



Fisheries Observers Insurance, Liability and Labor Workshop

Technical Memorandum

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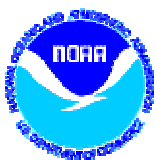


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To all other participants, fishery management counsel representatives, fishing industry associations, conservation organizations, and individuals concerned about the safety of the those that provide fishery management with invaluable data for the management and sustainability of our marine resources, we gratefully thank you

Executive Summary

The objectives of the National Observer Program’s Fisheries Observers Insurance, Liability and Labor Workshop were to:

- Review differences in existing fisheries observer contracts and insurance requirements;
- Provide a clarification of labor laws for observer managers and providers;
- Discuss different options that may exist to improve insurance coverage for observers; and
- Examine options for providing better consistency in contracts and insurance requirements in all regions.

The workshop brought together observer program managers and contracting specialists from each NOAA Fisheries region, representatives from regional Fishery Management Councils, fisheries observers, and observer service providers with agents, brokers, and consultants from the maritime insurance industry and worker’s compensation specialists. Presenters defined insurance terms, clarified the roles and responsibilities of various players involved in handling claims, discussed the different types of coverage that are provided by various insurance policies, and the benefits of a risk management approach to insurance and liability. Participants also discussed what types of benefits and compensation might be awarded to an injured observer under various policies and different types of coverage that may overlap.

Additionally, there was a presentation and discussion of the changes that were brought about by an amendment to the

Magnuson-Stevens Fishery Conservation and Management Act (MSA) in 1996 that resulted in all contracted observers being considered “federal employees” for the purpose of benefits and compensation under the Federal Employee Compensation Act (FECA, 5 U.S.C. 8101 et seq.).

The history, intent, significance of maritime and labor laws, and relevant case law were discussed by legal specialists. Predominantly, discussion circulated around the definition of a “seaman” under the Jones Act, whether or not this term applies to fisheries observers, and its appropriateness for observer needs. Although observers have filed claims for compensation as seamen under the Jones Act, case law has not been unanimous in its recognition of observers as “seamen” as defined by the Act. Additionally, the need for injured observers to bring a legal suit to provide for appropriate remedy and compensation is cumbersome, involves a lengthy timeframe, and will not necessarily conclude with satisfactory or positive results for the observer.

There was general consensus that the goal of insurance coverage should be to meet the desired remedy for an injured observer in a manner that is efficient, quick, and provides adequate compensation, no matter where the observer is working or what specific task they are doing. It appears that a good model for such coverage is that provided for by the Defense Base Act, which extends U.S. Longshore and Harbor

Worker's Compensation (USL&H) to military personnel and contract workers around the world. The Defense Base Act provides exclusive remedy for insured individuals, and additionally, does not require an injured individual to prove negligence or liability.

The USL&H was considered to provide the best benefits for an injured employee. Its compensation schedule is better than most state Worker's Compensation schedules and is more straightforward. It does not allow for a lawsuit against the employer, but still provides the ability to sue a vessel, platform, or other entity due to negligence.

Two presentations by former observers outlined problems and obstacles inherent in the current system that can result in an observer's quality of life being severely diminished as the result of a career-ending injury. The first observer was under contract with an observer service provider when injured. Claims for medical expenses and disability coverage have yet to be fully paid, although the observer has been seeking remedy through several avenues. In part, these problems are due to ambiguities as to what method of compensation is most appropriate for contracted fisheries observers. A second observer was a federally employed observer who was injured and sought compensation under FECA. The observer found that the basis for compensation under FECA was inadequate because it did not take into account the actual salaries paid to observers, which rely heavily on overtime pay as part of their wages.

In addition to coverage for observers, there was considerable discussion about the liability of observed vessels and insurance options. Insured fishing vessel owners often do not want the added risk of having an observer aboard, or the hassle of having to obtain endorsements on their insurance policy to cover observers (even if a government agency or service provider pays for this added expense). Further discussion arose as to how to handle cases where vessels operating in particular fisheries do not carry any liability insurance at all. Uninsured fishing vessel owners do not have the option of securing endorsements to protect themselves in the event an injured observer sues them for damages.

Hold harmless agreements attempt to shift risk to another party, but may not be adequate if poorly written, possibly resulting in the agreement being rendered useless legally. Another option may be the use of an "alternate employer" designation by the observer service provider. Like a "borrowed servant" endorsement, an alternate employer designation could possibly extend the coverage of the observer service provider to the borrower or alternate employer (i.e., the vessel owner).

NOAA Fisheries will use the information collected during this workshop to develop a more consistent and efficient approach to ensuring that all parties are adequately covered in the event of an injury or accident.

1 Introductory Remarks

Dr. William T. Hogarth, Assistant Administrator, NOAA Fisheries

Dr. Hogarth welcomed the participants by stating that he and the Agency support observer programs 100 percent. This year (FY 2001), there was an additional \$6 million in the NOAA Fisheries budget to expand observer programs and ensure efficient operations. Currently, observer programs operate differently in each NOAA Fisheries region. Dr Hogarth would like to prevent situations that cause observers to believe that they can only obtain adequate compensation for injuries by bringing legal action against vessel owners. In the past, NOAA Fisheries may not have had the legal option of supporting injured contracted observers, however the Agency is seeking to

remedy this. Creative options are needed to manage the expense of providing adequate insurance, and the use of one or two primary insurance contractors may be an option worth investigating to help keep costs reasonable. Observers, vessel monitoring systems (VMS), and enforcement are all critical components of an effective fisheries management regime. Dr. Hogarth voiced the opinion that the government should provide for the total costs of observer programs rather than having fishermen in some regions pay for it themselves, and others not. He encouraged the participants to look at insurance issues very seriously and to explore all possible solutions to the problems currently faced by observers, the industry and the government.

2 Overview of NOAA Fisheries Observer Programs

Dennis Hansford, NOAA Fisheries, National Observer Program

*Office of Science and Technology
Silver Spring, MD*

Observing in the US began with foreign fishing in the 1970s and shifted to domestic coverage in the 1980s. Although NOAA Fisheries observer programs have developed independently in each region to meet regional needs, each has common issues.

Funding sources vary for each regional observer program. The fishing industry pays for observer coverage in the North Pacific groundfish fishery and in the Northeast scallop dredge fishery; federal funds are used to deploy observers elsewhere. The National Observer Program (NOP) is pursuing amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to provide the Agency with the authority to collect funds from outside sources for observer programs. Currently, that authority does not exist outside of the North Pacific.

Observer service providers (also referred to as observer contractors) hire and deploy fisheries observers in the majority of NOAA Fisheries observer programs. Over 500 observers are deployed in approximately 15 fisheries around the country. With the notable exception of high levels of coverage in the North Pacific, observer coverage is very low in most programs, although it varies between regions. Coverage levels and the

legislative authorities for each program are outlined in Table 1, NMFS Observer Programs operating in FY 2001 and previous years.

Observers programs provide for the collection of biological, environmental and socio-economic data for science, fisheries management, and compliance monitoring. Observer data also provides a means for verifying other independent sources of data such as logbooks and landing reports.

Although observers need to interact closely with a vessel's crew, they are instructed not to interfere with or direct fishing activities. Sometimes they are looked upon as 'fish cops,' but they are not trained for nor instructed to engage in any enforcement activities.

The NOP was established in 1999 in recognition of the need for a central body to address issues at a national level and to establish consistent policies and standards. NOP staff consults regularly with an Advisory Team that includes representation from each NOAA Fisheries region and each Headquarters Office.

For more information about the NOP:
Website: www.st.nmfs.gov/st1/nop
Email: st1nop@www.st.nmfs.gov
Phone: 301-713-2328

Table 1. NMFS Observer Programs operating in FY 2001 and previous years.

NMFS Site/ Contact	Fishery (ies)	Authority	Program duration	% coverage
AFSC/ Dan Ito	North Pacific and Bering Sea Groundfish, Trawl and Fixed Gear	M-SFCMA	1973 to present	100% vessels >125'; 30% vessels 60-124'; plants 30 or 100% based on mt processed/mo
AFSC and NWFSC/ Dan Ito and Teresa Turk	Offshore Pacific Whiting	M-SFCMA (voluntary)	1975 to present	100%
NWFSC/ Teresa Turk	Shoreside Landings of Pacific Whiting (Enhanced Data Collection Program)	voluntary	1997 to 1999	13% (1998)
AKR/ Amy Van Atten	Cook Inlet Salmon Set and Drift Gillnet	MMPA	1999 to present	target 2%
NEFSC/ Harold Foster	Atlantic Sea Scallop Dredge - Georges Bank (Closed Area II)	M-SFCMA	1999 -first year of special exemption	25% (1999)
NEFSC/ Harold Foster	New England and Mid-Atlantic Gillnet	MMPA, M-SFCMA	1990 to present	2-4% (1999)
NEFSC/ Harold Foster	Northwest Atlantic Sustainable Fisheries Support (longline, trawl, lobster and sea bass pot, scallop dredge)	M-SFCMA, MMPA	1989 to present	<1%
SEFSC/ Elizabeth Scott-Denton	Southeastern Shrimp Otter Trawl	voluntary	1991 to present	<<0.1%
SEFSC/ John Carlson	Southeast Atlantic Shark Drift Gillnet/ Strike Net	MMPA, M-SFCMA	1998 to present	target Nov-Mar 100% target, Apr-Nov <100%
SEFSC/ Dennis Lee	Pelagic Longline	M-SFCMA, MMPA, ATCA	1992 to present	2.5-5%
SWR/ Don Petersen	California/Oregon Drift Gillnet	MMPA	1990 to present	20% (2000)
SWR/ Don Petersen	Monterey Bay Halibut Set Gillnet	MMPA	1999 to 2000	30% (2000)
SWR/John Kelly	Hawaii Pelagic Longline	M-SFCMA	1994 to present	20% (2000)
SF/Karyl Brewster-Geisz	Directed Large Coastal Shark Fishery	M-SFCMA	1994 to present	4% (1998)

3 Review of Workshop Agenda and Objectives

**Dennis Hansford, NOAA Fisheries
National Observer Program**

*Office of Science and Technology
Silver Spring, MD*

The workshop objectives were to:

- Define labor and insurance terms and define the roles of insurance agent, underwriter, and claims handler;
- Discuss types of maritime insurance coverage available;
- Differentiate coverage needs for land-based versus at-sea protection;
- Discuss case law regarding seamen versus non-seamen status under the Jones Act;
- Discuss whether current compensation is sufficient for injured observers and observers that have sustained career-ending injuries; and
- Discuss the feasibility of extending Protection and Indemnity (P&I) insurance to uninsured vessels that carry observers

Participant bios, list of participants, and the agenda can be found in Appendices A, B, and C.

4 Panel Discussions

4.1 Defining insurance and labor terms, various types of liability and compensation coverage and the role of the agent, underwriter and claims adjuster as they relate to observers.

Vince Gullette, *American Equity Underwriters, Inc.*

*Assistant Vice President of West Coast Operations
Seattle, WA*

Insurance coverage for observers presents a quagmire of risk management considerations because of the nature and location of working environments in which they operate. Observers on vessels typically fall under their employer's Maritime Employers Liability (MEL) policy, whether or not they are entitled to benefits as a Jones Act seaman. Each task or work environment has its own characteristic hazards from a risk management perspective. There are inherently potentially dangerous circumstances associated with working on fishing vessels or offshore platforms, such as working in proximity to heavy machinery, near electrical equipment, or being at sea during severe weather conditions. On land, observers may work in fish plants and be exposed to chemicals or slippery surfaces. Observers may also travel in automobiles or be in an office after the completion of their voyage. Thus, insurance coverage for observers needs to take into account each of these

potential exposures or risks, in addition to standard business liabilities.

The focus of this presentation is a review of the various insurance terminologies that may apply to observers, as opposed to practical considerations of how insurance coverage is applied.

(Most of these terms were provided to workshop participants as background materials and so are included here in their entirety for reference.)

Standard liabilities include:

- Commercial General liability - protection for accidents occurring on or away from a company's premises; covers injury and property damages, and any injury or damages from goods/products made or sold by the insured.
- Automobile liability - generally covers any hired or non-owned automobiles, and covers accidents, bodily injury, and damage to property.
- Worker's Compensation - statutory compensation for work-related injuries, illness or death, regardless of blame. Workers' compensation came into existence in the early 1900s, and by the early 1920s, most states had enacted no-fault workers' compensation laws. Before this time, workers had to file suit against their employers or fellow workers for damages, and negligence had to be proved.

- Employers Liability - liability an employer may have for injuries, illness or death suffered by employees in the course of their employment.

Liability coverage unique to maritime industries include:

- Maritime Employers Liability (MEL) - liability coverage for masters or crew of any vessel for bodily injury due to disease or an accident. MEL is used to protect the employer from suits brought by employees. It is different than general liability coverage for which assigning fault does not matter.
- U.S Longshore and Harbor Worker's Compensation (USL&H) - provides compensation in the event an injury or death occurs upon navigable waters of the U.S. or on any adjoining pier, wharf, dry dock or other area used for loading, unloading, repairing, or building a vessel. Administered by the Department of Labor Office of Workers' Compensation Programs.
- The Merchant Marine Act (the Jones Act) - provides seamen with the same protection from employer negligence as Federal Employers Liability Act (FELA) provides railroad workers (33 U.S.C. 901 et seq.).
- Protection and Indemnity (P&I) - provides coverage for bodily injury and property damage to third parties arising out of the vessel's defined operations.
- Death on the High Seas Act allows the personal representative of a person whose death occurred on

the high seas to file suit for damages against the vessel, person, or corporation that would have been liable had death not occurred. (45 U.S.C. 761, See sec. 5.4)

- Outer Continental Shelf Lands Act- applies to workers working super-adjacent to the shelf where they are working on platforms that are actually physically attached to the seabed.

Other general liability coverage includes:

- Federal Employee's Compensation Act (FECA) – applies to federal employees who sustain work-related injury, disease or death, and provides benefits for medical care and wage loss replacement, as well as assistance in returning to work where necessary (5 U.S.C. 8101 et seq.). Administered by the Department of Labor Office of Workers' Compensation Programs.
- Federal Employers Liability Act (FELA) – provides that railroads engaged in interstate commerce are liable for injuries to their employees if they have been negligent (45 U.S.C. 51 et seq.). This Act is relevant because its provisions were extended to maritime workers under the Jones Act.
- Defense Base Act - extends USL&H coverage to military personnel and contractors around the world.
- Excess Liability - provides additional coverage beyond stated limits of other liability coverage

- Third Party Actions – action by which an injured individual can subrogate a negligence claim against their employer for one against a non-employer third party under general maritime tort law, i.e., an observer injured on a vessel can sue a non-employer (the vessel owner) for negligence.

"Worker's compensation policy surrounds a "no-fault" mentality- you pay the benefit up front without regard to who's at fault.....Maritime Employer's Liability can turn into an adversarial mentality, where you sue your employer for compensation." V. Gullette

Observers are probably one of the most complex insurance accounts that a broker or underwriter will work with, because of the diversity of exposures and the myriad of disciplines involved. Oftentimes, there is not a single source of available knowledge for providing insurance for observers.

If an accident or injury occurs, the remedies under General Maritime Law require vessels to provide the following for crewmembers:

- Transportation - compensation to get back to homeport or residence.
- Wages – lost earnings.
- Maintenance - daily living costs (i.e. room and board).
- Cure - medical expenses.

General Maritime Law has, within it causative action, a warranty that the vessel be seaworthy. Action can be taken against a vessel if it is determined to be unseaworthy. The Jones Act extends this coverage and allows the injured to sue for negligence.

The LHWCA, which provides for USL&H coverage, was created because states were without power to regulate maritime employment. Originally, the Act was based on location at the time of injury. For example, if employees were on land, they were covered by the State (through Workers Compensation); if on a vessel, Federal statutes (i.e., USL&H) prevailed. Which coverage was in force depended on where one was standing, otherwise known as *situs*, and coverage continually shifted. It was not until 1972 that an amendment extended USL&H coverage landward, thus *situs* now also includes locations on or adjacent to navigable waters. Under USL&H, there is also a need to meet certain criteria to determine status, such as the injured person must have been engaged in “furthering maritime commerce.”

In 1984, several categories of employees were excluded from the Act, including aquaculture workers and those engaged in exclusively clerical work. Therefore, because commercial fishing is considered aquaculture under the LHWCA (which it defines as the controlled harvesting of marine fish and shellfish), it was concluded that the majority of observers would probably not meet the criteria for longshore status. Observers working on beach dredges or offshore platforms would not be considered aquaculture and probably would be more likely to meet the

status criteria. However, to cover all possible exposures, contractors generally include USL&H as part of their insurance package for observers.

The Defense Base Act (DBA) provides exclusive remedy for injured workers. However, policies must have a DBA coverage endorsement to cover applicable DBA liabilities.

There are many nuances regarding compensation insurance. Worker's Compensation insurance is regulated by each individual state, and rates and benefits vary substantially between states. Generally, Worker's Compensation is administered under guidelines issued by the National Council of Compensation Insurance (NCCI), which compiles data and establishes rates. There are also independent rating bureaus in certain states.

Some states have monopolistic state funds, while others do not. Washington, for instance, does not address the maritime industry, which is specifically excluded. Thus, there is a problem when trying to package coverage for multiple states together in one policy.

The nature of the various coverage options also presents difficulties in trying to issue one policy to cover all situations. Although a standard workers' compensation policy provides only state workers' compensation coverage, it is a fairly straightforward process to include USL&H, DBA, and Outer Continental Shelf Lands Act (OCS) coverage via endorsements on the policy. Claims filed against these policies do not attempt to

establish negligence before benefits are paid (i.e., they are no-fault policies).

However, Maritime Employers Liability (MEL) coverage cannot be added as an endorsement on a workers' compensation policy. In addition, claims against MEL are filed under a more adversarial climate in that the injured employee sues the employer for benefits. For this reason, the claims process for workers compensation-type claims (State Workers' Compensation, USL&H, OCS, and DBA) does not overlap very well with claims made under MEL.

The underwriter's role in this process is to evaluate accounts for compliance with company selection guidelines. They use classification rates and underwriting tools to determine insurance costs and issue endorsed insurance policies. Examples of underwriting tools that may be used include experience rating (a pricing tool that adjusts a premium by comparing an individual employer's loss experience to the expected average results), retrospective rating plans (a tool that adjusts policy premiums based on actual loss experience for the policy), and actuarial models.

An underwriter would interact with an observer service provider, not an observer. Observers, when injured, would deal with a claims adjuster.

