

# AN INTRODUCTION TO HANDLING LONGSHORE & HARBOR WORKERS' COMPENSATION ACT CLAIMS



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# A STANDARDIZED APPROACH TO HANDLING LONGSHORE & HARBOR WORKERS' COMPENSATION ACT CLAIMS

## I. INTRODUCTION

The Longshore & Harbor Workers' Compensation Act practitioner works on a daily basis within a federal administrative framework to resolve disputes. In order to effectively prosecute or defend cases arising under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), counsel should develop a standardized system for handling claims. That system should recognize and have access to key resource materials. It should also incorporate a basic trial notebook tailored to the needs of each case. Once counsel has developed a comprehensive approach, LHWCA cases can be handled efficiently.

## II. SOURCE MATERIALS

Counsel must initially understand where to find the body of applicable law, regulations, forms and treatises in order to successfully represent a claimant. The following are suggested basic resource materials:

### a. Longshore & Harbor Workers' Compensation Act

The provisions of the LHWCA are set forth in the Federal Longshore and Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§901-950. Accordingly, the practitioner needs to have a copy of the LHWCA available since a claimant's entitlement has a statutory base.

### b. BRBS Desk Book

The Longshore Desk Book was last published in 2003 by the Benefits Review Board Service. The Desk Book is an important research tool which will allow counsel to find applicable case law interpreting the LHWCA. While it is a good source of initial research, the Desk Book has not been updated in some time. Therefore, counsel should heed the notice preceding the Desk Book's Table of Contents. The Desk Book can be found online at: [http://www.dol.gov/brb/References/Reference\\_works/lhca/lstdesk/main.htm](http://www.dol.gov/brb/References/Reference_works/lhca/lstdesk/main.htm)

### c. Code of Federal Regulations: 20 C.F.R. 701, et. seq. and 29 C.F.R. 18, et. seq.

The Code of Federal Regulations contains rules and regulations which the practitioner should use in connection with the LHWCA. 20 C.F.R. 701, et. seq. contains regulations governing the administration of the LHWCA. 29 C.F.R. 18, et. seq. contains the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. These valuable sources provide counsel with procedural guidance in trying LHWCA cases.

### d. Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). American Medical Association (Chicago 2003)

The Guides to the Evaluation of Permanent Impairment (Guides) is a reference source published by the American Medical Association to be used by physicians in evaluating medical impairments. Chapter 1 of the Guides is especially helpful to the LHWCA practitioner. It explains the important difference between physical impairment and disability. As used in the Guides, "impairment" means an alteration of an individual's health status that is assessed by medical means. On the other hand, "Disability" is assessed by non-medical means. It is a change in a person's capacity to meet personal, social or occupational demands or statutory or regulatory requirements. Counsel must be careful to distinguish between impairment and disability at all times in handling LHWCA cases. The AMA Guides provide counsel the tools for assessing permanent physical impairment. They also can prove helpful in determining claimant's disability. Counsel can obtain a copy

of the Guides from amazon.com or through the AMA itself.

**e. OWCP-5 Form**

This is an official United States Department of Labor form which is important in determining a claimant's physical restrictions. The form sets forth certain boxes for a physician to complete regarding a claimant's physical capacity. (See attached OWCP-5 form - Appendix Form A). Upon receiving a properly completed OWCP-5 form from a physician, a qualified vocational rehabilitation specialist can determine whether a claimant has the physical capacity to perform sedentary, light, medium, heavy or very heavy work. Thereafter, the qualified vocational rehabilitation expert can form opinions about transferable skills, labor market access and wage earning capacity.

