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HUMAN RESOURCES DIVISION

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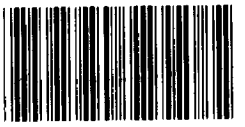

The Honorable John N. Erlenborn
Ranking Minority Member
Subcommittee on Labor Standards
Committee on Education and Labor
House of Representatives

Dear Mr. Erlenborn:

Subject: Interim Report on Issues Related to the Longshoremen's and Harbor Workers' Compensation Act (HRD-81-107)

In January 1980, you and the former Subcommittee Chairman asked us to (1) evaluate the effects of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 901) and (2) review the Department of Labor's administration of this act. On June 1, 1981, you requested a status report on our review; this report discusses our preliminary findings.

We found that the 1972 amendments to the LHWCA:

--Increased the number of compensation claims, thereby adversely affecting Labor's ability to carry out its responsibilities for overseeing, monitoring, and adjudicating these claims.

--Established compensation rates which, when combined with monetary benefits from other programs, equal or exceed preinjury take-home pay in some cases.

--Extended coverage to "maritime employees" who work in "areas adjoining navigable waters"; definitions of which have undergone and are expected to continue to undergo further modification.

--Clarified the limits of an employer's future liability in a second injury case 1/ by providing for the eventual pay-

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1/A case in which an employee with an existing permanent partial disability suffers another injury.

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ment of an employee's benefits from a Special Fund. Since 1973, claims of this type have increased so significantly that some employers and insurers believe that the Fund may have difficulty paying future employee benefits.

Regarding administration of the act, we found many instances in which Labor's district offices were neither following established procedures nor meeting program standards for processing compensation claims.

BACKGROUND

LHWCA was passed in 1927 to provide compensation and other benefits to maritime workers injured while working over navigable waters and declared by the Supreme Court not to be protected by States' worker compensation laws.

The 1972 amendments to LHWCA included changes that (1) extended LHWCA to cover additional maritime employees working in adjoining areas customarily used by an employer in loading, unloading, repairing, or building a vessel; (2) improved compensation benefits; (3) more clearly defined the limits of an employer's responsibility for second injury claims; and (4) provided for formal mechanisms--formal hearings before an Administrative Law Judge and appeals to a Benefits Review Board--within Labor for adjudicating claims.

The Secretary of Labor is responsible for administering compensation and benefit programs authorized by LHWCA. Within Labor, the Office of Workers' Compensation Programs (OWCP) oversees and monitors benefits provided by employers or their insurance carriers to assure that injured employees receive the benefits due them under the act's provisions.

When disputes between employees and employers over claims for benefits arise, OWCP district office officials are empowered to resolve these disputes through informal conferences. If the parties cannot reach agreement, LHWCA requires a formal hearing before one of Labor's Administrative Law Judges who issues a decision that may later be appealed to Labor's three-member Benefits Review Board. Benefits Review Board decisions may be further appealed to the U.S. Circuit Court of Appeals.

SCOPE OF OUR REVIEW

To determine the effects of the 1972 amendments to LHWCA, we interviewed (1) Labor officials in Washington, D.C., and in the district offices who have responsibility for administering

this compensation program; (2) officials representing insurance carriers, maritime employers, and maritime employees; and (3) attorneys representing employees and employers in LHWCA compensation cases. We also reviewed recent testimony before the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources on the administration of this act.

To evaluate Labor's procedures for claims administration and adjudication, we reviewed 100 randomly selected cases in each the San Francisco and New York district offices. We also used a questionnaire to obtain program information from the other district offices responsible for handling LHWCA claims. We validated selected responses to our questionnaire by performing limited verification work at the Long Beach, Houston, New Orleans, and Boston district offices. Other information on program administration was obtained from OWCP reports on district office LHWCA activities.

INCREASED WORKLOAD HAS ADVERSE AFFECT ON LABOR'S ABILITY TO EFFECTIVELY ADMINISTER PROGRAM

The increased coverage and other program revisions resulting from the 1972 amendments have had a significant, nationwide effect on OWCP's workload and administration of LHWCA. Labor is charged with prompt and efficient claims administration under the act. However, increased claims activities have adversely affected Labor's ability to administer the program in accordance with its established procedures and standards.

From fiscal years 1972 to 1980, the total number of injuries reported under this progam increased by about 230 percent--from over 72,000 to over 238,000. During this period injuries in which employees lost time from work increased from over 17,600 to over 59,800.