Jack Devnew, *Flagship Group Insurance Insurance Broker*
Norfolk, VA

The role of an agent or broker is to represent the insured, in this case, the

observer contractor. Agents represent their clients' interests in obtaining and negotiating coverage and they are the point of first contact in reporting and handling claims. Agents also feel an obligation to bring quality risks to underwriters; that is, to bring in companies that will likely have a low volume of claims. The reason for this is that a broker's income is derived from commissions paid by the insurance carrier, not directly from the premiums paid by the client.

A claims adjuster or handler is a third party that investigates the circumstances of injury, addresses liability issues, advises companies of potential exposure, sets reserves, and interfaces with attorneys, if they are involved.

Determining a rating basis is how the underwriter tries to quantify or identify exposure and what to charge for it. Typically, the costs are calculated from the projected payroll and the variety of job or risk classifications. The company may have an annual payroll audit to determine the actual payroll so that rates can be adjusted appropriately.

Jones Act coverage from the P&I standpoint is not usually based directly on payroll, but on types of exposure, such as time at sea, etc. Jones Act (MEL) and P&I coverage are essentially synonymous, except that P&I coverage is much broader. Typically a vessel owner purchases P&I based on potential for third party exposure such as ramming another vessel or fixed object, or death of a crewmember. An MEL policy is purely to provide compensation for maritime employees.

Flagship Group Insurance insures a number of Atlantic scallop and longline vessels that are required to carry observers. Generally the vessel owner obtains an endorsement from the underwriter on their policy, which treats the observer as a passenger (third party), and excludes the observer from working as crew. This protects the vessel owner, should an injured observer sue them. The charge is nominal (\$200-300/trip) and bills are sent to the observer contractor (who are reimbursed by the government).

Observer status under the various maritime laws is not well defined and therefore subject to interpretation according to prevailing case law. Because of these ambiguities, the application of the Jones Act varies greatly and seems only to be limited by the imagination of the plaintiff's attorneys.

Federal judges have been very liberal in how they apply seamen status in determining the applicability of Jones Act (see Section 5.5). If an injured individual were granted seaman status in a legal action, based on the observer's role as being critical to the vessel's mission, they would be entitled to maintenance (at an average of \$15/day based on the average maintenance cost while at sea), cure (medical expenses), and transportation (to return the individual to their home).

Howard Candage, H. E. Candage, Inc.
Marine Insurance Consultant
Portland, ME

The function of risk management, relative to insurance coverage, is the reduction or

the elimination of uncertainty. There is a lot of uncertainty about the work of observers, how they are treated, and the concomitant risks they face. Risk management is the identification of exposures to loss. In risk management, one needs to determine (1) what can be done to reduce or eliminate risk, (2) when can it be done, and (3) who is the advocate for the observer. Insurance is only one component of risk management. Risk management includes addressing exposure to loss both before an accident occurs (pre-loss) and after (post-loss).

Loss exposure

Loss exposure can be defined as engaging in an activity with the likelihood that a loss will occur, such as owning and operating a fishing vessel.

Pre-loss

The goal of a pre-loss assessment should be the prevention of the likelihood of a loss. When faced with potential exposure to loss, if the employer considers the risk exposure prior to a loss event, they can either take steps to avoid the risk, have someone else take the risk, or find another way to complete the work without the same risk of loss.

Employers retaining the risk can do so actively (**active retention**) or passively (**passive retention**). With active retention, employers assume risks knowingly. Passive retention is when an employer is unaware of a particular risk, such as an employer's lack of knowledge that the vessel has no insurance and an observer is placed on board.

One mechanism for transfer of risk is with insurance, which transfers the financial

consequences of loss to the insurer. Risk (i.e., liability) can also be transferred without insurance, such as through a contract between the government and an observer service provider. Risk transfer is only one way of managing risks. Exposure can also be reduced through loss control, safety, and prevention.

Post-loss

Although the pre-loss goal is not to incur a loss, it is impossible to completely avoid the potential for loss. Thus it is necessary to implement the best pre-loss solutions that are available. If a loss is sustained, the goal is to restore life and property to minimize the adverse effects of the loss. At this stage, one must determine:

- What is the risk philosophy,
- Who are the players,
- What mechanisms are in place to transfer risk, and
- What really happened, post-loss.

In NMFS' case, the risk philosophy is the relationship the government will have with contracted observers in the event of a loss. Will observers be treated like employees and full responsibility be taken in the event of a loss? Alternatively, will a mechanism be put in place to respond to a liability claim, where it is likely that observers will get compensated if it is the vessel's fault? Or will observers be left on their own to sue for damages? In post-loss, advocacy for the injured party is expensive and relief may not be available. The worst-case scenario is an injured observer who has no advocate and cannot get relief.

Both external and internal players are involved in any loss event. External players are those that deal with

distribution, or selling of insurance. They include the:

- Insurance agent (or broker) – identifies exposures in order to sell insurance to vessel owners or observer providers; represents the insured,
- Consultant or attorney - hired to act on one's behalf.

Internal players are those associated with the risk bearer, or the insurance company. These may be either company employees or consultants to the insurance company and include:

- Underwriter (may also be external) - protects and enhances the capital base of the insurance company,
- Claims adjuster - settles the claims under the terms of the insurance contract; determine coverage and how much will be paid,
- Marine surveyor - represents the risk bearer and investigates the loss
- Company attorney – handles the legal issues in connection with the claim.

Of all the participants listed, none actually represents the injured observer. Usually, pre-loss planning provides only for an advocate for the insured and the insurer, but not the injured party.

Distinction Between First Party and Third Party Insurance Contracts

General Liability policies are written to protect the procurer from the adverse consequences of loss. This type of policy is referred to as a third party contract because it relies on another party to compensate for damages. In contrast, a

first party contract is a contract procured by a party to assure a certain outcome in the event of an accident or other defined event. For observers, a first party contract is preferred because it provides direct compensation in the event of an accident, regardless of who was at fault. Examples of first party contracts are the *no fault* systems of State Worker's Compensation and USL&H policies.

Although the background materials noted that most vessels would take an observer if NOAA Fisheries would pay for the additional observer insurance costs borne by the vessel owner, it was noted that unless the insurance covers the observer as a first party claimant, negligence must be established for compensation to be provided.

Susette Barnhill, Department of Commerce
Workers' Compensation Operations Center
Washington, DC

With the changes brought about by the Sustainable Fisheries Act (SFA), which amended the MSA, all observers are now considered "federal employees" for the purposes of receiving benefits and compensation under FECA if they become injured. If the observer is in the direct employment of the federal government, the Department of Commerce handles his/her case. If the observer is employed by an observer service provider under contract to carry out the responsibilities of either the MSA or the Marine Mammal Protection Act (MMPA), the Special Claims Unit of the

Department of Labor handles his/her claim.

A handout entitled *Federal Workers' Compensation Terms and Unofficial Definitions* explained the following terms:

Federal Employee's Compensation Act (FECA) 5 U.S.C. 8101 et seq. - FECA is administered by the Office of Workers' Compensation Programs (OWCP) of the U.S. Department of Labor (DOL). It provides compensation and benefits to civilian employees and those designated as agents of the United States for disability due to personal injury sustained while in the performance of duty or an employment-related disease.

Traumatic Injury - An injury defined as a wound or other condition of the body caused by external force, including stress or strain. The injury must be identifiable by time and place of occurrence and member of the body affected. A specific event or incident, or series of events or incidents, must also cause the injury within a single day or work shift while in the performance of duty. For injuries resulting under these criteria, form CA-1 must be completed and submitted.

Occupational Disease - Defined as a condition produced in the work environment over a period longer than one workday or shift. It may result from systemic infections, repeated stress or strain, exposure to toxins, poisons, or fumes, or other continuing conditions of the work environment. Injuries resulting under these conditions must be documented and submitted on form CA-2

Claimant - A federal employee who sustains a work related injury/condition and who files a claim with DOL/OWCP.

Claims Examiner - An employee of DOL that adjudicates or handles the work related claims.

Burden of Proof - The employee's responsibility to establish the essential elements of the claim.

Causal Relationship - Establishing a connection between the injury and the condition found. This is based entirely on the medical evidence provided to the physician who examined and treated the employee.

Compensation - Compensation is payment for wage loss due to a work injury or occupational disease. Pay rate must be determined prior to compensation payment. Claims are determined on a case-by-case basis. For federal employees, if one has dependents, claimants receive 75% of their base pay; if there are no dependents, claimants receive 66 2/3 % of their base pay. In both cases, the compensation is tax-free. There was uncertainty over how observer benefits would be calculated.

Medical treatment - Medical services are authorized for treatment of any condition that is causally related to factors of federal employment. No limit is imposed on the amount of medical expenses or the length of time for which they are paid as long as the medical record establishes an ongoing relationship between the ongoing care and the condition accepted by DOL. Medical care

includes examination, treatment, and related services.

Rate of Pay – This is determined on a case-by-case basis using information provided by the employer.

Discussion and Questions and Answers (Q&A) session

Q: How is the seaworthiness of a vessel determined, and what happens with vessels that might not meet seaworthiness standards?

Insurance companies require that vessels pass a test to determine whether the vessel is 'fit' for its purpose. There are three implied warranties for insuring a vessel: 1) seaworthiness; 2) legality of voyage (no "drug running," "smuggling," or other illegal activity); and 3) no deviation from due course (a vessel should not deviate from the course required for it to perform its function). An insurance policy can be voided if any of these warranties are not met, such as if a vessel is deemed not seaworthy. Additionally, there is a difference between whether an owner knows that a vessel is unseaworthy, but knowingly puts it back to sea, as compared to a condition on a vessel that may make it unseaworthy, such as having fish on the deck which can result in someone slipping and falling.

Q: Who determines seaworthiness?

Seaworthiness is purely an admiralty issue, decided by a judge (or a jury). A maritime surveyor will generally not determine seaworthiness. A court determines seaworthiness at the time of a

trial. The case that established unseaworthiness as a cause of action for a seaman was *Mitchell vs. the Trawler, Racer* (1955). In the process of unloading fish, fish slime oozed out of a basket and froze on the deck, and Mitchell later slipped on this ice. Even though it was a transitory event, it was something the vessel owner knew about and should have prepared for. Even though Mitchell was aware of the ice on the frozen deck, the owner should have taken care to remove the hazard. The case went to the Supreme Court, and the owner of the trawler was found liable.

Any defect that the owner has a reasonable opportunity to discover and remedy, which has a causal relationship to a person's injury, is unseaworthiness *de Jure* (as a matter of law).

Q: Are observers deployed under the authority of the Marine Mammal Protection Act (MMPA) eligible for compensation under FECA?

All observers under contract to carry out the responsibilities of either the MSA or the MMPA, whether employed by an observer service provider directly contracted by NOAA Fisheries, or whether employed by an observer service provider contracted directly by the fishing industry, are considered federal employees for the purposes of compensation under FECA.

Q: Are observers working in Alaska covered by FECA and other insurance while in seaplanes or floatplanes while transiting to and from the work site?

There have been cases where fish spotters in the Atlantic have been eligible for

USL&H coverage, so it stands to reason that if observers must use planes as part of their work, they would be covered. However, in Alaska specifically, the state will most likely apply their State Worker's Compensation laws to any work performed while in Alaska, rather than directing workers to seek compensation elsewhere.

Q: Federal employees that are observers have been told that compensation pay under FECA would be derived from an employee's base pay, but would not include overtime. Why?

Overtime is not compensable under FECA. Compensation is based on the rate of pay at the time the injury occurred.

If the individual is a brand new observer, and there is no pay history, then the Department of Labor will request a pay history of a comparable employee to estimate an appropriate pay rate. Although night pay and hazardous duty pay (i.e. any premium pay) is considered when determining compensation under FECA, overtime is not. Administratively uncontrollable overtime (i.e. overtime that is essential for a job to be done) may be included, but this has not generally been applicable to work performed by observers, although responders were not sure why¹.

An injured observer is entitled to Continuation of Pay for up to 45 calendar days from the date of the injury, as long as the medical documentation supports that disability is due to the work injury.)

¹The law states that premium pay may be provided on an annual basis in addition to basic pay for administratively uncontrolled overtime (5 U.S.C. 5545(c)(2)).

Q: How are medical expenses handled?

Medical bills are paid per fee schedule. If the bill exceeds the fee schedule, the doctor's office or the hospital must write off the balance. The employee is not liable for the difference.

The injured individual has return rights (right to return to the same job), if they recover within one year from the date of the injury. If this is not available for some reason, or the injury causes the person to not be able to continue doing that job, a comparable job is supposed to be found.

It was noted that hazard and other premium pay was not included in FECA compensation provided to an injured federal observer from Hawaii. The compensation that was provided was based only on his base pay.

Q: What about COLA or cost of living adjustments?

COLA would be considered on a case-by-case basis by the Department of Labor².

Q: Can claimants receive benefits under both FECA and the Jones Act?

Generally one cannot receive FECA benefits and Jones Act benefits simultaneously. However, the benefits can run consecutively. If the injured opts for one benefit, and it ends or runs out, he/she can receive benefits from the second option, if any remain.

² The Department of Labor Circular CA-550 states that basic pay for determining compensation under FECA includes night differential, hazard, premium, holiday, and Sunday pay, but excludes locality pay (COLA) and overtime (5 U.S.C. 8114(e)).

Additionally, there is no obligation for a seaman to select remedy. In the Supreme Court case *Gazoni vs. South West Marine*, the seaman was not foreclosed from filing a Jones Act claim, even though he had settled under the USL&H policy. Election of one remedy does not foreclose an application for another remedy arising from another compensation, but the compensation of loss is offset, to account for the double indemnification.

Q: What about federal employees injured while working on fishing vessels?

If there were an injury involving negligence by the vessel owner, the Federal government could sue the vessel owner (as a third party claimant) to cover compensation and benefits of the injured observer. Additionally, federal employees can sue under the Jones Act.

The International Pacific Halibut Commission (IPHC) contracts 14 fishing vessels each year for research cruises. They had one instance where an employee did sue under the Jones Act. Since then, they require vessels to have an endorsement added to each vessel's P&I insurance. It is paid for by the IPHC (discussed in detail in Section 5.8). IPHC is an international quasi-governmental organization that is technically considered to be a foreign government.

Observer service providers could take the position that they will not put observers on a fishing vessel unless that vessel has P&I coverage. However, NOAA does not currently require this in their contracting documents or regulations.

Q: Under the 'Purchase of Services' arrangement used by NOAA observer program managers in the Southeast, would the individual be covered by FECA?

The contract should specify that the observer be considered a 'federal employee' for the purpose of compensation under FECA, in accordance with the MSA. They would then be covered at all times while working as an observer. They may also be covered while traveling to a vessel, if this was written into their contract.

There was mention that NOAA Fisheries requires all observer service providers who are contracted by the Agency to provide insurance. However, the point was raised that if this were true, why would the observers also need to be eligible for compensation under FECA? This situation appears to provide redundant coverage for observers. This redundancy may be the Agency's current attempt to manage risks associated with observers by overcompensating insurance coverage in the absence of clear guidance as to what is adequate coverage.

Currently, injured observers and their families are not fully or uniformly informed regarding how to seek appropriate compensation and benefits in the event of a loss, nor are some of the observer program managers. If a full pre-loss assessment were made, it would help to eliminate redundant coverage, and clarify for employers, observers and the government how injuries and losses should be handled. A pre-loss assessment should result in provisions being put in place to handle losses. Then an injured

observer or his/her family could be informed of these provisions, making them better able to deal with a loss.

The idea of amending the MSA to extend FECA benefits to contracted observers was intended to relieve industry of potential risks (see Section 5.4, for more discussion on legislative history). Unfortunately, at the time of the 1996 reauthorization of the MSA, the pros and cons of FECA coverage for observers were not fully considered, and subsequent analysis has found the language to be problematic.

There was further discussion about the need for a clearer interpretation regarding the FECA language in the MSA (¶ 403 (c) or 16 U.S.C.1881 (b)). The coverage appears more comprehensive than is being applied. However, the language is for observers “on a vessel” and does not take into account observers working in processing plants. This seems to have been done purposefully, as these observers are presumed to be covered by state Worker’s Compensation.

If the FECA language remains in the MSA, it could be supplemented with a *hold-harmless* agreement established with the vessel owner. However, in many instances, hold-harmless agreements do little to protect the vessel owner. Hold-harmless agreements usually do not insulate the third party from liability claims that may be asserted. Thus, the third party (in this case, the vessel owner) may still be at risk of having to defend themselves or subject to claims brought after the fact to recover the expenses of the suit (attorney’s fees, damages, civil or criminal fines or penalties, etc.). The only sure

way to avoid these risks is for the third party to be named on an insurance policy (a government policy, if one exists, or the observer service provider’s policy) so that the insurer has the obligation to indemnify and defend the third party against any claims.

Q: Is FECA “no fault” coverage and how many claims have contracted observers filed?

Yes, but it is up to the injured observer to file the claim and provide medical information. To date there has only been one FECA claim by a non-federal employee (see Panel 5.7).

Q: How far out to sea does State Worker’s Compensation cover?

State Worker’s Compensation follows the person, wherever they are. USL&H also provides worldwide coverage. Due to potential confusion and the desire to not leave any gaps in coverage, it has become customary to put all three insurance vehicles (MEL, USL&H, and State Worker’s Compensation) in place to make sure every potential incident is covered.

Q: There has been some mention of riders to be added to a vessel’s MEL to endorse the observer. How are rates for riders determined? Some have suggested it is only \$200-\$300. Is this true?

MEL is part of the P&I policy and P&I endorsements are generally based on a flat fee, but can change depending in part upon the length of a trip. Risk is considered very low for this additional P&I coverage, thus costs are not usually high. From the insurer’s perspective,

potential payout costs are usually limited to medical expenses. The endorsement excludes compensation to any crewmen on the vessel. However, in order for observers to complete their tasks, they sometimes find themselves having to assist fishermen with the fishing operation. If an injury occurred to an observer while they were taking part in the fishing operation, the policy would be nullified.

Furthermore, in many regions, vessels do not have P&I insurance. This is more common with small vessels, especially those operating in the Gulf of Mexico and Alaska.

Q: How does compensation under the Jones Act work?

Under the Jones Act, if a vessel is considered negligent, the injured seaman can sue for compensation. If awarded by the court, compensation may be provided beyond the ‘maintenance and cure’ typically provided by employers (or their insurers). Compensation is paid retroactively from the time of injury forward. In lieu of this compensation or until an award is made, maintenance is provided to cover food and other incidental expenses (typically at no more than a modest \$26/day, based on average maintenance costs while at sea). Wages are also paid, but only from the point of injury to home. Transportation costs are also limited to getting the injured individual home. Hence, Jones Act remedy is not all that attractive until a case gets to the litigation stage and only then if a jury agrees that the plaintiff deserves a lot more compensation.