**f. Dictionary of Occupational Titles. U.S. Department of Labor, revised 1991**

The Dictionary of Occupational Titles provides a standardized assessment of some 12,800 recognized jobs in the U.S. Economy. Each job description is coded and includes the skills for a given job. The physical demands of a job as well as aptitudes, reasoning, math and language requirements are found in accompanying publications. The Dictionary of Occupational Titles sheds light on the nature of claimant's pre-injury work. Also, it permits evaluation of alternative employment in the event a claimant cannot return to his previous jobs after an injury. The dictionary can be found at: <http://www.oalj.dol.gov/libdot.htm>

**g. The Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles, U.S. Department of Labor. revised 1991**

The Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles is a companion publication to the Dictionary of Occupational Titles. It defines the physical requirements of sedentary, light, medium, heavy or very heavy work. The handbook is useful in evaluating a claimant's post-injury wage-earning capacity. The handbook is used in conjunction with a VDARE form, an OWCP-5 form and the Dictionary of Occupational Titles to classify various jobs.

**h. The Longshore Newsletter Procedure Manual - (revised 1996)**

This manual provides a copy of the Longshore & Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§901-950, applicable CFR's and forms used by the Office of Workers' Compensation Program. It also provides certain basic information about how the LHWCA operates. Copies of the manual can be obtained from: <http://www.longshore.org/Publications.html>