In our previous report on LHWCA activities, 1/ we recommended that Labor assure that adequate resources are available to effectively and efficiently carry out its responsibilities under the act. Although Labor has provided for some increases in staff to carry out these responsibilities, we noted that its most recent request of 50 positions for fiscal year 1982 was not approved by the Office of Management and Budget.

1/"Improvements Needed in Administration of Benefits Program for Injured Workers Under the Longshoremen's And Harbor Workers' Compensation Act (Jan. 12, 1976, MWD-76-56).

Indications of insufficient staff resources to properly administer the act include:

--Seven of 15 district offices responding to our questionnaire stated that the present number of claims examiners was inadequate. In Philadelphia, Norfolk, and Long Beach the number of cases per claims examiner was three times OWCP's standard of 600 active cases. Only 4 of 15 districts were within this standard.

--Quarterly reports from 5 of the 15 district offices continually cite clerical shortages as a source of concern. In Boston, we found that the typing backlog alone increased by over 1,000 cases in the 3-month period ended in January 1981.

--Seven of 15 districts classified their backlog as "unmanageable."

--As of September 1980, over 11,500 claims were backlogged or an average of over 200 claims per examiner. OWCP's standard states that cases needing action should not exceed 75 for each examiner.

--Backlogs may be understated because some districts do not include in their backlog, cases in which established followup dates are missed.

--According to a New Orleans district official, the district had not yet disseminated information on LHWCA to employers and employees in Arkansas because of their heavy workload.

In addition to the problems caused by the increased number of claims, we also identified the following practices which, in our opinion, adversely affect OWCP's claims processing.

--Five of the 15 districts routinely establish case files for no-lost-time injuries even though OWCP procedures state that most injuries of this type are considered not to qualify as claims or cases. Moreover, claims examiners in three of these districts were reviewing these cases even though, in our opinion, these reviews were not necessary.

--Informal conferences to resolve disputes were held before receiving critical documents, such as initial medical reports or wage verification reports. After reviewing 50 memorandums of informal conferences, we concluded and a Boston OWCP official agreed that 47 of the conferences were of little value. OWCP's procedures state that conferences should not be held unless the evidence has been sufficiently developed to produce a meaningful result.

--The San Francisco and New York district offices did not generally provide injured claimants with standardized letters and pamphlets describing the benefits available under the act. Officials in each district assumed that claimants were aware of their rights.

--Although the act provides for penalties in cases where critical documents are not received within specified time frames, the district offices were generally not assessing such penalties. District officials told us that (1) assessments of penalties would affect their rapport with employers and insurance carriers and (2) only habitual offenders should be penalized. We also noted that in about half of the districts the postmark dates of late reports were not recorded as required by OWCP's procedures.

LEVEL OF BENEFITS MAY DETER SOME EMPLOYEES FROM RETURNING TO WORK

Compensation available under LHWCA, when combined with income from other Federal programs or from employer funded programs may provide the injured employee with spendable income that meets or exceeds preinjury take-home pay. As a result, employees may not return to work as soon as they are physically able. 1/

Two objectives of workers' compensation are to provide (1) the injured workers enough money to maintain a standard of living somewhat comparable to that which existed before the injury and (2) financial incentive for injured workers to seek rehabilitation and reemployment, where possible. The benefit level is a crucial factor in accomplishing these objectives. LHWCA entitles injured claimants to receive workers' compensation benefits equal to two-thirds of their gross average weekly wage. Maximum benefits under the act now exceed $450 a week and are adjusted annually based on the national average weekly wage of nonsupervisory workers on private nonagricultural payrolls. Because worker compensation benefits are not taxed, compensation, in many cases, is often close to or exceeds an injured employee's preinjury take-home pay. In addition, injured maritime workers may also be eligible for one or more of the following benefits:

1/Our report entitled "Federal Employees' Compensation Act: Benefit Adjustments Needed to Encourage Reemployment and Reduce Costs" (Mar. 9, 1981, HRD-81-19) discusses in more detail the issues related to benefit levels.

--During the first year of injury, the International Longshoremen's Association provides its members with payment of the difference between the workers' compensation benefit and a guaranteed annual income amount.

--Injured workers who have been with the International Longshoremen's and Warehousemen's Union for 13 or more years and are permanently and totally disabled, regardless of the cause, are entitled to a noncontributory disability pension. Injured workers may receive this disability pension in addition to longshore benefits after a 26-week offset period.

