

Longshore Reform

Attorney Panel Discussion

Claimant Counsel: David Neusner, Esq. & Robert Audette, Esq.

Defense Counsel: Edward Murphy Esq. & Mark McKenney, Esq.

Moderator: Anthony Filiato, Esq.

Agenda

- ▶ Meet the Panel
- ▶ Claimant Perspective: 3–4
- ▶ Employer Perspective: 5–6
- ▶ Equitable Reform – open discussion: pg.7
- ▶ Questions For The Panel: pg.8

Claimant

- ▶ **President Teddy Roosevelt, 1906:**
 - “In spite of all precautions exercised by employers, there are unavoidable accidents and even deaths involved in nearly every line of business connected with the mechanic arts...Compensation for accidents or deaths due in any line of industry...should be paid by that portion of the community for the benefit of which the industry is carried on—that is, by those who profit by the industry...It is therefore clear to my mind that the law should place the entire “risk of a trade” upon the employer. Neither the federal law, nor, as I am informed, the state laws dealing with the question of employers’ liability are sufficiently thoroughgoing.”
- ▶ **Longshore and State of Connecticut Workers’ Compensation Acts today**
- ▶ **U.S. Supreme Court decision in Sun Ship, Inc. v. Pennsylvania**
 - CT law filled in significant holes in Longshore coverage, particularly with regard to claims for permanent partial disability
- ▶ **Potomac Electric Power v. Dir., OWCP (“Pepco”), 1980,**
 - Claimants with unscheduled injuries and no actual post-injury lost earnings get nothing
 - Claimants with scheduled injuries and a permanent loss of wage-earning capacity are forced to absorb the entire brunt of lost lifetime earnings

Claimant (cont.)

- ▶ **CT law prior to 1993 included broad entitlement to specific and lost wage benefits**
- ▶ **CT's participation in the "race to the bottom" beginning in 1991**
 - Create an attractive business environment
 - Led to the enactment of WC "reforms" which radically reduced benefits and increased employers' control over claims
 - Most significant were the changes in PPD benefits: specific awards were reduced by 1/3;
 - Commissioners' discretion to award specific benefits for any injury was eliminated
 - Post-specific lost wage awards were reduced from a possible 780 weeks to a number of weeks not to exceed the specific award
- ▶ **Both the CT Act and the LHWCA are gravely deficient with regard to the handling of claims for permanent partial disability**
- ▶ **A focus for change ought to be handling claims for PPD in a more equitable manner**
 - Expanding the list of scheduled injuries
 - Undoing Pepco, to allow worker with scheduled injuries to be compensated as well for their actual wage loss(perhaps with an offset for the specific award)

Employer

- ▶ **Section 14 penalties**
 - 10 business days from order insufficient
 - With repetitive pay, good faith errors quickly rectified should not be penalized
- ▶ **Stays of orders at BRB**
 - Never granted as impossible to prove irreparable harm?
- ▶ **Recoupment Provision**
- ▶ **Single Justice Review from the Board to assess strength of appeal**
- ▶ **When a dispute concerns only the amount to be paid**
- ▶ **Section 22 – (Rusich v. EB)**
 - Did the decision go too far?
- ▶ **Section 12 and 13 –outside time limit for non–latent injuries**

Employer (cont.)

▶ **Cardillo/Ibos**

- Apportionment v. Delay in adjudication issue; follow Connecticut rule while the employers litigate
- Last exposure non-maritime employment

▶ **Concurrent Jurisdiction**

- Should claimants have the right to opt one jurisdiction or the other?
- Uniformity/parity for shipbuilders
- Hearing Loss
 - Non-work related problems before and after injury/exposure factored into awards
 - Post maritime employment injury. Should the last maritime employer be responsible for that too?
 - Are exit audiograms the answer
 - Statute of limitations

▶ **Managed Care**

- Should the employer be able to control costs with use of participating networks?
- Intoxication defense --- does the word “solely” essentially nullify the defense? Intertwined with 920(c)

▶ **Offset/Reduction in LHWCA for**

- Receipt of SS, VA, etc.
- Employer’s pension
- Eliminate LWEC benefits to death
- Widow’s benefits when employee is already retired at time of death, particularly if survivor’s pension or SS benefits are not reduced
- Change definition of widow to reflect Conn. law (time of injury)

Claimant & Employer

- ▶ Changes which might be palatable to both sides
 - Increase the funeral expense from \$3,000 to \$10,000
 - Award specific benefits in a lump sum using the same compensation rate for all workers
 - Limit attorney fee–shifting provisions of section 28 to cases involving medical care or awards of nominal amounts of indemnity benefits
 - Retainer agreement between claimant and attorney would determine the basis for attorney fees
 - CT fees contingent on success, usually are 20% of benefits obtained, subject to oversight by the Commissioner
 - Changes would eliminate the conflicts of interest inherent in the present system and would lead to healthier attorney client relationships.
- ▶ *Presumably Non–Controversial Changes/upward adjustments*
 - 9(a) Funeral allowance
 - \$7500 Ceiling on Disfigurement to face, head and neck
 - \$5K payment to the Fund under 44(c) for death with no survivors
 - Automatic/built in adjustments to avoid obsolescence? Which scale?
 - Widow rate

Panel Questions

- ▶ If you could change one section in the longshore act in order to achieve a more equitable result for your clients, what section would that be? How would you change it?
- ▶ Name a state benefit that you find to be more appropriate than the longshore equivalent?
- ▶ Should the age of the injured worker factor into the indemnity benefit due? If so, how?
- ▶ Does a panel review approach to medical care make sense?
- ▶ Would clients agree to medical management or directed care if it meant increased quality and timeliness of care?
- ▶ In the spirit of give & take, where should your clients give?