

# Navigating the Longshore and Harbor Workers' Compensation Act into the 21st Century





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## Navigating the Longshore and Harbor Workers' Compensation Act into the 21st Century

### About the Longshore Act

The Longshore Act provides medical and physical rehabilitation benefits and compensation for lost wages to covered employees for work-related injuries, illnesses and deaths. In 1927, Congress passed the Act in response to a 1917 U.S. Supreme Court decision (*Southern Pacific Rail Co. v. Jensen*) holding that the Maritime Clause of the Constitution prohibits state workers' compensation laws from covering workers employed over navigable waters.<sup>1</sup> In 1972, Congress extended jurisdiction landward of the water's edge to "adjoining areas" used in "maritime employment."

The Act covers more than maritime industry workers. Through several amendments, the Act was extended to cover other employees, including overseas employees of U.S. government defense and public-works contractors (Defense Base Act of 1941 and War Hazards Act of 1942); employees providing Morale, Welfare and Recreation activities for military members and their families (Nonappropriated Fund Instrumentalities Act of 1952); and, those who extract natural resources from the outer continental shelf (the Outer Continental Shelf Lands Act of 1953). More than 500,000 workers are estimated to be covered under the Act.

On a per claim basis, the Longshore Act is our nation's most expensive workers' compensation program and costs continue to rise. According to the National Council on Compensation Insurance, Inc. (NCCI), the average total cost for a Longshore claim rose 72 percent from 1993 to 2002. Private sector employers paid \$595 million of Longshore Act claims in calendar year 2004, while taxpayers financed the federal administration of the program by the U.S. Department of Labor.

Congress last amended the Act in 1984. Since then, most states have comprehensively updated their workers' compensation laws. For example, unlike the Longshore Act, most states have disability management practices that promise injured workers better medical treatment while encouraging return to work and controlling unnecessary medical and disability costs.

Timely and effective treatment benefits both workers and employers. The longer workers are on disability, studies show, the less likely they are to return to work. Injured workers can

also be affected by disruptions in family life and restrictions from pleasurable activities such as hobbies or sports. Employer costs go beyond the workers' compensation tab. Productivity declines, even if other employees work overtime or a temporary worker fills in, resulting in lost opportunities, lower revenues and higher labor costs.

Employees and employers alike suffer from the unnecessary administrative burdens that plague the system. And the cost of the Longshore Act continues to rise faster than state workers' compensation programs. This cost ultimately affects businesses and employees dependent on international trade.

These are just some of the reasons why Congress must update the Longshore Act and bring it into the 21st Century.

### Significant Recommendations

- Improve injured worker access to high-quality medical treatment that boosts employee health and is more affordable to employers
- Improve program administration
- Strengthen return-to-work incentives and improve payment equity of post-injury wage replacement, survivor and funeral benefits
- Ensure claims are for work-related injuries or illnesses only
- Streamline claim adjudication
- Eliminate "double dipping" – the filing of claims in state and federal workers' compensation programs for the same injury
- Discourage cost-shifting among employers in cases involving subsequent injuries and change the assessment for the Special Fund for second injuries used to subsidize these claims
- Strengthen fraud protections
- Reinforce exclusive remedy – that employers responsible for longshore benefits are protected against additional liability for the same injury – while eliminating unnecessary litigation

# About the Longshore Act

*As globalization touches every part of American life, the need to modernize the maritime workers' compensation system grows more critical. Cargo handling, shipbuilding and marine construction must be as efficient as possible to preserve American jobs. The failure to support these industries will result in thousands of high-paying American jobs moving to other parts of the hemisphere.*

For these reasons and more, Congress should amend the Longshore and Harbor Workers' Compensation Act ("Longshore Act" or "Act") 33 U.S.C. § 901 *et seq.*, which covers our nation's longshoremen, shipbuilders, marine construction workers and others.

The Longshore Act provides medical and physical rehabilitation benefits and compensation for lost wages to covered employees for work-related injuries, illnesses and deaths.

The Act is our nation's most expensive workers' compensation program, with private sector employers paying \$595 million for Longshore Act claims in calendar year 2004, according to the U.S. Department of Labor. Costs from the Longshore Act ultimately contribute to higher expenses for raw materials and finished goods that move through U.S. ports and for shipbuilding and marine construction. As foreign trade increases, the Act's costs are an expensive drag on commerce.

The last time changes were made to the Longshore Act, in 1984, Ronald Reagan was completing his first term as President, the Soviet Union still occupied Eastern Europe, mobile phones were brick-sized executive status symbols and Microsoft Windows had not even been introduced.

In 1927, Congress passed the Act in response to a 1917 U.S. Supreme Court decision (*Southern Pacific Rail Co. v. Jensen*) holding that the Maritime Clause of the Constitution prohibits state workers' compensation laws from covering workers employed over navigable waters. Although the Act was originally written to cover those working on the navigable waters of the United States, its jurisdiction was extended landward in 1972 to "adjoining areas" customarily used in loading, unloading, repairing or building vessels. For eight decades, the Act has covered employees in the longshore, marine terminal, shipbuilding and maritime construction industries.

Congress amended the Longshore Act in 1984 to correct the unforeseen consequences of amendments made in 1972: multifold benefit increases, broadened jurisdiction and other changes that created the nation's most expensive – and virtually uninsurable – workers' compensation program.

The 1984 Amendments addressed the worst excesses of the 1972 Amendments, but Congress did not address other fundamental flaws in the Act. Unchanged since 1984, the Act has drifted further off course, driven to and fro by misguided court decisions that add unnecessary complexity and cost.

Since 1984, most states have comprehensively amended their workers' compensation laws – some repeatedly. Most states, for example, now have disability management practices that promise injured workers better medical treatment while encouraging return to work. By using sound claims management practices that control unnecessary medical and disability income costs, many state programs have the necessary tools to effectively manage workers' compensation expenses.

While progress has taken place in the states, Congress has neglected to update the Longshore Act with similar reforms.

*The combination of fundamental flaws, outmoded practices and misguided court decisions beg for Congress to re-evaluate the Longshore Act and bring it into the 21st century.*

## State-Inspired Solutions

During the past 15 years, state workers' compensation programs have adopted "best practices" that could benefit the Longshore program. These would preserve the generous benefit structure of the Longshore Act while:

- reducing costs for employers and taxpayers;
- providing workers with high-quality medical treatment;
- encouraging return to work by ensuring wage replacement benefits are tied more closely to actual lost wages; and,
- strengthening the ability to prevent and punish fraud.

Failure by Congress to put the Act back on course will guarantee that taxpayers and employers continue to bear unnecessary costs that threaten jobs. The hidden costs of the Longshore program will continue to hit taxpayers in the pocketbook by inflating the expense of building and maintaining Navy and Coast Guard vessels as well as replenishing beaches and constructing highways, bridges and docks over navigable waters and adjoining areas.