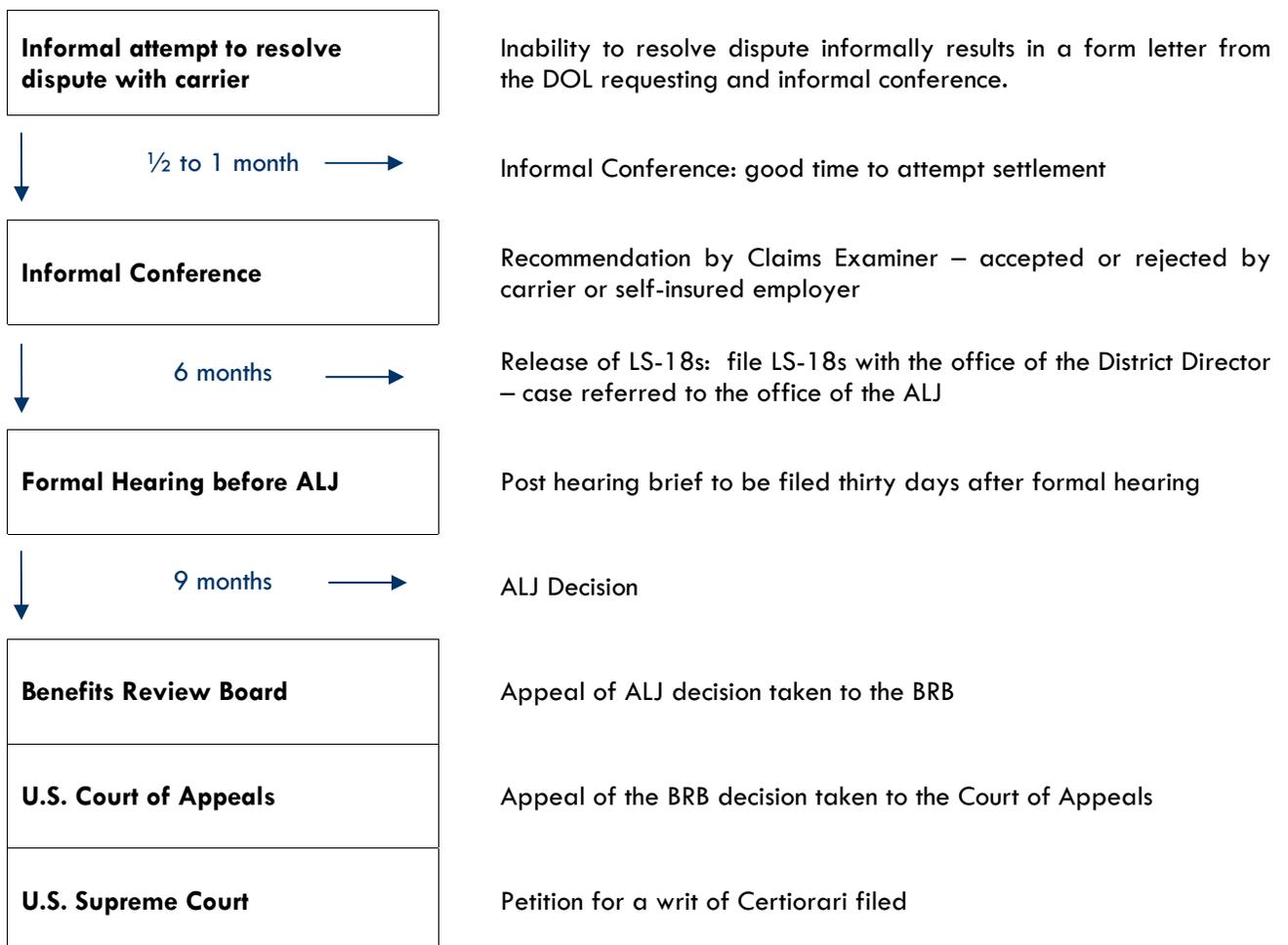
**i. Computation Tools**

Counsel needs several basic computation tools in order to handle LHWCA claims. First, a pocket calculator is indispensable. This will assist in the rapid calculation of case values for injuries arising under the schedule as well as general injuries. Second, a Future Damage Calculator is essential. The Future Damage Calculator is published by Lawyers and Judges Publishing Co., <http://www.lawyersandjudges.com/> or (619) 437-8787. It enables counsel to assess the present value of permanent total disability, non-scheduled permanent partial disability and death benefit cases. Counsel needs to calculate the present value of a claim in order to formulate a settlement demand. Once counsel has the necessary computation tools, the proper variables can be set forth in a standardized demand letter to the employer and carrier. A model demand letter is included as Appendix Form B.

*Armed with the essential source materials, counsel has the information with which to handle a LHWCA claim. Unfortunately, the material standing alone is not enough. It needs to be integrated into an organized framework.*

### III. INFORMAL AND FORMAL ADJUDICATION OF LONGSHORE & HARBOR WORKERS' COMPENSATION CLAIMS: AN OVERVIEW OF THE ADMINISTRATIVE SYSTEM

Understanding how longshore claims are administered and where relief can be obtained is helpful in handling claims. The claims system for resolving disputes under the LHWCA is administered by the United States Department of Labor. Since claims are initially handled by a carrier or self-insured employer, claimant's counsel should attempt to resolve disputes without resorting to an informal conference or formal hearing. Once an impasse is reached regarding compensation or medical treatment, counsel will ordinarily deal next with a United States Department of Labor claims examiner. An informal conference will be held where the parties to the dispute can discuss the issues. If an agreement cannot be reached, the examiner will render a written recommendation after the close of the conference. (LS-280). If the employer and carrier do not accept the recommendation, form LS-18's are customarily released to counsel with instructions to file the form with the district office. Thereafter, referral of the case to the Office of Administrative Law Judges occurs and a trial eventually takes place. Once the ALJ hears the case on the merits, a decision is rendered. Appeal of the case may be taken to the Benefits Review Board. Thereafter, an appeal may be taken to a United States Court of Appeals. Lastly, a petition for a writ of certiorari may be filed with the United States Supreme Court. A chart setting forth the stages of dispute resolution appears as follows:



Reviewing the dispute resolution chart, the bulk of counsel's work will involve (a) informal attempts to resolve disputes prior to informal conference (b) preparation for and attendance at informal conferences and (c) preparation for and trial of formal hearings. The vast majority of claims are resolved short of the Benefits Review Board, a United States Court of Appeals or the United States Supreme Court. Recognizing that fact, counsel's system should focus on the handling of cases from the time the case is opened until the post-hearing brief is filed with the Administrative Law Judge.

#### **IV. A SUGGUTED UNIFORM SYSTEM FOR HANDLING LONGSHORE & HARBOR WORKERS' COMPENSATION ACT CASES**

A uniform system for handling LHWCA claims incorporates a trial manual or notebook for each claim. Claimant's counsel should begin developing a trial notebook upon undertaking representation of the claimant. Sections IV(A) through (C) below discuss various forms which may be used in the trial notebook.

