeking reform of the Longshore Act and reprinted under date of August, 1980. The incorporation of this letter in the record of your oversight hearings would be appreciated.

Sincerely,

Albert E. May
Executive Vice President

KSL/pgr

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

A Federal Program In Crisis

Runaway costs for employers, inadequate reponse to employee medical needs, and unpredictability of the insurance risk exposures involved have brought the workers' compensation program established under the Longshoremen's and Harbor Workers' Compensation Act to an operational crisis.

Enacted in 1927 and administered by the Department of Labor, the Longshore Act provides for payment of medical expenses and wage replacement benefits for employment-related injuries. As presently interpreted, the law covers more than one million employees. The beneficiaries include not only longshoremen and harbor workers but also workers in the shipbuilding, ship repair, marina, construction, boatyard and offshore drilling industries; some U.S. personnel overseas; private employees in the District of Columbia; and many others.

Geography -- a work site over navigable waters or out of the country -- prevents many workers from qualifying for protection under state workers' compensation systems. But many employees who could receive state workers' compensation benefits are covered by the Longshore Act because Congress, the Department of Labor and the courts have extended the federal law's jurisdiction unnecessarily and in a confusing pattern. In fact, coverage has been expanded to such an extent that construction and other activities remote from the longshore and harbor workers' industries are caught under the umbrella.

Problems with the law stem from the Congressional amendments to the Act passed in 1972. Technical omissions and unspecific

language, combined with generous interpretations of the revised law, have moved the program well beyond medical benefits, rehabilitation, and income replacement into life insurance, pension benefits and other supplemental income.

Compensation benefits, for instance, are often awarded when workers continue to work at full pay, and survivors' benefits are payable even when the death is unrelated to the deceased's employment injury. Such coverage was never intended by those who drafted the original law and does not belong in any workers' compensation program.

The generous benefits provided by the 1972 amendments and the jurisdictional confusion arising from them have created a legal and financial nightmare for employers and insurers. The Longshore Act today is virtually uninsurable because it is impossible to predict the degree of risk exposure. As a result, the number of insurance companies willing to underwrite this line of protection has dwindled.

Because of the generous benefits available under the law, the companies which will still underwrite the coverage are forced to charge extremely high rates for it. Similarly, self-insured employers must incur and finance exorbitant costs.

Because the expense of workers' compensation insurance is usually passed through the distribution system, the high cost of Longshore coverage creates additional pressure on the present inflationary economy. For example, in the case of stevedoring companies, much of the cost is transferred to shipowners, then to their customers, and ultimately to consumers of the products involved. Shipyards

also must pass the high price of Longshore coverage through to shipowners.

The high cost is passed along, to the detriment of American industry and the number of jobs it can provide. At the point the cost is reflected in the price which those buying shipping services must pay, American ships and ports become less competitive in the market for handling world trade, and business can be lost.

The cost, as it affects the non-commercial consumer, has clearly been seen in the District of Columbia, where, through an anomaly, all private sector employees have been covered under the Longshore and Harbor Workers' Compensation Act. The District, which rates as one of the safest jurisdictions in the nation in terms of incidence of work-related injuries and illnesses, has had workers' compensation insurance rates which are three to four times higher than those in neighboring jurisdictions of Maryland and Virginia. This translates directly into higher consumer costs. For example, a new $95,000 town house in the District of Columbia, would sell for $5,000 less if workers' compensation insurance costs were equivalent to those in Maryland or Virginia.

So critical has the cost situation become that the District of Columbia recently enacted legislation to remove itself from coverage under the Longshore Act and create a program which is independent and financially sound. The new law will take effect October 1, 1981.

There is another price the nation as a whole is paying -- in the area of affirmative action and opportunity for all citizens regardless of background or handicaps. Since the generous benefits

paid under the Act are tax-free, many individuals receive awards approaching or exceeding pre-injury take-home pay. This constitutes a negative work incentive which has had the effect of unnecessarily prolonging disabilities and inviting claims for conditions more serious than they really are.

The Longshore Act has thus effectively discouraged rehabilitation and return to work within reasonable time -- concepts fundamental to all workers' compensation programs.

The Ill-Conceived Amendments of 1972

Mystery surrounds the origin of some of the most troublesome provisions of the 1972 amendments. Those who hammered out the changes during the last days of the 92nd Congress lacked and failed to seek cost studies and other hard data as a basis for their decisions. It is doubtful that anyone understood the full implications of the revisions.

The 1972 amendments were enacted to remedy two situations: the low weekly benefit level being offered at the time, and the loss -- through judical interpretations -- of employers' "exclusive remedy" protection under the Act. Over the years, the Supreme Court had interpreted the law to permit third party liability and indemnification actions in which an injured longshoreman could sue a shipowner for damages. The shipowner could, in turn, sue the employer of the longshoreman to recoup those damages, thus indirectly allowing the employee to sue his employer. This had eliminated the fundamental no-fault principle of workers' compensation.

The 1972 amendments seemingly struck a balance among labor, management and government concerns. Through specific new language in the law eliminating employer liability in third-party suits, workers' compensation was re-established as the exclusive remedy employees have under the Longshore program. In return, compensation benefits were substantially increased.

Far from achieving balance, however, the 1972 amendments removed controls which provided balance and left other intentions unclear. The effect in a few short years was to make compensation under the Longshore Act an inordinately generous and expensive program. Maximum disability benefits have increased from $70 a week in 1972 to $426 a week in 1979, and are automatically escalated annually.

The built-in generosity has been compounded by galloping inflation and by the liberal interpretations of the Act which enable many workers having marginal eligibility or marginal claims to qualify for benefits.

Dimensions of the Crisis

Problems under the Longshore Act were graphically described by stevedores, shipbuilders, small boat builders and repairers, marinas, port authorities, insurers, state insurance funds, and many others at hearings before the House Subcommittee on Compensation, Health and Safety in 1977-78.

The same groups appeared, joined by a growing number of others affected by the Act, for additional hearings in late 1979 before the House Labor Standards Subcommittee, which now has jurisdiction. All pointed to 1972 as the year trouble began.

By vastly expanding the opportunities to receive high tax-free benefits, and lacking counterbalancing controls, the 1972 amendments triggered a surge in utilization of the program. According to Department of Labor statistics, injuries reported under the Act (excluding those for private employees in the District of Columbia) rose from 72,087 in 1972 to 105,384 during 1973, and to 151,274 during 1974. In 1977, the number was 205,584.

This is an increase of 185% in only 5 years. Conversely, during the period immediately preceding the amendments, reported claims had dropped steadily -- from 96,944 in 1969 to the 72,087 in 1972, a decrease of 25% in three years. The 1972 amendments emphatically and expensively reversed the downward trend of compensation claims.

Besides the stimulus to increased utilization which the amendments provide, the ambiguity of the revised law leaves great latitude to the Labor Department review process and the courts to rule in favor of claimants whether grounds for the awards are justified or not.

The problems with the Longshore program today are even worse than they were at the time of the original hearings in 1977-78:

- Jurisdiction

  Before passage of the 1972 amendments, the concept of "water's edge" clearly prevailed. Employees who worked seaward of the water's edge were covered under the Act. Those landward were covered under the applicable state system. The 1972 amendments extended the coverage landward but left doubts about how far and to whom.

  No one today can say with assurance where Longshore coverage ends and where state workers' compensation jurisdiction begins. This has encouraged employees to "migrate" from state programs if there is the possibility of qualifying for the higher Longshore benefits. It has also created extensive litigation and

caused all reviewing courts to complain about the lack of clarity in the amendments and their legislative history.

- Benefits Escalation (Indexing)

The 1972 amendments quadrupled the weekly benefit level and pegged it permanently to two-thirds of the workers' income, not to exceed 200% of the national average weekly wage. This means that there is an open-ended annual tax-free increase in benefits -- both for those who will have claims in the months and years ahead and for those with claims in the process of being paid.