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**Failure by Congress to put the Act back on course will guarantee that taxpayers and employers continue to bear unnecessary costs that threaten jobs.**

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The cost of covering these workers continues to rise. The average total cost per claim, under the Act, rose 72 percent from 1993 to 2002, according to the National Council on Compensation Insurance, Inc. (NCCI), the nation's oldest and largest provider of workers' compensation and employee injury data and statistics.

Many industries are affected by these rising costs. Consider the shipbuilding industry. Virtually all Department of Defense and other federal agency contracts for building or repairing U.S. Navy and Coast Guard vessels are awarded to private shipyards whose workforce is covered by the Longshore Act.

Even though the Occupational Safety and Health Administration's accident/injury/illness (OSHA recordable) rate for the shipbuilding industry has steadily declined in recent years as a result of the industry's focus on reducing on-the-job injuries, workers' compensation costs increased significantly for the builders of U.S. Navy warships. These higher costs, coupled with a sustained period of declining Navy budgets for ship procurement – an average of only six ships a year for 15 years – have contributed to the overall expense of building U.S. Navy warships.

## Who is Covered?

Through several amendments, the Longshore Act was extended to cover overseas employees of U.S. government defense and public-works contractors (Defense Base Act of 1941 and War Hazards Act of 1942) and employees providing Morale, Welfare and Recreation activities for military members and their families (Nonappropriated Fund Instrumentalities Act of 1952). Other extensions provide coverage for: those who extract natural resources from the outer continental shelf (the Outer Continental Shelf Lands Act of 1953), and until 1982, private sector workers employed in the District of Columbia (District of Columbia Workmen's Compensation Act). Because the Longshore Act covers workers in so many industries under many unique circumstances, it is impossible to know for certain how many workers are covered. The most often-cited figure is 500,000-plus workers.

# The Longshore Act and International Trade

*Over the past 20 years, the maritime industry has seen the demise of the steamship, a vast expansion in the use of containers, an increase in exports from less-developed countries, and a change in the international trade and transportation status of the United States from globalization and competition. Meanwhile, the Longshore Act has remained unchanged. It is badly out-of-date at a time when efficiency and cost-effectiveness are key to preserving jobs for cargo handlers, shipbuilders, marine construction workers and others covered by the Act.*

The United States is the most active trading nation in the world, comprising nearly 20 percent of the world's oceanborne trade, which amounts to \$2 trillion annually.<sup>2</sup> All freight moving in, out and within the United States amounts to approximately 15 billion tons, according to a report by the U.S. Chamber of Commerce.<sup>3</sup> Further, international trade has more than doubled since 1970 as a percentage of gross domestic product (GDP), rising from 11 percent of GDP in 1970 to 27 percent in 2002.<sup>4</sup>

**Top 10 Containerized Imports, by Value, 2004 \***

Category of Import	All U.S. Ports	
	Value (Billions of dollars)	Percentage of Total Containerized Imports Nationwide
Machinery, Boilers, Reactors, Parts	74.8	17.7
Electric Machinery, Sound and Television Equipment Parts	49.4	11.7
Vehicles and Parts, Except Railway or Tramway	30.8	7.3
Apparel Articles and Accessories, Knit or Crochet	23.1	5.5
Apparel Articles and Accessories, Not Knit or Crochet	22.5	5.3
Furniture, Bedding, Lamps, Etc.	19.3	4.6
Toys, Games, and Sports Equipment and Parts	16.9	4.0
Footwear	13.9	3.3
Plastics and Articles Thereof	12.7	3.0
Articles of Iron or Steel	9.8	2.3

Maritime trade and employment continue to grow: the U.S. Department of Transportation forecasts that freight volumes will increase more than 50 percent over the next 20 years.<sup>5</sup> The same Chamber of Commerce report predicts that even at moderate rates of economic growth, the total domestic tonnage carried by all U.S. freight systems will increase approximately 67 percent by 2020.<sup>6</sup> At the Ports of Los Angeles and Long Beach, the number of container arrivals increased substantially between 1997 and 2005. Foreign container trade more than doubled at the Port of Los Angeles during this time period — from 2.1 million containers in 1997 to 4.9 million containers in 2005. At the Port of Long Beach, the number of containers also increased from 2.7 million in 1997 to 4.4 million in 2005.<sup>7</sup>

The U.S. economy depends heavily on trade. The success of the cargo-moving and shipbuilding industries is critically important for exporting American goods and importing foreign goods through about 360 U.S. ports – the gateways for finished and intermediate goods and raw materials. Because the Longshore Act covers workers directly involved in transporting goods into and out of the United States, it has a significant financial effect on businesses and consumers.

## ...rising Longshore Act costs threaten U.S. competitiveness and jobs.

Freight transportation shapes cities, supports the economy and determines U.S. trade patterns. Port-related jobs employ about 5 million workers who earn \$44 billion in annual personal income. Furthermore, the Port of Seattle estimates that each container of goods brings in about \$1,000 to the local economy. With ports nationwide processing 26 million containers annually, the economic impact on each local economy is enormous.<sup>8</sup> Maritime employment is on the rise. The number of full-time longshoremen at the Ports of Los Angeles and Long Beach combined has risen to 6,300 — a 40% increase from 2004 to 2006, according to an article posted on the Port of Long Beach website.<sup>9</sup>

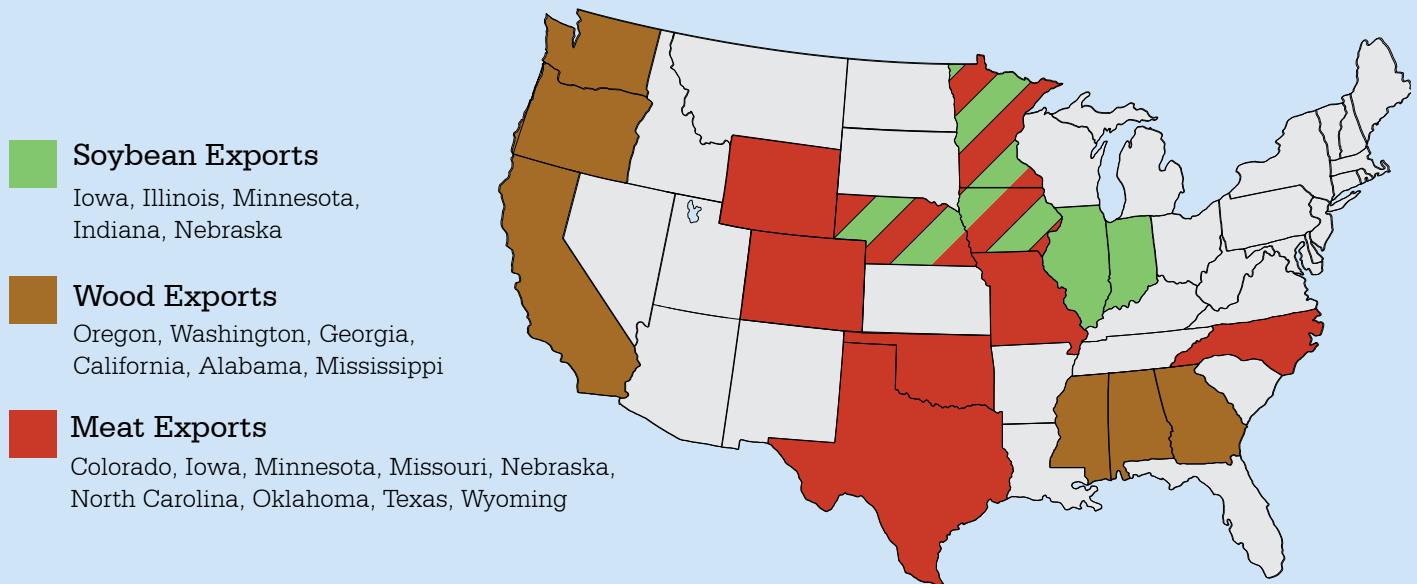
Lower transportation costs help everyone from the U.S. soybean farmer to the steel mill operator compete against the rest of the world. That is why rising Longshore Act costs threaten U.S. competitiveness and jobs. U.S. ports are already competing directly against ports in Mexico and Canada, which strive to undercut U.S. ports.

