



The Monthly Maritime Newsletter of SeaBright Insurance Company

The Special Fund

The US Longshore and Harbor Workers' Compensation Act (USLHWCA) establishes a "special fund" or second injury fund that is financed by payments and assessments collected from employers and carriers. 33 U.S.C. § 944. While most of this Fund's money is used for permanent disability payments for qualifying second injuries, it also pays for other activities, including the Department of Labor's vocational rehabilitation program, and compensation and medical benefits to claimants who have no viable source for them. As with most compensation programs, this provision in the Longshore Act limits the liability of an employer for work injuries if the disability is increased due to an employee's "pre-existing disability." Section 8(f) of the Act provides specific requirements for limiting liability; when such requirements are met, benefits are paid by the Special Fund after the employer first pays permanent disability for a specified time period. For the fiscal year 2010, the Fund anticipated paying \$134,000,000 in indemnity benefits, making the Fund the single largest payer of compensation under the USLHWCA.

The Special Fund is managed by the Secretary of Labor, who has delegated responsibility to the Associate Director for Longshore Programs. It is his duty to defend the Special Fund, collect fees and assessments and dispense moneys as required. The chief purpose of § 8(f) is to encourage employers to hire and retain disabled workers. See *Director v. Newport News Shipbuilding & Dry Dock Co. (Langley)*, 676 F.2d 110, 112 (4th Cir. 1982). Without § 8(f), employers would have a disincentive to hire disabled workers "for fear of having to pay for the entirety of their injuries if their pre-existing disabilities were to be aggravated at work." *Director v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134, 138 (4th Cir. 1998). The Special Fund concept predates the Americans with Disabilities Act, and some have questioned the continued need for such a fund since employers are now required to hire disabled workers if they can physically perform the tasks required by the job.

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Federal and Admiralty Laws Booklet Available from SeaBright

This booklet is a great primer on who is covered under the Jones, USL&H and other federal acts, and when and where coverage applies. To request your complimentary copy, please visit the "Request a Brochure" page on our website at www.sbic.com.

The Fund is *not* paid for with government money. The overwhelming majority of money in the Fund comes from assessments levied against employers and carriers. Penalties paid for late reporting and late filing of forms, as well as a \$5,000 payment for work-related deaths when no beneficiaries exist, also go to the Fund. All approved insurance carriers and self-insured employers pay assessments, whether or not they have any claims being paid by the Fund. The assessment formula is based on all indemnity payments made under the USLHWCA by a carrier in a single year and also factors in the amount paid by the Fund on behalf of claims from that carrier. On average, for every \$1.00 paid by the Fund to claimants for a particular carrier, that carrier is required to pay \$1.17. In other words, putting a claim into the Special Fund does not automatically reduce the actual employer or insurer cost of Longshore claims. Because the Fund is the payer of last resort when employers and carriers are insolvent, it is important that every potentially-liable Longshore employer has coverage. This insures that the cost of the Fund is spread across the entire industry.

To qualify for limitation of liability under § 8(f), an employer must show that (a) a claimant has a pre-existing permanent partial disability; (b) the pre-existing permanent partial disability must have been *manifest* to the employer; (c) the pre-existing permanent partial disability must combine with the most recent injury to result in greater disability than would have been caused by the last injury alone; and (d) the ultimate disability must not be due solely to the most recent injury. The word “disability” here has two different definitions. A “disability” for pre-existing purposes is very broad and can be either a physical or economic condition, e.g., diabetes, prior back surgery, etc. The resultant “disability” needs to be either a scheduled impairment or loss of wage-earning capacity. The procedures for applying for this limitation are detailed in 20 C.F.R. § 702.231, and the Director, OWCP, will typically oppose any deviation from them. Time limits are strict, and any procedural mistake by the employer may prevent an otherwise eligible claim from receiving § 8(f) limitation.

The right to limitation, however, is given only to employers who specifically insure workers for longshore coverage. 33 U.S.C. § 32(a) Thus, an employer that only learned on appeal that its worker was covered under the USLHWCA was deprived of use of § 8(f) even though all other requirements of that section were met. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000). Over the strenuous objections of the OWCP Director, the Board decided the § 32(a) restriction did not apply to an employer whose worker was held covered only after the Board changed the law and applied longshore jurisdiction to a longshore (as opposed to DBA or NAF) employee injured in Jamaican territorial waters. *Weber v. S.C. Loveland, Inc.* 35 BRBS 190 (2002).

If limitation is granted, the employer normally pays no more than 104 weeks of permanent disability. However, the claim file remains open as the employer is still liable for all medical treatment, any temporary disability benefits payable to the claimant, and attorneys fees. Limitation is available only for permanent disability or death claims, and the financial implications and legal expense of pursuing limitation are factors that should be considered before an application for relief is filed.

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