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MEMORANDUM OF LAW

DATE: November 16, 2004

TO: Afshin Oskoui, Architectural and Engineering Services, Deputy Director

FROM: Susan Y. Cola, Deputy City Attorney

SUBJECT: Federal and State Insurance Requirements for Public Works Projects located on or near navigable waters

INTRODUCTION

The City of San Diego's [City's] current contract boilerplate for public works projects located on or adjacent to navigable waters (e.g., Mission Bay) includes a provision that requires the general contractor to provide maritime workers' compensation coverage:

> 7-3.5.10.3 WORKERS' COMPENSATION INSURANCE FOR WORK IN, OVER, OR ALONGSIDE NAVIGABLE WATERS:
>
> In addition to the Workers' Compensation Insurance required under the General Conditions of this Contract (Agreement) Contractor shall provide Workers' Compensation coverage which shall include coverage under the U.S. Longshoremen and Harbor Workers Compensation Act, The Jones Act, Maritime Employers Liability and any other coverage required under Federal or State laws pertaining to workers in, over or alongside navigable waters. The cost of such insurance [hereinafter Maritime Workers' Compensation Insurance] is generally passed on to the City in the form of higher bid amounts.

You have asked our Office to clarify the federal and state requirements for maritime workers' compensation insurance to determine when this insurance provision should be included in the City's public works contracts.

QUESTION PRESENTED

What are the federal and state requirements for Maritime Workers' Compensation Insurance coverage for public works projects on or adjacent to navigable waters and which City projects should require coverage?

SHORT ANSWER

Federal maritime insurance laws for injuries occurring during the course of employment on or near navigable waters are included in the Longshore and Harbor Workers Compensation Act [LHWCA], the Jones Act, and general maritime law cases. In essence, the LHWCA requires employers to secure workers' compensation coverage for the disability or death of an employee resulting from an injury occurring upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). The Jones Act allows a "seaman" to maintain an action for damages against his or her employer for personal injuries occurring during the course of employment in connection with a vessel in navigation. In addition to claims filed under the LHWCA and the Jones Act, a worker injured during the course of employment may also sue an employer or third party, or both, under general maritime tort principles and state workers' compensation laws.

In light of these laws, the City should include a contractual maritime insurance provision for projects involving work on a commercial pier, wharf, dry dock, terminal, building way, marine railway, or bridge work performed on a barge or sea stationed platform. We also recommend revision of the City's current maritime insurance provision, as follows:

> 7-3.5.10.3 WORKERS' COMPENSATION INSURANCE FOR WORK IN, OVER, OR ALONGSIDE NAVIGABLE WATERS:
>
> In addition to the Workers' Compensation Insurance required under the General Conditions of this Contract (Agreement), Contractor shall provide additional insurance coverage for claims brought under the Longshore and Harbor Workers' Compensation Act, the Jones Act, general maritime law, and any other federal or state laws, resulting from Contractor's work in, over, or alongside navigable waters.

ANALYSIS

Federal maritime insurance laws for injuries occurring during the course of employment on or adjacent to navigable waters are set forth under the LHWCA, the Jones Act, and general maritime law cases.[1] State and federal courts have concurrent jurisdiction, but state courts will apply federal substantive law in deciding coverage cases. *Gault v. Modern Continental/Roadway Construction Company, Inc. Joint Venture,*100 Cal.App. 4th 991, 997 (2002).

A. The LHWCA requires employers to provide workers' compensation coverage for injuries occurring on navigable waters or adjacent shore areas during the course of maritime

[1] The LHWCA was originally enacted in 1927 as the Longshoremen's and Harbor Workers Compensation Act. Its name was revised to its current form in the 1972 amendment. The City's maritime insurance provision should be modified to reflect this change.

employment.

The LHWCA, a federal law set forth in 33 U.S.C. §§ 901-950, requires employers to obtain workers' compensation coverage in the event of injury or death to an employee during the course of maritime employment in navigable waters or adjacent shore areas.[2] LHWCA claims are handled by the United States Department of Labor, Office of Workers' Compensation Programs [OWCP]. To qualify for coverage under the LHWCA, an injured worker must meet both a situs test (i.e., be injured at a place on or adjoining navigable waters) and a status test (i.e., be engaged in maritime employment). *Northeast Marine Terminal Co. v. Caputo*, 432 US 249 (1977).