The increase is determined by the Secretary of Labor each October 1 based on the percentage increase during the previous year in the national average weekly wage. For example, the increase was 8.05% for 1978 and 7.5% for 1979, bringing the maximum benefits for disability to the current $426 a week.

These are quantum jumps. Inability to project the increases gives employers and insurers their greatest risk assessment problems. The adjustments are also a major factor in employers' escalating premium costs.

- Insurability

Insurance companies and their reinsurers are retreating from the Longshore market because of its unpredictability. Not knowing clearly who is covered under the Act, and how inflation will affect future benefits, both insurance companies and self-insurers cannot project their risk exposure and claims losses. A one percentage miscalculation of inflation rates for the year ahead can literally make millions of dollars' difference in the cost of claims.

As Longshore insurance has become less available, many employers have had to turn reluctantly to self-insurance, if they are large enough to afford the bonding, or to more costly and less effective assigned risk coverage. However, for both self-insurers and insurance companies, the same problem then looms: reinsurance. Reinsurers are reluctant to accept unlimited escalation when there is no possibility of obtaining adequate rates.

Ultimate losses simply cannot be predicted when future claims payments are linked to inflationary factors which make it impossible to collect or set aside reserves adequate to protect both insurers and their reinsurers.

Predictability is essential to retain the involvement of companies still voluntarily underwriting or reinsuring Longshore risks, and to attract others back into the market.

- Cost

Because benefits are high and continually escalating, opportunities to qualify are many, and administration of the program has been generous, insurance premiums and self-insurance costs have soared. In New York, the employers' rate for general stevedoring coverage runs $363 per employee per week or $18,876 a year. For many employers under the Act, workers' compensation is the second greatest cost after direct payroll.

The effects of the generous program must also be assessed in terms of disincentive to return to work and the loss of productivity this involves.

Evidence even has emerged suggesting that the volume of trade and number of jobs at American ports is being affected. During 1974-1976, more than $1 billion in cargo was exported by land and loaded for shipment overseas at Canadian ports where Longshore rates are much lower. It the trend continues and is positively linked to Longshore rates, the greatest cost -- lost jobs and pay -- could be experienced by the very people the program is designed to protect.

- Unrelated Death Benefits

The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the Act was originally passed, and it further complicates the matter of risk predictability.

- Maximum Death Benefits

Through a quirk in the law upheld by the Supreme Court, death benefits to surviving spouses can be tremendous since they are granted tax-free at half the actual gross income the deceased was earning, subject to no maximum. Additional benefits are paid to surviving children. Not only that, all death benefits are escalated annually.

This interpretation literally puts a premium on death. The surviving spouses of high-paid workers can collect benefits at a higher rate than the workers would have received in disability compensation had they lived -- benefits which can total millions of dollars tax-free over the spouses' lifetime.

- "Unscheduled Injury" Awards

In the case of unscheduled injuries -- primarily back and head injuries and occupational disease -- employees can receive

permanent partial disability payments, unqualified, for a lifetime. An employee can thus resume work at full pay, with the permanent partial benefits serving, in effect, as supplemental income.

- Administration

The most frustrating administrative practices for both employers and employees are found in the Labor Department's review process. Creation of the Benefits Review Board by the 1972 amendments as the top layer of the process has slowed procedures considerably and made contested cases more difficult to close.

Approximately two years is required for review -- first by a Deputy Commissioner, then by an Administrative Law Judge, and finally by the Board. If the case is appealed further, it takes another year-and-a-half at least for a decision from the appropriate federal appeals court. Prior to 1972, decisions of the Deputy Commissioner could be appealed directly to the U.S. District Court.

Members of the Board are appointed by the Secretary of Labor, for an indefinite term, without Congressional review of their credentials or appropriateness. With no Departmental guidelines and an ambiguous law, the Board's judgements, along with those of the Administrative Law Judges, have favored claimants whether for good cause or not.

- Medical Treatment

The medical service provision in the 1972 amendments is interpreted by the Department of Labor to allow any physician to treat and evaluate Longshore injuries instead of only those doctors experienced in industrial medicine and willing to cooperate with the Longshore program. As a result, many employees receive incompetent medical care.

Besides the failure to exercise supervisory authority over medical treatment given to employees, the opportunities for rehabilitating the disabled have also been overlooked. Practical rehabilitation efforts which fit the aspirations and remaining abilities of those disabled to jobs where they can truly be productive have been neither developed nor encouraged under the Longshore Act. The situation stands out as one of the most tragic indictments of the program.

- The Special Fund

By limiting the liability an employer has under workers' compensation for an employee who at the time of hiring had a disability, the Special Fund is designed to encourage employment of the handi-

capped. If a work accident occurs and the employer can show that previous disability existed, his liability for the accident is limited to payment of the first 104 weeks of compensation. The Special Fund pays the rest of the claim.

The Special Fund is administered by the Department of Labor, and claims payments made by the Fund are financed through annual assessments on insurers and self-insurers. The cost of these usually open-ended claims is thus spread among all those underwriting the Longshore program.

Absence of administrative safeguards for the Fund creates the temptation to use it in cases which may not be justified -- to encourage the development of a record in such cases which would establish both total disability and pre-accident disability.

During the period 1972-75, claims payments by the Special Fund increased from $42,000 to $2,200,000, a jump of 5,138%. Claims currently being paid by the Fund are increasing at the rate of an additional $10 million in liability each month. Even greater increases are expected.

To complicate matters, the Fund is not subject to reserving practices and other insurance procedures to assure that claims obligations can be met. Concern is spreading over the escalating liability and the need for a realistic plan to handle the cases involved.

Solution to the Longshore Dilemma

The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act have created many more problems than they solved. Designed to provide a balanced trade-off of increased benefits for re-establishment of the "exclusive remedy" principle, they have instead produced excessive costs, uninsurability, more administrative delays, court confusion, and an unnecessary additional need for legal services.

These results have had adverse effects for both employers and employees. Society as a whole also suffers because the consumer ultimately pays for the additional costs in the price of products and services.

The only effective cure is to start at the core of the dilemma, the law itself. The Longshoremen's and Harbor Workers' Compensation Act cries out for revision. Even the Supreme Court has noted that it is about as unclear as any statute could conceivably be and has termed it a "jurisdictional monstrosity."

Legislation -- not simply renovation of administrative and operational procedures under the Longshore Act -- offers the only hope for true reform.

LONGSHORE ACTION COMMITTEE

The following associations and companies are actively seeking appropriate remedial legislation in the Longshoremen's and Harbor Workers' Compensation Act. They have formed an ad hoc coalition -- the Longshore Action Committee -- to help focus their joint and individual actions.

Air Transport Association
Alaska Insurance Company
Alliance of American Insurers
American Association of Port Authorities
American Boat Builders & Repairers Association
American Home Assurance Company
American Insurance Association
American International Group
American International Underwriters of Dallas
American Life Insurance Company
American Trucking Association
American Waterways Shipyard Conference
Associated Waterways Shipyard Conference
Birmingham Fire and Marine Insurance Company
C. V. Starr Company
Chamber of Commerce of the United States
Commerce and Industry Insurance Company
Crane & Rigging Association
Crum & Forster Insurance Companies
Delaware American Life Insurance Company
Great Lakes Terminal Association
Greater Washington Board of Trade
Hartford Insurance Group
Hawaii Fire & Marine Insurance Company
Illinois Fire & Marine Insurance Company
Independent Insurance Agents of America
Independent Liquid Terminal Association
Inland Rivers Ports & Terminals, Inc.
Insurance Company of North America
International Association of Drilling Contractors
Kemper Group
Landmark Assurance
Life Insurance Company of New Hampshire
Master Contracting Stevedore Assn. of the Pacific Coast, Inc.
Metropolitan Marine Maintenance Contractors Association
New Hampshire Insurance Company
National Association of Casualty and Surety Agents
National Association of Independent Insurers
National Association of Insurance Brokers
National Association of Manufacturers
National Association of Stevedores
National Constructors Association
National Food Processors Association
National Marine Manufacturers Association
National Ocean Industries Association
National Union Fire Insurance Company
National Club Association

Pacific Union Assurance
Professional Insurance Agents
Reinsurance Association of America
Sheetmetal & Air Conditioning Contractors National Assn.
Shipbuilders Council of America
Southeastern Risk Specialists
Southern California Marine Association
Southwestern Risk Specialists
UBA, Inc.
Vermont Accident & Health Insurance Company
West Gulf Maritime Association

9/8/80

REINSURANCE ASSOCIATION OF AMERICA

1025 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20036 202/293-3335

September 23, 1980

Honorable Harrison A. Williams, Chairman
Committee on Labor & Human Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This letter is submitted by the Reinsurance Association of America (RAA) with the request that it be made a part of the record of your Committee's recent oversight hearing into the operation of the Longshoremen's and Harbor Workers' Compensation Act. The RAA is a trade association of property and casualty reinsurance companies whose members write premiums in excess of $4.5 billion annually.