**Top 10 Containerized Exports, by Value, 2004 \***

Category of Export	All U.S. Ports	
	Value (Billions of dollars)	Percentage of Total Containerized Exports Nationwide
Machinery, Boilers, Reactors, Parts	21.8	15.7
Plastics and Articles Thereof	12.5	9.0
Vehicles and Parts, Except Railway or Tramway	8.3	6.0
Electric Machinery, Sound and Television Equipment Parts	7.6	5.5
Organic Chemicals	7.6	5.5
Cotton, Including Yarn and Fabric	4.7	3.3
Miscellaneous Chemical Products	4.4	3.2
Paper and Paperboard	3.8	2.7
Optic, Photographic, and Medical Instruments	3.7	2.7
Inorganic Chemicals	3.2	2.3

\* Source: U.S. Waterborne Container Trade by U.S. Custom Ports, 1997-2005. U.S. Department of Transportation, Maritime Administration.

# How the Longshore Act Impacts Commodity Exports



## ■ Transportation Costs: The International Deal Maker or Breaker for Soybeans

Since many commodities are price-sensitive, keeping U.S. ocean transportation costs, including Longshore costs, low is necessary to keep America competitive in the world market. In fact, by quickly increasing its market share to roughly that of the United States, Brazil could soon become the world's leading exporter of soybeans.

Consider that shipping soybeans from New Orleans to Hamburg, Germany, costs only about two-tenths of a cent less per nautical mile compared with shipping soybeans from Rio Grande, Brazil, according to data published in the United States Department of Agriculture's (USDA) *Grain Transportation Report*.

For fiscal year 2005, the USDA expects the production cost of U.S. soybeans, grown primarily in Iowa, Illinois, Minnesota, Indiana and Nebraska, to be about \$25 more per metric ton than Brazilian soybeans. Since Brazilian soybeans are less expensive than U.S. soybeans, exporters in the United States must rely on less expensive shipping costs to maintain their competitive position.

## ■ Transportation Costs Crucial to Maintaining U.S. Wood Exports

Ocean freight costs frequently provide the competitive margin for U.S. exporters, making it more critical than ever for the United States to contain domestic water transportation costs. Currently, the United States ranks as the world's third largest exporter of lumber (both hardwood and softwood). However, its position is being challenged by Canada, Europe, South America and Asia, according to the American Forest & Paper Association (AFPA).

Lumber imports have captured a large share of the domestic U.S. market. Imports account for 39 percent of the U.S. softwood lumber market, and imports of softwood lumber (from countries other than Canada) have doubled in the past five years, according to the AFPA.

Such trends will significantly affect the U.S. forest products industry, which in 2005 produced an estimated 97 million cubic meters of softwood lumber and 25 million cubic meters of hardwood lumber, according to the AFPA. Lumber exports totaled approximately 1.9 million cubic meters and 3.0 million cubic meters respectively with a total value of nearly \$2 billion. Of the 25 states that supply forest products, those that produce the most — Oregon, Washington, Georgia, California, Alabama and Mississippi — stand to be hurt the most financially by international competition.

## ■ Meat Export Success Depends on Transportation Costs

Competition in the global meat trade is fierce, and rising shipping costs largely affect the ability of U.S. meat exporters to compete internationally, according to the U.S. Meat Export Federation (USMEF). In many markets, a price difference of pennies per pound will determine the sale of various cuts of beef, pork and lamb.

The United States exported 9.3 billion pounds of red meat and poultry in 2005 and is projected to export about 9.8 billion pounds in 2006, which is valued at about \$5 billion annually, according to the USDA Economic Research Service's *Livestock, Dairy, & Poultry Outlook*.

Meat export profits increased in domestic industries in states including Colorado, Iowa, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Texas and Wyoming, according to USMEF. It is crucial to this industry's future that shipping costs do not impede profitability.

# The Longshore Act: More Expensive than State Programs

*Employees working in major industries covered under the Longshore Act generally earn much higher wages than average American workers. Through the Longshore Act, they also are compensated under a much more generous benefit scheme than state workers' compensation programs.*

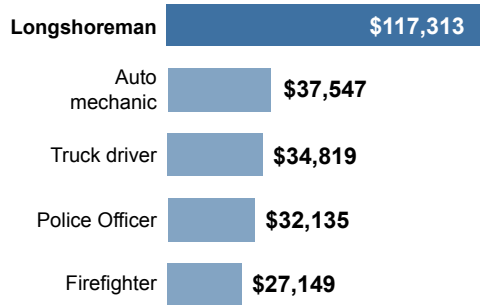
The Longshore Act is the nation's most expensive workers' compensation program. A more expensive benefit structure and higher wages, however, only partly explain why the Longshore Act is so costly. The Act lacks features many states have adopted over the past 15 years to contain ever-growing medical costs arising from unnecessary medical treatment, treatment disputes and weak utilization review authority. Lacking policies that encourage return to work, the Act also is encumbered by administrative and judicial decisions that interfere with sound disability management.

The substantial difference between state workers' compensation and Longshore Act costs can be seen in the insurance "factor" — the extra charge on insurance policies for work covered under the Act.

