



The Monthly Maritime Newsletter of SeaBright Insurance Company

Navigable Waters of the United States

The “navigable waters” referred to in the Longshore Act are precisely the same “navigable waters” that are necessary for determining admiralty and maritime tort jurisdiction. This phrase has been defined in 33 U.S.C. § 329 as those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce while the waterway is in its ordinary condition. Although each circuit has interpreted this definition somewhat differently, nearly every waterway and lake in the continental United States has been evaluated for legal navigability.

Under some circumstances, coverage has been extended to the high seas. In *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982), the Second Circuit held that the Act applied to injuries on the high seas, although it limited its holding to the facts of the case that involved two ship repairmen injured when a boiler exploded on a voyage from New York to Philadelphia; at the time of injury, the ship had deviated onto the high seas 135 miles offshore. The court then reasoned that if the Act could never apply to injuries occurring on the high seas, employers could walk employees in and out of coverage by deviating back and forth from territorial waters to the high seas and could prevent employees from recovering compensation merely by changing course. Such a holding would be inconsistent with the express purpose of the Act. The Fifth Circuit reached the same result in *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5th Cir.), cert. denied, 479 U.S. 885 (1986). In *Reynolds*, the employee was injured beyond the three mile limit during sea trials. The court stated that Congress did not intend to limit navigable waters to territorial waters as it could have chosen the narrower definition if it wished. In keeping with the intent of the 1972 Amendments to broaden coverage, it held the Act applicable to an injury occurring on the high seas, as otherwise ships could easily and purposefully sail beyond the three mile limit to avoid coverage.

The United States has territories and possessions from Asia through the Pacific to the Caribbean. How does the Longshore Act apply, if at all, to these places? Fortunately case law gives us the answer: As a general rule, maritime employees

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in these territories and possessions (except Puerto Rico) are covered by the Longshore Act. In *Garcia v. Friesecke*, 597 F.2d 284 (1st Cir. 1979), cert. denied, 444 U.S. 940 (1979), the court held that the local Puerto Rico compensation scheme displaced the LHWCA. In *Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349 (1st Cir. 1956), the court held that the purpose of the Act as enacted in 1927 was to provide a workers' compensation remedy to those injured on navigable waters where states could not legislate. Puerto Rico, as a territory, was not prohibited from enacting a workers' compensation statute that covered its navigable waters, so it was not covered under § 3(a) of the Act. The Defense Base Act, however, does apply to qualified workers at military bases in Puerto Rico.

The legal relationship between the United States and the territory controls coverage. For example, the LHWCA applies to the U.S. Virgin Islands, a possession of the United States. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir.), reh'g denied, 910 F.2d 1179 (1990), cert. denied, 498 U.S. 1067 (1991). Likewise, the territorial waters of Guam are included in the navigable waters of the United States for § 3(a) coverage. The fact that Guam was first a possession and then an unincorporated territory of the U.S., rather than a Territory is not dispositive given the ambiguities in the meaning of the terms. Guam's status is similar to the Virgin Islands, so the Board held that a system of concurrent jurisdiction is more consistent with the purposes of the Act. *Tyndzik v. University of Guam*, 27 BRBS 57 (1993), rev'd on other grounds, 53 F.3d 1050 (9th Cir. 1995).

The Ninth Circuit affirmed the Board's decision that the territorial waters of the Commonwealth of the Northern Marianas Islands (CNMI) are included in the navigable waters of the United States under § 3(a). *Uddin v. Saipan Stevedore Co., Inc.*, 133 F.3d 717 (9th Cir. 1998), aff'g, 30 BRBS 117 (1996). The Commonwealth is a lower case territory as it is unincorporated, but this is not determinative, as the term territory when used in the Act is comprehensive and Congress intended the Act to apply to the fullest extent possible with no restrictions on federal coverage short of the limits of maritime jurisdiction. The court noted that the Act applies to Guam, and the Covenant of the CNMI states that federal laws applicable to Guam apply to the Marianas. In a more recent case the Benefits Review Board held that the Republic of the Philippines is not a territory of the United States pursuant to §§ 2(9) and 3(a), the Longshore Act, of its own force, does not apply to the Philippines. *A.P. [Panaganiban] v. Navy Exchange Service Command*, 43 BRBS 123 (2009).

We see from these cases that geographical distance does not rule out Longshore coverage for distant territories, but those islands covered must be in fact U.S. possessions. Sorting through coverage for maritime work beyond the continental United States requires considerable expertise, and SeaBright's professionals are ready to assist our brokers in providing complete workers' compensation coverage for all of their clients' employees.

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