4.2 Applicability of the Service Contract Act, Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act to observers as they pertain to pay for hours worked beyond 40 hours per week.

Supplemental meeting materials may be found In Appendix B, Appendix C, Appendix D, and Appendix E.

Tom Obert, *Department of Labor Wage and Hour Division Washington, D. C.*

In 1965, the Service Contract Act (SCA) was established to set standards for wage rates and to fill gaps that existed in government contracts. Because the principle cost in service contracts is wages of staff working on the contract, there was concern that competitive bidding and award of contracts to the lowest bidders would cause wage rates to decrease below acceptable levels. The SCA was intended to remedy this problem.

Observer programs generally contract for services through the use of service employees and are therefore subject to the SCA. Generally, only professional or administrative employees are exempt from the SCA. The definitions of professional and administrative employees are found in the Fair Labor Standards Act (FLSA) and are how FLSA links with the SCA. Exempt employees are those that are salaried, do not receive overtime pay, and are required to have at least a bachelor’s degree to conduct the specific work for which they are employed. Non-

exempt employees have hourly wage rates set, and are paid overtime for hours worked over a 40 hour workweek. The Act itself does not define who these employees are; these are defined in CFR 29 Part 541. The SCA also does not address overtime directly; this is covered by FLSA or by the Contract Work Hours and Safety Standards Act (CWHSSA).

"For the most part, observers are working in international waters, beyond the scope of the U.S. You're not going to have either SCA or FLSA coverage during that time at sea." T. Obert

Although the CWHSSA deals with overtime compensation, it is limited to laborers and mechanics and thus does not figure prominently in work performed by observers. In addition, it is unclear whether CWHSSA has the same geographical limits as FLSA, for example, if a vessel departed a port in US waters and steamed beyond US Territorial Waters, but returned within 40 hours, the vessel would be covered by FLSA, but it may not be covered under CWHSSA.

Observers are paid wages that are based on an hourly rate and are clearly service employees, thus, they are covered by the SCA. However, because the FLSA does not apply beyond the U.S. territorial waters (12 miles from shore), and some observers work beyond this point, there may be periods when observers are exempt from the SCA. Technically, observers (and their employers) are only subject to these laws for that portion of work performed inside territorial waters.

This makes the application of the requirement to pay overtime more confusing.

Mark Langstein, Department of Commerce, General Counsel
Contract Law Division
Washington, D.C.

As described by Mr. Obert, the Contract Work Hours and Safety Standards Act provides guidance for overtime compensation, but would generally not apply to observers because their tasks and functions are considered technical and scientific, not manual labor. However, observer programs would have to be assessed on an individual program by program basis to determine whether the Contract Work Hours and Safety Standards Act would apply in specific cases. Based on existing programs, it is likely that observers would be considered professional employees and not manual laborers and therefore the Act would not apply. For example, taking biological samples, other measurements, and maintaining records would not be considered manual labor, even if the work were physically demanding at times. Additionally, a minimum of a Bachelor's degree or other special training is usually required to be an observer.

Discussion and Q&A session

Q: What is the definition of salary?

Salary is basically a set amount employees receive regardless of the number of hours worked over a specified amount of time. The Department of labor (DOL) normally

issues wage determinations under the SCA. In a collective bargaining agreement, DOL is obligated to issue a wage rate and fringe benefits and a daily rate may be negotiated. However, it is not clear whether a daily rate constitutes a salary for the purposes of the FLSA.

It was the understanding of some panelists and participants that observers would not be exempt from the provisions of the SCA and FLSA. The CWHSSA provides the ability to apply liquidation standards, which allows the US Government to recover dollars if overtime was not properly paid to employees, but the SCA does not. Hours worked are defined in 29 CFR 785.6.

Q: What is the area covered by the Outer Continental Shelf Act as it relates to territorial waters and overtime?

With regard to distance from shore, the area covered by the Outer Continental Shelf Act was based on the distance and depths at which offshore drilling used to occur (out to 100 fathom contour, or a depth of approximately 600 feet). This is likely to be the same basis as for the SCA and FLSA as to why they do not cover employees outside of Territorial waters.

Q: If observers are considered biological technicians, what effects does the FLSA or CWHSSA have on them?

They would be non-exempt under the SCA, but then a determination remains regarding which overtime law applies, the FLSA or CWHSSA. The CWHSSA only applies to labourers and mechanics, whereas the FLSA applies to everyone else. If observers are paid hourly and considered non-exempt for purposes of

overtime laws, the FLSA or CWHSSA requires that they be paid time and one half for overtime. But confusion obviously exists, and the application of these standards is currently inconsistent. In the Southeast US, one NOAA Fisheries observer program considers observers exempt, and pays a daily rate or salary, not an hourly wage. Another NOAA Fisheries observer program does not consider observers exempt and pays an hourly wage plus overtime.

Q: How are “Agreements” viewed by DOL?

While the SCA deals only with contracts, for the purposes of this Act, all “agreements,” even those lacking a clear contract, are considered to have the “intent” of a contract, thus making the Act applicable.

Q: Who sets the wage determinations?

Although the Department of Labor issues wage rate determinations, NOAA Fisheries or their contractors provide the information used to make those determinations. Currently, NOAA Fisheries has seven wage rate determinations for fisheries observers operating in various parts of the country, each with a different wage rate.

Generally, federal observers have been hired at a rate equivalent to GS-5, Step 1. However, the current wage determination rate for some observers is more in line with a GS-3 rate. It was unclear to the observer program managers whether this determination was based on information provided to the Department of Labor by NOAA Fisheries, or from some other

source. However, anyone can request a review and re-consideration of a wage rate. If the practice of a federal direct hire for a GS-5 was to include hazardous pay, then this must be taken into account in the equivalent observer wage rate determinations issued by DOL.

Q: What is the penalty for an agency not going to the Department of Labor and asking for a wage determination?

There is no particular penalty, however, if it comes to the attention of the Department of Labor, then they send a letter to the agency to rectify the problem, retroactively. Employees do not have private right of action under the SCA. DOL has sole enforcement authority and is mandated by statute to act on the employees' behalf. Under the FLSA, an employee can sue their employer for inappropriate wages, but they cannot sue under the SCA. However, in the event of an injury, different laws and different rules apply.

Q: Are there processes set up for dealing with cumbersome circumstances, for instance, locality keeps changing or employees keep moving around?

If the nature of the job is such that employees work from different locales, the Department of Labor uses head-up points, which refers to where the trip began. Multiple landings do not negate the SCA requirements.

Q: What is the applicability of the SCA to observers in the North Pacific groundfish observer program, considering its unique service delivery model?

There have been two rulings (by different agencies) regarding the applicability of the SCA to observers employed by private companies supplying observers for the North Pacific Groundfish Observer Program (NPGOP). One, by NOAA Fisheries, determined that the SCA did apply. The other, by the Department of Labor, determined it did not apply.

In the NPGOP, even though there is not a direct contract between NOAA Fisheries and the private companies or service providers that employ the observers, NOAA Fisheries has presumed that the situation met the intent of an "agreement" between the two parties and therefore fell under SCA requirements. NOAA Fisheries has therefore been requiring the observer service providers to meet the requirements of the SCA. However, it was the position of the General Counsel of the Department of Labor that under the NPGOP there was not a contract, therefore the SCA was not applicable.

The Department of Labor has final authority on labor issues. These kinds of questions should go to Labor for the appropriate expertise.

If observer companies in the NPGOP are required to pay SCA wages, but do not, the Department of Labor could issue a three-year debarment. There is no avenue for early removal of this debarment period once it is in place. During an investigation, if a contract was found out to have a wage rate, a

determination would be made and the investigation would resume.

It was noted that, observers in the NPGOP worked outside of Territorial Waters most of the time, where the SCA or the FLSA does not appear to apply.

4.3 Differentiating between coverage needs for land-based and sea-based protection for observers

Tim McHugh, *Looney & Grossman*
Attorney
Boston, MA

In the mid 1970s while working for the U.S. Coast Guard, Mr. McHugh was involved in the early implementation of the original Magnuson Act and had his first exposure to fisheries observers (aboard foreign vessels). He provided an analytical approach to differentiate between insurance coverage needs for all observers.

Insurance coverage should provide sufficient compensation so as not to diminish the quality of life for injured observers, whether they are government employees or contracted observers.

To ensure that all instances of potential injury (all types) are covered, one needs to consider where the work is occurring. For instance, observers work in three locations: on foreign and US fishing vessels (including on the high seas), on fixed and floating platforms, and in processing plants. If one considers there are two main types of observer employment: contract observers and

federal employees, there are six different scenarios or categories to consider. For each of these six categories, there are three types of risk: personal injury, death, or other torts (sexual harassment, isolation). A matrix of these potential locations and types of injury results in 18 different conditions or scenarios to resolve. Within each of these 18 scenarios, there are at least nine different ways to provide compensation. Without regard to the nature of the injury, the NOP should refine the 18 x 9 matrix of potential combinations of reimbursement down to one. This one remedy needs to include medical cover for cure, replacement of lost income, and future income stream to the extent that an observer is injured, or in the event that he/she is killed, to provide support for any beneficiaries or survivors. This will lower the level of uncertainty on a case-by-case basis.

Under the Jones Act and related litigation, there are three basic components that are covered: maintenance and cure, seaworthiness, and negligence. However, while there have been dramatically high settlements under the Jones Act, it actually gets used little to the maximum extent and successful cases are few and far between.

If someone is seeking a more immediate remedy, using USL&H is preferable. If an observer asserts a claim as a Jones Act claim, a jury hears the case. If it is a pure unseaworthiness claim, then a judge hears it. Either way, the remedy will not be immediate. In either case, the vessel's General Liability or P&I coverage will respond.

If an observer service provider, through a contract with the government, places an observer on a vessel, the observer should be covered under FECA. If there were some negligence on the part of the vessel, under FECA the government could seek redress from the vessel.

"The Jones Act gets used little to the maximum extent and successful cases are few and far between." T. McHugh

Don Wadhams, NOAA, Western Administrative Support Center
Contract Officer
Seattle, WA

Mr. Wadhams presented a contracting officer's perspective on observer insurance and land-based versus sea-based coverage. The main priorities are to:

- Keep insurance premiums as low as possible;
- Ensure that the insurance plans of observer service providers meet all state and federal statutory requirements to protect their employees; and
- Ensure that the liability insurance of observer service providers is adequate to keep them solvent in the event of a large award to an injured employee.

Mr. Wadhams considered three main 'players' involved in the issue of observer insurance: the government, observer service providers, and the insurance industry.

From the government side, the participants include the staff of the specific observer program office, National Observer Program staff, contracting staff, legal advisors, and other government experts. The overall goals of the government with respect to observer programs are to:

- Obtain reliable data;
- Spend tax dollars wisely; and
- Comply fully with Congressional mandates and statutes.

For the observer service providers there are management staff, legal advisors, and observers. Observer service providers are in business to make a profit, thus they sell services, work to protect the interests of their company and its employees, and must continue to satisfy their customers.

The insurance industry is represented by management staff, marketing and sales staff, brokers and legal staff. Insurance providers are also in business to make a profit through selling insurance. They do this by maximizing sales and minimizing costs, while they protect the interests of their company, and work to provide competitive services.

The acts that govern insurance coverage relevant to observers fall into two broad categories: status-based and location-based. The Jones Act and FECA govern status-based coverage, while the location based insurance coverage is governed by Longshore & Harbor Worker's Compensation Act (LHWCA) and state Worker's Compensation.

However, there is a varying degree of overlap between the coverage governed

by these various acts. The Jones Act and LHWCA are mutually exclusive. The LHWCA and state Worker's Compensation often overlaps at the shoreline but in some states are mutually exclusive. State Worker's Compensation and FECA are typically mutually exclusive, but with respect to observers, there is some uncertainty regarding this.

From the Contracting Officer's perspective, one has to consider the coverage needs of sea-based and land-based observers. Fisheries observers are considered sea-based employees, since more than 30% of their work occurs at sea. However, the courts have consistently found that observers are not seamen because they do not meet two parts of the court's three-pronged test:

- They do not "contribute to the function of the vessel," and
- They do not (usually) "have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."

Priority questions that still need to be clarified include:

- What are the inner and outer geographical limits of LHWCA?
- What are the outer geographical limits of state Worker's Compensation?
- Where are LHWCA and state Worker's Compensation coverage redundant?
- If observers are "deemed to be federal employees" for compensation under FECA, should

there be any coverage under LHWCA?

- How would the insurance company handle a Jones Act claim by an Observer?

Scott McCabe, *Mid Atlantic Consultants Insurance Broker*
Norfolk, VA

Service providers do not always consider insurance in cost proposals. In some cases, observer service providers may be unsure whether the insurance they have would actually provide necessary coverage in the event of a claim. There is often a need for a clearer definition of the goals of insurance coverage for land and sea based protection.

It was strongly recommended that the NOP promote a centralized program. Elements of the centralized program should include a single source of advice on risk, and the ability to pool observers and/or programs. If there is a large pool, consolidation is less expensive and more efficient as there are economies of scale. Additionally, it may also be possible to pool together health insurance and Worker's Compensation.

Vince Gullette, *American Equity Underwriters, Inc.*
Assistant Vice President of West Coast Operations
Seattle, WA

Mr. Gullette generally agreed that there may be advantages in integration, but a centralized program will not always be more efficient, or necessarily less expensive. He explained that due to the

complexities of the various observer programs, albeit might be difficult to find many carriers willing to integrate the P&I, MEL, USL&H coverage.

Due to large differences in opinion by region and program, it appears the different types of coverage are each needed. However, FECCA may be able to handle all the coverage needs. Thoughtful legislation would be needed to obtain the appropriate coverage that would be beneficial for the long run.

"There are other Federal related workers who are covered by LHWCA, who are not maritime at all, and each one of those groups has its own jurisdictional definition, so you don't have to worry about being on the vessel or on land " T Fitzhugh

Additionally, he believed that coverage governed by the LHWCA is status based, rather than location based, contrary to categorization proposed by Mr. Wadhams. Similar to the Jones Act, once a person obtains seaman status, he/she remains a seaman, no matter where he/she is located. Thus, LHWCA provides coverage regardless of location.

Discussion and Q&A session

Q: When would state Worker's Compensation come into play? Why would this supercede the LHWCA?

The Northwest Fishery Management Council mandated that in order to provide observer with the best protection, all the levels of coverage are required, even though the Council recognized that there

is overlap and redundancy. In the Northwest, the vast majority of claims go through the state Worker's Compensation system, although most of these claims are minor. However, NOAA Fisheries, and/or Fishery Management Council insurance requirements are not currently uniform around the country.

Q: Is there case law that clearly defines observers as seamen for purposes of Jones Act?

Observers have been considered seamen for certain maritime wage claims (see Section 5.4 and the Case Law attachment, in particular rulings by the 9th Circuit), although the courts may have been stretching the claim for this somewhat, with regard to special status. A potential ripple effect of this is that once the status of one category of employees changes, it potentially calls into question other categories, and/or requires that these categories change as well. For example, vessel pilots are not considered Jones Act seamen, nor are dredge operators. In *O'Boyle v. United States*, *O'Boyle* was determined to *not* be a seaman. This case is the most current precedent.

In addition, obtaining the status of seamen for fishery observers is not necessarily beneficial. There may be faster and better methods for an injured observer to obtain the appropriate compensations. It is also important to remember that the needs of observers are different than those of fishing vessel owners and observer service providers.

Q: Why is MEL required, if the observer would not be able to claim under it?

This is not clear, except that MEL provides liability protection for the observer service provider by providing protection from potential suits brought by employees, and possibly an additional option for observers to receive compensation. It mitigates the fact that in some courts observers have been considered to be seamen, while in others, they have not.

Q: Observers perform various tasks with varying levels of risks. How does this affect potential compensation?

MEL coverage can be expensive, thus payroll audits are conducted to resolve how many payroll hours are specifically attributed to specific tasks and time at sea.

If there are dramatic variations in the daily tasks or the type of work being conducted by observers, it is important to keep records of observers' payroll hours allocated to individual tasks. Different tasks carry different risks, and therefore have different insurance rates. Audits can help to keep insurance costs lower by accounting for hours spent working on administrative tasks on land (i.e. record keeping, debriefing, data entry in an office), since these are much less risky when compared to time at sea.

Q: What happens if an observer becomes sick while at sea?

If an observer on a vessel becomes sick, he or she is covered by Worker's Compensation. Employers must provide Worker's Compensation coverage. Worker's Compensation basically provides compensation to the injured

party, to discourage them from suing the employer for injury or illness.

Likewise, FECA covers injury and occupational illness and, by accepting 'remedy,' the observer also cannot directly sue the vessel owner.

Q: What can happen if an injury is caused by negligence?

Under FECCA guidelines, cases of negligence are adjudicated as a third party tort. In the event the claimant receives benefits from his private insurer prior to the adjudication, the insurance carrier can seek to recoup expenses from the wrongdoer. Such a claim would be settled by the insurance industry, without the need for the observer to be directly involved.

The Jones Act provides a means for taking action in a federal court of law. Sometimes, cases are settled without trial, but not always, and suits do not always end favorably for the injured party. If the goal is to restore the injured party to pre-accident status (make them 'whole'), the Jones Act is not the ideal remedy. Other remedies are quicker and more likely to result in a favorable outcome for the plaintiff.

Up to 1996, a plaintiff had to show negligence, however slight, in order to recover for personal injury. However, in a unanimous decision the 5th Circuit overturned itself *en banc* (meaning all of the judges participated in the hearing and

decision in the case³) in *Gautreaux v Scurlock Marine*. The decision was based on pure comparative fault. Today, in Jones Act cases, the jury is instructed to allocate a percentage of fault between the plaintiff and the defendant(s) and are no longer instructed that negligence, however slight, on the part of the shipowner, is sufficient to establish liability.

The "negligence, however slight" standard seemed to give juries the impression that any fault on the part of the ship owner would establish "sole" fault, and the plaintiff seaman would get all the damages he or she sought. The *Scurlock* decision was designed to clarify the instructions that are given to the jury with respect to the doctrine of pure comparative fault applicable in admiralty law.

Q: How are new observer programs handling insurance issues?

The Pacific States Marine Fisheries Commission's (PSMFC) new West Coast groundfish observer program was discussed. Since vessels are very small, NOAA Fisheries and the PSMFC did not want to burden vessel owners with extra insurance, but they set insurance coverage requirements for the observer service provider. However, the contract solicitation did not mention any requirement for the vessel owners to be indemnified as part of the observer service provider's requirements. It states that the

³ This is significant because (a) the 5th Circuit is the leading Circuit Court in the development of admiralty law, and (b) there are nearly 20 judges on the 5th Circuit Court of Appeals. Accordingly, the 5th Circuit decision carries a lot of weight with other circuits, and also in the Supreme Court.