For virtually identical jobs, a California heavy construction contractor, for example, pays \$28.04 per \$100 of payroll for Longshore coverage. Compare this to state workers' compensation coverage at \$4.12 per \$100 — less than 15% of

## Maximum Payload

Average salaries of some blue-collar jobs in Charleston, S.C., in 2004:



Sources: Economic Policy Institute; Bureau of Labor Statistics

Source: "How Longshoremen Keep Global Wind At Their Backs," copyright 2006 by *The Wall Street Journal*. Reproduced with permission via Copyright Clearance Center.<sup>10</sup>

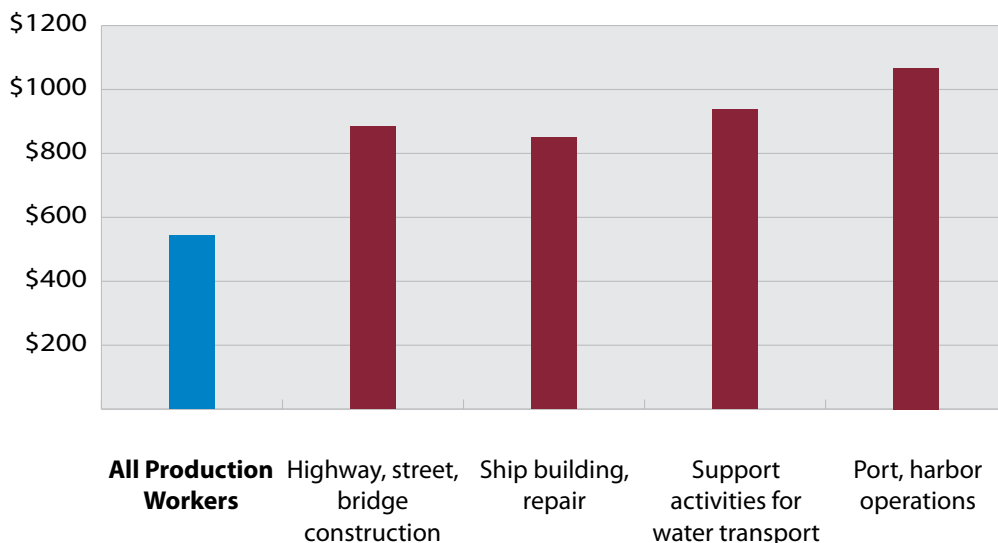
the cost for the same work. Other differences are shown in the table below:

Contractor Type	California (per \$100 of payroll)	Longshore (per \$100 of payroll)	Difference
Electrical	\$8.90	\$30.03	237%
Rebar	\$22.40	\$49.51	121%
Environmental	\$24.69	\$102.77	316%

This cost differential is reflected in insurance rates. Employers pay higher rates if Longshore exposure is present. For example, in Louisiana, employers pay an extra 130 percent to cover an employee under the Longshore Act compared to a worker doing the same job under the state workers' compensation program, according to data from the NCCI. (See Appendix A for a list of Longshore insurance factors by state.)

Additionally, benefit costs for Longshore claims are significantly higher compared to state workers' compensation programs. The average cost per lost-time claim — a claim filed when an employee misses work because of a work-related incident — is generally double that of state workers' compensation systems. From 1993 to 2002 (the most recent figures available), the average total

## Average Weekly Earnings



Source: U.S. Bureau of Labor Statistics (2005 figures)

cost of a Longshore claim was 221 percent higher than the average total cost of a state workers' compensation claim, according to NCCI data (chart on this page).

In 2005, the average wages of longshoremen, shipbuilders and marine construction workers — who are generally covered under the Longshore Act — were nearly double the average wages of private production workers, according to the U.S.

Bureau of Labor Statistics (see chart on page 6). For example, the average annual earnings of a longshoreman in Charleston, S.C. in 2004 was \$117,313 (see chart on page 6).

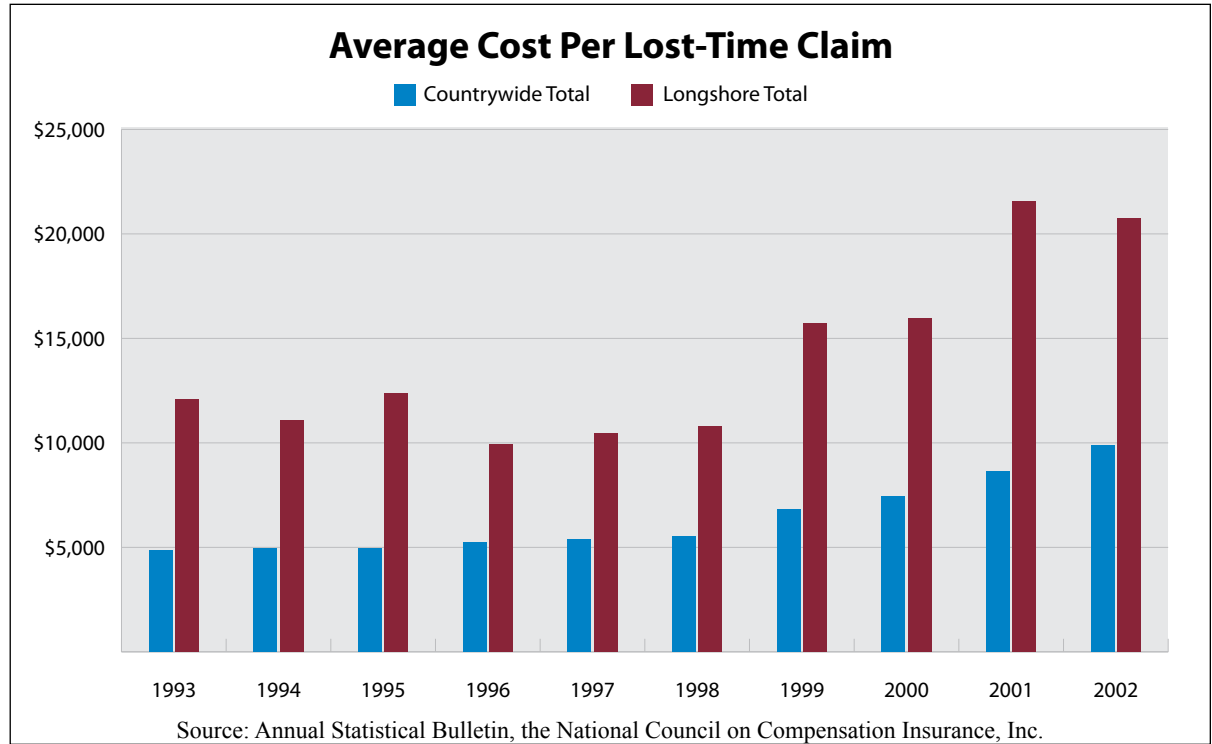
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**...workers covered under the Longshore Act generally receive the most generous workers' compensation benefits in the nation.**

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Meanwhile, the maximum wage replacement benefit under the Longshore Act is, on average, nearly double that of most state workers' compensation programs. Maximum wage replacement benefits under state workers' compensation programs generally are capped at **100 percent** of the **state** average weekly wage. Maximum Longshore Act wage replacement benefits, however, are capped at **200 percent** of the **national** average weekly wage. (See Appendix B for sample wage replacement rates).

Workers' compensation wage replacement benefits are tax free. Employees working for industries covered by the Longshore Act typically earn more than the average American, and the Longshore Act has a maximum weekly benefit nearly double most state workers' compensation programs. Therefore,



workers covered under the Longshore Act generally receive the most generous workers' compensation benefits in the nation.

Combine a generous benefit design with weak cost controls, add inefficient dispute resolution and misguided case law, and it is easy to see why Longshore costs are unnecessarily high.