Reinsurance, the principal activity of all our member companies, is the business of one insurer assuming all or part of a risk originally undertaken by another insurer. Unlike primary insurance companies, reinsurers do not deal directly with the general public. The principal technical functions of reinsurance are to provide insurers with capacity enabling them to write policies in larger amounts than otherwise could be written; to share the financial burden of reserves attendant to the growth of premium income; and, generally, to reduce an insurer's net liability to amounts considered appropriate for the insurer's capital and surplus.

While forms of reinsurance treaties vary widely depending on their objective, the principal type of arrangement in the workers' compensation line is excess of loss reinsurance. Under such a treaty, the primary insurer, subject to a specified limit, would be indemnified against the amount of loss in excess of a specified retention.

During the course of testimony before your Committee, the witnesses representing various segments of the insurance industry described major defects in the Longshoremen's and Harbor Workers' Compensation Act and its administration. While all those factors affect reinsurers

to some extent, reinsurers find the impact of inflation and escalation of benefits on a very slowly developing line of business to be particularly onerous. It is for this reason, as well as references made to reinsurance at the hearing, that we are bringing to your attention problems with workers' compensation in general and the added feature of unlimited benefit escalation of this program.

Workers' compensation claims are difficult for primary carriers to evaluate and properly reserve because they may take one, two, three or more years to determine the extent of loss. Reinsurers, however, are in a far worse position. A study by the RAA indicates that only 20% of ultimate losses incurred are known at the end of the first year. By the second year known losses increase to less than 30%, and by the fourth year about 45% of ultimate losses are known. By the seventh year about 60% are known. This pattern of loss development makes it extremely difficult to price coverages accurately for future losses which may have a somewhat different development --historically it has been worse.

Another special consideration for reinsurers relates to the leveraged effect of inflation. While, over the long run, a primary company must respond to total limits inflation, the excess of loss reinsurer must take extra precautions. The reinsurer writing excess of loss business actually gets a double penalty during an inflationary period as the amount of loss per claim goes up and as the number of claims that reach the excess level goes up.

To understand the effect of a change in the amount of a claim on the primary insurer and the reinsurer, assume a primary carrier retained the first $50,000 of each loss and that a loss of $75,000 was incurred. The reinsurer would pay $25,000 of the loss. Now assume an inflation rate of 10%. The next year the $75,000 loss becomes $82,500, while the primary company still pays $50,000, and the reinsurer will pay $32,500, an increase of 30%.

This example illustrates the nature of the problem of an excess of loss reinsurer in an inflationary period. Even beyond this, however, the reinsurer of coverages written under the Longshoremen's and Harbor Workers' Compensation Act must also anticipate the level of annual cost of living increases for these future claims which will be subject to annual benefit increases provided under the Act, since, unless not responsible for escalation by terms of the treaty, the reinsurer will be liable for the entire amount of escalation in those claims in excess of the primary company's retention.

The combination of these factors makes it very difficult to predict ultimate losses. Even when these losses are evaluated as well as possible so as to determine an actuarially sound rate, another problem often arises. Because the cost of the program is high, state regulatory officials sometimes suppress rates with the result that the premium charged is simply inadequate to pay both the primary losses and the reinsurance premium.

Dealing with inflation alone is difficult, but the added aspect of unlimited escalation of benefits makes it virtually impossible to establish the proper rate or obtain an adequate premium to support future losses. Unless action by Congress is taken to limit the future rate of benefit increases, the situation will only worsen and the risks will ultimately become unaffordable.

If we can provide additional information, please let us know.

Sincerely,

James M. Shamberger

JMS:mwm

September 26, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Senate Labor & Human
Resources Committee
4230 Dirksen Office Building
Washington, DC 20510

Dear Senator Williams:

Please find enclosed the views of the Ad Hoc Legal Committee of the International Association of Drilling Contractors with respect to the implementation of the Longshore and Harborworkers' Compensation Act.

We appreciate this opportunity to express our views on this important legislation.

We look forward to working with you and your staff during the next Congress to improve the administration of the Act.

Kindest personal regards,

B. J. Lange Hoffman, Chairman
Ad Hoc Legal Committee

Enclosure

The International Association of Drilling Contractors (IADC) is a trade group representing over 730 drilling companies, 630 allied service and support companies, and 160 exploration departments of petroleum producing companies. Our members, headquartered in over twenty countries throughout the world preform the actual well drilling operations, under specific service contracts, for thousands of independent oil and gas producers and major petroleum companies. We stress that the contract drilling firms which comprise our membership do not own or operate the oil and gas wells they drill, nor are they involved in the maintenance of wells after completion of the drilling. Ours, is a service industry composed of small and medium-sized companies providing highly specialized services to the petroleum industry.

As producing companies throughout the world have turned increasingly to offshore lands in the search for vital hydrocarbon resources, the contract drilling industry developed advanced technology and work practices to meet the unique challenges presented by the marine environment. Typical of the equipment that has been created to meet these challenges is the mobile offshore drilling unit (semi-submersible, submersibles, jackup rig, drill ship and tender assisted platform rig). What the equipment has in common is first, their single function, special purpose nature--the creation of a stable base from which drilling operations may be safely conducted while over water. Additionally, none of these units were contemplated in the scheme of things when the maritime laws were created

specifically to cover the compensation of "blue water" sailors working on the high seas. In fact, these units were not even in existence during the time most of the legislation was enacted.

As a result, the offshore industry has been subject to complex and conflicting regulation vis-a-vis the treatment and protection afforded its employees. Depending upon what court is hearing any particular case, the employee has been covered variously by the Jones Act, Longshore and Harborworkers Compensation Act, State Workmen's Compensation, and a variety of common law remedies. The IADC has previously asked the Congress to create a specific category of coverage for these maritime petroleum employees--to bring all such employees under one compensation system. This recommendation was greeted with a certain amount of controversy and we are therefore reconsidering what course of action would be most appropriate to address this difficult problem.

Our legal committee has, however, reviewed other aspects of the LHWCA and at this time we would like to limit our testimony to one significant, but hopefully non-controversial aspect of the LHWCA. We urge the committee to consider an amendment which would clarify the status of written indemnity agreements with regard to third party actions.

We stress that we do not propose to modify the benefits available to workers involved in offshore oil and gas drilling activities. In fact, the language developed by our legal committee and attached to this statement carefully avoids modification of the present law in this matter. We are concerned only with the allocation of risks negotiated fairly between the

drilling contractor, the oil company, and those third parties who are on the contractors' drilling unit in other capacities at the request of the oil company producer or the contractor.

For more than two decades, both prior to the 1972 amendments and today, the standard practice in the industry has been to require each company involved in offshore operations to remain responsible for its own employees and equipment and to indemnify each other for any losses. These risks are normally insured and the cost of the insurance is included as one of the factors making up the hourly rates charged for services. This system of "each taking care of their own" worked well, since everyone involved can evaluate and know what the risks are, and provide adequate insurance to cover them. This standard practice avoids a great deal of complex and very expensive litigation.