PSMFC must be indemnified, but not the vessel owner. Thus an observer would still have a cause of action in *rem*, and could sue the vessel if an injury occurred.

4.4 Court decisions and current legal opinions on seamen vs. non-seamen status as it relates to observers

*Supplemental meeting
Materials May Be Found In
Appendix H, Appendix I,
Appendix J, and Appendix K.*

Bill Myhre, *Preston Gates Ellis & Rouvelas Meeds, LLP*
Attorney
Washington, DC

The question of whether or not observers should be considered seamen is relevant to the three historical seamen's remedies. In essence, the vessel owner is given the role of "parent" in protection of the "seaman."

The three historical remedies are:

- Maintenance and cure - every seaman is entitled to this and unearned wages if they are injured.
- Seaworthiness - vessel must be a reasonably fit place in which to work and live. This is true regardless of whether the vessel owner directly employs the seaman.
- Jones Act - covers injuries to seamen aboard vessels to fill a gap that existed under common law. It provides the same rights as afforded to railway

workers under other laws. It also provides the right to a jury trial.

There are three immediate standards that must be met for an individual to be regarded as a seaman:

- Whether the vessel is in navigation;
- Whether the client has a permanent connection to the vessel; and
- Whether the claimant is there to aid in the navigation of the vessel or accomplishment of the mission of the vessel.

Regarding the last of the three standards, if a vessel cannot operate without the observer on board, does that allow them to meet the final standard? In the O'Boyle case (1993), the observer was aboard a Japanese vessel. The court determined that neither the Jones Act nor FECA was available to the observer. There was an attempt to resolve this controversy during the 1996 reauthorization of the MSA through an amendment in the Sustainable Fisheries Act. As previously discussed, the amendment allows observers on vessels to be deemed a federal employee for the purposes of receiving benefits under FECA. This change solved one problem, but did not provide an exclusive remedy.

If an observer is not qualified as a seaman, then they may be qualified as a guest (See section 5.8)

Tim Conner, *Department of Commerce, General Counsel*

*General Litigation Division
Washington, D. C.*

A summary of the history of case law was provided in the handout titled "Case Law Regarding Seaman Status of Fisheries Observers." Case law decisions have come down on both sides of the seaman issue. There were two Key Bank cases in the 9th Circuit in 1992; the first decided that observers were not seamen, because independent scientific personnel did not perform crew functions or duties. Later that same year, a second ruling determined that they were seamen because the vessels were required by law to have an observer on board and could not legally complete their mission without them. It appears that the decision depended on which judge heard the case.

In *Arctic Alaska Fisheries Corp v. Feldman*, it was determined that the observer was not a seaman under the Jones Act, because the three standards were not met. In this case, the court cited 16 U.S.C. Sec. 1383a (e)(7), of the Marine Mammal Protection Act, which precludes personal injury suits by observers, therefore finding that the observer had not been engaged to perform duties in service to the vessel.

In the O'Boyle case, the observer was a contract employee working for Frank Orth & Associates on a Japanese driftnet boat. The case was dismissed in the District Court (S.D. FL). O'Boyle was simultaneously looking for remedies by both the Jones Act and FECA. In the 11th Circuit Court, the Judge felt strongly that

O'Boyle did not meet the seaman criteria; therefore the Judge determined no seaman status. This became a leading Circuit Court case, mainly in the Eastern District. After the O'Boyle case, court decisions have gone both ways with regard to seaman status. However, between 1993 and 2000 none of the Western District cases cited O'Boyle.

More recently there was a case by Alaska Observers in the Western District of WA for a maritime lien: Bank of America v. Pacific Lady. The Judge cited O'Boyle as precedent for the observer not being a seaman, and also cited that it was unlawful for observers to perform crewman duties, thus, how could they be considered seamen, for maritime liens?

A full review of case law up to the present does not appear to support observers being regarded as seamen.

John Cullather, U.S. House of Representatives

*Democratic Staff Director, Subcommittee on Coast Guard and Maritime Transportation
Washington, DC*

Mr. Cullather provided an historical perspective of the status of seamen, starting in 1789, and a review of Congress' role in admiralty law. From 1789 to the early 1900s, admiralty jurisdiction placed the responsibility for assessing liability with the courts, not Congress. Some unfavorable decisions by the courts then prompted Congress to intervene. In what became the Jones Act, Congress determined that a seaman could not sue his employer but could sue the

vessel owner. While the Jones Act attempted to resolve only a small issue, it raised a series of new problems with general maritime law. The courts have been trying to remedy these problems ever since. In addition, court actions have continued to evolve and conflicts are still being processed by court decisions.

Prior to the Death on High Seas Act, there was no remedy for death beyond three miles at sea. In the early 1900s, there was an effort to include longshore and dockworkers under state Worker's Compensation. The Supreme Court ruled against this, and considered these workers to be seamen. Congress then established a special act to address workers' compensation for these workers through the Longshore & Harbor Worker's Compensation Act (LHWCA).

Congressman Gerry Studds introduced a bill that addressed compensation for fishermen and fishing vessel safety. In 1987, longshoremen's insurance was no less expensive than Jones Act coverage, and this bill was trying to remedy this problem.

Prior to 1994, the Merchant Marine & Fisheries Committee (a committee with staff comprising experts in maritime and fisheries issues, which was dissolved in 1994) designed the remedy of putting observers under FECA rather than the LHWCA. In part, this was due to the fact that they did not deal with LHWCA, which was handled by the House Education Committee. Additionally, since USL&H insurance was very expensive, like MEL, they sought to avoid it.

However, no committee staff had really considered that observers are sometimes on the dock monitoring the unloading of fish. Staff had been considering the kind of insurance coverage necessary for observers working offshore on a fishing vessel. Thus, the amendment wording chose FECA as an exclusive remedy for Federal government and contracted observers. It was understood that this would be a tradeoff between a tort system (where one may or may not receive compensation, and that compensation is reduced by the attorney's fees) versus a system that would be guaranteed for handling injuries. For the employer, this represents a tradeoff between not having to worry about large claims, while probably having to pay for numerous smaller claims.

The Sustainable Fisheries Act (SFA) amendment may not address all O'Boyle-type cases. The amendment only covers observers pursuant to the MMPA and MSA, but not all NOAA regulations. Yet, the intent of Congress was to make sure all observers are protected.

Discussion and Q&A session

Q: Are observers covered by Worker's Compensation or FECA when they are working on shore?

The Senate Bill Report stated that it applies to observers while aboard vessels while performing their duties. Senate staff believed that State Workers' Compensation adequately covered observers while on land. However, the law applies to contract observers who are responsible for the monitoring

requirements under the MSA. This seems to imply that FECA would provide coverage while working on a dock or shore.

It was noted that the LHWCA operates much better than other laws in terms of delivering benefits. Another model to consider is the Defense Base Act (DBA). Under the DBA, the government ultimately pays the cost. The act provides exclusive remedy, and is a federal analogy of the LHWCA that works well. It was considered best to define the group that needs coverage, rather than where (*situs*) and/or when the coverage was needed. The DBA could be the best model and could incorporate the longshore benefit schedule as a procedure. An observer could file a claim, their status, employment, and other details with the Department of Labor, so that he/she would not have to prove any negligence or liability.

Q: Should observers receive benefits above and beyond what seamen get?

No, the intent is to ensure at least equal and guaranteed benefits. It was reasoned that there are sufficient programs already in existence to provide a vehicle for an optimum system for observer insurance coverage. Changes may encourage higher benefits for observers, but at higher costs. If a change in remedy were proposed, it would likely require some legal basis.

The majority of participants agreed that certainty in the delivery of compensation, as a remedy was preferable to having observers pursue compensation through a Jones Act suit.

Q: Does anyone think the Jones Act better serves observers?

Under the threat of a Jones Act suit, the employer and employee tend to conclude a claim without trial. Reaching an out-of-court settlement is the most preferable outcome for the employer, as it eliminates a much higher risk of losing a Jones Act suit with a large award.

Q: Is it better to define the observer job description, clearly and unequivocally, or not?

NOAA Fisheries has had difficulty in reaching a single definition of the observer role and resolving what observer's responsibilities are, in part because these continue to evolve. Another question is whether it is better to provide a job description, or instead, describe the purpose of the job. Additionally, even if the responsibilities or purpose are better defined, this does not necessarily resolve which Act or liability coverage individual observers would be best served by. Finally, there would still be the need for the determination to be authorized by Congress.

A resolution to these issues could become increasingly elusive as observer programs continue to evolve. Therefore, the Defense Bases Act or some similar act may provide a good model, since it serves as an exclusive remedy (for military and contract personnel) no matter where the injury occurred, or how it was caused.

A two-prong approach was suggested. The first part would involve a long-term approach, through legislation, that would

develop a broad definition and use the LHWCA as an exclusive remedy. Within this structure, there would need to be some protection for the vessel owner who has no control over which observer will be on board. The second part would involve a short-term remedy that utilizes private insurance placements.

Q: How easy would it be to get a Congressional 'fix?'

This should not be difficult if the solution were developed under an existing status, such as the LHWCA. However, if the solution required substantive changes to the LHWCA, then it would be more difficult. Any potential legislative language should be distributed as widely as possible, to ensure it covers all issues, and does not leave any issues unaddressed.

Providing adequate compensation to an injured employee is the primary concern. Secondary and tertiary issues that need to be addressed include whether vessels have to carry insurance (to provide third party coverage), and how the observers should be covered if they are working under a contracted services program. These additional issues do not necessarily concern how an observer is compensated, but do apply to the allocation of risk.

Q: Do observers get general medical (health) benefits?

Many observer service providers do not offer health insurance to their observers⁴.

⁴ In the North Pacific, observer service providers will provide a small reimbursement towards health insurance, if the observer demonstrates they are obtaining their own coverage.

If an emergency health issue arises, such as an observer having an appendicitis attack, it can be regarded as an illness that may be covered by USL&H. In this regard, it was noted that in Alaska, if an observer is inside seven miles from shore, he/she may chose between using a maritime claim or USL&H. If the observer is more than seven miles from shore, he/she may only file a maritime claim.

In Alaska, State Worker's Compensation appears to be quite good, and it usually provides for a quick remedy. But for the long term, it would still be preferable to have an exclusive remedy, thus eliminating the need to determine exactly where an injury occurred.

4.5 Seamen: How it applies to observers under various insurance laws

*Supplemental Meeting
Materials May Be
Found In Appendix F
and Appendix G.*

Howard Candage, H. E. Candage, Inc.
*Marine Insurance Consultant
Portland, ME*

Most vessels would willingly carry a fisheries observer if NOAA Fisheries would pay for the additional insurance coverage. Using a direct contract between the observer provider and the Agency was considered preferable over a third party contract. NOAA Fisheries would then be

the 'client,' and the Agency would know that coverage exists and would be afforded more control over the contract. An insurance certificate does not do much to protect the observer. Additionally, if the observer were to be considered as a member of the crew, a liability standard would exist, and negligence would have to be proven.

Under the LHWCA, there is a cap of \$966.23/ week for wages, which is adjusted annually. MEL coverage would likely be in place, and P&I would still cover liability. However, under LHWCA there is only one source of compensation to consider. The observers would have defined benefits, and those benefits would begin immediately, so long as status is clearly determined, and the injured party was clearly in service as an observer. This would eliminate a number of issues of concern that have been discussed during the workshop.

Other issues that would require consideration include shore-side damage, vessel damage, injury to other crew, contracts, and potential liability that gets passed on to others.

Potential shortcomings of using the LHWCA to provide an exclusive remedy for observers are:

- Using an attorney, as an advocate for the observer is expensive and takes time.
- There are limits to the insurance.
- It provides a per occurrence, not per person, coverage.
- It includes defense within limits (DWI). Payment to cover a defense is not a supplementary payment,

but is included in the award (for example, this is different than auto and homeowners policies). It can be tied into the compensation received, and thus can substantially reduce the amount of compensation the observer actually receives.

- Warranties expire or are breached (expressly or implied, such as through lack of sea-worthiness).
- It is an overburden to the cost of risk.
- Defense costs.
- A large portion of the money in the system ends up being used to make the system work rather than to compensate the injured (mostly occurs post loss).
- Limits pre-loss measures.
- There is no advocacy.
- Advocates are generally working for wrong person.
- The Worker's Compensation improvement gets distorted.

It was recommended that the Agency create a uniform first party system that is status based (does not matter what happened or where) and has a defined benefit as an exclusive remedy, such that risk is limited in the pre-loss sense. This type of system would help to predefine the outcome for the Agency and the observer, and would define a philosophy of observer treatment with respect to insurance coverage.

Scott McCabe, *Mid Atlantic Consultants Insurance Broker*
Norfolk, VA

An insurance broker is responsible to his client, which is usually an employer. The insurance contract is between the client and the carrier. The client is concerned with what he/she is purchasing, the price, if there is competition to make the price reasonable, and what combination of policies will achieve the maximum coverage for the least cost.

It is the job of the broker to protect the employer, yet also to provide benefits to the observer. Mechanisms exist for every goal and every client, thus it is a matter of determining the best model to protect the observer.

"...Creating and defining benefits for risk management strategies achieve a predefined outcome that embodies your philosophy of observer treatment." H. Candage

Mr. Fitzhugh agreed with Mr. Candage's statement that certificates of insurance are usually worthless, because they do not include any exclusion of special coverage. Additionally, it is inadvisable to rely on P&I insurance, because this only applies if a vessel owner is solvent. If the vessel owner becomes bankrupt, there would be no coverage or compensation.

In addition, if a vessel owner's policy payments are not current, there is a possibility the insurance company would deny benefits if a claim were made against that vessel owner. This would be an unsatisfactory way to try to protect observers and their families.

Finally, it is never wise to go to trial or have to rely upon a trial (as would be required to collect under Jones Act) as the only means of seeking compensation.

There are several ways to provide coverage; one of them would be to use the Defense Base Act (DBA). The DBA would provide observers around the clock coverage, USL&H benefits, and would cover them worldwide. In Texas, there is a tremendous amount of shipping, including both river and deep-water maritime commerce. There are a lot of Jones Act and LHWCA cases, and the 5th Circuit Court, has extensive experience with these types of cases.

Discussion and Q&A session

Q: How are the DBA and USL&H different?

They are the same; the DBA essentially extends the benefits of USL&H to another group of people, *i.e.*, military personnel. Some entity has to pay premiums for Worker's Compensation. In FECA it is a hidden cost; under the DBA, the government pays for USL&H, but as a reimbursement through the contract itself. Thus, the observer service provider would pay for the coverage, which would be reimbursed by the government through

the contract, as opposed to a vessel owner paying.

Q: If observers are covered under FECA, can contractors elect not to carry State Worker's Compensation?

Contractors are required by law to buy Worker's Compensation, irrespective of other insurance coverage. With Worker's Compensation, state and federal acts guarantee payment, and they are monitored and audited. The fact that contractors must provide Worker's Compensation does not mean that observers are covered as if they were crew; most state rules exclude seamen from coverage. States require State worker's Compensation for non-maritime workers but they do not require employers to provide maritime coverage.

If an employer does not have insurance, it does not remove their liability responsibility and they still must pay the employee for an injury. Fees are regulated under the LHWCA, and payment goes straight to the plaintiff. Under the Jones Act, payment of the settlement goes to the lawyers who take their fees off the top before the plaintiff receives their compensation.

Q: If coverage like the DBA was established would it be cheaper than current coverage?

It would be difficult to imagine it costing more than current coverage and in the long run it is likely to be less, because of more certainty of the risks to observers and reduction of litigation. It should speed the flow of benefits for injured observers. Coverage under the DBA is to

the mutual exclusion of any other compensation act. If you are covered under DBA, there will be no State Compensation Act or Jones Act, only Longshore type benefits regardless whether injury occurred on land or at sea. This is the nature of exclusivity coverage.

DBA compensation is based on an individual's wages. That is specified in the statute. It is two-thirds of the individual's average weekly wages, paid tax-free. This calculation is based on all earnings and includes overtime, hazardous pay, etc. The Worker's Compensation model also follows this type of structure.

Q: Are there other opinions regarding which of the existing insurance vehicles provide a good model for observer coverage?

According to Mr. McHugh, the Worker's Compensation model appears favorable to achieve the goal of providing adequate compensation to an injured observer. The important question to consider is how to provide adequate compensation expeditiously. Whatever the specific case may be, one should work to minimize the risk that an injured observer may not receive adequate compensation. A thorough review of case law and existing remedies will help to determine how to best achieve this goal.

Extension of the LHWCA to include observers appears to provide the most direct route for providing adequate compensation in an expeditious manner, barring any potential political problems that such a recommendation may elicit, and many participants believed that

USL&H provides the best benefits. It was noted that private fish spotters have already been provided coverage via the LHWCA. USL&H provides better coverage than most State Worker Compensation Acts and is less complicated.

Regarding exclusive remedy, longshoremen cannot sue their employers, but still have the ability to sue the owners of the vessel or platform, or another company, if one was negligent. This is standard tort law. Under the MMPA, NOAA Fisheries attempted to add a hold harmless clause, but it was determined this could not be done (see Section 5.8).

The Defense Base Act makes good model because one does not have to be concerned with individual state Worker's Compensation. USL&H replaces it. Medical lifetime benefits are also included. The potential of a large reward from suing under the Jones Act is replaced by the certainty of the benefits. However, the ability to sue the vessel owner (not the employer) is not removed.

Another vehicle that was suggested was the Oceanographic Research Vessel Act of 1965 (ORVA, Title 53). Under ORVA, members of a scientific party may not sue under the Jones Act, but courts have held that they may recover damages using the doctrine of unseaworthiness. In essence, ORVA limits and clarifies what statute prevails in case of injury.

Using a status-based test to determine the most appropriate insurance coverage vehicle was also suggested. All the potential observer programs should be considered, including at sea, on shore, in

the air, on platforms, voluntary, required, etc. Then an effort could be made to distill the information into a single status. Additionally, there is the need to determine the process for federal employees. Vessel size should not matter, since the focus should be on what the observer is doing, rather than where they are doing it.

Q: How can costs be controlled and yet still allow for improved or comprehensive insurance coverage?

One of the potential benefits of a national observer program is that many insurance companies could compete for the business. If NOAA Fisheries could choose one insurance company under, for example, a three year contract (or as a one year contract with two one-year options, as an example) overall costs should be more attractive. The program may be able to be self-funded, at some level, and NOAA Fisheries could require potential observer service providers to use this pre-selected insurance company.

Regarding costs to a contractor, this could be simplified if observer service providers were to obtain a composite rating, which could be determined by insurance underwriters. Additionally, there are economies of scale that should accrue to the purchasers of the insurance.