### Longshore Act Coverage: A Much Higher Price Tag

Consider two freight handling workers doing essentially the same type of work in Connecticut. One worker is covered under the Longshore Act and the other is covered by the state's workers' compensation program. Covering the worker under the Longshore Act costs the employer \$22.07 per \$100 of payroll – more than triple the \$6.86 rate it takes to cover the worker covered under the state's workers' compensation program, according to data from the National Council on Compensation Insurance (NCCI). For the same scenario in Georgia, the rate more than triples for Longshore coverage to \$18.46 per \$100 of payroll compared to \$5.48 for state coverage.

## Improve Injured Worker Access to High Quality Medical Care

*Since the last Longshore Act amendments in 1984, medical costs have exploded. From 1993 to 2002, the medical cost per claim under the Act was 69 percent higher than under state workers' compensation programs (see chart on opposite page).*

Workers' compensation provides first-dollar, unlimited lifetime coverage for all reasonable and necessary care, and workers have incentive to seek additional treatment to maximize their claims for disability benefits. Therefore, these programs are especially vulnerable to medical cost inflation.

Under the Longshore Act, treatment protocols are weak or non-existent, putting workers at risk of harm and impeding their ability to return to work. Therefore, specific guidelines are necessary to improve the Longshore program, similar to steps that many states have successfully adopted. These measures include:

- granting employers authority to direct workers to receive care through treatment networks;
- requiring medical care to be consistent with high-quality treatment guidelines founded on evidence-based medicine; and,
- using uniform guidelines for reviewing use of medical services.

The changes outlined below have improved medical care delivery and contained costs in state workers' compensation programs.

### **End “doctor shopping” by requiring medical treatment through medical networks, panels or approved lists.**

During the past 20 years, states have begun providing more tools to control workers' compensation medical costs. A major element allows employers to provide timely and quality medical care delivered through medical networks similar to those workers encounter with their health insurance. Injured workers covered by the Longshore Act now have unrestricted choice of physician, which often leads to a referral to a doctor selected by the worker's attorney. Too often, this results in excessive care and longer periods of disability. About half the states, however, are using

the “employer choice” approach, which allows injured workers to select a provider from a medical network furnished by the employer.

Experience with state workers' compensation systems shows medical networks:

- ensure medical treatment is necessary and appropriate;
- encourage faster recovery;
- foster return-to-work as soon as medically feasible;
- reduce medical and wage replacement costs; and,
- discourage medical provider fraud.

## Absence Costs Employees, Employers and the Economy

Employees are valuable, so when a work-related injury or illness requires time off from work, the cost to employers goes far beyond wage replacement and medical bills. Productivity declines even if other employees work overtime or a temporary worker pitches in, resulting in lost opportunities, lower revenues and higher labor costs.

Absence also costs the worker. It often means a disruption in family life and schedules and restrictions from pleasurable activities, such as hobbies or sports. Studies show that the longer employees are off the job because of disability, the more difficult it is to return them to work. At 12 weeks, employees have only a 50 percent chance of returning to work and by one year, potential for gainful employment drops to less than 2 percent.<sup>11</sup> Further, workers can be affected psychologically when they do not feel like productive members of society.

Addressing the clear and hidden costs of workers' compensation begins with giving workers the tools they need to get quality medical care and quickly get through the claims process so they can return to their normal lives and jobs as fast as medically reasonable. Encouraging return to work helps workers, their families and their employers and ultimately strengthens America's position in the global marketplace.



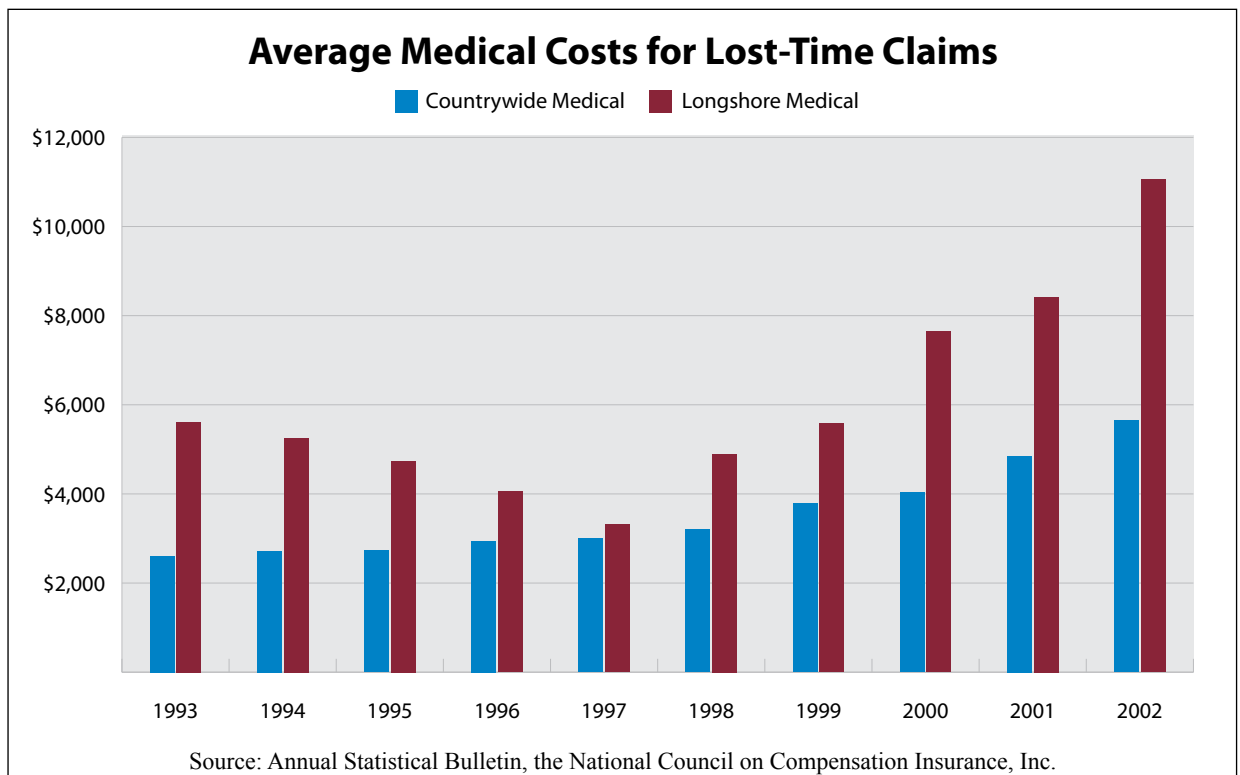
Research on recent state workers' compensation medical cost containment approaches, conducted by the Workers Compensation Research Institute (WCRI), shows that state reforms offer valuable lessons for the Longshore program. Employee choice of physician results generally in costly and unnecessary care, leading to delayed return to work and poorer outcomes.<sup>12</sup> This guarantees higher medical and benefit costs.

Use of medical networks provides better outcomes at a lower cost while encouraging access to quality physicians, according to a report by the California Workers' Compensation Institute (CWCI).<sup>13</sup>

**Adopt nationally-recognized treatment guidelines consistent with evidence-based medicine**

Evidence-based medicine (EBM) has evolved over the past 30 years as a means to guide treatment decisions. Although EBM is a relatively recent development in workers' compensation, its application through high-quality treatment guidelines holds considerable promise for improving medical treatment for injured workers while eliminating unnecessary cost.

