Identity crisis: why figuring out seaman status in the US should always be a priority

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As shipowners and operators continue to diversify within the USA, they may increasingly find themselves facing claims brought by their employees that raise difficult, but important, issues concerning Jones Act seaman, longshore/harbour worker and dual capacity employer status. The distinction between a seaman and a longshore/harbour worker is critical in the US, in terms of both the legal obligations owed by the employer and the P&I insurance coverages that may apply.

Introduction

For an injured seaman in the USA, the legal remedies against his employer generally include a Jones Act negligence action, a breach of the warranty of seaworthiness action (where the seaman's employer owns the ship in question), and a claim for maintenance and cure.[1]

In contrast, an injured longshoreman/harbour worker generally cannot sue his employer, and instead receives statutory workers' compensation in the form of average weekly wages and coverage for medical treatment.[2]

There is, however, an important exception to this rule where the longshoreman's/harbour worker's employer also owns the ship on which the injury occurred – commonly referred to as a dual capacity employer. When this happens, the longshoreman/harbour worker may bring a negligence action against his employer for acts or omissions that occurred in the employer's capacity as shipowner.[3]

P&I insurance will typically be called upon to respond to a seaman's Jones Act negligence, unseaworthiness, and maintenance and cure claims. Conversely, workers' compensation cover will be called upon to respond to a longshoreman's/harbour worker's claim for statutory compensation. However, where the longshoreman/harbour worker also brings a negligence action against his employer, P&I insurance will again be looked at for coverage. Thus, from an insurance standpoint, the earlier these issues and risks are identified by the member and notified to the P&I club, the more effectively the exposure can be properly evaluated and catered for. A brief overview of the distinction between a Jones Act seaman and longshoreman/harbour worker is discussed below.

Jones Act seamen

The U.S. Supreme Court has enunciated a two-part test to be used in determining whether a maritime employee is a Jones Act seaman. The first part concerns whether the worker contributes to the *function* of a ship and this is generally quite easily satisfied. The second, and more often litigated, part is the worker's *connection to a ship or group of ships*. The connection must be substantial in terms of both its *duration* and its *nature*. For *duration*, the Supreme Court sets a 'rule of thumb': an employee who spends less than roughly 30% of his time in the service of a ship does not qualify. For the *nature* of the connection, the inquiry looks at whether the employee's duties take him to sea. Consequently, courts have focused their inquiries on the unique perils associated with being a seaman.

1 Jones Act seaman status is coveted because of much more expansive legal duties owed by the employer and a lower legal burden of proof to establish breach of those duties.
2 33 U.S.C. section 905(a).
3 33 U.S.C. section 905(b).
4 33 U.S.C. section 901.
5 33 U.S.C. section 905(a).

Identity crisis: why figuring out seaman status in the US should always be a priority continued

The status as a Jones Act seaman or longshoreman/harbour worker is mutually exclusive.

The purpose of the substantial connection test is to separate the sea-based maritime employees who are entitled to Jones Act protection, from those land-based workers who have only a transitory or sporadic connection with a ship in navigation and, therefore, whose employment does not regularly expose them to the perils of the sea.

Longshoreman/harbour workers

In the event that the employee is not a Jones Act seaman, they will most likely be considered a longshoreman or harbour worker and be covered under the Longshore and Harbor Workers Compensation Act (LHWCA).[4]

This means that the longshoreman/harbour worker receives statutory compensation if injured during the course and scope of his employment due to the negligence of a third-party ship and, therefore, cannot sue his employer but is entitled to bring a lawsuit against that ship's owner to recover damages (section 905(b)). The duties owed by a shipowner under the LHWCA are much more limited than those owed to a Jones Act seaman. There are essentially only three basic duties owed by such shipowners (commonly called the *Scindia* duties):

(a) To warn of hidden dangers, and turn over control of areas of the ship that are reasonably safe so that an experienced longshoreman/harbour worker employer can carry out operations;
(b) To exercise reasonable care in areas that remain in the active control of the ship; and
(c) To intervene in the longshoreman/harbour worker employer's operations if it knows the employer is acting unreasonably in failing to protect its employees (the longshoreman/harbour worker).

Dual capacity employer

If the longshoreman/harbour worker's employer is also the owner of the ship upon which he is injured, can the injured employee sue his employer in negligence under section 905(b)? The answer is 'it depends'.

The difficulty in answering this question is that while a shipowner is exposed to liability under section 905(b), the LHWCA says that an employer establishing a workers' compensation programme shall have no other liability.[5] To answer this question, therefore, the US courts have generally analysed the allegedly negligent conduct to determine whether that conduct was performed in furtherance of the employer's *longshore/harbour-working operations*, i.e. the employer's role as stevedore, or whether the conduct was performed in the course of the *operation of the ship*, i.e. the employer's role as shipowner.

Where the injury-causing act or omission relates to the operation of the ship, the employee will be permitted to sue his employer under section 905(b) based on breach of the *Scindia* duties.

This is all subject to one last – and sometimes missed – caveat. Section 905(b) of the LHWCA prohibits maritime workers engaged directly by a shipowner as shipbuilders, ship repairers or shipbreakers from bringing a negligence action against their employer.

Conclusion

What hopefully will be taken away from this overview is the importance of making an employment status determination very early on in the underwriting and then subsequent claims-handling process between a member and its P&I club, in light of the significant difference that status can make in terms of insurance obligations and liability for both the member and the club.