##### **A. Intake Forms: Signing Up a Claimant**

When a prospective claimant approaches counsel to discuss an injury, counsel should initially refer to an intake sheet which is part of a sign-up kit. (Appendix Form C). The sign-up kit contains an intake sheet, an LS-203 form, a cover letter to the U.S. Department of Labor regarding the LS-203, medical releases, wage releases, social security releases and a power of attorney.

The proposed intake sheet tracks Department of Labor form LS-203 which should be completed at the time of the initial interview. As a general rule, counsel should file the LS-203 form with the U.S. Department of Labor after a decision has been made to represent the claimant. The proposed model intake sheet form contains space for third-party lawsuit information, prior injuries, vocational history, and background information.

Counsel should forward claimant's LS-203 to the U.S. Department of Labor with a standard cover letter and a copy of the power of attorney authorizing representation. The failure to file an LS-203 in a timely manner can result in a bar of claimant's right to continuing compensation. See: 33 U.S.C. §§913(a) and 913(b)(2). If a power of attorney is not forwarded to the U.S. Department of Labor, counsel can expect a follow-up letter from a claims examiner requesting that one be sent.

The initial intake meeting with the claimant permits counsel an opportunity to discover important facts. Counsel should methodically proceed down the model intake sheet in an attempt to cover all important issues.

##### **(i) Average Weekly Wage Inquiry at the Time of the Initial Interview**

Since the LHWCA is a wage driven act, special attention should be paid to the average weekly wage issue. This issue is commonly overlooked by claimant's counsel. Since carriers often use a Section 10(c) calculation out of convenience or to save money, counsel should pay particular attention to claimant's pre-injury earnings and how the average weekly wage was calculated. A careful inquiry may raise claimant's temporary benefits and significantly increase the future value of the case. An understanding of how Section 10 of the Act works can be obtained by reviewing *Roundtree v. Newpark Shipbuilding and Repair, Inc.*, 13 BRBS 862 (1981), rev'd 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), panel decision rev'd en Banc, 723 F.2d 399, 16 BRBS .34 (CRT)(5th Cir. 1984), cert. denied, 469 U.S. 818, 105 S.Ct. 88 (1984).

##### **(ii) Third-Party Inquiry at the Time of the Initial Interview**

At the time of the initial interview, counsel should explore the possibility of a LHWCA third-party lawsuit. The most common LHWCA third-party case is brought against a vessel owner. Pursuant to 33 U.S.C. 5905(b), a claimant can sue a vessel owner whose negligence causes injury.

The vessel owner's duty to longshoremen working aboard a vessel was set forth by the United States Supreme Court in *Scindia, Id.*, and its progeny. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, (5th Cir. 1983). In *Scindia*, the Supreme Court recognized three separate and distinct categories of shipowner duties to longshoremen who come aboard a vessel to work. *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981).

The first duty set forth in *Scindia* addresses the vessel owner's responsibility to longshoremen prior to the commencement of stevedoring activity. The Court held that the vessel owner owes to the longshoremen the duty of exercising due care under the circumstances: (*Scindia*, 101 S.Ct. at 1622.)

This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

The second duty arises when the vessel is actively involved in the cargo operation or when the crew retains active control of part of the vessel during the course of cargo operations. Where the vessel is actively involved in cargo operations, it has the duty to avoid negligently injuring the longshoreman. When the crew retains active control over areas and/or equipment during the course of stevedoring operations, the vessel has the duty to exercise due care to avoid exposing longshoremen to harm from hazards that the longshoremen may encounter in those areas or from that equipment.

The third duty discussed in *Scindia* deals with the responsibility of the vessel owner once the stevedoring process has begun. The court clearly held that the vessel does not have the duty to inspect or supervise the operation. As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. *Id.* at 1623. Contract provisions, positive law or custom can create a general duty to supervise or inspect once the stevedore's cargo operations begin. *Id.* at 1624. When the vessel owner for whatever reason, becomes aware of a dangerous condition that has developed in the cargo operations and in the stevedore, in the exercise of obvious improvident judgment, is continuing to use malfunctioning gear that presents an unreasonable risk of harm to the longshoremen, then the vessel owner has a duty to intervene and stop the stevedoring operation until the defective gear is repaired.