There are many treatment guidelines in use, but they are not at all equal. Guidelines developed by the American College of Occupational and Environmental Medicine (ACOEM), which have been subjected to acceptance-testing by both clinicians and patients, are superior and have had the most comprehensive testing so far. They are being used in workers' compensation systems in Colorado, Louisiana and Nevada and by doctors in all 50 states. ACOEM guidelines were incorporated into the California workers' compensation system



in 2004 following an analysis by the Rand Corporation, which recommended their adoption.

ACOEM guidelines have the potential to improve quality of care and save money by reducing unnecessary and ineffective treatment. Extensive research by the CWCI proves that prior to ACOEM guidelines, only 8 percent of low back treatment for soft-tissue injuries was within the guidelines. Early indications also are positive for more prompt return-to-work.<sup>14</sup> Therefore, treatment protocols lead to better outcomes and lower wage replacement costs.

**Adopt treatment dispute approach consistent with nationally-recognized utilization review guidelines**

Treatment disputes should be addressed first through an internal process within the medical network consistent with nationally recognized utilization review guidelines, such as those promulgated by URAC (formerly the Utilization Review Accreditation Commission). Medicare and Medicaid programs use the same guidelines as well. Dispute resolution should use qualified medical professionals, be limited to findings based upon the record and be accorded strong deference so that physicians can make treatment decisions without being second-guessed by lawyers and judges.

## Bring Benefits into the 21st Century

*The Longshore Act needs to be modified to fulfill its intent: to replace a portion of wages lost because of work-related injuries or illnesses while providing the financial incentive for return to work. This goal also improves protections for spouses and children and ensures that disability benefits more uniformly reflect lost wages.*

### Enforce Child Support Orders

Currently, injured workers receiving Longshore Act benefits are not required to meet child support commitments. Unfortunately, this means they can pocket money meant for their dependents. Moreover, federal and state laws are in conflict over this important issue, necessitating Congressional resolution.

The Act prohibits garnishment for any reason. However, federal regulations have been interpreted to provide a right to enforce child support orders against payments out of the Longshore Special Fund. Adding further confusion, a Florida court has interpreted that state's law to require workers to pay child support out of their Longshore benefits. The Department of Health and Human Services, as part of a comprehensive child support initiative affecting all government agencies, has proposed to broaden child support rights by amending sections 916 and 917 of the Act. This will clarify that all Longshore wage replacement benefits are subject to withholding for child support in states where state child support can be deducted from state workers' compensation benefits.

Besides protecting children, enforcing child support orders for Longshore benefits in all states will reduce conflict between state and federal law and lower claim costs by encouraging return to work.

### Equalize the Wage Replacement Rate for Surviving Spouses

Under the current Longshore Act, the weekly wage replacement rate for a worker fatality varies depending on the number of surviving dependent children. For example, a surviving spouse without dependents receives just 50 percent of the worker's gross pay. A surviving spouse with two or more dependents receives 66-2/3 percent of the worker's gross pay – the same benefits paid to a disabled worker.

Most state workers' compensation laws pay fatality benefits at the same wage replacement rate as for total disability, regardless of the number of dependents. To equalize financial treatment of surviving spouses and ensure consistency with modern workers' compensation practice, the weekly wage replacement rate for fatality benefits should be the same as for total disability benefits.

### Increase Burial Benefits From \$3,000 to \$7,500

The current Longshore burial benefit for a fatal injury is just \$3,000 – an amount seriously eroded by inflation. Raising the burial benefit requires Congressional action. The burial benefit should be \$7,500, which is more generous than most states and greatly exceeds the Federal Employees' Compensation Act (FECA) burial allowance of \$800.

## Best Practices from State Programs

- Strengthen exclusive remedy
- Require treatment through medical networks
- Incorporate evidence-based treatment standards with American College of Occupational and Environmental Medicine (ACOEM) guidelines
- Incorporate nationally accepted utilization review standards with URAC guidelines
- Ensure claims are work related
- Increase surviving spouse benefits
- Improve benefit equity
- Rationalize last-employer payment liability
- Require restitution for fraudulently procured benefits
- Grant immunity to those reporting suspected fraud
- Mandate drug testing
- Freeze second injury fund applications
- Alter second injury fund assessment formula

## Ensure Work-Relatedness of Longshore Claims

Current law allows claims for hearing loss, cumulative trauma and other occupational injuries and diseases that may have non-occupational causation. Such claims should be compensable only after clear and convincing evidence proves work to be the major contributing cause. States with such laws include Arkansas, Kansas, Louisiana, Michigan, Missouri, Nebraska, New Hampshire, Oregon and Wyoming.

Ironically, some workers have been collecting benefits under the Longshore Act for non-occupational hearing loss because of flawed rules for determining work-relatedness. Over the years, noise-induced hearing loss claims have become more common – increasing 56 percent, from 1,886 in FY 2003 to 2,951 in FY 2005, according to the U.S. Department of Labor. Many hearing loss claims are not initiated until after the date of retirement – effectively treating the Act’s benefits as a supplemental pension. Under today’s rules, insurers and self-insurers are financially responsible for a portion of pre-employment hearing loss even though the loss occurred prior to the date of hire.

To ensure that benefits are payable only for work-related hearing loss, the Act needs to be amended to specifically exclude hearing loss resulting from aging (presbycusis), pre-employment hearing loss documented at the time of employment and other non-employment causes. There also should be time limits on post-employment claim filings. And the Act also should allow apportionment of benefits for all types of diseases and injuries so that employers are not paying workers’ compensation benefits for health conditions unrelated to work.

## Conform Wage Replacement Benefits to More Accurately Reflect Lost Wages

Neither Longshore payments nor state workers’ compensation payments are taxable under income and payroll tax laws. Since taxes and benefits can account for 35 percent or more of an employee’s gross pay, the current replacement formula of 66-2/3 percent of gross pay under the Longshore Act can actually mean that a worker receives close to – or even more than – his pre-injury take-home pay. This directly diminishes return to work incentives. It also results in varying levels of effective wage replacement for different individuals, depending on the tax bracket and the amount of taxable income from other individual’s household members.

## Necessary Longshore Act Improvements At-A-Glance

- Improve injured worker access to high-quality medical treatment that boosts employee health and is more affordable to employers
- Improve program administration
- Strengthen return-to-work incentives and improve payment equity of post-injury wage replacement, survivor and funeral benefits
- Ensure claims are for work-related injuries or illnesses only
- Streamline claims adjudication
- Eliminate “double dipping” – the filing of claims with state and federal workers’ compensation programs for the same injury
- Discourage cost-shifting among employers in cases involving subsequent injuries and change the assessment for the Special Fund for second injuries used to subsidize these claims
- Strengthen fraud protections
- Reinforce exclusive remedy – that employers responsible for Longshore benefits are protected against additional liability for the same injury – while eliminating unnecessary litigation

The wage replacement formula should be changed so the employee receives 75 percent of net (after-tax) wages. Alaska, Connecticut, Iowa, Maine, Michigan, Rhode Island and all Canadian provincial workers’ compensation laws replace a percentage of “spendable earnings” – a standardized form of net pay – rather than gross pay. This approach ensures greater consistency because workers at different income levels have less variation in their effective wage replacement rates.