1. To obtain coverage under the LHWCA, a claimant must establish that his or her employment occurred upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

To satisfy the situs requirement, the employee must establish that his or her employment occurred upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. 33 U.S.C. § 902(4). "A waterway is navigable provided that it is used or susceptible of being used as an artery of commerce. Neither noncommercial fishing nor pleasure boating nor water skiing constitutes commerce. Commerce for purposes of admiralty jurisdiction means activities related to the business of shipping." *Adams v. Montana Power Company*, 528 F.2d 437, 439 (9th Cir. 1975) (citations omitted). In general, employees who are injured while they are engaged in maritime employment activities situated on navigable waters are covered by the LHWCA unless their employments are specifically excluded by the statute .[3] 33 U.S.C. § 902(3).

In cases where employment activities are conducted on structures adjacent to navigable waters, courts are likely to scrutinize whether the structure is, in fact, an adjoining pier, wharf,

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[2] General contractors must also provide coverage for subcontractors' employees unless the subcontractor has already provided coverage. 33 U.S.C. § 904.

[3] The following categories of individuals are expressly excluded from coverage: (A) persons performing exclusively office, clerical, secretarial, security or data processing work; (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet; (C) individuals employed by a marina who are not engaged in construction, replacement, or expansion of the marina (except for routine maintenance); (D) individuals who are (i) employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises, and (iii) are not engaged in work normally performed by maritime employees; (E) aquaculture workers; (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length; (G) a master or member of any crew of any vessel; or (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals in clauses (A) through (F) are subject to coverage under a State workers' compensation law. 33 U.S.C. § 902(3).

dry dock terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel. For example, in *Hurston v. Director, Office of Workers Compensation Program*, 989 F.2d 1547 (9th Cir. 1993), the Court considered whether a claimant pile driver met the situs requirement because he was injured on a structure used to separate water, gas, and crude oil from oil pumped from a nearby well. Although the structure was housed on a pier with pilings in navigable waters, the structure was not an area customarily used by an employer in loading, unloading, repairing or building a vessel. The Court nevertheless found that the phrase in the statute "upon the navigable waters of the United States (including any adjoining pier…)" is unqualified and that claimant did not have to show that the pier upon which the injury occurred was customarily used to load, unload, repair or build a vessel. *Id.* at 1549. *But see Brooker v. Durocher, Dock and Dredge,* 133 F.3d 1390, 1994 (11th Cir. 1998)(in which the court determined that a seawall supported by pilings in navigable waters, that fell on and injured a claimant, was not a pier or wharf or "other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel," despite the fact that two barges were moored to buoys near to the seawall, because the seawall's purpose was to protect an electric plant); and *Bianco v. Georgia Pacific Corp,*304 F. 3d 1053 (11th Cir. 2002)(wherein the court held that a worker who was injured while employed in a gypsum board plant that adjoined a pier used to unload gypsum did not meet the situs requirement because the area of claimant's employment was not customarily used by the employer for loading, unloading, repairing, dismantling or building a vessel.)

In light of the Ninth Circuit's strict interpretation of the situs requirement, LHWCA coverage should be required for projects involving commercial piers, wharfs, dry dock terminals, building ways, marine railways. Other projects can be evaluated on a case by case basis for a determination as to whether the "other adjoining area" is customarily used by an employer in loading, unloading, repairing or building a vessel.[4]

2. To be covered under the LHWCA, the employment must be related to a traditional maritime activity such as loading, unloading, repairing, building or breaking a vessel.

To satisfy the status requirement under the LHWCA, a claimant must establish that his or her employment is maritime in nature, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. 33 U.S.C. §902(3). The LHWCA expressly excludes certain categories of employment on or near navigable waters that are not considered to be traditional maritime occupations (see footnote 3). *Id.*

Under the LHWCA, to be considered "maritime" in nature, the employment must have a "connection with the loading and unloading of ships." *See Coloma v. Director, Office of Workers*

[4] For assistance in making these case by case determinations, we recommend that City's Contract Services staff contact the OWCP LHWCA Division in San Francisco or Long Beach.