--Benefits may also be available under the Social Security Disability Insurance program after 6 months of disability.

Allowing for income taxes and work-related expenses, it appears to be financially attractive for some injured workers to remain on compensation rather than seek rehabilitation and reemployment.

We found examples which illustrate how strong the disincentive to return to work can be.

--In the New Orleans district, an injured worker was receiving tax-free compensation and social security disability benefits amounting to $2,220 a month compared with a preinjury taxable income of $1,812 a month.

--In the Long Beach district, an injured worker's combined tax free workers' compensation and social security benefits totaled over $367 a week. His preinjury taxable weekly wage was only $8 more.

EXPANDED JURISDICTION: A CONTINUING PROBLEM

The expansion of jurisdiction under the 1972 amendments has caused and, according to some maritime employers and their insurance carriers, is expected to continue to cause confusion over who is and who is not covered under the act. In 1977 (5 years after the amendments expanded coverage), Labor issued guidelines for determining coverage under the LHWCA. These guidelines were to be updated as other questions relating to coverage were decided by the courts or, in some cases, by the Benefits Review Board. In 1979 hearings before the House Committee on Education and Labor, Labor's Assistant Secretary for Employment Standards testified that ultimately the decision on what is or is not coverage under any workers' compensation law resides in the courts.

The original LHWCA limited coverage to injuries literally occurring on the water or in a dry dock. If an injured worker fell and landed on a vessel, the act covered the worker, but if the worker landed on a dock or pier, the act did not cover the worker. Injuries on land were covered under State workers' compensation laws. Substantial disparities in benefits occurred depending on whether the injury occurred over water or on land and in which State the accident took place.

In September 1972, the House Committee on Education and Labor which reported on the bill to amend LHWCA noted that, with containerization, more of the longshoreman's work is performed on land. The Committee believed that

> "* * * compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment * * * if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel.

Since these amendments were enacted in 1972, there has been almost continuous litigation to define jurisdictional issues related to who is covered (status) and what is the locality of the injury (situs). We believe the following statements describe frustrations the maritime industry and others have had in accurately defining the scope of coverage.

--A representative for a west coast stevedore association, in September 1980 hearings before the Senate Committee on Labor and Human Resources, stated that 8 years of litigation (since the 1972 amendments) and several Supreme Court cases have brought some clarification to the issue of the act's inland reach, particularly as it related to transferring cargo between vessels and land transportation systems. However, the jurisdictional picture facing other segments of the maritime industry is somewhat foggier and that jurisdictional disputes in the "marine" construction field are just beginning.

--A representative for a national property and casualty insurance trade association at the above-mentioned hearings

stated that the 1972 amendments extended the coverage landward but left doubts about how far and to whom.

--According to a report prepared for Labor by a private consulting firm, the single most serious problem under the act is the uncertainty about who is covered. Because jurisdiction is uncertain and benefit costs are high, unpredictability of risk arises and liabilities become unpredictable.

However, Labor's Chief Administrative Law Judge believes that, since the 1972 amendments, sufficient legal precedents have been established to resolve most issues related to jurisdiction.

SECOND INJURY CLAIMS AGAINST THE SPECIAL FUND: CAUSE FOR CONCERN

Under section 8(f) of the act, an employer can limit its future liability for compensation payments when an employee with an existing permanent partial disability suffers a subsequent injury that results in an increased disability that is not solely related to the subsequent injury.

Usually, under LHWCA an employee's injury is related to his or her employment with a specific employer, and the employer or its insurance carrier is solely responsible for the compensation liability arising out of the employee's injury. However, when an employee suffers a subsequent injury as defined by section 8(f) the self-insured employer's or insurance carrier's financial liability is limited to a scheduled award or 24 months, whichever is greater. Any compensation payments due to an employee beyond these time frames is paid from a Special Fund established by section 44 of the act. The Special Fund is financed by prorated assessments on insurance carriers and self-insured employers providing compensation coverage under the act. Thus, the liability in a second injury case is eventually shared by all self-insured employers and insurance carriers.

Second injury claims approved under section 8(f) of LHWCA have increased from a total of 18 in 1976 to a total of 561 in 1980. Benefit payments have increased from about $80,000 in 1976 to almost $6 million in 1980, and Labor estimates that in 1985 second injury payments will amount to $15 million.