In addition, “wages” must be defined more carefully, e.g., by excluding incentive or one-time payments, severance pay, settlements of employment law claims, unguaranteed bonuses, container royalties, stock and stock options. Multiple awards resulting in benefit payments greater than 100 percent of the maximum benefit rate should also be excluded.

## Update Program Administration

*Currently, there is an inappropriate and a costly duplication of liability for employers because courts have allowed workers to claim benefits for the same injury under both the Longshore program and other legal systems.*

Workers can also claim Longshore benefits when a medical condition was caused by subsequent non-Longshore employment. Moreover, the Act's pay-as-you-go Special Fund — an ineffective and now unnecessary part of the system since the advent of the Americans with Disabilities Act of 1990 (ADA) — carries a huge unfunded liability for second injury claims.

### **Eliminate Concurrent Benefits Coverage in Two Jurisdictions**

A fundamental principle of workers' compensation is that in exchange for providing benefits to injured workers on a no-fault basis, employers are assured that these benefits are their exclusive liability for work-related injuries or illnesses. Congress originally intended the Longshore Act to be the exclusive remedy and reinforced exclusive remedy principles in the 1972 Amendments. However, today injured workers in many states can claim benefits under both state law and the Longshore Act for the same injury. This anomalous result is the product of a 1980 U.S. Supreme Court decision that allowed workers to file for both Longshore benefits and state benefits if the injury occurred on landside worksites.<sup>15</sup>

Dual jurisdiction – and in some cases, dual liability – violates the exclusive remedy principle and drives up administrative, legal and benefit costs. Recognizing the many problems caused by dual jurisdiction, many coastal states have eliminated this inequity by amending their state laws to exclude state act claims from injured workers covered by the Longshore Act and thus within the maritime jurisdiction of federal government. These states are Florida, Hawaii, Louisiana, Maine, Maryland, Mississippi, New Jersey, Oklahoma, Oregon, Texas and Washington. Dual jurisdiction remains a major problem in other states with significant longshore exposure, including California,

Connecticut, Georgia, Massachusetts, New York, South Carolina and Virginia. Much of the cost ultimately falls on federal taxpayers because of substantial government contract work covered by the Longshore Act.

### **Clarify Employer Liability by Fixing the “Last Employer Rule”**

In most states, when an injured worker's claim results from exposure on successive jobs, only the last employer where injurious exposure occurred is liable for workers' compensation benefits. Known as “the last employer rule,” this practice eliminates the administrative and legal cost of apportioning liability when the injurious exposure occurred at multiple employers. The Longshore Act also uses the last employer rule, but courts have held that the last Longshore employer remains liable even when the employee's actual last employer is covered under state workers' compensation.

This policy unfairly puts Longshore employers at a significant disadvantage. The rule works as intended when a worker has initial exposure in employment covered by state workers' compensation and last exposure in Longshore employment. But when the situation is reversed, and the last employment exposure is not under the Longshore Act, the Longshore employer remains liable.

To correct this inequity, Congress needs to amend the Act to clarify that the last maritime employer is not responsible for compensation in circumstances when the last exposing employer is not covered under the Longshore Act.



# Freeze the Longshore Act's "Second Injury" Special Fund

Currently, the Act allows insurers and self-insured employers to obtain reimbursement from the Special Fund for benefits paid for subsequent injury claims. Like "second" or "subsequent" injury funds enacted in many states, the fund was created long before the passage of the Americans with Disabilities Act (ADA) in 1990. The Special Fund was intended to encourage employers to hire or continue to employ workers with prior permanent disabilities by shifting the liability for part of future injury claims. The idea was that an employer might be more willing to hire a disabled individual if there were assurance the employer would not be solely responsible for paying the entire cost of a combined disability if the individual is injured again.

Employers finance the Special Fund through an assessment. Insured employers pay the assessment as part of their insurance premiums.

The Special Fund now serves a variety of purposes, but its "second injury" component is by far the largest and has generated huge unfunded liabilities. However well-intentioned, the fund's second injury component should be frozen to bar new claims. (Workers already collecting benefits from the fund will continue to do so.) The reasons for doing so are:

- The rationale for a second injury fund disappeared with enactment of the ADA, which prohibits employers from discriminating against disabled workers. In fact, the ADA requires reasonable accommodation for disabled workers and affords workers a direct remedy.
- The Special Fund, financed like Social Security on a pay-as-you-go rather than an incurred basis, continues to dig a financial hole every year. Assessments – based on compensation paid by employers and insurers – were \$125 million in CY 2006.
- There is no demonstrable evidence the Special Fund's second injury component ever fulfilled its theoretical purpose. The fund works to the detriment of safer employers by shifting part of workplace injury costs to other employers.

The fund's estimated unfunded future liability for existing claims was \$2.5 billion, according to a 1999 Government Accountability Office estimate – the most recent information available.<sup>16</sup> This amount has certainly grown since then. There is no effective limit on how much money is spent or assessed, and there is little or no claims management oversight.<sup>17</sup>

The Special Fund's enormous unfunded liability, like the proverbial "sword of Damocles," is a looming danger for the Longshore program. It puts workers and employers at risk that the fund will run out of money to pay benefit obligations. Ultimately, taxpayers may be asked to absorb this cost.

By "freezing" the second injury component of the Special Fund, its unfunded liability will decline over time. Injured workers will still receive all promised benefits, but employers will no longer be able to shift their workplace injury costs to other employers.

Recognition of the enormous unfunded liabilities of second injury funds has led 16 states over the past 15 years to freeze them. Second injury funds in Connecticut, Florida and Kentucky, now frozen, had unfunded liabilities of \$6.2 billion, \$4.5 billion and \$2.5 billion, respectively. In 2004, Georgia abolished its second injury fund after an actuarial report concluded its unfunded liabilities exceeded \$1 billion and would require payouts extending past 2070.

Finally, regardless of whether a second injury fund is "frozen," accounting rules adopted in 1997 by the American Institute of Certified Public Accountants (AICPA) and in 1999 by the National Association of Insurance Commissioners (NAIC) necessitate a change in the assessment formula for insured employers.

The Longshore Special Fund is financed through an assessment based on annual compensation paid ("paid losses.") For insurers, continuing this practice creates a drag on their balance sheets and limits capital they can use in the insurance marketplace. In only a distinct minority of states are paid losses still used as the assessment base.

The accounting problem with a paid loss assessment should be addressed by changing the assessment formula for insured employers from "paid loss" to "premium-based surcharge." (The assessment base remains unchanged for self-insured employers.) The national trend, now reflected in a majority of states, has clearly moved toward using premium as the assessment base. Jurisdictions that have altered their paid loss assessments to premium include Connecticut, the District of Columbia, Indiana, Iowa, Michigan, Minnesota, Montana, New York, Oklahoma, Pennsylvania and Rhode Island.