The Supreme Court was clear in setting forth the shipowner's duties regarding its equipment prior to and at the start of the stevedoring operations. The vessel owner at least has a duty to exercise ordinary care to have the ship and its equipment in such a condition that an experienced stevedore will be able to carry out cargo operations with reasonable safety. The vessel owner also has a duty to warn the longshoremen of any hazards known to the vessel owner, or which should be known to the vessel owner where the hazards are likely to be encountered by the stevedore, or are not known by the stevedore and will not be obvious to or anticipated by the stevedore if reasonably competent.

Pursuant to 33 U.S.C. 5933, an injured longshoreman can also bring a third party action against interests other than a shipowner. See: 33 U.S.C. 5933(a). Such an action may involve a products liability claim against a manufacturer (*Borel v. Fiberboard Paper Prods., Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869, 95 S.Ct. 127(1974); a products liability claim against a supplier (*Devlin v. Johnson-Mansville Corp.*, 495 A.2d 495 (N.J. Sup. 1985) or claims against a parent, subsidiary or affiliated company (*Handle v. PPG Industries*, 765 FRD 566 (E.D. Tx 1974).

### **(iii) Claimant's Expectations and the Initial Interview**

The initial intake visit with the claimant is also an important time to address case expectations. Counsel should discuss case value and how long the case will take to resolve.

#### **a. Average Weekly Wage and Claimant's Expectations**

If you have initially determined that the claimant has a low average weekly wage, the issue should be addressed at the commencement of the attorney-client relationship. A low average weekly wage will result in a correspondingly low weekly compensation rate and a relatively small recovery regardless of how devastating the injury. Accordingly, counsel should not postpone the average weekly wage discussion. Counsel should\_ have the claimant understand at the time of the initial interview that the LHWCA is a wage driven Act which provides recovery based on a claimant's average weekly wage.

#### **b. Section 8(f): A key factor in whether claimant's case will be settled**

Claimant's counsel should do a thorough 8(f) inquiry at the time of the initial intake even though the issue is viewed as solely a defense issue. While claimant's counsel will not address Section 8(f) on the merits at trial, the issue directly impacts a claimant's ability to settle a case for a lump sum. An inadequate lump sum settlement offer can be anticipated in a case where the carrier believes that it can meet the following three-prong test for Section 8(f) relief:

1. At the time of the subsequent injury or death, the employee had a pre-existing permanent partial disability;
2. The pre-existing permanent partial disability contributed to the employee's injury or death; and
3. The pre-existing permanent partial disability was manifest to the employer.

See, *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5<sup>th</sup>Cir. 1977); *Phillips v. Marine Concrete Structures*, 17 BRBS 193 (ALJ) 1985. In a case where Section 8(f) relief seems likely, the carrier's settlement offer is generally reduced. The carrier has an expectation that the federal government will issue checks to claimant from the special fund once two years have passed from the date of claimant's maximum medical improvement. Accordingly, a claimant with pre-existing impairment should be advised that it may be necessary to take the case to formal hearing and to receive weekly benefits for life in lieu of an inadequate lump sum settlement offer. Plainly, the Section 8(f) issue is central to a discussion of case expectations.

#### **c. Justice delayed is justice under the Longshore & Harbor Workers' Compensation Act**

Claimant's counsel needs to point out that formal adjudication of a claim takes a long time. Counsel should explain the stages of dispute resolution to the claimant as shown in the

aforementioned "Timetable" chart. Special attention should be paid to the time frame between referral of the matter to the Office of Administrative Law Judges and the issuance of a decision and order by the ALJ. It may take eighteen months from the informal conference request to the issuance of a decision and order. If that is explained to the claimant at the onset, claimant frustration can be lessened.