Compensation Programs, 897 F.2d 394, 398 (9th Cir. 1990)(*quoting Herb's Wedding, Inc. v. Gray*, 470 U.S. 414, 423-24 (1985)). Employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are also covered by the LHWCA. *See Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40 (1989). Generally, this means that courts will evaluate claims on a case by case basis, however, certain categories of work are unlikely candidates for LHWCA coverage. For example, in *Coloma*, 897 F.2d 394 (9th Cir. 1990), the Court held that a shipping company's messman/cook did not meet the status test because the messman/cook's occupation was not essential to the loading and unloading process. Similarly, in *Mary Freeze v. Lost Isle Partners,* 96 Cal. App. 4th 45 (2002), the court found that a laborer for a seasonal bar and restaurant located on an island in the delta of the San Joaquin River and who was injured while mooring a barge to transport employees, supplies and customers to and from the mainland had properly abandoned her claim under the LHWCA because the statute expressly excludes coverage for individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. *See, e.g.*, 33 U.S.C. § 902(3)(C). As these cases demonstrate, to be covered under the LHWCA, the employment must be related to a traditional maritime activity such as loading, unloading, repairing, building or breaking a vessel, which should further limit the number of contracts actually requiring LHWCA insurance coverage.

3. Because the City may also be subject to third party liability under the LHWCA, the City should require its general contractor to obtain a waiver of subrogation to cover third party liability.

When a third party has caused the injury, an employee may accept compensation benefits from the employer under the LHWCA and may pursue a civil action in against the third party under general maritime law. 33 U.S.C. § 933(a). If a compensation award is issued, the employee's right of action is assigned to the employer unless the employee sues the negligent third party within six months after the award was issued. 33 U.S.C. 933(b). Although the City is not required to provide coverage for its general contractors' employees because the City is not an "employer" within the meaning of the LHWCA, the City, as owner of the public works project, may still be subject to third party liability for negligently causing an injury covered under the LHWCA. Therefore, the City should require its general contractor to obtain a waiver of subrogation endorsement in favor of the City, from the contractor's insurer, which would prevent the insurer from pursuing its third party rights against the City. *See Fireman's Fund Ins. Co. v. Morse Signal Devices*, 151 Cal. App. 3d 681 (1984).

B. The Jones Act requires employers to provide coverage for death of or personal injury to "seamen" during the course of employment in connection to a vessel in navigation.

The Jones Act, a federal law set forth in 46 U.S.C. § 688, gives seamen the right to recover from their employers for negligence regardless of location of injury or death. *Moragne v. States Marine Lines, Inc*., 398 US 375 (1970). The Jones Act is essentially on employer's liability law governed by the Federal Employers Liability Act (45 U.S.C. §§ 51-60), which applies to railroad workers. An employer is liable under the Jones Act if negligence is the

proximate cause of an injury to a member of the crew. Liability is imposed if the employer's negligence "played any part at all." *Rogers v. Missouri Pac. R.R.*, 352 US 500, 507 (1957). Although the LHWCA and Jones Act are seemingly intended as mutually exclusive remedies, certain claimants may still qualify for coverage under both statutes. *See, e.g*., *Southwest Marine Inc. v. Gizoni,* 502 US 81 (1991) (ship repairer who had recovered LHWCA benefits not necessarily barred from recovering Jones Act damages).

To recover under the Jones Act, the claimant must satisfy the following four requirements to establish seaman status: (1) the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, (2) the employee must have a connection to a vessel in navigation, (3) the connection must be substantial in its duration, and (4) the connection must be substantial in its nature. *Chandris, Inc. v. Latsis*, 515 US 347 (1995); *Rupert Gault v. Modern Continental/Roadway Construction Company, Inc. Joint Venture,* 100 Cal. App. 4th 991 (2002).