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# Conclusion

*The Longshore and Harbor Workers' Compensation Act was originally enacted in 1927 to fill a void in workers' compensation coverage for maritime workers. Since then, numerous amendments to the Act have expanded coverage and benefits.*

*The Longshore Act has not been updated for more than twenty years. Meanwhile, state workers' compensation programs have developed a whole host of best practices that would greatly benefit workers covered under the Longshore Act.*

*Congress now needs to modernize the Act and bring the program into the 21st century -- for the sake of workers, employers and the U.S. economy.*

## Endnotes

- <sup>1</sup> *Southern Pacific Rail Co. v. Jensen*, 244 U.S. 205 (1917).
- <sup>2</sup> U.S. Department of Transportation Maritime Administration. *Annual Report to Congress FY 2004*, page 2.
- <sup>3</sup> The National Chamber Foundation of the U.S. Chamber of Commerce. *Trade and Transportation: A Study of North American Port and Intermodal Systems*. March 2003, page 1.
- <sup>4</sup> *Ibid.* page 5.
- <sup>5</sup> *Annual Report to Congress FY 2004*, page 22.
- <sup>6</sup> *Trade and Transportation*, page 1.
- <sup>7</sup> U.S. Department of Transportation, Maritime Administration. *U.S. Waterborne Container Trade by U.S. Custom Ports, 1997-2005*.
- <sup>8</sup> American Association of Port Authorities. *America's Ports Today*. February 2006, page 3.
- <sup>9</sup> "Strong Demand, Smooth Sailing: Industry Experts Say They're Ready for Peak Season." The Port of Long Beach. <http://www.polb.com/news/displaynews.asp?NewsID=47>.
- <sup>10</sup> Squeo, Anne Marie. "How Longshoremen Keep Global Wind At Their Backs," *The Wall Street Journal*. July 26, 2006, page A1.
- <sup>11</sup> Ferguson, Julie. "On the Job Recovery – Everybody Wins." *Choice Report on Workers' Compensation*. Summer 2005, Vol. 3. Issue 3.
- <sup>12</sup> Victor, Richard A., Barth, Peter A., and Neumark, David. *The Impact of Provider Choice on Workers' Compensation Costs and Outcomes*, June 2005. Workers Compensation Research Institute and Public Policy Institute of California.
- <sup>13</sup> Swedlow, Alex. "California Workers' Compensation Medical Care Reform & Access to Medical Care." August 2006.
- <sup>14</sup> Swedlow, A., Gardner, B., Harris, J. et al. "Measuring the Value of Medical Treatment Outside ACOEM Guideline Targets on Low Back Soft Tissue Injury Outcomes." *CWCI Research Notes*, September 2005.
- <sup>15</sup> *Sun Ship, Inc. v. Pennsylvania et al*, 447 U.S. 715 (1980).
- <sup>16</sup> U.S. Government Accountability Office (formerly U.S. General Accounting Office). *Oversight of Longshore Special Fund Needs Improvement*. Report to the Chairman of the Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives. October 1999, page 1.
- <sup>17</sup> Fitzhugh, Thomas. "Has the Special Fund outlived its purpose?" The Longshore Institute. [www.longshore.org](http://www.longshore.org).

## Appendix A

### Coverage Percentages Under the Longshore Act

STATE	LOSS COSTS	EFFECTIVE DATE	VOLUNTARY RATES	EFFECTIVE DATE
ALABAMA	135%	3/1/06		
ALASKA	30%	1/1/06	25%	1/1/98
ARIZONA	50%	10/1/05		
ARKANSAS	103%	7/1/05		
CALIFORNIA*				
COLORADO	68%	1/1/06		
CONNECTICUT	26%	1/1/06		
DELAWARE			49%	12/1/05
DC	4%	11/1/05		
FLORIDA			129%	1/1/06
GEORGIA	66%	7/1/05		
HAWAII	54%	1/1/06		
IDAHO			40%	1/1/05
ILLINOIS	29%	1/1/06	45%	1/1/06
INDIANA	73%	1/1/06	73%	1/1/06
IOWA	124%	1/1/06		
KANSAS	75%	1/1/06		
KENTUCKY	40%	2/15/06		
LOUISIANA	130%	5/1/06		
MAINE	44%	1/1/06		
MARYLAND	66%	1/1/06		
MASSACHUSETTS			38%	9/1/05
MINNESOTA	51%	4/1/05		
MISSISSIPPI	111%	3/1/06		
MISSOURI	66%	1/1/06		
MONTANA	119%	7/1/05		
NEBRASKA	91%	2/1/06		
NEVADA	47%	3/1/06	69%	7/1/00
NEW HAMPSHIRE	133%	1/1/06		
NEW JERSEY			50%	1/1/06
NEW MEXICO	87%	1/1/06		
NEW YORK			111%	10/1/05
NORTH CAROLINA	102%	4/1/06		
OKLAHOMA	69%	7/1/05		
OREGON	85%	1/1/06		
PENNSYLVANIA			79%	4/1/06
RHODE ISLAND	74%	1/1/06		
SOUTH CAROLINA	99%	7/1/04		
SOUTH DAKOTA	52%	7/1/05		
TENNESSEE	152%	3/1/06		
TEXAS*				
UTAH	78%	12/1/05		
VERMONT	42%	4/1/05		
VIRGINIA	54%	4/1/06		
WISCONSIN			50%	10/1/05

This chart shows the difference between state workers' compensation and Longshore Act costs. The "loss costs" and "voluntary rates" columns reflect the insurance "factor," which is the extra charge on insurance policies for work covered under the Act. For example, in Alabama, employers pay an extra 135 percent to cover an employee under the Longshore Act compared to workers doing the same job under state workers' compensation program.

\* The Longshore factor is at the discretion of each insurer.

## Appendix B

The maximum wage replacement benefit under the Longshore Act is, on average, nearly double that of most state workers' compensation programs. Below is the maximum weekly benefit under the Longshore Act and that of various states:

Workers' Compensation Program	Maximum Weekly Benefit	Formula
Longshore Act	\$1,114	200% of the national average weekly wage
Alabama	\$629	100% of statewide average weekly wage
California	\$840	Not indexed
Connecticut	\$1,005	100% of statewide average weekly wage
Florida	\$683	100% of statewide average weekly wage
Georgia	\$450	Not indexed
Louisiana	\$454	75% of statewide average weekly wage
Maine	\$524	90% of statewide average weekly wage
Massachusetts	\$958	100% of statewide average weekly wage
Mississippi	\$351	66.67% of statewide average weekly wage
New Jersey	\$691	75% of statewide weekly wage
New York	\$400	Not indexed
South Carolina	\$592	100% of statewide average weekly wage
Texas	\$540	100% of statewide average weekly wage
Virginia	\$773	100% of statewide average weekly wage
Washington	\$905	120% of statewide average monthly wage

(Table based on data from the U.S. Department of Labor, Office of Workers' Compensation Programs)