## **B. Requesting and Attending an informal Conference**

While the LHWCA is in the first instance a self-administered Act, controversies over the payment of compensation and medical benefits are common. When they cannot be resolved informally with the employer or carrier, counsel should send correspondence to the U.S. Department of Labor requesting an informal conference. Counsel should detail the specific issues to be discussed and the source of disagreement with the carrier. An undocumented request for an informal conference may be met with rejection. If that happens, the informal conference may be delayed by several weeks. Appendix Form E sets forth a sample informal conference request directed by claimant's counsel to the U.S. Department of Labor.

In the Eighth Compensation District informal conferences are usually held on Tuesdays. As a general rule, the U.S. Department of Labor provides ten (10) days prior notice to all parties. The claimant should attend the conference. The hearing may be passed by the claims examiner if the injured worker is not present.

Counsel should carefully check the informal conference notice to see the issues to be discussed. (Appendix Form F). This is especially important for defense counsel or for claims adjusters. The failure to present a properly documented 8(f) petition at the first conference where permanency is listed as an issue may result in the raising of the absolute defense as a bar to Section 8(f) relief. See: 33 U.S.C. 908(F)(3); 20 C.F.R. §702.321(b); *Cajun Tubing Testors, Inc. v. Hargrave*, 25 BRBS 109 (5th Cir. 1992); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56 (1st Cir. 1991). If Section 8(f) is barred because of untimeliness, relief will be unavailable no matter how meritorious the issue appears at formal hearing. Once Section 8(f) relief is barred due to untimeliness, the employer and carrier's settlement leverage is reduced.

Claimant's counsel should meet with the claimant before the informal conference and explain what will take place. Counsel should discuss the desired result of the conference with the claimant. Generally, claimant's counsel requests an informal conference to resolve a medical or compensation dispute. Counsel may also seek to have continuing compensation, such as voluntarily paid permanent partial disability payments, reduced to a formal running award. In such an instance, counsel is essentially requesting a conference in order to settle the case.

Claimant's counsel should present documentation at the informal conference for the issues set forth in the hearing request. Updated medical reports and earnings records are the most common items presented at the hearing. Claimant's counsel should address the specific relief requested and why the examiner should issue a favorable recommendation. Claimant's counsel should be cooperative but careful at an informal conference. Even though the proceeding is informal, a record is not made and the hearing examiner's recommendation is not entitled to deference by the administrative law judge, the proceeding should not be taken lightly. The entire direction of a case can change in an unexpected manner at an informal conference. Accordingly, counsel should exercise caution and remain flexible. The claimant should sit quietly at the conference and say as little as possible. This is not a time for the claimant to vent frustration. Nor is it a time for the defense to depose the claimant.

Claimant's counsel should also bring a completed LS-18 and cover letter to the informal conference for filing with the U.S. Department of Labor. In the event that the conference issues cannot be resolved, the next step will be the release of form LS-18 by the claims examiner. The form is usually due within twenty (20) days from the release date. However, if you feel going into

a conference that the issues are not going to be resolved informally, then bring a completed LS-18 to the conference. (See Appendix Form H). Once form LS-18 is filed, the case will be referred to the Office of Administrative Law Judges for a formal hearing. The filing of form LS-18 is an important step in trying your case. If the form is not filed, the case will not be set for a trial date. The file will sit in the Deputy Director's office and nothing will happen.

When the employer and carrier file for Section 8(f) relief, the referral of claimant's case to the Office of Administrative Law Judges for a trial may be delayed for a prolonged period. This should be explained to the claimant. Also, claimant's counsel should encourage the prompt referral of the case regardless of the merits of the 8(f) petition.

### **C. Post Referral Activity: Office of Administrative Law Judges Level Forms**

The filing of form LS-18 with a cover letter requesting referral to the Office of Administrative Law Judges for a formal hearing signals an intention to try claimant's case. Claimant's counsel should treat the LS-18 as the equivalent of a federal court pretrial order which needs to be completed and updated prior to trial. Witnesses and exhibits should be included in an amended form LS-18 as the case develops. The amended form should be filed with the Administrative Law Judge prior to trial. The failure to update an LS-18 may result in an inability to present evidence before the ALJ. Accordingly, counsel should remember to file an amended LS-18 prior to trial in order to provide opposing counsel fair notice of trial witnesses and exhibits.