It is important to remember that an insurance company will charge premiums at the highest possible level, but will pay out at lowest possible level, even if it has to be determined which policy is actually going to pay.

4.6 Claims: How are they filed and what are the roles of the observer, government, observer service provider, and state in facilitating compensation

Tom Monti, *F. A. Richard & Associates Insurance Services, Inc.*
Claims Adjuster, FARA Nautilus Branch Metairie, LA

An observer, as the employee, should report a claim promptly to the employer, who will submit it to the insurance carrier, along with pay rate information. Once the process starts, there is usually an explanation of the benefits by the adjuster to the injured employee. An investigation begins, and witnesses or the employer are interviewed, to help determine which jurisdiction (specific insurance policy) will handle the benefits. Benefits should be paid promptly (under the Jones Act) particularly for maintenance and cure.

In some cases, the insurance carrier will coordinate with the employer to pay a supplemental wage. In addition to being appropriate and beneficial to the injured employee, this also helps to deter lawsuits. Thus, overall costs to the employer will usually be lower than those incurred through a lawsuit.

Then there is also a payment of benefits (medical or other) that usually is based on a review of actual bills. It is important for the insurance carrier to determine the medical situation early in the process, to try to prevent unnecessary surgery and similar issues.

Susette Barnhill, Department of Commerce
Worker's Compensation Operations Center
Washington, DC

Compensation for injured Department of Commerce (DOC) federal employees is handled directly by the DOC, which has sole authority (the current contact at DOC is Stephanie Stone, Special Unit Supervisor, 202-513-6800). Injuries to fishery observers who are not DOC employees are handled by the Department of Labor.

There are two types of injury, each with different benefits:

- Traumatic Injury - injury caused by a specific event or a series of events within a single day or work shift. This injury has continuation of pay for up to 45 calendar days.
- Occupational Disease - injury caused by systematic infections, repeated exposures to continuing conditions or the work environment. This injury has no continuation of pay benefit.

Medical evidence or documentation necessary for benefits include:

- History of the injury
- Diagnosis
- Statement which supports that the reported injury caused the employees condition
- Test results

Compensation that is received by an injured federal employee is 75% of base pay, tax-free (if the injured has

dependents). Pay rates are determined by past history of pay, and the injured cannot receive dual benefits simultaneously.

Jack Devnew, Flagship Group Insurance
Insurance Broker
Norfolk, VA

The insurance broker represents and is an advocate for the client, which in this case is the observer service provider. The first notice of loss should go to the agent, and the agent informs the insurer. The injury has to be known before relief can be sought. Adjusters therefore investigate the circumstances to understand the injury.

There is usually not a simple solution, and the interests of the different parties involved are rarely aligned. If a problem arises, the client (observer service provider) should hold the adjuster responsible to rectify it.

Regarding insurance coverage costs, it must be remembered that observers are working in a risk prone environment. Therefore the costs will likely be higher as compared to other occupations.

"It's up to the employer to behave in a prudent uninsured manner....what would you do if it were your money and not the insurance company's? You should do your best to mitigate the loss and get the person the proper attention in the shortest period of time."
T. Monti

Discussion and Q&A session

Q: Is there ever a question regarding the validity of claims?

Sometimes questions or issues need to be addressed and investigated. Frequently, a team of specialists handles and reviews the claim. Sometimes a check is hand delivered; to make sure claims are valid.

Q: What percentage of claims is fraudulent? Who investigates?

If there is evidence of fraud, an insurance company will usually hire a private or

Q: Where do supplemental wage come from?

Supplemental wages usually come from indemnity policies that employers carry. They often have liability limits, such as \$1 million. Sometimes the insurance broker will handle the claim immediately, or may encourage the employer to pay the supplemental wage, the cost of which is subsequently reimbursed from the appropriate insurance policy. Some companies may render their deductible immediately, however, the process is very subjective.

Q: Do insurance carriers or agents encourage employers to have employees take a medical physical before employment?

While it is up to the employer as to what conditions should be exerted on employees, requiring physicals can result in benefits to the employer. If an employer requires medical exams, conducts drug testing, supplemental

independent investigator to try to obtain evidence that will back up hearsay. This is useful in case a company needs to go to court, and an independent witness is needed. There was no information regarding the number of fraudulent claims, however, it is more likely for genuine claims to be inflated rather than being completely fabricated.

Q: Are physician follow-ups required?

Sometimes it is necessary to consult with several doctors, but usually the injured person can go to a doctor of their choice.

training, and/or requires other tests, then the insurance agent can usually obtain a better insurance rate for the employer.

One NOAA Fisheries observer program manager noted that to the best of his ability, he obtains a medical history on potential employees. This is useful, particularly if in the future they have to submit a claim to FECA.

Q: How long after an event can claims be filed?

A federal employee has three years to file a claim. If the three-year period has expired, the individual can still file a claim and medical costs can be awarded, but usually compensation is not. Therefore, NOAA Fisheries staff should have employees record injuries, document them and submit a claim, no matter how small it may seem. A special fund has been provided by Congress to cover FECA expenses for non-federal employees.

Private insurance companies usually employ a ‘gate-keeper’ to ensure individuals are not using more than one avenue to seek benefits. But there is no nexus between FECA and private insurance. There is no agency that monitors Jones Act settlements. Conversely, the LHWCA is handled and monitored by the Department of Labor.

Q: Is the \$1 million limit per occurrence on MEL, USL&H, or state Worker’s compensation adequate?

There is no liability limit on USL&H or Worker’s Compensation. There is no cap on injury compensation. If a case goes to court, a jury may award an amount above an employer’s insurance limit. For personal injury, \$1 million for insurance liability is usually recommended. Typically, \$1 million compensation should be enough for an observer. This limit has been appropriate for the New England area, and it is often a standard amount which banks require when financing a vessel in the that area⁵.

⁵ If an observer or a fisherman suffers an injury on a vessel, a lien is automatically sought against the vessel. The lien of the injured person resulting from his or her personal injury has priority over any bank mortgage, should the vessel have to be sold to satisfy the injury lien. As a result, if there were no insurance and the boat had to be sold to satisfy the personal injury claim, the bank could lose some or all of the value of its collateral. Therefore, banks require vessel owners to carry some amount of P&I insurance (\$1,000,000 is a standard amount in the Northeast) to cover the injury losses so as to avoid an injury impairing or diminishing the value of the bank’s mortgage lien.

4.7 Understanding what compensation means to injured observers and their quality of life

Eric Sandberg, NOAA Fisheries, Pacific Islands Area Office

*Computer Specialist, former Hawaii-based pelagic longline observer
Honolulu, HI*

Mr. Sandberg is a full time federal employee who, while employed as a Hawaii-based pelagic longline observer was injured and used the FECA process to seek compensation and benefits.

At the onset of the trip, it appeared that the captain did not have extensive experience. He was young and the entire crew was new. In the three years prior to Mr. Sandberg’s deployment, the vessel was involved in several incidents involving casualties, including a mayday call because pumps were not properly dewatering, and a mutiny.

While hauling gear about 800 miles north of Honolulu, the vessel encountered severe weather, with high winds, building seas, and a change in wind direction. Water was coming on board. Suddenly a rogue wave hit the vessel, and everyone except the captain was thrown overboard. Mr. Sandberg sustained severe injuries including a broken back and coccyx, punctured lung, and other puncture wounds.

Despite these injuries, he swam back to the vessel, and the captain was able to haul him on board. The other crewmen were also rescued, except for one who was lost at sea. The next day a freighter picked them up, and returned them to port. Mr. Sandberg was in the hospital for a considerable period.

Under FECA, he received 45 days of continuation of pay. However, a substantial portion of what observers get paid is not computed for FECA, most notably, overtime and hazardous pay. Mr. Sandberg decided to not go on disability, but to go back to work in some capacity because he learned that disability would only pay about \$1500 per month, much less than his average earnings. Other parts of FECA he has chosen to not participate in.

Mr. Sandberg's injuries have severely affected his personal and professional life. Due to the extent of his injuries, Mr. Sandberg can no longer work as a field biologist, nor participate in sports as he did previously. Additionally, the future is uncertain with regards to the level of salary he will be able to achieve. His current annual salary is approximately \$20,000 less than before he was injured.

John Varner, *Former North Pacific observer*

*Ellensburg, WA
(by conference call)*

Mr. Varner agreed to participate in this workshop to explain the problems that he, as an injured observer, has been facing. By participating, he hopes to prevent some of the aggravation he experienced

from happening to other injured observers. He believes he has received ill treatment from his employer and the insurance company due to a lack of information, and he has not received adequate assistance from any entity. If observer service providers and insurance companies provide good care to an injured observer from the onset, it would likely cost less money in the long run.

Without notice, the compensation Mr. Varner was receiving was changed to maritime pay, and again without notice, the maritime pay was cut off. Prior to injury, his average pay as an observer was \$4,950 a month. Subsequent to his accident, he was receiving only \$1,500 per month in compensation.

Mr. Varner was not provided information on how to proceed with obtaining compensation. Only by asking a lot of questions and spending a lot of time following up with different sources was he able to make progress. This causes undue stress to an injured observer and their family. His case was unnecessarily turned into a legal affair, due to a lack of apparent options and direct assistance. In his view, his employer should have been his advisor, not his adversary.

Kim Dietrich, *Association for Professional Observers*

Seattle, WA

The Association for Professional Observers (APO) is a grassroots, non-profit organization engaged in advocacy on behalf of professional observers. Insurance has not been a priority issue for the organization in the past, but the APO is

now seeking ways to expand their advocacy role to assist injured observers and provide observers more information about their rights. There appears to be a lack of consistency in the treatment of observers, as well as a need for improved, written procedures.

Without adequate information, observers do not know what choices are available, or what questions to ask. This lack of information is one area where NOAA Fisheries appears to be falling short in demonstrating their care for observers.

"The key to all of this is to provide sufficient compensation to injured observers so that their quality of life is not drastically diminished." T. McHugh

Discussion and Q&A session

Question for Eric Sandberg: Who provided advice to you?

Staff at the Department of Commerce Workers' Compensation Operations provided some assistance, and he received Worker's Compensation benefits (all his hospital bills were paid). However he never received pay compensation, because he did not choose to go on to disability, for reasons he previously stated.

Mr. Sandberg did not seek damages from the vessel because he knew it was not worth much, and under FECA, if he had sued, he would have had to repay the Department of Labor for the hospital bills that they paid before he directly received any money. His bills were well over

\$100,000, so he calculated that he would not personally have received very much.

Q: Did both injured observers return to work?

One of FECA's responsibilities is to get employees back to work. Mr. Sandberg returned to work two months after the accident, not because he had recovered, but primarily because he was out of sick leave time. He was still in great pain.

With regard to holding the fishing vessel responsible, that is, to recoup something from the vessel, the compensation would likely be less than the value of an average car.

John Varner was one of the observers that several years ago had to deal with his employer, Arctic Observers, going bankrupt. At that time, NOAA Fisheries was powerless. He subsequently got back to work and worked his way up to a senior position, prior to this accident. Subsequent to this accident, again, NMFS appears powerless. It is demoralizing to have to try to make do with food stamps. Additionally, he applied for social security disability, and was denied twice. Even though staff at the Department of Commerce Worker's Compensation Operations Center has tried to assist, the system appears to fall short of the real need of an observer when they are seriously injured.

Question to John Varner: Have you received your maximum medical benefit?

Mr. Varner had a surgical opinion scheduled shortly after this meeting. He had one surgery, which failed. Doctors

now want to perform another surgery, but it is unclear whether it will be approved by medical insurance.

Alaska National provides benefits under Worker's Compensation and the Jones Act. Mr. Varner was receiving Worker's Compensation, but benefits stopped, and he was not initially informed of the reason. When the amount of money that was allotted for his injury was fully used, Alaska National conducted a re-evaluation, and ceased further payments.

He is currently being treated as a maritime employee; medical wages are being paid, but he is not receiving an income.

Q: Can appeals be made to the Department of Labor?

Appeals can be made in the case of USL&H, but not under MEL. The example of Mr. Varner's situation demonstrates why observer programs would be better served by USL&H as a standardized insurance system.

If Mr. Varner pursued a claim under FECA while receiving state benefits, he could be considered fraudulent. The MEL / Jones Act remedy, which seeks courts to intervene, essentially puts an insurance company and employer into an adversarial position against the employee.

Additionally, the insurance company has no obligation to settle until the injured party reaches maximum medical cure, which prolongs the process.

Q: What information do the observer service providers (employers) provide to observers at time of hire?

It was noted that once a plaintiff attorney becomes involved, it places constraints on the insurance company and other parties involved with regard to providing information.

As demonstrated by John Varner's case, the employer has insurance to protect its interests, not necessarily those of the employees. Thus, the employer is not usually an advocate for the observer. However, most no fault systems or states have a legal group established to advocate on behalf of employees. Within the Department of Labor or similar agency, there should be an employee advocate.

Limited information is provided.

Observers are usually simply instructed to report an accident immediately. In the North Pacific, observer service providers do not provide health, life, or disability insurance. These companies have contracts directly with fishing vessels and not with NOAA Fisheries, thus are not required to meet the provisions of the Service Contract Act (SCA). These companies do provide observers a small reimbursement towards health insurance, if they demonstrate they are obtaining their own coverage. It usually does not completely cover the actual cost of the insurance.

Providing observers is the major part, if not all of the business of the companies in the North Pacific area. Another company operating outside of this region provides observer services as only a small part of their government contract business. Since they must meet the requirements of the SCA, employees that work as observers are provided the same benefits

as all other employees (they cannot be excluded).

Q: What is required by NOAA Fisheries with regard to health benefits?

Requirements are confusing and possibly not consistent with regard to the specification of required health benefits in NOAA Fisheries solicitations for observer programs. If a company wishes to provide comprehensive benefits, they are disadvantaged in the solicitation process, because their bids are often too high. Solicitations state the need to meet the requirements of the SCA, but if the work is offshore, or outside territorial seas, then certain benefits apparently are not required. This is not clearly stated in most solicitations.

Additionally, there appears to be redundancy if contract observers are covered by FECA, yet solicitations require observer service providers to obtain MEL and USL&H policies. This leaves the perception that there is confusion within NOAA Fisheries with regard to its obligation to contract observers. Additionally, cases like those of Eric Sandberg and John Varner appear to not have been satisfactorily resolved, even with this apparent redundancy.

It was suggested that the NOAA Fisheries should review these issues, set minimum standards, and address supplemental insurance. It could include long-term disability insurance, and it may be possible to obtain a group long-term disability plan for all observers.

It was clarified that NOAA Fisheries' current obligation to observers is to insure

that all statements of work contain language that would identify the various required insurance coverage policies for the observer service provider and observer.

In conclusion, participants commented that:

- Scientists who use the data are getting full employment benefits, yet the observers appear to be treated less well and receive less support. Observers should receive equitable benefits.
- The NOP has made great strides to put observer programs on the map. Individual observer programs need to be better funded, so that insurance and liability issues can be better addressed.

4.8 Determining the feasibility of extending professional liability coverage to uninsured vessels that carry observers

*Supplemental Meeting
Materials May Be Found In
Appendix L and Appendix M.*

Mike Larsen, *International Pacific Halibut Commission*
Administrative Officer
Seattle, WA

The International Pacific Halibut Commission (IPHC) has been managing the Pacific Halibut since 1923 and has conducted research charters using commercial vessels since 1933. It is funded as an international fisheries organization.

During a research charter, the IPHC runs the vessel, directing where it is to go, etc. A survey covers over 1100 stations from the northern California coast to the Aleutian Islands. This year, 14 commercial fishing vessels were involved covering 700 days at sea, and including two to three IPHC staff. IPHC staff charter both U.S. and Canadian vessels, and vessels go into each country's waters. Thus the IPHC had to determine how they would provide comprehensive insurance coverage for everyone, not just P&I.

The IPHC purchases:

- P&I insurance through the vessel's plan;
- Occupational Insurance (USL&H);
- Long Term Disability coverage (because State Worker's Compensation is not appropriate for a foreign government); and
- Medical insurance for those that do not have it.

The specifications for P&I coverage are presented to prospective vessel providers in their Request for Proposals. The fishing vessel owners are responsible for obtaining the required supplemental coverage to meet the IPHC standard, and are reimbursed, usually at a cost of approximately \$200-\$400. The research program is dependent on the vessel securing this coverage. The IPHC reviews issues with riders or coverage limits. Proof of coverage and the vessel's status are required (i.e. physical proof of insurance).

A copy of the bill from the insurance company for the supplemental insurance is adequate proof. Contracts also include

language that holds the IPHC harmless, but this may not suffice legally.

The IPHC plans to pursue purchasing vessel-independent P&I coverage in 2002. They expect it will cost anywhere between \$5,000 and \$15,000.

"Hold-harmless agreements attempts to shift risk to another party,these agreements often leave items out or are poorly written, which may result in the agreement not being legally binding."

V. Gullette

The IPHC is concerned with providing adequate insurance coverage for employees because:

- They have had two Jones Act release agreements in the last three years (due to medical conditions, not an injury);
- There is a government obligation to treat employees and associated individuals fairly (the requirement for federal employees is different from that of private or contract employees);
- They wish to maintain a non-adversarial relationship with employees and the vessel operators (there are only about 100 vessels that can meet their charter requirements, and the IPHC needs 15 each year); and
- They wish to reduce liabilities for IPHC and the contracted vessel.

The IPHC Liability Coverage Philosophy is: *"Create a comprehensive liability plan such that the livelihood and quality of life of the employee is not diminished in the*

event of an injury or illness while employed.”

Lynne Phipps, NOAA, Eastern
Administrative Support Center
Contracting Officer
Norfolk, VA

When an observer program started on the east coast, there was only one observer service provider interested, and the provider knew what type of insurance to obtain. When the allocation of the contract for the program changed to a competitive bidding process, five observer service providers were interested, and the issue of insurance arose.

Vince Gullette, American Equity
Underwriters, Inc.
Assistant Vice President of West Coast
Operations
Seattle, WA

The feasibility of extending professional liability coverage from the observer service provider to the fishing vessel, thus eliminating the vessel’s risk, needs to be addressed. Although it used to be possible to get insurance for vessels, it may not be as accessible anymore. Last year, the insurance market constricted greatly and many carriers became insolvent. Of 15 carriers, five now remain, thus there are fewer and fewer insurance providers, and their constraints are growing.

Hold-harmless agreements attempt to shift risk to another party, and NOAA Fisheries would likely want to shift risks to the observer service provider. However,

Three million dollars of coverage under MEL was determined to be adequate for observer programs. This was based on the average cost of the region’s fishing vessels. This limit has not been an issue on the east coast, and obtaining insurance has never been a problem for observer service providers. In the Northeast, contracts also require fringe benefits for observers.