The allocation of liability among the various service contractors and the oil company producer by agreement, with each party providing insurance to underwrite its own responsibility, is a concept widely approved by the courts. As noted in the Fifth Circuit opinion (Cormier v. Rowan Drilling Co., 549 F. 2d 963, 5th Cir. 1977):

> The whole purpose behind these provisions is to make sure that the ... contractor ... and the company ... are each solely responsible for anything that happens to their own respective employees, regardless of fault. In the most specific detail, which writes over or around any possible tort or maritime theory by which liability could be palmed off on the other, the

> contracts identify precisely the respective indemnity obligations between the parties to the contract with respect of the employees of each. Thus, the waiver of indemnity between the two parties so far as it goes is complete without regard to the negligence of either party, the unseaworthiness of any vessel or the breach of underlying contractual obligation.
>
> . . .
>
> This carefully drawn, commonly used contractual provision reflects a practical, efficient agreement by parties faced with sharing, apportioning or underwriting the economic risk of offshore drilling. It is a means by which unnecessary insurance costs are avoided, the ultimate bearer being the owner for whom others contract.

The 1972 amendments while directed at traditional longshore-stevedore situations has, through oversights, created havoc and inconsistency with the long established equitable system of assumption of risk among contracting parties in the offshore industry. Congress in enacting Sec. 905 (b) was treating the problems posed by the proliferation of three-sided lawsuits involving injured workers, ships and employers arising out of conventional stevedoring and shipbuilding operations. Congress apparently overlooked the impact of its literal language on the enforcement of indemnity agreements common in the off shore industry.

This omission has been judicially recognized.

If the non-seaman is injured on the platform, the parties appear free to have their rights and liabilities determined by their contract since the 1972 amendment only prohibits indemnity involving a vessel. On the other hand, the moment the third party employee steps from the platform to the crew boat, or mobile offshore drilling unit (MODU), any indemnification provision between the employer and anyone identified as connected with the vessel evaporates. In commenting on this anomaly, created by the 1972 amendments, a federal district court (Meredith v. A & P Boat Rentals, Inc., 414 F. Supp. 788, E.D. La. 1976) noted:

> A different result might obtain if (the oil company) had been sued for negligence occurring on the platform... Here, however, the plaintiff has sued (the oil company) in its capacity as the time charterer of the vessel on which the injury occurred. In literal terms, the statute prohibits the indemnity agreement in the contract between (the contractor) and (the oil company). It is true that Congress might have decided not to protect employers from the indemnity claims of crew boat operators and vessel owners operating on the Outer Continental Shelf, and it might have limited the prohibition against indemnity to the relationships between the owners and charterers of cargo ships and those who load and repair them. Apparently this was not considered.

As suggested by the court, we now ask that Congress consider and act favorably on our request for clarification under Section 905. The proposed amendment does not affect the stevedoring or shipbuilding industries but simply permits the parties in our specialized industry to apportion the economic risk of offshore drilling as approved and encouraged by the Courts.

The proposed IADC amendment does not affect the stevedoring or shipbuilding industries. It would apply only to those cases covered by the LHWCA because of the Outer Continental Shelf Lands Act and thus basically affects only the offshore development industry. We do not know nor do we wish to speak for any other industry as we are not familiar with their operations, problems, or position on this matter.

Our amendment allows an orderly method of calculating the risks involved and covering same and would save, we believe, a great deal of court actions and congestion. Attached is our proposed language to remedy this problem.

LONGSHOREMEN'S AND HARBORWORKERS' ACT

Proposed Amendment to 33 U.S.C. §905(b)

Amend Section 905(b) as follows:

I. Insert the following language immediately following: "(b)" and before the introductory phrase, "In the event of injury":

"(1) Except as provided in Subsection (b)(2) of this section,...."

II. Add the following new Subsection (2) to §905(b):

"(2) In the event that the negligence of a third party causes injury to a person entitled to receive benefits under this chapter by virtue of the Outer Continental Shelf Lands Act, or the incident occurs on a special-purpose vessel designed for or utilized in connection with or support of activities relating to the exploration for, or production of, oil, gas, or other minerals, including drilling, provision or transportation of supplies or personnel, anchor handling, diving, pipelaying, or other construction activities, offshore, or in state territorial water, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such third party in accordance with the provisions of Section 933 of this Title and, in the absence of a written agreement to the contrary, the employer shall not be liable to such third person

for such damages directly or indirectly. The liability of a third party under this Subsection (b)(2) shall be based solely upon negligence or strict liability of sellers of products, but shall not be based upon the warranty of seaworthiness or a breach thereof, or strict liability of owners of offshore facilities. The remedy provided in this Subsection (b)(2) shall be exclusive of all other remedies against such third party, except remedies available under this Chapter. Nothing contained in this Chapter, or in any otherwise applicable state laws, shall preclude the enforcement according to its terms of any written agreement under which the employer or other person has agreed to indemnify such third party in whole or in part with respect to such action."

NATIONAL CLUB ASSOCIATION

1625 Eye Street, NW
Washington, D.C. 20006
[202] 466-8424

Gerard F. Hurley, CAE
Executive Director

September 23, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Committee on Labor and Human Resources
352 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Williams:

The National Club Association (NCA) appreciates the opportunity to express the views of our members on the Longshoremen's and Harbor Workers' Compensation Act during general oversight hearings by the Senate Labor and Human Resources Committee.

NCA is the national trade association representing the private recreational club industry in the United States. NCA estimates that there are 8,000 private clubs in America, with a total individual membership approximating 6,000,000 persons.

As Chairman of NCA's Yacht Club Council, I am writing to you in support of the proposition that the boat club and yacht club employees be exempt from the operation of the Federal Longshoremen's and Harbor Workers' Compensation Act.

Although not specifically stated in the legislative history, it would seem reasonable that the original and laudable intention of Congress in adopting the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to injured employees loading, unloading, building, repairing and maintaining large commercial vessels, certainly a hard and hazardous job. However,

the United States Department of Labor, other Agencies and the Courts have extended the coverage of the Longshoremen's and Harbor Workers' Compensation Act to recreational boat builders and marinas. By analogy, the Longshoremen's and Harbor Workers' Act would be applicable to all or at least part of the employees involved in recreational boating activities, including employees of boat clubs and yacht clubs.

Throughout the United States, there are many such boat and yacht clubs located on the navigable waters of the United States involving thousands of citizens enjoying ever-growing recreational boating activities. Permit me to describe a typical boat or yacht club.

Generally, this is a land area bordering on navigable water with fixed or portable docks around the perimeter of the land where boats are docked on a permanent or transient basis. Because of a nationwide dock shortage, there may also be mooring areas near the land but not connected by land or docks. The land area typically is composed of auto parking areas, picnic grounds, land recreational facilities (tennis courts, pool, etc.), lockers, a supply store for miscellaneous boating equipment, a boat gas station, generally referred to as a "gas dock", a "haulout" facility for taking boats from the water onto the land for repair and maintenance and a clubhouse. The clubhouse typically has full or part time food and/or beverage service.

Obviously, all of these facilities require employees for service and maintenance. Consider, for example, boat or yacht club employees who:

1. Work on and around the gas dock going on and off the dock and boats for normal "gas station" services;
2. Work in the clubhouse but deliver food or beverages to boats;

3. Work on docks or in work boats to install, repair, paint and maintain docks;
4. Operate the equipment required to lift boats from the water to the land and return;
5. Take boat owners and guests to and from boat moorings in a launch;
6. Normally work on the land but once or twice per week operate a race committee boat to conduct sail or power boat races;
7. Conduct classroom and on-the-water schools in boating safety and operation for children.