The determination of seamen status is generally a mixed question of law and fact, which means that unless the facts and law only support one conclusion, the finder of fact must look at the totality of circumstances surrounding the claimant's employment. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997). Consequently, it is helpful to review how courts have determined whether claimants have sufficiently established seamen status. For example, in *Rupert Gault*, 100 Cal. App. 4th 991 (2002), the court found a triable issue of fact as to the claimant's seaman status notwithstanding that the claimant's work on the barge was temporary, the barge had no navigational equipment, and the barge was being used primarily as a stationary platform for construction of the bridge. In making this determination, the court found that a trier of fact could still determine that the barge was a vessel in navigation because the flood channel was navigable and used by other commercial vessels, the accident occurred while a section of the barge was being uncoupled to move around rows of piles, and movement of the barge was necessarily connected to the claimant's employment. *Id.* at 1004-05.

By contrast, in *Melvin Spears v. Kajima Engineering & Construction, Inc*., 101 Cal. App. 4th 466 (2002), the court found as a matter of law that the claimant had not established seamen status because the barge that he had been injured on was anchored to the harbor bottom and secured by a headline to shore when the accident occurred. Additionally, the claimant had not ridden aboard the barge when it was unsecured and being pulled by a tugboat to transport people and equipment. Finally, even if the barge was a vessel in navigation, claimant could not show that he had a substantial connection to it because the vessel was not in transit when he was injured. Furthermore he was not engaged in a sea-based activity when the injury occurred (claimant's fingers were amputated when his hand got caught in the pinch point of a crane operating from the barge). *Id* at 480. Given that some of the City's public works projects may entail the use of a barge (e.g., bridge work), the City should consider the inclusion of a maritime insurance provision for those contracts.

C. In addition to claims filed under the LHWCA and the Jones Act, a worker injured during the course of employment may also sue an employer and or third party under general maritime tort principles.

In addition to claims filed under the LHWCA and the Jones Act, a worker injured during the course of employment may also sue an employer and or third party under general maritime tort principles. *See e.g., Mary Freeze v. Lost Isle Partners,* 96 Cal. App. 4th 45 (2002)(court held that the jury's finding that Plaintiff was not a seaman for purposes of the Jones Act did not dispose of her alternative causes of action for unseaworthiness of a vessel and negligence). Consequently, the City's maritime insurance provision should also include coverage for claims made under general maritime laws. The City should ideally request additional insured status, however, this may be cost prohibitive or impossible to obtain, depending upon the pool of insurers and market conditions.

D. California workers' compensation law may also apply to claims subject to coverage under the LHWCA and or Jones Act.

Maritime regulation is exclusively with the jurisdiction of the United States under Article III, § 2 of the United States Constitution. However, an established body of federal and state case law recognizes a "twilight zone" of concurrent federal and state coverage for land-based injures or injuries that are "local in character." *See e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-18 (1980). For example, an injury that meets the situs and status tests of the LHWCA may also meet the compensability requirements for California workers' compensation law. *Id.* In this event, either the state or a federal tribunal may take jurisdiction. *Davis v. Department of Labor & Indus.*, 317 US 249, 256 (1942). Similarly, California workers' compensation law may also apply concurrently with the Jones Act. *See, e.g., CNA Ins. Co. v. WCAB*, 58 Cal. App. 4th 211 (1997)(bartender assigned to vessel sailing between mainland and Catalina Island injured in fall on gangway to dock owned by City of Avalon).The City already requires state workers' compensation coverage for all of its construction contracts, regardless of project type or location. Therefore, the City need not include an additional requirement for state workers' compensation coverage in its maritime insurance provision for projects in, over, or alongside navigable waters.

CONCLUSION

Federal maritime insurance laws for injuries occurring during the course of employment on or near navigable waters are set forth under the Longshore and Harbor Workers Compensation Act [LHWCA], the Jones Act, and general maritime law cases. The LHWCA requires employers to secure workers' compensation coverage for the disability or death of an employee resulting from an injury occurring upon navigable waters of the United States and any adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. The Jones Act allows a seaman to maintain an action for damages against his or her employer for personal injuries occurring during the course of employment in connection with a vessel in navigation. In addition to claims filed under the LHWCA and the Jones Act, a worker injured during the course of employment may also sue an employer or third party, or both, under general maritime tort principles and state workers' compensation laws.

In light of these laws, the City should include a maritime insurance provision for projects involving work on a commercial pier, wharf, dry dock, terminal, building way, marine railway, or bridge work performed on a barge or sea stationed platform. We also recommend revision of the City's current maritime insurance provision, as follows:

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