However, the issue of uninsured fishing vessel is a problem. Ms. Phipps was not aware if a vehicle that exists in the contracting process to handle observer injuries if a fishing vessel is uninsured.

these agreements often leave items out or are poorly written, which may result in the agreement not being legally binding. One could attempt to provide a blanket cover (e.g. 200 endorsements, for numerous vessels).

Regulations or mechanisms that are currently in place include the requirement for an employer to be licensed in the state in order to carry USL&H. Considering the insurance coverage that are available, it should be possible to construct a policy to meet all of an observer program needs.

A first party contract is probably the most appropriate approach to extend coverage to uninsured vessels. In the Worker’s Compensation arena, an observer service provider cannot simply add someone on a policy, however they can use an **alternate employer**. An alternate employer is used when an employee is working under the direction of someone different than his or her employer. The concept is taken from a “borrowed

servant” concept, i.e. the alternate employer is borrowing the employee’s services from his or her employer. Like a borrowed servant endorsement, an alternate employer endorsement keeps the liability with the normal employer and extends the normal employers’ coverage to the borrower or alternate employer. A similar endorsement may be possible to use to cover the liability of an uninsured vessel.

Discussion and Q&A session

One concern of a vessel owner is the vessel or vessel’s crew being protected from injury due to an observer’s actions. There was uncertainty whether having an MEL policy, where the vessel is listed as an additional insured, solves this problem.

Q: What is the difference between Commercial General Liability (CGL) and MEL?

CGL is liability coverage for being “in existence.” For example, if someone is hurt on your property, or if you cause a third party injury, it provides coverage. MEL deals with the employer-employee relationship, and those causes of actions in the marine environment, but not any contractual actions.

A CGL policy would not cover an accident caused by an employee on a vessel, but a Marine Employer’s Liability policy could be fashioned this way (i.e. like covering exposures of a stevedore, wharf owner, or ship repairer).

Vessel owners have complained about the risk of exposure, claiming if they put an

additional person on board, they violate their warranty. It has been reported that the added cost is very high, as much as \$1,500 per crewman per month.

Additionally, observers participating in crew-like activities could possibly void a vessel’s warranty or coverage. It was again noted that observers do undertake work that is similar to that undertaken by the crew, as they interact substantially with crew. For instance, an observer might have to direct the crew to assist efforts like tagging a turtle. Sometimes just to work harmoniously on a boat, an observer has to assist more directly with the fishing effort.

Education in the P&I marketplace could help reduce costs. This could be done through brokers or P&I underwriters. If it were shown that the observer service provider is already carrying liability coverage, it may reduce the additional costs for a fishing vessel.

Q: On what basis would the risks be rated? Is it good to use observer history?

There is a great need to distinguish the actual risks of having an observer on board compared to a Jones Act seaman. Unfortunately, statistics are not well kept in all areas of the marine industry. Loss statistics from across the nation would be critical for establishing a realistic rate base. However, for short-term observer needs, some companies may have a flat minimum charge, and other companies may not charge anything. In reality, fees will likely range greatly.

In New England, insurance costs caused an increase of about 10% in total costs to the observer program. The vessel owner’s

MEL insurance provides protection to the observer service provider.

P&I coverage extends upwards from the vessel hull. Generally, a policy has a general liability component, for damages such as from running into another vessel, fixed object, or something similar. MEL is a subset of the exposures that can be added to a P&I policy. MEL usually is an endorsement to a compensation policy or to a P&I policy (like wreck removal). Each vessel requires an individual policy, though they are sometimes bundled under a fleet policy.

Under a standard vessel's P&I, an observer is already covered. P&I typically provide coverage for "guests." But sometimes, these policies have added cost components if the guest goes to sea, and can be excluded if the guest (observer) acts as a crewman. Some policies may set a crew warranty (number of people on board), thus, a vessel generally should not go over that limit. There are two separate issues a vessel owner needs to consider: if it is already covered under its current exposure, or if the risk changes by having an additional person on board, which may increase the rate.

Generally, neither an observer service provider nor NOAA Fisheries have an insurable interest in a vessel, and therefore cannot extend their P&I coverage to the vessel. Therefore, extending P&I to uninsured vessels is not a feasible option, except possibly under the context of an "alternate employer." This needs to be investigated. In the Northwest, it was determined by observer program staff that P&I and MEL were redundant as a requirement for

observer service providers. Thus, NOAA Fisheries dropped the P&I requirement, and required observer service providers to have a CGL policy.

Q: Regarding safety, is there any potential for rates to be reduced if the vessel is required to participate in the U.S. Coast Guard voluntary commercial fishing vessel safety inspection program or the underwriter is made aware of the fact that observers are required to go through safety training?

Additional training or safety requirements such as these could potentially help to reduce insurance costs, but this is uncertain. A U.S. Coast Guard safety sticker would probably not make any difference, because all vessels should minimally meet the same safety requirements by law. A vessel safety sticker does not cover other important risk issues such vessel stability, safety around fishing gear, etc. However, other activities by a company such as requiring drug testing, special training of crew, etc., should be of significant interest to the underwriter.

A Marine Index exists, and vessel operators are required to notify the Index of casualties or accidents at sea. Form 2692 has to be filed with the local U.S. Coast Guard Marine Safety Office (MSO) in the event of an accident on a vessel or to a seaman. Vessel number in the Coast Guard's database can search data on casualties. NOAA Fisheries could potentially use these data to help to identify unsafe vessels.

5 Workshop wrap-up and summary

Dennis Hansford, NOAA Fisheries, National Observer Program

*Office of Science and Technology
Silver Spring, MD*

A summary of the issues discussed during the workshop was provided:

- It appears that the Jones Act may not be as suitable as other laws or acts to protect observers because a jury must decide the level of benefits to be awarded.
- Adequate medical coverage reimbursement is in place now, but the process for replacing daily wages (compensation) may not be adequate. Participants agreed that observers' premium pay should be considered when computing benefits.
- The issue of risk management was presented, emphasizing the importance of identifying risk pre-loss (identifying and understanding risks in advance), rather than post-loss.
- Information on the services provided by underwriters, adjusters, and insurers to observer providers (entity paying for the services) was presented. The current system may not always have the best interest of observers as a primary concern.
- Contractors with multiple deployment sites in multiple states with varying rates and benefits deal with complex financial tracking schemes, as they try to provide adequate coverage under the current system.
- Potential remedies to the current inadequacies in providing benefits may include legislative solutions. For example, this may include creating first party contracts by extending U.S. Longshore & Harbor Worker's Compensation Act (USL&H) coverage to observers. A good model for this type of extension of 1st party coverage to non-longshoremens is the Defense Base Act.
- The converging and diverging coverage of USL&H, State Worker's Compensation Act, and FECA was discussed. FECA will provide coverage to observers while deployed at sea. USL&H provides coverage on navigable waters of the US - including any adjoining pier, wharf, or docks. Some states' compensation plans provide coverage while on land and in state waters, while others may supersede USL&H while in state waters.
- Clarification of eligibility and procedures for processing claims for FECA for the two types of injury, traumatic and occupational disease, were discussed. While both contracted and Federal observers are eligible for compensation under FECA, contracted observers must submit their claims to the Department of Labor Office of Worker's Compensation Programs; Federal observers would forward their claims to the Department

of Commerce Worker's Compensation Operations Center.

- Through the participation of two seriously injured observers, an appreciation was gained for the importance of compensation as it relates to maintaining quality of life for injured observers. The exclusion of premium pay under certain remedies when computing compensation is a major concern.
- The Fair Labor Standards Act (FLSA), Service Contract Act (SCA), and the Contract Work Hours and Safety Standards Act (CWHSSA) were described, and their applications discussed. The FLSA provides guidelines for overtime payment for contracts under the SCA. However, the SCA does not apply outside of territorial waters, thus affecting the requirement for paying overtime, to observers. The CWHSSA deals with overtime compensation for manual laborers, but generally does not apply to work performed by observers.
- Issues regarding uninsured vessel owners and how to protect vessels owners from lawsuits were discussed. Neither NOAA Fisheries nor observer service providers have an insurable

interest in the vessel, thus cannot extend their P&I coverage to vessel owners. However, it may be possible to extend liability coverage through the use of an 'alternate employer' option.

APPENDICES

- Appendix A Biographies of invited panellists
- Appendix B Workshop Participants
- Appendix C Workshop Agenda
- Appendix D Service Contract Act
- Appendix E Fair Labor Standards Act
- Appendix F Basic Observer Duties and Responsibilities
- Appendix G Contract Work Hours and Safety Standards Act—Overtime Compensation
- Appendix H “Lost at Sea: an Argument for Seamen Status for Fisheries Observers”
- Appendix I What is a Seaman Under the Joes Act?
- Appendix J James O’Boyle v. United States of America
- Appendix K Key Bank of Washington v. Dona Karen Marie Fisheries, Inc.
- Appendix L Case Law Regarding Seamen Status of Fisheries Observers
- Appendix M Chandris, Inc v. Latsis
- Appendix N Northeast Region-Management Control Review Findings/Conclusions
- Appendix O Southwest Region-Management Control Review Findings/Conclusions

Appendix A: Biographies of Invited Panelists

Susette Barnhill

***Workers' Compensation Specialist,
Workers' Compensation Operations
Center, Department of Commerce,
Washington, DC***

Ms. Susette Barnhill, a Workers' Compensation Specialist, has been with the Department of Commerce, Washington, DC, since December 1993. She participated in the development of the Centralized Workers' Compensation Operations Center and has remained with the Center since it became operational in January 1994. She was instrumental in the development of the database created to record and maintain critical information on each injury claim for the Department. Ms. Barnhill has managed the National Oceanic and Atmospheric Agency (NOAA) claims since 1995, providing guidance to injured employees and training both supervisors and executive officers of the NOAA Corps.

Ms. Barnhill has received numerous awards during her career with the Department of Commerce, including two organizational awards: Bronze Medal Award for Customer Service, December 2000 and the Silver Medal Award for Meritorious Federal Service, October 1995.

Prior to joining the Department of Commerce, she was with the Headquarters, U. S. Air Force Civilian Personnel Office, and Pentagon. She held various civilian positions with the U.S. Air Force while in the Netherlands and United Kingdom, as she accompanied her husband on his military tours of duty.

***Howard Candage
Marine Insurance Consultant and
President, H. E. Candage, Inc.,
Portland, ME***

Howard Candage, CPCU, CIC, AMIM, AAI, AIS, is President of H.E. Candage, Inc. a resource organization for the insurance and risk management industry, founded in 1996. He specializes in marine insurance and manages accounts nationally and around the world for marine interests. He also practices risk management and consults on mergers and acquisitions and best practices. Mr. Candage has a background in commercial fishing as a vessel owner and independent businessman, as well as marine surveyor. He was an independent agent and an owner in two agencies prior to his position as a Regional Marketing Manager for a major property and casualty insurer.

Mr. Candage is a former member of the Board of Directors of the Independent Insurance Agents Association of Maine, Inc., past president of the Maine Chapter of the Society of CPCU (and recipient of their "Personal Sponsorship Award") and has held several committee positions for the National Society of CPCU. The American Association of Managing General Agents also has awarded him the "Chair's Award" for outstanding contributions to the fields of Insurance and Risk Management.

Michael Timothy Conner
Chief, General Litigation Division,
Dept. of Commerce, Office of
General Counsel, Washington, DC

Since 1985, Tim Conner has been the Chief of the General Litigation Division, DOC/OGC in Washington, DC. Prior to that he was a Staff Attorney at the Office of the Asst. General Counsel for Admin., DOC/OGC, and for the NOAA General Counsel's Office in the Enforcement & Lit. Division. The General Litigation Division provides legal advice and litigation services to the Department of Commerce and its agencies in the areas of tort claims, litigation and liability; commercial matters (i.e. loan work-outs, bond restructuring, bankruptcy); environmental matters (Superfund defensive support); debt collection; false claims; employee testimony; and other litigation related matters.

While Mr. Conner supervises the handling of all of these matters, he personally specializes in tort liability and litigation and has published papers on maritime tort liability of the United States in the *Journal of Maritime Law & Commerce*. He also has experience in aviation weather cases, and has published "Liability for the Collection and Dissemination of Aviation Weather Products" for the *Journal of the Third Int'l Conference on the Aviation Weather System of the American Meteorological Society*, and "The Aviation Lawyer's Guide to Meteorology in the Aviation Weather Case," for *Litigation in Aviation*.

Mr. Conner received his B.A. in Government & Public Administration (1969) and his J.D. (1976) from American

University. He has received several awards, including "Attorney of the Year" (DOC/OGC, 1989), DOC/OGC Exceptional Performance Award (1997), "Who's Who in American Law" and "Who's Who in America" (2000, 2001).

Jack Devnew
Insurance Account Executive,
Flagship Group Ltd, Norfolk, VA

Jack Devnew has been an insurance broker at the Flagship Group Ltd in Norfolk, VA specializing in Marine Insurance since 1994. In particular, he focuses on Hull and P&I for fishing vessels (Flagship insures over 500 commercial fish boats) and other commercial craft (tugs, barges), as well as other marine liabilities including USL&H and State Act Worker's Comp. Prior to that, Mr. Devnew spent 20 years in the fishing industry as a fisherman, in fleet operations, and processing and sales of seafood products.

During the mid 1980's Devnew supervised the at-sea operations of several fishery joint ventures for mackerel, herring and squid fisheries with East German, Italian, Portuguese, and Russian vessels, and interfaced with the NMFS observers program to handle the logistics for the deployment to these International fleets. Devnew currently serves on the Board of Directors of the Blue Water Fishermen's Association, is appointed to the NMFS HMS Advisory Panel, and is a member of the ICCAT Advisory Committee. He attended the University of Delaware graduate school of Marine Policy.

Kim Dietrich
Association of Professional
Observers, Seattle, WA

For the past 10 years, Ms. Dietrich has worked on commercial fishing vessels in the Bering Sea and on research vessels in the North Pacific and Southern Ocean. After getting her BA in Biology and Environmental Science from the University of Pennsylvania, she jumped right in to work as a fisheries observer in Alaska. (This was a bit of an eye opener for someone who had never been on a boat, never worked with fish, hates cold weather and who grew up in the landlocked state of Nebraska.) She has progressively decreased her observing work while she's increased more research-oriented endeavors. She most recently worked with Ed Melvin and Julia Parrish testing seabird deterrent devices on sablefish and Pacific cod longline vessels in Alaska. As a graduate student, she hopes to continue the work on seabird bycatch in commercial fisheries.

Tom Fitzhugh
Attorney, Longshore Institute,
Houston, TX

Tom Fitzhugh is President of the Longshore Institute and senior partner in the firm of Fitzhugh & Elliott, P.C. He maintains an active law practice primarily in longshore and federal trial and appellate litigation and regularly appears before the U.S. Court of Appeals for the Fifth Circuit, the Benefits Review Board, and Administrative Law Judges. Mr. Fitzhugh edits The Longshore Newsletter, The Longshore Procedure Manual, and Brahm's Court Index, publications

interpreting the Longshore and Harbor Workers' Compensation Act (and its extensions), and presents seminars on the LHWCA to the bar and insurance industry. He earned a B.S. in Geophysics from Texas A&M University and a J.D. (with honors) from the University of Texas. Since 1976 he has been in private practice in also serving as a Special Master and mediator for federal courts. A frequent lecturer and author on maritime law topics and the Longshore Act, Mr. Fitzhugh is a member of Maritime Law Association, serving on its Longshore Subcommittee and Carrier Security Committee. As an adjunct professor at Texas A&M University in maritime law, Mr. Fitzhugh serves as General Counsel to the Maritime Security Council and is a Life Fellow of the Texas Bar Foundation, the Houston Bar Foundation, and a Charter Member of the College of the State Bar of Texas.

Vince Gullette
Assistant Vice President of West
Coast Operations. American Equity
Underwriters of Washington LLC,
Seattle, WA

Vince Gullette's background includes 17 years of insurance industry experience, including workers' compensation underwriting, and multi-line rating. Prior to joining American Equity Underwriters in June 2000, he was employed with Industrial Indemnity/Fremont Compensation, where he took on increasing responsibility: beginning as an Underwriter and concluding his tenure there as USL&H Underwriting Manager. In his role as underwriter, Vince handled a \$15 million book of multi-state workers'

compensation, with an average of \$250,000 per account. As USL&H Underwriting Manager, he developed a national pricing model and managed three underwriters with a \$30 million total book of maritime workers' compensation. In addition, Vines provided consultation to insure that the new underwriting computer system would properly handle maritime exposures and conducted continuing education classes on topics such as jurisdiction and loss-sensitive rating plans.

Mark Langstein
Deputy Chief, Contract Law
Division, DOC General Counsel,
Washington, DC

Mark Langstein is presently Deputy Chief of the Contract Law Division of the Department of Commerce. Since joining Commerce in 1986, he has been the Department's principal counsel in many of its major bid protests and appeals at both GSBCA and the General Accounting Office and has also assisted with protests under the Court of Federal Claims exclusive judicial bid protest jurisdiction. Mark has also assisted the Republic of Moldova in implementing its government procurement system. Mark began his Government contracts career in 1981 at the General Services Administration in the Claims and Litigation Division where he primarily practiced before the now Court of Federal Claims, District Court and the General Services Administration Board of Contract Appeals. At GSA he also handled civil service and discrimination suits at the Merit Systems Protection Board and the Equal Employment Opportunity Commission.

Prior to his time at Industrial Indemnity, Mr. Gullette was an underwriter for Golden Eagle insurance Company, where he pioneered a \$25 million book of California workers' compensation business and started an expansion office in Sacramento, California. He started his insurance career with the Argonaut Insurance Company, where he was an underwriting assistant and multi-line rater/coder. He received his BS in Managerial Economics from the University of California — Davis, Davis, California.

Mark received his law degree in 1979 graduating *cum laude* from Boston College Law School where he served on the Boston College Law Review and was honored as a member of the Order of the Coif. His undergraduate degree is from New York's New School for Social Research.

Timothy McHugh
Attorney, Looney & Grossman,
Boston, MA

After college, Timothy McHugh obtained a commission and served in the United States Coast Guard for six years, both at sea and in staff positions. He served on the cutter *Vigilant*, out of New Bedford for two years, and then in staff positions in Boston and Washington. While in Washington his duties solely concerned the enforcement of fisheries regulations, including effecting the transition from international to coastal regulation, participating in negotiations with foreign governments on issues of enforcement at sea and safety, and serving as a liaison with Congress and federal agencies concerned with fisheries law enforcement

matters. While on active duty, he specialized in fishing industry matters including implementation of the United States' 200-mile exclusive economic zone and international agreements, which regulate fishing by foreign flag vessels off the United States' coasts. He attained the rank of Lieutenant Commander and was awarded the Coast Guard Commendation Medal in 1976.