Once the case has been referred to the Office of Administrative Law Judges, counsel should proceed methodically through the OALJ form section found below.

#### **i. Letter to the District Director Requesting Certified Copies of Department of Labor ("VOL") Documents on File**

Claimant's standardized approach should include a letter to the District Director requesting certified copies of DOL documents on file. (See Appendix Form I). This will provide claimant with the following LS forms: 201, 202, 203, 206, 207 and 208. These should be marked as trial exhibits and offered at the formal hearing. Generally, the DOL paperwork will be offered as a joint exhibit. Do not offer or allow the claims examiner's recommendation of informal conference to be admitted into the record at the formal hearing since the administrative law judge conducts a de novo proceeding. 33 U.S.C. §919(e).

#### **ii. Interrogatories and Requests for Production**

Claimant's counsel should use interrogatories and requests for production as discovery devices. See: 20 C.F.R. 702.341, 29 C.F.R. 18.18. Discovery in an LHWCA case serves the same function as in any other type of civil case. In an LHWCA case Claimant's counsel needs to make sure that certain items are discovered prior to a formal hearing. Counsel needs to obtain copies of all medical reports, pre-injury wage information, vocational rehabilitation reports, labor market surveys and surveillance tapes. Furthermore, counsel needs to discover each and every witness who will or may testify at the formal hearing along with defendant's trial exhibits. (See Appendix Form J).

Claimant's counsel should ensure that the defense case at formal hearing does not consist of undisclosed "rebuttal witnesses", undisclosed surveillance videotapes of claimant and an eleventh hour labor market survey by defendant's choice of vocational rehabilitation expert.

Claimant's counsel should not permit defense counsel to list "rebuttal witnesses" as a catchall category on an LS-18 or in discovery answers. The phrase "rebuttal witnesses" is broad enough to include any witness that the defense elects to call to challenge claimant's allegations of physical

restriction and loss of capacity. Proper discovery and motion practice can avoid the surprise created by undisclosed "rebuttal witnesses" at trial.

In addition to requests for production, claimant's counsel should consider filing a pre-trial disclosure motion based upon the reasoning contained in *Chiasson v. Zapata Gulf Marine Corporation* 988 F.2d 513 (5th Cir. 1993) reh'g en Banc, denied, 1993 U.S. App. Lexis 23968 (5th Cir. Sept. 17, 1993), to discover surveillance tapes. Counsel should obtain the complete unedited tapes of claimant's activity prior to trial in order to objectively assess trial and settlement options.

An eleventh hour labor market survey describes the problem created when a defense vocational rehabilitation expert presents a new and improved labor market survey on the eve of formal hearing. As a rule, such surveys boost claimant's alleged post-injury wage earning capacity to a higher level than previously disclosed. An eleventh hour labor market survey by a defense vocational expert may be cured by an eleventh hour deposition. Counsel may also entertain a motion to strike or limit the testimony of the witness proffering such a last minute labor market survey.

### **iii. Corporate Representative Depositions - Subpoena Duces Tecum**

A corporate representative deposition accompanied by a subpoena duces tecum is a helpful tool in proving claimant's case. (See Appendix Form K). The corporate representative deposition can discover payments made to claimant during the pendency of the case, refusal to pay for medical services pursuant to Section 7 of the Act, the medical basis for the termination or reduction of compensation, claimant's job description at the time of injury and claimant's proper average weekly wage. Also, claimant's counsel can use the deposition to narrow issues. Claimant's counsel will find it helpful to take a copy of the sample stipulation sheet and use it as a corporate representative deposition checklist. (See Appendix Form O).