The growth in compensation payments for an increasing number of second injuries is a concern shared by some employers, insurers, and Labor. Labor is concerned that recent decisions by Administrative Law Judges, the Benefits Review Board, and some Courts of Appeals have broadened the interpretation of the act's provisions regarding second injury claims. Maritime industry and insurance company representatives are concerned that rising assessments

needed to pay an increasing number of second injury claims will create a substantial burden on future generations of employers providing coverage under the act.

Future liabilities of the Special Fund are unfunded and an insurance carrier representative estimated this liability to be in the "hundreds of millions of dollars." According to a spokesperson for a west coast stevedoring association, the current Special Fund assessment mechanism imposes upon insurers and self-insured employers a potential liability which is both unknown in amount and subject to factors over which they have no meaningful control.

In addition to rising assessments needed to finance these 8(f) claims, there is a concern that some insurance carriers and self-insured employers are obtaining Special Fund relief in a number of cases which seem to go beyond the purpose of the 8(f) provision. Labor's former Assistant Secretary for Employment Standards in hearings before the Senate Labor and Human Resources Committee stated the purpose of this provision "was to encourage the hiring or rehiring of partially disabled workers by making second injury relief available only in those cases where the worker's previous disability was realistically manifest to the employer."

Examples of cases approved for Special Fund relief noted during our review, in which the preexisting injury did not appear to be realistically manifest follow:

--One court ruled that hypertension was a preexisting disability.

--An Administrative Law Judge found that a pulmonary disease attributed to smoking satisfied the preexisting disability requirement.

While the courts have stated that the preexisting injury must have been "manifest" to the employer before the injury that is the basis for the compensation claim, the courts have also extended the meaning of the term "manifest" to cover a wide variety of situations where it was not shown that the employer had actual knowledge of the disability. Although the term "manifest" was not used in LHWCA, the term has been widely used in decisions written by the Administrative Law Judges, the Benefits Review Board, and the Federal appeals court in connecting employment injuries with preexisting conditions. According to the 1972 House Committee report on the bill to amend LHWCA, the purpose of this section is to encourage the employment of the handicapped by limiting an employer's financial responsibility for a second injury to a scheduled award or to 104 weeks, whichever is greater.

Another reason for the increases in 8(f) awards--limiting a self-insured employer's or insurance carrier's liability--is that in some of these cases, the Administrative Law Judges appear to be awarding employers Special Fund relief when the employer and employee have reached a "stipulated agreement." OWCP is supposed to initially address 8(f) issues in its informal proceedings. However, we found that employers and insurance carriers are able to bypass OWCP by using "stipulated agreements." In these cases, a formal hearing before an Administrative Law Judge is requested to resolve issues that do not include second injury issues. Later, the employer amends his petition for a hearing to include this issue. At the formal hearing, 8(f) becomes the only issue represented to the Administrative Law Judge for consideration; the employee and employer representatives having reached a "stipulated agreement" on all other issues.

A representative for an association of property and casualty insurance companies attributed the rapid growth in the number of cases being covered by section 8(f) to Labor's failure to defend the Special Fund at formal hearings. Regulations (20 C.F.R. 702.333 and 801.401) governing Labor's administration of LHWCA permit the Solicitor of Labor to represent the interest of the Director of OWCP at formal hearings or appeals. However, an attorney with the Solicitor's office told us that sufficient resources are not available to routinely defend the Special Fund in 8(f) cases decided at these formal hearings.

A number of Administrative Law Judges indicated to us that Labor's failure to defend the Special Fund in 8(f) cases invited fraud and collusion between employer and employee. Because the employee does not lose compensation benefits in 8(f) determinations, he has little interest in the decision reached. However, the self-insured employer or insurance carrier significantly limits his future liability for compensation.

The representative of an association of property and casualty insurance companies suggested that if Labor can not defend the Special Fund in 8(f) cases, then it should at least give insurers and self-insured employers the opportunity to limit the Special Fund's liabilities. He said that in a number of States (e.g., New York and Michigan) the function of administering similar funds has been turned over to insurers and self-insured employers. He believed that a similar approach would be helpful in (1) controlling the number of claims which ultimately end up in the Special Fund and (2) limiting the future financial liability of this Special Fund. According to a Labor official, LHWCA would have to be amended to provide authority for this type of an arrangement.

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