In 1979, Mr. McHugh was admitted to the Massachusetts Bar after receiving his law degree from the Washington College of Law at American University. He is also admitted to practice in the U. S. Courts of Appeals for the First and Eleventh Circuits, and the U. S. District Court for the District of Massachusetts. Mr. McHugh's practice focuses on advising individuals, businesses, and government entities with respect to admiralty and maritime law matters, including commercial transactions, vessel construction, purchases and sales, financing and charters, environmental, regulatory and insurance matters, and dispute resolution. In this practice, he has been admitted to represent clients on a *pro hac vice* basis in Connecticut, Delaware, Florida, Louisiana, Maine, New Hampshire, New Jersey, New York, Rhode Island, and Texas.

Thomas Monti, Sr.
Claims Adjuster, FARA Insurance Services, Inc.

Mr. Monti has 33 years experience in insurance claim handling, supervision, administration and management working in Dallas, New Orleans, Baton Rouge, Baltimore, Chicago, and Indianapolis. He

has worked on all casualty lines, primarily on Workers Compensation (with a specialty in maritime – LS&HWA & Jones Act), and has worked for Employers Casualty Company, Maryland Casualty Company/Zurich Commercial, and F. A. Richard & Associates (Nautilus Branch).

Mr. Monti has a BS degree in Math & Physics from the University of Southern Mississippi. He also served six plus years in the military which included formal military investigative training and experience in Germany, DC, Vietnam.

Tom Obert
Wage and Hour Analyst, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC

Thomas Obert joined the Wage and Hour Division in 1974 as a labor economist in the Branch of Service Contract Wage Determinations in Washington, D.C. In 1981, Mr. Obert became a Wage and Hour Analyst in the Division of Contract Standards Operations. As such, he serves as a technical advisor for the drafting of regulations, legislation, enforcement policies, and procedures; and prepares opinions and rulings concerning policy and interpretations on matters involving government contract labor standards statutes (to include the McNamara-O'Hara Service Contract Act, the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, the Copeland Act, the Tennessee Valley Authority Act, the Fair Labor Standards Act, and the National

Endowment for the Arts and the Humanities Act).

Don Wadhams
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Seattle, WA

Don Wadhams, Chief of Science and Technology Contracts Branch, National Oceanic & Atmospheric Administration, Western Administrative Support Center, serves as an advisor to the Northwest and Alaska regions of the National Marine Fisheries Service (NMFS) on federal acquisition related issues. He provides general business consulting services to NMFS and a number of smaller NOAA clients. Mr. Wadhams has worked with contracted Fisheries Observer Programs since 1989. He served as Contracting Officer for the North Pacific Groundfish Program, Foreign Fisheries Observer Program, Cook Inlet Drift and Set Gillnet Observer Program, California Drift Gillnet Observer Program, and Hawaii Longline Observer Program.

Mr. Wadhams received a B.A. in Government/Business Management from the University of Maryland, an M.A. in International Relations from the University of Southern California, and has completed about 840 classroom hours of Federal Acquisition training.

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Appendix C: Workshop Agenda

National Marine Fisheries Service
National Observer Program
Insurance, Liability and Labor Workshop
SSMC4, 1305 East West Highway
Silver Spring, Maryland 20910
Rm#1W611
June 12-14, 2001

June 12, 2001

Tuesday

- 8:30- 9:00 General welcome and introductory remarks – Dr. William T. Hogarth,
Assistant Administrator, National Marine Fisheries Service
- 9:00-9:15 Individual introductions
- 9:15-9:30 Review of Workshop Agenda and Objectives and NMFS Observer
Program Overview - Dennis Hansford
- 9:30-10:30 Panel Discussion #1:

Defining insurance & labor terms, the various types of liability and compensation coverages
and the role of the agent, underwriter and claims adjuster as they relate to observers

Insurance Industry

Jack Devnew, Insurance Broker, Flagship Group Insurance, Norfolk, VA

Vince Gullette, Assistant Vice President of West Coast Operations, American Equity
Underwriters, Inc., Seattle, WA

Howard Candage, Marine Insurance Consultant, H. E. Candage, Inc. Portland, ME

Federal

Susette Barnhill, Compensation Specialist, Dept. of Commerce Workers'
Compensation Operations Center, Washington, DC

Background materials: Insurance Terms and Definitions

- 10:30-10:45 Break

10:45-12:00 Guided discussion among panel members and open for general Q&A session

12:00-1:00 Lunch

1:00-1:45 Panel Discussion #2:

Applicability of the Service Contract Act and Fair Labor Standards Act to observers as it pertains to pay for hours worked beyond 40 hours per week

Federal

Tom Obert, Dept. of Labor, Wage and Hour Division, Washington, D. C.

Mark Langstein, DOC General Counsel, Contract Law Division, Washington, D.C.

Union

Howard Holten, President, Alaska Fisheries Division, United Industrial Workers' Union, Anchorage, AK

Background materials: Service Contract Act Information Sheets, Fair Labor Standards Act Information Sheets, Basic Observer Duties and Responsibilities, Contract Work Hours and Safety Standards Act-Overtime Compensation

1:45-2:30 Guided discussion among panel members and open for general Q&A session

2:30-2:45 Break

2:45-3:30 Panel Discussion #3:

Differentiating between coverage needs for land-based and sea-based protection for observers

Insurance Industry

Tim McHugh, Attorney, Looney & Grossman, Boston, MA

Vince Gullette, Assistant Vice President of West Coast Operations, American Equity Underwriters, Inc., Seattle, WA

Scott McCabe, Insurance Broker, Mid Atlantic Consultants, Norfolk, VA

Federal

Don Wadhams, Contract Officer, Western Administrative Support Center, Seattle, WA

- 3:30-4:15 Guided discussion among panel members and open for general Q&A session
- 4:15-4:45 Wrap-up

June 13, 2001

Wednesday

- 8:30-9:00 Introduction and review of agenda
- 9:00-9:45 Panel Discussion #4:

Court decisions and current legal opinions on seamen v. non-seamen as it relates to observers

Federal

Tim Conner, Chief, Dept. of Commerce, General Counsel General Litigation Division, Washington, D. C.

John Cullather, Democratic Staff Director, U.S. House of Representatives Subcommittee on Coast Guard and Maritime Transportation, Washington, D. C.

Insurance Industry

Tim McHugh, Attorney, Looney & Grossman, Boston, MA

Bill Myhre, Attorney, Preston Gates Ellis & Rouvelas Meeds, LLP, Washington, DC

Background materials: James O'Boyle v. United States of America, Key Bank of Washington v. Dona Karen Marie Fisheries, Inc., McDermott International, Inc. v. Wilander, Chandris, Inc. v. Latsis

- 9:45-10:30 Guided discussion among panel members and open for general Q&A session
- 10:30-10:45 Break
- 10:45-11:30 Panel Discussion #5:

Defining seamen as it applies to observers under various insurance laws

Insurance Industry

Tom Fitzhugh, Attorney, Longshore Institute, Houston, TX

Scott McCabe, Insurance Broker, Mid-Atlantic Consultants, Norfolk, VA

Howard Candage, Marine Insurance Consultant, H. E. Candage, Inc. Portland, ME

Background materials: Lost At Sea: An Argument for Seaman Status for Fisheries Observers (excerpts from a paper by Alecia Van Atta), What is a “seaman” under the Jones Act?

11:30-12:15 Guided discussion among panel members and open for general Q&A session

12:30-1:30 Lunch

1:30-2:15 Panel Discussion #6:

Claims: How are they filed and what are the roles of the observer, government, contractor, and state in facilitating compensation

Federal

Susette Barnhill, Compensation Specialist, Dept. of Commerce Workers' Compensation Operations Center, Washington, DC

Insurance Industry

Tom Monti, Manager of FARA Nautilus Branch, FARA Insurance Services, Inc., Metairie, LA

Jack Devnew, Insurance Account Executive, Flagship Group Limited, Norfolk, VA

2:15-3:00 Guided discussion among panel members and open for general Q&A session

3:00-3:15 Break

3:15-4:00 Panel Discussion #7:

Understanding what compensation means to injured observers and their quality of life

Observer

John Varner, Former North Pacific observer, Ellensburg, WA (by conference call)

Eric Sandberg, *Former Hawaii-based pelagic longline observer*, Computer Specialist, NMFS Pacific Islands Area Office, Honolulu, HI

Union Rep

Howard Holten, President, Alaska Fisheries Division of United Industrial Workers' Union, Anchorage, AK

Non-Governmental Organization

Kim Dietrich, Association for Professional Observers, Seattle, WA

4:00-4:45 Guided discussion among panel members and open for general Q&A session

4:45-5:15 Wrap-up

June 14, 2001

Thursday

8:30-9:00 Introduction and review of agenda

9:00-9:45 Panel Discussion #8:

Determining the feasibility of extending professional liability coverage to uninsured vessels that carry observers

Federal

Lynne Phipps, Contracting Officer, NOAA Eastern Administrative Support Center, Norfolk, VA

Mike Larsen, Administrative Officer, International Pacific Halibut Commission, Seattle, WA

Insurance Industry

Vince Gullette, Assistant Vice President of West Coast Operations, American Equity Underwriters, Inc., Seattle, WA

Background materials: MCR Findings/Conclusions/Recommendations (excerpt from the NER NMFS Contracted Observer Program, pg.146), MCR Findings/Conclusions (excerpt from the SWR NMFS Contracted Observer Program, pg. 224)

9:45-10:30 Guided discussion among panel members and open for general Q&A

session

10:30-10:45

Break

10:45-12:00

Workshop wrap-up and summary

Version Dated: June 8, 2001

Appendix D. Service Contract Act

TITLE 29--LABOR

CHAPTER 1—OFFICE of the SECRETARY of LABOR

Part 4. Labor Standards for Federal Service Contracts

§4.112 Contracts to furnish services "In the United States."

(a) The Act and the provisions of this part apply to contract services furnished in the United States." including any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. The definition expressly excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country. Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished "in the United States" within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographical limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. However, if a service contract is to be performed in part within and in part outside these geographic limits, the stipulations required by S 4.6 or S 4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case the requirements of the Act and the contract clauses will not be applicable to the services furnished outside the United States.

(2) In addition, a contract, which is performed essentially outside the United States with only an incidental portion performed within the United States, as defined, is not covered by the Act. For example, a contract for services to be performed on a vessel operating exclusively or nearly so in international or foreign outside the geographic areas named in section 8(d) would not be for services furnished "in the United States" within the meaning of the Act and would not be covered. However, if a significant or substantial portion of a service contract is performed within the statutory geographic limits, the Act applies, and the stipulations required by stipulations required by § 4.6 or § 4.7, as appropriate, must be included in the invitation for bids or negotiation the labor standards must be observed with respect to that part of the contract services that are performed within these geographic limits, but the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

(3) In close cases involving a decision as to, whether a significant portion of a contract will be performed within the United States as defined, the Department of Labor should be consulted,

since such situations require consideration of other factors such as the nature of the contract work, the type of work performed in the United States and how necessary such work is to contract performance, and the amount of contract work performed or time spent in the United States vis-a-vis other contract work.

Appendix E. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. The Wage and Hour Division (Wage-Hour) administers and enforces FLSA with respect to private employment, State and local government employment, and Federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and the Tennessee Valley Authority. The U.S. Office of Personnel Management enforces the FLSA for employees of other Executive Branch agencies, and by the U.S. Congress for covered employees of the Legislative Branch.

Special rules apply to State and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of cash overtime pay.

Basic Wage Standards

Covered nonexempt workers are entitled to a minimum wage of not less than \$4.75 an hour, effective October 1, 1996, and not less than \$5.15 an hour, effective September 1, 1997. Overtime pay at a rate of not less than one and one-half times their regular rates of pay is required after 40 hours of work in a workweek.

Wages required by FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are not legal to the extent that they reduce the wages of employees below the minimum rate required by FLSA or reduce the amount of overtime pay due under FLSA.

The FLSA contains some exemptions from these basic standards. Some apply to specific types of businesses; others apply to specific kinds of work.

While FLSA does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices that FLSA does not regulate.

For example, FLSA does not require:

- (1) vacation, holiday, severance, or sick pay;
- (2) meal or rest periods, holidays off, or vacations;
- (3) premium pay for weekend or holiday work;

(4) pay raises or fringe benefits; and

(5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

The FLSA does not provide wage payment or collection procedures for an employee's usual or promised wages or commissions in excess of those required by the FLSA. However, some States do have laws under which such claims (sometimes including fringe benefits) may be filed.

Also, FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years old.

The above matters are for agreement between the employer and the employees or their authorized representatives.

Who is Covered?

All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person are covered by FLSA.

A covered enterprise is the related activities performed through unified operation or common control by any person or persons for a common business purpose and --

(1) whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated); or

(2) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or

(3) is an activity of a public agency.

Construction and laundry/dry cleaning enterprises, which had been previously covered regardless of their annual dollar volume of business, became subject to the \$500,000 test on April 1, 1990.

Any enterprise that was covered by FLSA on March 31, 1990, and that ceased to be covered because of the \$500,000 test, continues to be subject to the overtime pay, child labor and recordkeeping provisions of FLSA.

Employees of firms which are not covered enterprises under FLSA still may be subject to its minimum wage, overtime pay, and child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. Such employees include those who: work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross State lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

Domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters are covered if (1) their cash wages from one employer are at least \$1,000 in a calendar year (or the amount designated pursuant to an adjustment provision in the Internal Revenue Code), or (2) they work a total of more than 8 hours a week for one or more employers.

Exemptions

Some employees are exempt from the overtime pay provisions or both the minimum wage and overtime pay provisions.

Because exemptions are generally narrowly defined under FLSA, an employer should carefully check the exact terms and conditions for each. Detailed information is available from local Wage-Hour offices.

Following are examples of exemptions that are illustrative, but not all-inclusive. These examples do not define the conditions for each exemption.

Exemptions from Both Minimum Wage and Overtime Pay

(1) Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations);

(2) Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, **seamen employed on foreign vessels, employees engaged in fishing operations**, and employees engaged in newspaper delivery;

(3) Farm workers employed by anyone who used no more than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year;

(4) Casual babysitters and persons employed as companions to the elderly or infirm.

Exemptions from Overtime Pay Only

(1) Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales workers, or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by nonmanufacturing establishments primarily engaged in selling these items to ultimate purchasers;

(2) Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, **seamen on American vessels**, and local delivery employees paid on approved trip rate plans;

(3) Announcers, news editors, and chief engineers of certain nonmetropolitan broadcasting stations;

(4) Domestic service workers living in the employer's residence;

(5) Employees of motion picture theaters; and

(6) Farm workers.

Recordkeeping

The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor recordkeeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used. With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the following records must be kept:

(1) personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;

(2) hour and day when workweek begins;

(3) total hours worked each workday and each workweek;

(4) total daily or weekly straight-time earnings;

(5) regular hourly pay rate for any week when overtime is worked;

- (6) total overtime pay for the workweek;
- (7) deductions from or additions to wages;
- (8) total wages paid each pay period; and
- (9) date of payment and pay period covered.

Records required for exempt employees differ from those for nonexempt workers. Special information is required for homeworkers, for employees working under uncommon pay arrangements, for employees to whom lodging or other facilities are furnished, and for employees receiving remedial education.

Terms Used in FLSA

Workweek -- A workweek is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment each workweek stands alone; there can be no averaging of 2 or more workweeks. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

Hours Worked -- Covered employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.

Computing Overtime Pay

Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of the maximum allowable in a given type of employment. Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (except for certain statutory exclusions). The following examples are based on a maximum 40-hour workweek.

(1) Hourly rate -- (regular pay rate for an employee paid by the hour). If more than 40 hours are worked, at least one and one-half times the regular rate for each hour over 40 is due.

Example: An employee paid \$8.00 an hour works 44 hours in a workweek. The employee is entitled to at least one and one-half times \$8.00, or \$12.00, for each hour over 40. Pay for the week would be \$320 for the first 40 hours, plus \$48.00 for the four hours of overtime--a total of \$368.00.

(2) Piece rate -- The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings.

Example: An employee paid on a piecework basis works 45 hours in a week and earns \$315. The regular rate of pay for that week is \$315 divided by 45, or \$7.00 an hour. In addition to the straight-time pay, the employee is also entitled to \$3.50 (half the regular rate) for each hour over 40 -- an additional \$17.50 for the 5 overtime hours -- for a total of \$332.50.

Another way to compensate pieceworkers for overtime, if agreed to before the work is performed, is to pay one and one-half times the piece rate for each piece produced during the overtime hours.

The piece rate must be the one actually paid during nonovertime hours and must be enough to yield at least the minimum wage per hour.

(3) Salary -- the regular rate for an employee paid a salary for a regular or specified number of hours a week is obtained by dividing the salary by the number of hours for which the salary is intended to compensate.

If, under the employment agreement, a salary sufficient to meet the minimum wage requirement in every workweek is paid as straight time for whatever number of hours are worked in a workweek, the regular rate is obtained by dividing the salary by the number of hours worked each week. To illustrate, suppose an employee's hours of work vary each week and the agreement with the employer is that the employee will be paid \$420 a week for whatever number of hours of work are required. Under this agreement, the regular rate will vary in overtime weeks. If the employee works 50 hours, the regular rate is \$8.40 (\$420 divided by 50 hours). In addition to the salary, half the regular rate, or \$4.20 is due for each of the 10 overtime hours, for a total of \$462 for the week. If the employee works 60 hours, the regular rate is \$7.00 (\$420 divided by 60 hours). In that case, an additional \$3.50 is due for each of the 20 overtime hours, for a total of \$490 for the week.

In no case may the regular rate be less than the minimum wage required by FLSA.

If a salary is paid on other than a weekly basis, the weekly pay must be determined in order to compute the regular rate and overtime pay. If the salary is for a half month, it must be multiplied by 24 and the product divided by 52 weeks to get the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52.

Enforcement

Wage-Hour's enforcement of FLSA is carried out by investigators stationed across the U.S. As Wage-Hour's authorized representatives, they conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. Where violations are found, they also may recommend changes in employment practices to bring an employer into compliance.

It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under FLSA.

Willful violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction may result in imprisonment.

TITLE 29 – LABOR

CHAPTER V - WAGE and HOUR DIVISION, DEPARTMENT of LABOR

Part 784. Provisions of the Fair Labor Standards Act Applicable to Fishing and Operations on Aquatic Products

Subpart B Exemptions Provisions Relating to Fishing and Aquatic Products

§784.127 - Office and clerical employees under section 13(a)(5).