### **iv. Medical Depositions**

Most LHWCA cases involve deposition testimony from treating or examining physicians. Claimant's counsel should have a basic understanding of the medical and vocational source material contained in Section II of this article prior to taking a medical deposition in an LHWCA case. Particular attention should be paid to the AMA Guides. Claimant's counsel should consider taking the Guides to all medical depositions. Counsel should also consider using illustrations as exhibits if they will prove helpful. Finally, form OWCP-5 is helpful if counsel needs to prove up a claimant's physical limitations. A sample medical deposition outline is found in Appendix Form L.

### **v. Notice of Hearing and Pre-Hearing Order**

The Notice of Hearing and Pre-Hearing Order is sent to counsel several months prior to the formal hearing date. The calendar notice sets forth cases in a trailing docket with a date the cases will be called for trial. The calendar notice does not contain preferential settings or specific trial times. Therefore, counsel should be prepared to try claimant's case at docket call.

A pre-hearing order usually accompanies the calendar notice. The pre-hearing order may address the following trial requirements:

- 1) Discovery completion dates,
- 2) Stipulation forms,
- 3) Pre-hearing statement,
- 4) Exhibit exchange and format, and
- 5) Exhibit lists (See Appendix Form M)

Counsel should adhere to the requirements of the pre-hearing order. Failure to comply with the pre-hearing order may result in the exclusion of exhibits or witnesses.

**vi. Flow Chart of Cases**

A flow chart is helpful in keeping track of the progress of each case counsel has set for a formal hearing. Cases should be added to the flow chart upon receipt of the Notice of Calendar Call and Pre-Hearing Order. The flow chart lets counsel view at a glance the progress of discovery, depositions and the deadlines set forth in the ALJ's Notice of Calendar Call and Pre-Hearing Notice. The flow chart is especially useful when counsel has numerous formal hearings set on different dockets. (See Appendix Form N)

**vii. Stipulations**

A stipulation form usually accompanies the Notice of Calendar Call and Pre-Hearing Order. (See Appendix Form O). Stipulations assist in narrowing the issues to be tried at formal hearing. Counsel should not wait until the case is called to trial to discuss stipulations. They should be entered into in advance of the formal hearing. If no stipulation form is sent by the ALJ who will be trying the case, counsel should voluntarily agree to use Appendix Form O in order to streamline the trial of the case.

**viii. Claimant's Witness and Exhibit Lists**

The ALJ's Pre-Hearing Order may require counsel to prepare and exchange witness and exhibit lists prior to trial. Failure to comply with this pre-trial requirement may result in the exclusion of evidence. Accordingly, counsel should make every effort to notify opposing counsel of witnesses and exhibits prior to trial. Sample witness and exhibit lists are found in Appendix Forms P & Q.

**ix. Post-Hearing Brief**

At the close of the formal hearing the Administrative Law Judge will generally ask counsel if they choose to make a closing statement. Counsel should decline the opportunity to close. A closing statement only repeats the opening which was made several hours earlier. Instead, counsel should request the opportunity to file simultaneous post-hearing briefs within thirty (30) days from the receipt of the formal hearing transcript. That will allow counsel the opportunity to present a concise case analysis to the court.

Counsel must remember that the Administrative Law Judge deciding the case has a heavy workload. A written decision and order may not be forthcoming for nine (9) months or more after the formal hearing. Consequently, a well written post-hearing brief assists the judge in conducting a complete review of the facts as well as the applicable law at a later date when the decision is written. The post-hearing brief should be written in a direct manner using a standard format. The post-hearing brief is generally a combination of a brief-in-chief and a reply brief. Appendix Form R contains a sample post-hearing brief.

**CONCLUSION**

A standardized approach to handling Longshore & Harbor Workers' Compensation Act claims combines resource materials with a series of basic forms. Counsel should initially assemble and carefully review the source materials set forth in Section II, Sources a-i in order to understand how the LHWCA works. Thereafter, counsel should fashion a uniform system for handling claims. The system should integrate a series of sample letters and forms such as found in Appendix Forms A-P. Once the system has been implemented, claims can be handled in a more productive manner.