



## Toolbox Talk

### Does the Longshore Act Apply Overseas?

What happens to U.S. workers engaged in maritime employment within the territorial waters of foreign countries or in foreign shipyards? The Jones Act requires U.S. flag vessels have any major repairs done by U.S. shipyards and U.S. workers. Absent exigent circumstances, this can mean that American citizens are flown worldwide to repair such ships. The work done would clearly be covered by the Longshore Act if performed in the U.S. What covers injuries to these Americans abroad?

Many American employers with employees working overseas supplemented state extraterritorial compensation benefits with voluntary coverage, often referencing the Longshore Act. These benefits were generous, but because they were contractual in nature, the longshore claims process was not available to injured workers, and they often had to sue to obtain their recovery. The Benefits Review Board has not been consistent in deciding when, if ever, Americans “engaged in maritime employment” outside the U.S. could recover LHWCA benefits.

Joseph Webber worked for S.C. Loveland as a field superintendent. In May 1986, he injured his back in the port of Kingston, Jamaica. He slipped and fell while walking the catwalk on his employer’s barge. Webber was hospitalized in Jamaica, then flown back to the United States. The parties agreed that Webber is permanently totally disabled as a result of the injury. A voluntary workers’ compensation insurance policy paid over \$250,000 in benefits. Nevertheless, Webber sued under the Jones Act. A federal judge dismissed his suit, observing that his injury was covered by the Longshore Act. He then filed a longshore claim. Webber’s usual job was that of a maritime employee, and 95% was done in the United States and the remainder of his work was performed in foreign countries.

The parties agreed he met the status requirement, but the ALJ denied the claim. The Benefits Review Board (BRB) reversed the ALJ’s finding, justifying coverage through a claim of a “developing trend” to extend U.S. benefits to foreign locations. All the cases cited by the Board, however, were Jones Act cases. It completely ignored the distinction between the high seas and territorial waters of another country. The confused legal reasoning of the board caused litigation to continue for over a decade, resulting in three published BRB decisions. Because the employer had no longshore endorsement covering Jamaica, the BRB concluded the employer alone was liable for benefits. In its final decision, the BRB admitted it had made new law and, in direct violation of § 32, allowed the employer the limitation of liability under § 8(f) even though it had never paid into the Special Fund for foreign coverage.

No other federal court has recognized the convoluted holding in Webber, but one Washington state appellate court did, applying the LHWCA to an injury occurring on a barge offshore Sakhalin Island, Russia. *Grennan v. Crowley Marine Services, Inc.*, 128 Wash. App. 517, 116 P.3d 1024 (Wash. Ct. App. 2005).

More recently, however, the Board has revisited the issue, and though it did not overrule Webber, it seems to have limited that case to its facts. *Tracy (J.T.) v. Global International Offshore, Ltd.*, 43 BRBS 92 (2009).



Joseph Tracey worked for Global Offshore (Global) in Louisiana from October 1995 until approximately February 1996. Initially, he was assigned to convert the *DB-1/Navajo* from a flat-deck barge to a derrick barge, and then he was assigned to the *Hercules* which he accompanied on a job in the Gulf of Mexico. Between July 1996 and November 1997, Tracey worked for Keller Foundation in San Diego, Calif., on the South Bay Ocean Outfall sewer project where he worked from barge decks installing a temporary platform approximately 3 miles offshore, loading and unloading barges at the shore and the platform and outfitted the platform.

During the last six months of his employment with Keller, Tracey spent 95% of his time loading and unloading barges at the R.E. Staite shipyard. In March 1998, Tracey worked with Global as a barge foreman on the *Iroquois*, first in the shipyard in Louisiana before its voyage, while it was being towed to Mexico, and while it was laying pipe off the coast of Del Carmen, Mexico. Thereafter, and until his heart attack in 2002 caused him to stop working, Tracey worked overseas for Global on barges “264” and the *Seminole* and in ports in Malaysia, Singapore and Indonesia.

Tracey filed claims against Global and Keller for longshore benefits for his heart attack, hearing loss, cumulative arm trauma and arthritis. The ALJ carefully analyzed the work history, dismissed the heart attack claim, concluding it occurred while Tracey was a seaman and also found a fact issue on the arm trauma but allowed the hearing loss claim under the LHWCA.

The BRB affirmed, this time carefully analyzing each injury, the employer, Tracey’s status, and the geographical location of each. Keller, the San Diego employer, argued that Tracey’s work in Asian ports was covered by the Longshore Act under the same theory the Board developed in *Webber*. If Keller could have Tracey’s work covered under the LHWCA, it would avoid liability for all his claims under the “last maritime employer” rule. However, since there was no longshore-covered work after Keller, that company remained liable under the Longshore Act for the hearing loss and arguably for the cumulative trauma to the arm.

The BRB distinguished the facts of this case on grounds that the claimant in *Webber* was based in the U.S. and was sent to unload a ship in Jamaica that he had loaded in Louisiana, and that this was a “purely American controversy.” Tracey, on the other hand, was living in the foreign countries when his injuries occurred, and thus he was not entitled to Longshore benefits.

While the Benefits Review Board’s logic has been confusing at times, we believe the plain language of the act limits LHWCA coverage to navigable waters of the United States. Workers assigned overseas must rely on state compensation extraterritorial provisions and/or voluntary compensation coverage from their employer. Underwriters at 3CU can assist in suggesting the appropriate coverage for such workers.