The above are a few cases where injury claims could be compensable under the Longshoremen's and Harbor Workers' Act. None of the above, and especially the schoolteacher, would seem to be the type of employment that is contemplated for coverage under the Longshoremen's and Harbor Workers' Act. I believe I am safe in stating that all states have Worker's Compensation Laws providing full benefits for injuries suffered by all of the employees listed in the above examples.

However, as matters now stand, should any of the above listed employees be injured while performing their so-called maritime activities, the employees could claim Longshoremen's and Harbor Workers' benefits rather than Workmen's Compensation benefits.

All this means, of course, that boat and yacht clubs must purchase Longshoremen's and Harbor Workers' insurance, which ultimately becomes an extra cost to the boat owner. This is an unnecessary expense, and the cost is extreme. Annual premiums for Longshoremen's insurance for small yacht clubs run into many thousands of dollars, and the cost is going up each year.

Not only is the premium cost substantial, but there are two other problems. First, many boat and yacht clubs are not even aware of the hazard. They believe they are fully covered by state Workmen's Compensation insurance. A claim under the Longshoremen's and Harbor Workers' Act could bankrupt the clubs.

Second, the Longshoremen's and Harbor Workers' coverage is difficult to buy. The insurance broker handling the coverage for the Cleveland, Ohio yacht clubs reports that his brokerage company, one of the largest companies in Cleveland, represents 85 insurance companies. Of these companies, only one will write the Longshoremen's and Harbor Workers' coverage and that company has been reluctant to renew the policy for the past few years. Should that company refuse to renew or cancel, the broker doubts that he could find another insurance company to write the coverage.

Since boat and yacht club employees are fully covered by state Workmen's Compensation laws providing injury benefits, I strongly urge that Congress exempt boat clubs and yacht clubs from the Longshoremen's and Harbor Workers' Compensation Act.

Thank you for your attention.

Sincerely,

Edwin A. Kennedy

Edwin A. Kennedy, Chairman
Yacht Club Division Council
National Club Association

Air Transport Association ata OF AMERICA

1709 New York Avenue, NW
Washington, DC 20006
Phone (202) 626-4000

September 25, 1980

Honorable Harrison A. Williams, Jr.
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Dear Chairman Williams:

Attached is the statement of the Air Transport Association of America, which represents virtually all U.S. scheduled airlines, on The Longshoreman's and Harbor Workers' Compensation Act.

We have closely followed the Committee hearings on this Act and would appreciate your including our statement in the hearing record.

Thank you very much for your kind attention to this matter.

Sincerely,

William J. Burhop
Vice President
Federal Affairs

Attachment

United States Senate
Committee on Labor and Human Resources
September 1980

The Longshoremen's
and
Harbor Workers' Compensation Act

The Air Transport Association of America, which represents virtually all of the United States scheduled airlines, welcomes this opportunity to comment on"The Longshoremen's and Harbor Workers' Act". The airline industry is vitally concerned with this Act for a number of reasons. First, as an industry we employ in excess of 300,000 people. Over the years a significant number of these employees, either through broad definitional interpretations of the Act, or through contractual language, have become covered by the provisions of the Act. Second, since 1972 the overly generous benefits available under this law has resulted in spiralling costs. Third, since the degree of exposure and risk involved are unpredictable, the insurance market for such exposure has steadily declined to a point where benefits under The Longshore Act are virtually uninsurable, which significantly increases the amount of self-insurance required. For these and other reasons to be outlined in our following comments, the airline industry requests the Senate Committee to carefully review this Act and reform the law through remedial legislation.

The airlines have a long history of supporting fair and adequate compensation for job related disabilities. Today, the industry once again wants to reaffirm that position. Unfortunately, since 1972, the benefit levels and claims filed under this Act have not been equitable. The Alliance of American Insurers in their testimony before this Committee clearly outlines the problems

all employers are encountering with this Act. To reiterate one illustration from the Alliance's testimony, a 28 year old widow with a small child, drawing $259 in weekly benefits would typically cost $548,000 over the claim period. Yet, if the case is indexed at a conservative 6 percent, the cost of the claim will exceed $3,000,000. If an index of 7 percent, the average since 1972, is utilized, the total cost would be $4,200,000.

Claims under the Act have also dramatically increased since 1972. According to the Department of Labor statistics, injuries reported under the Act (excluding those for private employees in the District of Columbia) rose from 72,087 in 1972 to 205,584 in 1977. This is an increase of 185% in only five years. Prior to the 1972 amendments, claims had steadily dropped from 96,944 in 1969 to 72,087 in 1972, a 25% decline in the three years preceding the 1972 amendments.

Of just as much concern as the number and cost of claims, is the quality of claims. Obviously, awards for permanent partial disabilities are an integral part of a workers' compensation system. However, when the system allows for the recovery of substantial benefits for relatively minor injuries, the objectives of the workers' compensation program become frustrated and negate an insurance scheme whose purpose is to replace wages lost as a result of industrial accidents. Under the Longshore Act, awards are routinely made for non-scheduled permanent disability in spite of a worker's actual return to regular work at full pay. Such awards involve substantial benefits and represent a totally unnecessary financial drain on the system. Especially since such benefits are not only payable during the life of the employee, but continue at an increased rate, for the life of a survivor,

even if the beneficiary dies of causes totally unrelated to the accident.

The impact of such claims experience and its resultant costs were clearly evident in the District of Columbia, where through an anomaly, all private sector employees were covered under the Longshore Act. The District, which was rated as one of the safest jurisdictions in the nation in terms of incidence of work-related injuries and illnesses, had workers' compensation insurance rates which were three to four times higher than those of neighboring jurisdictions in Maryland and Virginia. This translates directly into higher consumer costs. The cost situation became so critical that the District of Columbia recently enacted legislation to remove itself from coverage under the Longshore Act and create a program which is independent and financially sound. The new law will take effect October 1, 1981.

In addition to questions of cost and claims experience, the airline industry is also concerned about several specific problems with the Act which, in turn either directly or indirectly, impact on the cost of the program. These specific concerns are described below:

Jurisdiction

Before passage of the 1972 amendments, the concept of "water's edge" clearly prevailed. Employees who worked seaward of the water's edge were covered under the Act. Those landward were covered under the applicable state system. The 1972 amendments extended the coverage landward but left doubts about how far and to whom.

No one today can say with assurance where Longshore coverage ends and where state workers' compensation jurisdiction begins. This has encouraged employees to "migrate" from state programs if there is the possibility of qualifying for the higher Longshore benefits. It has also created extensive litigation and caused all reviewing courts to complain about the lack of clarity in the amendments and their legislative history.

Benefits Escalation (Indexing)

The 1972 amendments quadrupled the weekly benefit level and pegged it permanently to two-thirds of the workers income, not to exceed 200% of the national average weekly wage. This means that there is an open-ended annual tax-free increase in benefits -- both for those who will have claims in the months and years ahead and for those with claims in the process of being paid.

The increase is determined by the Secretary of Labor each October 1 based on the percentage increase during the previous year in the national average weekly wage. For example, the increase was 8.05% for 1978 and 7.5% for 1979, bringing the maximum benefits for disability to the current $426 a week.

These are quantum jumps. Inability to project the increases gives employers and insurers their greatest risk assessment problems. The adjustments are also a major factor in employers' escalating premium costs.

Insurability

Insurance companies and their reinsurers are retreating from the Longshore market because of its unpredictability. Not knowing clearly who is covered under the Act, and how inflation will affect future benefits, both insurance companies and self-insurers cannot project their risk exposure and claims losses. A one percentage miscalculation of inflation rates for the year ahead can literally make millions of dollars difference in the cost of claims.

As Longshore insurance has become less available, many employers have had to turn reluctantly to self-insurance, if they are large enough to afford the bonding, or to more costly and less effective assigned risk coverage. However, for both self-insurers and insurance companies, the same problem then looms: reinsurance. Reinsurers are reluctant to accept unlimited escalation when there is no possibility of obtaining adequate rates.

