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Marine & Energy News Alert

How COVID-19 Can Affect Jones Act and LHWCA Claims

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As the reported number of coronavirus (COVID-19) cases continues to rise, marine insurers have been forced to consider the potential impact the virus might have on insured risks. Marine insurers recognize that the inherently global nature of the maritime industry makes it more susceptible to COVID-19 outbreaks than most other transportation sectors. With that understanding, we provide the following overview of the potential issues COVID-19 presents to marine employers and shipowners in the Jones Act and the Longshore Harbor Workers' Compensation Act (LHWCA) context.

Maintenance and Cure (Seaman) vs. LHWCA Benefits (Longshore and Harbor Workers)

Once a seaman meets an initial burden of proving that his/her illness manifested during service of the vessel, the employer's obligation to provide a maintenance rate (maintenance) and medical care (cure) is triggered. Importantly, a seaman does not have to prove causation to establish a prima facie case for maintenance and cure. With few exceptions, a Jones Act employer must continue providing maintenance and cure until there exists definitive evidence that the seaman has reached maximum medical improvement (MMI).

In terms of a COVID-19 case, given the wide ranging, and at times reportedly mild, symptoms associated with the disease, it could be difficult to refute manifestation while in the service of a vessel. Because the virus is highly contagious, one case could quickly be followed by many others. An employer's obligation to provide maintenance and cure related to treatment of the disease would include the costs of all medical care related to treatment of the disease – including potential repatriation, sequestration and quarantine – to continue until maximum medical improvement. The obligation also could renew in the event of a relapse, a reported complication of the condition.

In contrast, a longshore or harbor worker seeking medical and indemnity benefits under the LHWCA is required to prove that his/her illness is work-related. Proof requires the longshoreman to offer evidence of a causal link between his/her employment and contraction of COVID-19. However, the LHWCA is a compensation scheme at its core, which means that the scale is almost always tipped in the claimant's favor.

Under Section 20(a) of the LHWCA, a longshoreman's alleged injury or illness is presumed to have arisen out of and in the course of employment. Once the injured

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worker has established a prima facie case — that is, some injury or harm occurred and that working conditions or an accident occurred that could have caused the injury — it is presumed that the injury arose out of his/her employment. This rebuttable presumption of causation can only be overcome if the employer presents "substantial proof" to the contrary.

Given the reports of COVID-19's contagiousness, employers and their insurers may face an uphill battle in contesting causation in LHWCA cases without uncovering definitive rebuttal evidence.

Seaman's Negligence Claims

A seaman may bring a negligence action under either the Jones Act or the general maritime law. In COVID-19 claims brought under either scheme, it is important for insurers to note that all traditional prongs of the negligence analysis apply just as they would if the injured worker suffered an acute physical injury, such as a broken leg. The plaintiff bears the burden of proving that the tortfeasor owed him/her a duty, that the duty was breached, and that he/she contracted the virus and suffered damages as a result of the tortfeasor's failure to act in accordance with the duty owed.

Obviously, the factual circumstances surrounding the contraction of the disease would be of paramount importance in the context of a COVID-19 claim. For example, given the latency period of the disease and the reportedly myriad potential sources of infection, it could prove difficult for a seaman with a lone infection aboard a vessel to claim that it was brought about by the fault or neglect of the employer. In contrast, however, it could be far easier for co-workers who subsequently fall ill to contend that their illness resulted from their employer's lax treatment, isolation, quarantining or screening practices.

Unseaworthiness

Jones Act seaman may also assert a claim of unseaworthiness when a condition of the vessel on which he/she works causes or contributes to injuries. The question in an unseaworthiness action is whether the vessel, equipment or appurtenances are reasonably fit for their intended use. The Jones Act seaman must show that the unseaworthy condition of the vessel (1) played a substantial part in bringing about or actually causing his injury and that (2) the injury was either a direct or reasonably probable consequence of the unseaworthiness.

The duty of seaworthiness is independent of negligence. The seaman does not need to establish the existence of a duty to provide a seaworthy vessel — it exists as a standalone duty. For that reason, the plaintiff's largest hurdle in such actions is in establishing causation.

In the context of COVID-19, the seaman only needs to establish that he/she contracted the disease due to a legally cognizable unseaworthy condition of the vessel, which can include the actions of co-workers. Once again, deficiencies with

training and implementation of proper treatment, isolation, quarantining and screening practices, as well as issues with poor sanitation, supplies and the like, could provide the basis for a viable unseaworthiness claim.

Section 905(b)

The LHWCA is the longshoreman's only mechanism of recovery against his employer, though he may assert a claim in negligence against the owner of a vessel, which can include his/her own employer. Much like the seaman, the longshoreman must prove negligence on the part of the vessel owner. Notably, a longshoreman will not receive the same level of deference he/she would be afforded when asserting a claim for compensation. Additionally, 905(b) liability is limited to three narrow duties: "(1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under the active control of the vessel and (3) a duty to intervene." turnover duty encompasses two distinct-but-related obligations. First, the vessel owner "owes a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that an expert stevedore can carry on stevedoring operations with reasonable safety." And second, the vessel owner "owes a duty to warn the stevedore of latent or hidden dangers which are known to the vessel owner or should have been known to it."

Regarding a COVID-19 claim, neither the second nor third duties listed above are likely to form a basis of a claim. The Turnover Duty, however, could provide a potent basis for a claim if a shipowner failed to warn a stevedore of the existence or presumed existence of infected crew and a longshoreman subsequently fell ill.

As our understanding of this virus continues to evolve, we expect to learn more about the potential liability exposure that may follow. In the coming months, we also expect to know more about the risks the virus poses and viable defenses to claims brought under the Jones Act and LHWCA.

Given the uncertainty surrounding COVID-19, we urge marine insurers and their assureds to mitigate risk of infection as best they can. For professional guidance on how that might be achieved, please feel free to contact any of our experienced marine and energy litigators.