Ultimate losses simply cannot be predicted when future claims payments are linked to inflationary factors which make it impossible to collect or set aside reserves adequate to protect both insurers and their reinsurers.

Predictability is essential to retain the involvement of companies still voluntarily underwriting or reinsuring Longshore risks and to attract others back into the market.

Unrelated Death Benefits

The Longshore Act is the only workers' compensation law paying death benefits to survivors of permanently disabled employees when the death was not employment or employment-injury related, such as by murder or suicide. This costly form of life insurance was not contemplated when the Act was originally passed, and it further complicates the matter of risk predictability.

Maximum Death Benefits

Through a quirk in the law upheld by the Supreme Court, death benefits to surviving spouses can be tremendous since they are granted tax-free at half the actual gross income the deceased was earning, subject to no maximum. Additional benefits are paid to surviving children. Not only that, all death benefits are escalated annually.

This interpretation literally puts a premium on death. The surviving spouses of high-paid workers can collect benefits at a higher rate than the workers would have received in disability compensation had they lived.

"Unscheduled Injury" Awards

In the case of unscheduled injuries -- primarily back and head injuries and occupational disease -- employees can receive permanent partial disability payments, unqualified, for a lifetime. An employee can thus resume work at full pay, with the permanent partial benefits serving, in effect, as supplemental income.

Administration

The most frustrating administrative practices for both employers and employees are found in the Labor Department's review process. Creation of the Benefits Review Board by the 1972 amendments as the top layer of the process has slowed procedures considerably and made contested cases more difficult to close.

Approximately two years is required for review -- first by a Deputy Commissioner, then by an Administrative Law Judge, and finally by the Board. If the case is appealed further, it takes another year-and-a-half at least for a decision from the appropriate federal appeals court. Prior to 1972, decisions of the Deputy Commissioner could be appealed directly to the U.S. District Court.

Members of the Board are appointed by the Secretary of Labor, for an indefinite term, without Congressional review of their credentials or appropriateness. With no Departmental guidelines and an ambiguous law, the Board's judgments, along with those of the Administrative Law Judges, have favored claimants whether for good cause or not.

Conclusion

In summary, the airlines note that since 1972, The Longshoremen's and Harbor Workers' system has not provided fair and equitable benefits. Due to this inequitable arrangement, the costs of the system are skyrocketing. In the face of uncontrolled costs and unpredictable risks, the insurance industry is withdrawing from the marketplace. This leaves employers with little alternative but to self-insure this volatile exposure. In this environment reform is no longer a luxury, it is a necessity. The system must be reformed to clearly define who is covered, to cap escalating benefits and to reduce extraneous claims.

Again, the airline industry appreciates this opportunity to comment on The Longshoremen's and Harbor Workers' Act The industry is confident that the Senate will recognize this legitimate need for reform and will restore sanity to this worthwhile system.

U.S. Department of Labor

Office of the Secretary
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

Reply to the Attention of:

September 30, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Senate Committee on Labor
and Human Resources
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

Attached is the Benefits Review Board's reply to your letter of September 22, 1980, in which you query the Board on various aspects of the Longshoremen's and Harbor Workers' Compensation Act.

We are most appreciative for the opportunity you have extended to the Board and are pleased to offer our continued cooperation.

I hope our comments prove helpful to the Committee's oversight of this Act.

Sincerely,

Samuel J. Smith

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

Response To Questions Submitted To The
Benefits Review Board, U. S. Department of Labor
By The Honorable Harrison Williams, Chairman,
Senate Committee on Labor & Human Resources
On The Longshoremen's and Harbor Workers' Compensation Act
September 17, 1980

1. What is the mission of the Benefits Review Board?

The mission of the Benefits Review Board (hereinafter "Board") is twofold: (a) to fulfill the Congressional mandate for a prompt and even-handed adjudication system which provides due process of law for all parties involved in the workers' compensation statutes under federal jurisdiction and (b) to maintain a high quality, timeliness and consistency of decision making in the disposition of appeals filed under these statutes.

2. What has the Board's Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHCA") appeals caseload been since its 1972 creation, what projections can be made for future years and what is the basis for those projections?

Historically, the number of LHCA appeals filed with the Board has steadily increased each year from an appeal level in FY 72 of 28 to an appeals level in FY 80 of 364. Our past experience shows that we have received appeals at a rate of approximately 16% of the Office of Administrative Law Judges' (hereinafter "OALJ") dispositions. Thus, dependent on OALJ projections, we can determine that in FY 81, the Board can expect to receive 494 new appeals, in FY 82 - 514, and in FY 83 - 517 new LHCA appeals. These projections do not appear to indicate a significant increase in the forthcoming LHCA appeal rate; however, this number of LHCA appeals still continues to represent a considerable number of claims to adjudicate.

3. What percent do LHCA appeals constitute of the total Board caseload?

Our statistics show that prior to the enactment of the Black Lung Benefits Reform Act of 1977 (March 1, 1978) the LHCA appeals consistently averaged 69% or more of our total workload. However, as a result of the passage of the Black Lung Act, FY 80 LHCA caseload currently represents 30% of the total caseload and it is reasonable to project that by FY 82 and FY 83 LHCA appeals will level off to 15% of our total workload.

4. What is the average time required by the Board to dispose of LHCA appeals?

The promptness of Board review is borne out by Board statistics. The average elapsed time between the filing of a notice of appeal before the Board and final disposition of a claim and between completion of pleadings and final disposition is notable.

	Number of LHCA Cases Decided	Elapsed Time From Notice of Appeal To Final Decision	Elapsed Time From Completion of Pleadings To Final Decision
FY 78	220	9.7 months	6.8 months
FY 79	349	8.5 months	6.2 months
FY 80	451	10.0 months	6.8 months

(Approximately 100 days from the time a notice of appeal is filed is consumed for the filing of briefs by the parties in interest to a case.)

5. What has the Board's experience been on LHCA cases appealed to the Court of Appeals in terms of those affirmed, dismissed, reversed and vacated?

The prompt review granted appeals as shown in four (4) above is further accompanied by quality decision making. Statistics reveal that in its seven year history the Board's determinations have more often been affirmed and dismissed by the Courts of Appeals than reversed or vacated.

AFFIRMED	REVERSED	VACATED	DISMISSED
120	36	8	127

An examination of the total number of decisions on the merits issued by the Courts of Appeals since 1972 on LHCA appeals establish that 62% of the Board's decisions on these appeals have been affirmed.

6. What percentage of Longshore cases are appealed to the Court of Appeals?

Since 1972, the Board has issued 1,646 decisions on Longshore cases and to date 401 of these cases have been appealed to the Court of Appeals. Thus, only 24% of all Longshore cases have been appealed to the Courts of Appeals.

7. It has been stated in various testimony that the creation of the Board by the 1972 amendments has slowed procedures considerably and made contested cases more difficult to close. Further, it has been suggested that decisions by the Deputy Commissioner might be appealed directly to the U. S. District Court as was done prior to 1972. In your opinion, what effect would this have upon the appeals process?

The extreme changes in the 1972 amendments liberalizing the benefit structure have caused a much larger amount of litigation under the LHCA than prior to the amendments. Accordingly, the Board was charged with statutory interpretation of Congressional intent in a significantly revised statute. The deputy commissioners and district courts had been administering and adjudicating a relatively stagnated statute.

The Board, recognizing its mission of uniformly interpreting and applying this new law, has been careful and deliberate in making its decisions of national scope. The Board, unlike the various district courts around the country, must insure consistency of every decision issued. This consistency provides the predictability necessary for the voluntary settlement of claims between the parties, a basic goal in compensation law. It should be noted that not only are the district courts around the country not bound by each other, but many are not necessarily aware of what the others are doing in similar cases.

The continuing litigation, now some eight years after the amendments, is almost completely comprised of heretofore unresolved legal issues: The parties continue to probe into the "gray areas" which will always exist. However, the significance of these "gray areas" which might have existed prior to the amendments is that they now involve much higher monetary stakes. The maximum weekly rate of benefits has been raised from $70 to 200% of the national average weekly wage; the employer's liability is no longer limited to $24,000 and can easily exceed $200,000; death benefits are payable without any relationship to the injury; claimants' attorney fees now are often a liability in addition to compensation benefits.

The primitive system of decisions of adjudicators not subject to the Administrative Procedure Act being reviewed by the various disconnected district courts around the country is not really a viable alternative. It was satisfactory in its day, but to revert now would destroy the

consistency and predictability so vital to a highly litigated area of the law. Although some may be discontent with several of the determinations or precedents set by this "new kid on the block," one should not lose sight of the Board's high affirmance rate by the Courts of Appeals. This Board cannot relegate any case on its docket to a status lower than many cases arising in the typical district court. Indeed, this Board is providing the uniform priority treatment and promptness of review which cannot be derived from any other proposed system.

8. Can the Benefits Review Board, composed of three Members, adequately manage the present and projected workload?

No, it cannot. It is apparent that the Board will soon face a critical situation. Specifically, based on statistics from the Office of Workers' Compensation and the Office of Administrative Law Judges, it is reasonable for the Board to expect to receive in FY 81 approximately 450 to 550 LHCA appeals and between 2,700 to 2,900 Black Lung appeals for a total ranging from 3,150 to 3,450 appeals and in FY 82 to receive a total of approximately 3,500 appeals.

The Board's goal has been to process Longshore and Black Lung cases appealed to the Board in an average of six to nine months. Our success is readily reflected by our statistics related earlier in response to your question four. By the beginning of FY 81, the Board's workload will reach a level where the present three Members will no longer be able to maintain this prompt case processing time. To afford litigants timely due process and to also maintain consistency and quality decision-making, during FY 81, the Board will need to average 260 to 285 decisions per month. This productivity range is just not possible with three Board Members, even though the present three Members are experienced in the adjudication of both Longshore and Black Lung laws.

With a substantially increased caseload resulting from the passage of the Black Lung law coupled with a considerable number of yearly LHCA appeals, past experience indicates that the present three Member Board at maximum productivity could realize a 5 year backlogged caseload by FY 83 and that an expansion of the Board is needed.

9. Since the Board is an agency of the Department of Labor, can you relate the budgetary process through which you are able to provide for personnel, resources and funding?

The Department of Labor has a Management Review Committee (hereinafter "MRC"), chaired by the Under Secretary and comprised additionally of the Solicitor, Assistant Secretary for Administration and Management, Deputy Under Secretary for Legislation, and Assistant Secretary for Policy, Evaluation and Research. Also present when the MRC meets are the Executive Assistant and Counselor to the Secretary.

Based on an analysis of our needs, the Board develops a budget request with accompanying workload tables which it submits in June to July each year. The MRC reviews this analysis and will hold a meeting with the Board to discuss our individual budget needs in detail. Subsequently, the MRC makes recommendations to the Under Secretary and transmits same back to us. The Board can appeal to the Secretary and, on the recommendations of his budget office, the Secretary makes a decision on the appeal. This must all take place in time for the Department to prepare and rank each agency's request in order of importance to the Department.

10. What budgetary request has the Board made and what has the Department of Labor granted?

Central to the Board's budget request this year was the establishment of three positions for Alternate Board Members. This was essential from the Board's point of view so that the timeliness of dispositions could be maintained in the face of a fourfold increase in the number of cases appealed to the Board. The Board further requested eight additional positions for data processing and support to the Alternate Members. Three positions were for Counsels to the Alternate Members to help expedite the completion of cases. The remaining five positions were for word processing staff to handle the increased typing workload and for data processing staff to continue the successful operations of our computer system which provide our management reports, meaningful statistics, and assists in the day-to-day operations of our Clerk's Office.

The Department of Labor failed to appreciate the essential nature of our request for additional resources and all eleven positions were denied.

11. Has the Board gone beyond the provisions of the Act and the intention of Congress in holding that the schedule of injuries contained in Section 8(c)(1) through (20) is not exclusive if the claimant can prove an actual loss in post injury wage earning capacity in excess of the schedule and in determining that loss in terms of other than actual post injury earnings?

No. In a very early case Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357 (1975), the Board followed the reasoning of the D.C. Circuit in the American Mutual Insurance Co. of Boston v. Jones, 426 F.2d 1263 (1970) which held that the schedule under Section 8(c) was not exclusive if the claimant could prove the existence of a permanent total disability. Drawing on the reasoning of this precedent, the Board in Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978), (Smith, Chief Administrative Appeals Judge dissenting) clearly stated that this concept is applicable to cases of permanent partial disability. Briefly stated, the rationale recognizes that the schedule is intended conclusively to establish a given level of lost wage earning capacity merely by demonstrating the physical loss. However, in terms of the statute itself in Section 8(c)(21), "In all other cases..." the Board has upheld the use of Section 8(c)(21) where the claimant can prove an actual loss of wage earning capacity which exceeds the presumed level of loss under the schedule. This action and its underlying rationale has recently been approved by the D.C. Circuit in the case of PEPCO v. Director, OWCP, 606 F.2d 1324, 1328 (1979), cert. granted 48 U.S.L.W. 3535 (Feb. 19, 1980), in which the court stated

> Permanent partial disability, no less than total disability, is an economic concept whose meaning in any single case is tied inextricably to the claimant's wage-earning capabilities. Where the scheduled benefits fail adequately to compensate for a diminution in those capabilities, Section 8(c)(21) is the remedial alternative.

The holding of the D.C. Circuit conflicts with the prior action by the Fifth Circuit which, in affirming the District Court's opinion in the case of Williams v. Donovan, 234 F. Supp. 135 (E.D. La. 1964), aff'd, 367 F.2d 825 (1966) (per curiam), cert. denied, 386 U.S. 977 (1967), appears to have supported the view that the schedule is

exclusive. See also dissenting opinion by Chief Administrative Appeals Judge Smith in Brandt, supra. It is hoped that the granting of certiorari by the United States Supreme Court in PEPCO will resolve this conflict.

Furthermore, ascertaining the loss in post injury wage earning capacity is not as simple as merely identifying the claimant's post injury wage level since that wage level may not accurately reflect earning capacity. As indicated by the Board's case of Devillier v. National Steel and Shipbuilding Co., 10 BRBS 649 (1979) many factors must be taken into consideration not the least of which is to determine the wage that would be paid to the injured claimant in the open labor market under normal employment conditions. In addition, the very terms of the statute in Section 8(h) require that factors other than actual post injury earnings be considered.

> [I]f the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

12. Under what circumstances may a claimant who is actually engaged in post injury work activity nevertheless be awarded benefits for permanent total disability?

The circumstances are extremely limited. The Board has held, in the early case of Walker v. Pacific Architects and Engineers, Inc., 1 BRBS 145 (1974), that a claimant may be awarded permanent total disability benefits even though fully employed if that employment is at the sufferance of a sympathetic or beneficent employer. This holding flows from the concept that post injury earning capacity is measured by the ability to earn in the open labor market and not the ability to secure exceptional consideration from a sympathetic employer. See also United Engineering Co. v. Pillsbury, 92 F. Supp. 898 (D.C. Cal. 1950).

In addition, the Board has held, in the case of Lewis v. Haughton Elevator Co., 5 BRBS 62 (1976) that the working claimant may be considered permanently and totally disabled if his continued employment is undertaken in the face of excruciating pain and diminished strength requiring extraordinary effort. This action and the underlying rationale has been affirmed by the Fifth Circuit in Haughton Elevator Co. v. Lewis, 572 F.2d 447 (1978).

However, as the Board has indicated in the cases of Chase v. Bethlehem Steel Corp., 9 BRBS 143 (1978), Eaddy v. Rukert Terminals Corp., 10 BRBS 31 (1979) and Kimmel v. Sun Shipbuilding & Dry Dock Co., 10 BRBS 310 (1979) the Lewis/Walker rule has limited application and is considered the exception and not the rule. It remains claimant's burden to prove the exception.

13. Has the Board gone beyond the provisions of the Act and the intentions of Congress in holding that even a relatively minor injury may produce a total disability and in imposing the burden of proof on the employer to demonstrate the existence of actual job opportunities available to the claimant in order to avoid a finding of total disability in such cases?

No. It is clear from Section 2(10) of the Act that the question of disability is an economic as well as a medical concept. It has often been stated that disability is an economic concept built on a medical foundation. Owens v. Traynor, 274 F. Supp. 770 (D. Md. 1966), aff'd, 396 U.S. F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968). Accordingly, it follows that if an injury causes that claimant to lose the ability to engage in his or her usual employment, no matter how little physical damage is done to the claimant, that injury is totally disabling in relation to that employment. This principle has been specifically condoned by the D.C. Circuit in the case of American Mutual Insurance Co. v. Jones, 426 F.2d 1263 (1970). These are well settled principles of law under the Act which the Board has used in its own adjudication of cases.

Likewise, the shifting burden principle has its origins in very early cases under the Act. The case of Perini Corp. v Heyde, 306 F. Supp. 1321 (1969) cites a case as old as 1937 among others (p. 1326 and fn 4) holding that once the claimant has established the extent of his disability, the burden shifts to the employer to

show the availability of employment which the claimant can perform in his or her impaired condition.

The Board has been upheld in five Circuit Courts of Appeals. See for example American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Newport News Shipbuilding and Dry Dock Co. v. Chappell, 592 F.2d 762 (4th Cir. 1979); Base Billeting Fund v. Hernandez, 588 F.2d 173 (5th Cir. 1979); Ridgley v. Ceres, Inc. 594 F.2d 1175 (8th Cir. 1979). In addition, in the case of Pilkington v. Sun Shipbuilding and Dry Dock Co., 9 BRBS 473 (1978), and the recent cases of Cason v. Norfolk Shipbuilding and Dry Dock Corp., 11 BRBS 50 (1979), Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 BRBS 10 (1980), and Walker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 133 (1980), the Board has held that the employer's burden has been met thus indicating the process by which employers may succeed on this issue.

14. Has the Board created a legal fiction regarding notice of injury under Section 12 of the Act?

No. The Board case law has adhered to the statutory language and relevant Court of Appeals case law in deciding cases raising this issue. Section 12 provides that written notice of injury must be given to the employer and the deputy commissioner. However, Section 12(d) provides two exceptions to the written notice requirement. First, failure to give written notice is excused if the employer or his agent or the carrier has knowledge of the injury and no prejudice resulted from failure to file the written notice. In interpreting this statutory language the Board is examining its early position enunciated in the case of Leyden v. Capitol Reclamation Corp., 2 BRBS 24 (1975), aff'd mem., 547 F.2d 706 (D.C. Cir. 1977), in light of the Court of Appeals cases of Strachan Shipping Co. v. Davis, 571 F.2d 968 (5th Cir. 1978) and Sun Shipbuilding and Dry Dock Co. v. Bowman, 507 F.2d 146 (3rd Cir. 1975) which provide that not only must the employer have knowledge of the injury but also knowledge that the injury is job related. See also Sun Shipbuilding and Dry Dock Co. v. Walker, 590 F.2d 73 (3rd Cir. 1978) and the more recent Fifth Circuit cases of United Brands Co. v. Melson, 594 F.2d 1068 (1979) and Avondale Shipyards, Inc. v. Vinson, F.2d (1980). In addition, the Board follows the Davis case in its definition of prejudice for purposes of Section 12(d). The employer may show prejudice if it can establish that due to the failure to file the written

notice, it has been unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services.

The second exception contained in Section 12(d) provides that lack of written notice may be excused if some satisfactory reason is given for the failure. The Board has applied this exception to limited factual patterns. Written notice has been excused where the claimant himself lacked the knowledge that his physical impairment was work related and where the claimant could not ascertain the employer's identity. Jordan v. General Dynamics Corp., 4 BRBS 201 (1976). Johnson v. Treyja, Inc., 5 BRBS 464 (1977).

15. Have the Board decisions facilitated or hindered the process of settlement under Section 8(i) of the Act?

In the seminal case of Clefstad v. Perini North River Associates, 9 BRBS 217 (1978) the Board overruled prior case law and held that administrative law judges have authority under Section 19(d) of the Act and the Administrative Procedure Act to approve settlements under Section 8(i)(A). The Board set out clear guidelines to be followed, thus facilitating the settlement process. In relation to settlements of Section 8(i)(B) claims, the Board majority found itself bound by the unambiguous statutory language and held that the power to approve such settlements rests only with the Secretary of Labor. Ladner v. Marine Concrete, BRBS , BRB No. 79-337 (Sept. 22, 1980). However, a strong dissent by Chief Administrative Appeals Judge Smith provides a method of interpreting the statutory language in such a way as to permit Section 8(i)(B) settlements at the administrative law judge level.

The Board continues to follow the case of DuPuy v. Director, OWCP, 519 F.2d 536 (7th Cir. 1975) in relation to settlement of survivor's claims under Section 9 of the Act. Here again, the Court found itself bound by the unambiguous statutory language of Section 8(i) in holding that Section 9 survivor's claims may not be settled. Whether Ladner and DuPuy in fact hinder the settlement process is a question for debate. Nevertheless, the Board is bound by the statutory language and case law precedent and will continue to enforce it.

16. Have the rulings of the Board resulted in assessment of claimants' attorney fees against the employer in amounts greater than authorized by Section 28(b) of the Act?

No. Section 28(b) provides that claimant's attorney fees become the liability of the employer when it refuses to accept the recommendation of the deputy commissioner and when the claimant is successful in obtaining a benefit award in an amount larger than the amount tendered or paid by the employer. The amount of the fee is to be "based solely on the difference between the amount awarded and the amount tendered or paid." The Board has allowed fees to be assessed against employer which have exceeded the amount of the additional compensation obtained. This was done on the basis of two principles which flow from the structure of the Act and the purpose of Section 28. First, the Board has held that the Secretary of Labor's regulation, 20 C.F.R. Section 702.132, requires consideration of many factors in addition to the simple mathematical calculation contained in the statutory language. Kelley v. Handcor, Inc., 1 BRBS 319 (1975). Since there has not been a successful challenge of the validity of this regulation, the Board has made use of it in adjudication of attorney fee issues.

This approach has been affirmed by the Ninth Circuit in the case of National Steel & Shipbuilding Co. v. Director, OWCP, 606 F.2d 875, 882 (1979), citing Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976).

Second, the Board has allowed fees in excess of the difference between amount tendered and amount paid in cases in which the claimant wins benefits different in kind but not necessarily different in dollar amount. In the case of Brown v. Lykes Brothers Steamship Co., Inc., 6 BRBS 244 (1977) the Board examined the employer's tender of the full amount of permanent total benefits which contained a provision that the fact of permanent total disability was not admitted. The claimant went on to obtain an award of permanent total disability benefits. Here, while the dollar amount of the tender and the award were identical, the Board recognized that, through adjudication the claimant had established the fact of total permanent disability which created contingent rights for survivor's benefits under Section 9 of the Act. Such benefits were held to be additional compensation under Section 28(b) which are not readily reducible to a fixed dollar value. A similar argument holds for the claimant

who pursues and wins medical benefits under the Act. Brown, supra pp. 249, 250.

Respectfully submitted,

Samuel J. Smith

September 30, 1980 SAMUEL J. SMITH
Chief Administrative Appeals Judge

The CHAIRMAN. The hearing is now adjourned.
[Whereupon, at 3:45 p.m., the committee adjourned.]

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