Office and clerical employees, such as bookkeepers, stenographers, typists, and others who perform general office work of a firm engaged in operating fishing boats are not for that reason within the section 13(a)(5) exemption. Under the principles stated in Sec. 784.106, their general office activities are not a part of any of the named operations even when they are selling, taking, and putting up orders, on recording sales, taking cash or making telephone connections for customer or dealer calls. Employment in the specific activities enumerated in the preceding sentence would ordinarily, however, be exempt under section 13(b)(4) since such activities constitute ``marketing" or ``distributing" within the meaning of that exemption (see Sec. 784.153). In certain circumstances, office or clerical employees may come within the section 13(a)(5) exemption. If, for example, it is necessary to the conduct of the fishing operations that such employees accompany a fishing expedition to the fishing grounds to perform certain work required there in connection with the catch, their employment under such circumstances may, as a practical matter, be directly and necessarily a part of the operations for which exemption was intended, in which event the exemption would apply to them.

Appendix F. Basic Observer Duties and Responsibilities

Fishery observers monitor and record catch data from commercial fishing vessels and processing facilities. When observing, most observers are at sea. Processing facilities may be on shore, but many of the facilities are large factory vessels. The data are used to supplement research and aid in the management of US living marine resources. The observers may collect data on species composition of the catch, weights of fish caught, disposition of landed species and protected species, i.e., marine mammals, and seabirds, interactions with the fishing gear. Though most observer programs cover commercial fishing activities, not all do. Some observers in the Gulf of Mexico monitor the removal of oil drilling platforms and off Florida's East coast, observers monitor beach nourishment dredging.

Much of the data collected by observers are fish lengths, weights and aging structures. Observers working on processing vessels may also collect stomach content data that would be otherwise difficult to collect. Fishing positions and fishing effort are important data for managing fisheries. In some fisheries, observers provide valuable assistance to researchers with tagging projects involving sharks, tunas, sablefish, spiny lobsters, swordfish, and even some species of sea turtles. Observer programs are responsible for collecting a significant component of fisheries management data in many fisheries.

The first hand information supplied by observers to NMFS on protected species interactions with fishing activities provides excellent information to help reduce interactions between fishing operations and protected species. It is also vital to assessments that track the sustainability of stocks important to the fishing industry.

Appendix G. Contract Work Hours and Safety Standards Act--Overtime Compensation

(a) Overtime requirements. No Contractor or subcontractor contracting for my part of the contract work which may require or involve the employment of laborers or mechanics (see Federal Acquisition Regulation (FAR) 22.300) shall require or permit any such laborers or mechanics in any workweek in which the individual is employed on such work to work in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than 1 1/2 times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.

(b) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the provisions set forth in paragraph (a) of this clause, the Contractor and my subcontractor responsible therefore shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanics employed in violation of the provisions set forth in paragraph (a) of this clause in the sum of \$10 for each calendar day on which such individual was required or permitted to work it) excess of the standard workweek of 40 hours without payment of the overtime wages required by provisions set forth in paragraph (a) of this clause.

(c) Withholding for unpaid wages and liquidated damages. The Contracting Officer shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same Prime Contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act which is held by the same Prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions set forth in paragraph (b) of this clause.

(d) Payrolls and basic records. (1) The Contractor or subcontractor shall maintain payrolls and basic payroll records during the course of contract work and shall preserve them for a period of 3 years from the completion of the contract for all laborers and mechanics working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Nothing in this paragraph shall require the duplication of records required to be maintained for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.

(2) The records to be maintained under paragraph (d)(1) of this clause shall be made available by the Contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the Contracting Officer or the Department of Labor. The Contractor or subcontractor shall permit such representatives to interview employees during working hours on the job.

(e) Subcontracts. The Contractor or subcontractor shall insert in any subcontracts, exceeding \$100,000, the provisions set forth in paragraphs (a) through (e) of this clause and also a clause requiring the subcontractors to include these provisions in any lower tier subcontracts. The Prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the provisions set forth in paragraphs (a) through (e) of this clause.

Appendix H. Excerpts from Alecia Van Atta's paper, "Lost At Sea: An Argument for Seaman Status for Fisheries Observers"

C. Sound Jurisprudence: How Observers Satisfy the Test Seamen Status

Although the question of whether an observer qualifies as a seaman has engendered much debate, the three-prong test for seaman status, as applied to the observer, is relatively straightforward.

First, the vessel on which the observer is aboard will be engaged in navigation. The observer's job is to collect scientific data from the catch of commercial fisherman while the crew is actively fishing. This cannot take place unless the vessel is in navigation. Thus, the first prong of the test will seldom pose a problem to the observer.

Second, the observer has a "more or less" permanent connection with the vessel. This second prong of the test only requires that an individual have more than a transitory relationship with the vessel. Observers have extensive contact with the same vessel, sometimes stationed there for months at a time. This contact goes far beyond a mere transitory relationship. Thus, the second prong of the test will likewise rarely pose a problem to the observer.

Third, the observer performs duties which contribute to the function of a vessel or to the accomplishment of its mission. Although this prong could have potentially posed a problem before *McDermott International Inc. v. Wilander*, the Supreme Court has clarified that to "aid in navigation" means simply to perform duties which contribute to the function of the vessel or the accomplishment of its mission. Because vessels are required by federal law to have an observer on board, a fishing venture, at least legally speaking, would be impossible without them. By keeping vessels in compliance with federal law, and allowing them to fish lawfully, observers contribute to the function of the vessel and the accomplishment of its mission.

Though the vessel cannot legally fish without an observer, an observer is more than a license to fish. Observers are an invaluable component of the fishing industry's mission. Not only do observers allow current vessels to accomplish their missions, but they also guarantee that future vessels will accomplish their missions by ensuring that fishery resources are available in years to come. The purpose of the observer program under the Magnuson Act is to observe and manage fishery resources so that there will be continued resources for the commercial

vessels to harvest. The information gathered by Magnuson Act observers is essential to protect coastal fish, the national fishing industry, and dependent coastal economies from stresses caused by overfishing waters adjacent to the territorial waters. In this respect, observers are as important to the overall mission of the commercial fishing industry as any

other individual on board the vessel. Thus, on both a short-term and long-term basis, fisheries observers are vital to the accomplishment of the mission of the vessel.

Because observers meet the three-prong test for seaman status they should be afforded legal remedies equal to those of traditional seamen. Given the Supreme Court's liberal interpretation of the third requirement for seaman status, to hold otherwise would run afoul of the Court's underlying policy rationale and demonstrate a swing back to earlier, more rigid definitions of a seaman. The Supreme Court has emphasized that the underlying policy basis for granting special maritime remedies to certain groups of employees is to compensate or offset "the special hazards and disadvantages to which they who go down to sea are subjected." Because Magnuson Act fisheries observers are subjected to the special hazards and disadvantages of the North Pacific, they should be afforded the same basic protections that are afforded to traditional seamen.

Appendix I. What Is a “Seaman” Under the Jones Act?

The U. S. Supreme Court has addressed and attempted to clarify the issue of Jones Act "seaman" status. In *Chandris v. Latsis*, - *Chandris v. Latsis*, U. S. -, 115 S. Ct 2172, 132L. Ed. 2d314(1995) - the District Court had held that a worker could qualify as a Jones Act seaman if he was "either permanently assigned to a vessel or performed a substantial part of his work on a vessel". The Supreme Court reversed the lower court, holding that a seaman must have a connection to a vessel in navigation in terms of both its duration and its nature.

No specific finding was made as to whether Latsis was a Jones Act seaman, but the court set forth the following guidelines for determination of seaman status:

- 1) Those working aboard a vessel for the duration of a voyage in furtherance of the vessel's mission are not necessarily seamen.
- 2) Jones Act coverage depends not on the place where the injury is inflicted, but on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters.
- 3) A distinction must be made between sea-based workers and land-based workers who have only a transitory or sporadic connection to a vessel in navigation.
- 4) Land-based maritime workers do not become seamen because they happen to be working aboard a vessel when they are injured, and seamen do not lose Jones Act protection where the course of their service to a vessel takes them ashore.
- 5) In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ a "snapshot" test for seamen status, inspecting only the situation as it exists at the instant of injury, but rather, the total circumstances of an individual's employment must be weighed to determine whether he has a sufficient relation to the vessel. Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker is engaged while injured.
- 6) The essential requirements for seaman status are:
 - (a) An employee's duties must contribute to the function of the vessel or to the accomplishment of its mission;
 - (b) A seaman must have a connection with a vessel in navigation (or to an identifiable group of such vessels), that is substantial in terms of both its duration and its nature;

The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime worker is a seaman because the ultimate

inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on a vessel at a given time.

Appendix J. James O'Boyle v. United States of America

James O'BOYLE, Plaintiff-Appellant, v. UNITED STATES of
America, Defendant-Appellee, Frank Orth & Associate,
Defends

No. 92-4032.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

993 F.2d 211; 1993 U.S. App. LEXIS 13569 1993 AMC 2153;
7 Fla La, W. Fed, C 428

June 11, 1993, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the Southern District
of Florida. DISTRICT/BKRPTCY COURT DKT# 91-963-CIV-JWX. DISTRICT JUDGE: KEHOE

DISPOSITIONS:

AFFIRMED,

COUNSEL:

For Plaintiff-Appellant: Edward R. Pink, C/o RUF & CARNSY, P.A., 2455 L. Sunriva
Blvd. - PH-E, Ft. Lauderdale, FL 33304, (305) 561-2230~

For Defendant-Appellee: Dexter W. Lehtinen, U.S. Attorney, 155 S. Miami Ave_ Miami, FL 33130,
FTS 350-5420. Mark D. Greenberg, STINSON, LYONS, et l., 1401 Brickell Ave., 9th Fl., Kismi, Ph
33131-3553, (305) 173-7571, John Adrian, USDOJ - Admiralty Division, P.O. Box 14271,
Washington, DC 20044-4271, (202) 501-7378. David V. Hutchinson, USDOJ - Admiralty Division,
P.O. Box 14271, Washington, DO 20044-4271, (202) 501-6355.

JUDGES: Before ANDERSON and EDMONDSON, circuit Judges, and DYER, Senior Circuit Judge.

OPINION BY:

DYER

OPINION:

DYER, Senior Circuit Judge

O'Boyle appeals the dismissal of his amended complaint against the United States for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In his amended complaint, he alleged that he was injured as a result of his slip and fall on a Japanese fishing vessel. He sought relief under the Jones Act, 46 U.S.C. App. @ 688 and the Federal Employees Compensation Act, 5 U.S.C. @@ 8101 -8193 (FECA), and made claims for maintenance and cure, wages and travel expenses, negligence and emotional distress. We conclude that O'Boyle was not a seaman, and affirm.

The amended complaint alleged that O'Boyle was aboard the HAURYO-MARU-53, a Japanese driftnet vessel plying the international waters of the Pacific Ocean when fish slime was left on the deck causing him to slip and fall and injure himself. The complaint alleged that the Driftnet Impact Monitoring, Assessment and Control Act of 1987, P.L. 100-220, 101 Stat. 1477, note 16 U. S. C. @1822, and the Shima- Asselin Treaty provide for the placement of American observers on Japanese driftnet fishing vessels in international waters.

The complaint further alleged that the Secretary of Commerce through the National Oceanic & Atmospheric Administration contracted with Frank Orth & Associates to provide scientific observers to conduct research and compile data concerning driftnet fishing. Pursuant to its contract with the government, Orth recruited O'Boyle, a field biologist and Grade 2 Observer, who had responded to an offer of employment by Orth in the Miami Herald newspaper. O'Boyle signed a contract with Orth as a special project employee. Orth had administrative and logistic responsibility over O'Boyle, issued him his pay check and provided him with work-related health and accident, workmen's compensation and Jones Act insurance. Following his injury, Orth paid O'Boyle maintenance and care benefits.

The amended complaint sought recovery as a borrowed servant employee of the United State under the Jones Act, the general Maritime law, or as an employee under FECA.

While this appeal was pending O-Boyle's claim for benefit under FECA was disallowed on the ground that he was not an employee of the United States under Section 8101(1) (A), (B) of the Act. FECA's action is not reviewable on appeal.

O' Boyle argues that he is not a United States' employee for purpose of FECA, but under the borrowed servents doctrine, a United States' employee under the Jones Act. We need not tarry long with this argument because even if he was an employee of the United States under the borrowed servant doctrine, which we need not decide, it is clear that in order to recover damages under the Jones Act, he must have the status of a seaman. *Hurst v. Pilings & Structures, Inc.*, 896 F. 2d 504, 505 (11th Cir.1990). O'Boyle's sole argument that he was a seaman was, even though the owner and the crew did not want him aboard, once he was assigned to the vessel, it could not go fishing for squid without him, thus he was essential to the vessel's mission.

O' Boyle was not a member of the crew, was not involved with the navigation of the vessel, was not paid by the vessel, had no responsibilities or allegiance owing to the owner or operator of the vessel, was not performing the ship's work nor furthering its purpose. There was no means of communication between O'Boyle and the Master and crew of the vessel. O'Boyle could not speak Japanese and the Captain and crew spoke no English. He was aboard the HAURYO-MARU-53 solely because the treaty required him to be there in order to observe the types of marine life encountered by the ship during its voyage. He collected data and conducted scientific studies. O'Boyle's mission was not to catch fish or to have anything to do with the vessel. He was simply an employee of Orth, aboard a Japanese fishing vessel as a business invitee. His amended complaint set forth his duties as follows:

1. Maintain organized, accurate, up-to-date records for all information data and specimens collected;

2. Carry out research objectives efficiently, but tactfully to maintain good rapport with fishing industry representatives and officers and crew on board;
3. Collect biological specimen of fish, squid, seabirds and marine mammals including dissection of porpoises for biological samples and necropsy data;
4. Monitor gillnet set/haul operations and record observations/data concerning the incidental entanglements of marine mammals, salmon and seabirds and marine organisms as required;
5. While the vessel is underway, conduct sighting surveys for marine mammals and debris; and
6. Conduct ancillary scientific studies as required; e.g., CTD casts, seabird sighting surveys, neuston tows, and ichthyoplankton sampling.

Upon the completion of the voyage, O'Boyle submitted a detailed report of his scientific observations to the National Oceanic & Atmospheric Administration, not to the vessel owner or operator.

In *McDermott Int'l, Inc. v. Wilander* the court emphasized that "the key to seaman's status is employment-related connection to the vessel in navigation...a necessary element of the connection is that a seaman perform the work of the vessel". The Court cited approvingly that part of the Fifth Circuit's test which requires that a seaman's duties "contribute to the function of the vessel or to the accomplishment of its mission." *Id.* (quoting *Offshore Co. V. Robison*, 266 F.2d 769, 779 (5th Cir.1959)).

This court in *Hurst v. Pilings & Structures, Inc.*, *supra*, set forth the qualifications for seamen status as follows:

To qualify for seaman status, a worker must satisfy the following criteria:

(1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips. *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir.1980).

Under any theory of liability that O'Boyle alleged in his amended complaint, he cannot recover because he was not a seaman. The motion to dismiss his complaint was properly granted.

AFFIRMED.

CONCURB
ANDERSON

CONCUR:

ANDERSON, Circuit Judge, concurring

O'Boyle contends that he was a seaman because his presence on the HAURYO-MARU-53 was essential to the

accomplishment of its mission, in the sense that the vessel could not legally perform its function without carrying him aboard. Although I find some merit in O'Boyle's argument, and although it cannot be said that O'Boyle's position is clearly incorrect in light of the paucity of relevant authority, I conclude that Judge Dyer's reasoning is more persuasive. Aside from the fact that his presence on the vessel was legally required, O'Boyle did not contribute to the vessel's function in any way.

Appendix K. Key Bank of Washington v. Dona Karen Marie Fisheries, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEY BANK OF WASHINGTON, a Washington banking corporation, as: trustee for
CHRISTIANIA BANK OF KREDITKASSE, a bank chartered under the laws of Norway,

Plaintiff,

V.

DONA KAREN MARIE, Official No. 681105, its engines, tackle, rigging, machinery,
equipment, and other appurtenances. in rem; and DONA KAREN MARIE FISHERIES,
INC., a Washington corporation, in personam

Defendants.

NO. C92-1137R

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S NOTION FOR SUMMARY JUDGMENT WITH
RESPECT TO INTERVENORS

THIS MATTER comes before the court on plaintiff Key Bank's motion for summary
judgment and order of sale, and on opposition motions filed by three intervenors. Having
reviewed the motions, together with all supporting materials, and having heard oral
argument, the court finds and rules as follows:

ORDER

I. BACKGROUND

Many of the material facts in this admiralty case are not in dispute. On October 19, 1990,
defendant Dona Karen Marie Fisheries, Inc. ("DKMF") executed and delivered two
promissory notes to Key Bank ("Bank"), which is the trustee for Christiania Bank of
Kreditkasse of Norway. Under the "Term Note," DKMF promised to pay to the order of Key
Bank the principal sum of \$5,500,000 with interest under the "Working Capital Note,"
DKMF promised to pay the principal sum of \$2,500,000 with interest. Also on October 19,
1990, to secure payment on the notes, DKMF executed a Preferred Ship Mortgage. On
October 29, 1990, the United States Coast Guard at Seattle recorded this mortgage.

Thereafter, DKMF failed to pay certain installments of the principal and interest due under the Notes, and the mortgage went into default. On July 17, 1992, Key Bank filed a complaint in rem and in personam to foreclose and the Preferred Ship Mortgage under 46 U.S.C. § 31325(b). On July 21, 1992, the vessel was arrested. On August 27, 1992, Key Bank filed two motions: (1) a motion for summary judgment in personam against DKMF for the amounts due under the notes, for summary judgment in rem against the DONA KAREN MARIE, and for an order of foreclosure and sale; and (2) a motion for default judgment in rem against all persons who had failed to file claims against the DONA KAREN MARIE. The first motion opposed by DKMF and the DONA KAREN MARIE. To the extent that the Bank contends that its preferred ship mortgage has priority over all outstanding claims against the vessel (with the exception of claims for administrative costs), the first motion is also opposed by three intervenors who assert maritime liens against the vessel: Pacific Observers, Inc. ("POI"), Sabroe Refrigeration ("Sabroe") and Harris Electric, Inc. ("Harris"). The present order treats only the Bank's first motion, and only to the extent that it is opposed by the three intervenors.¹

II. DISCUSSION

A. Standards for Summary Judgment

Summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the moving party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., *T.W. Electrical service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630-31 (9th Cir. 1987); *Lew V. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). To withstand a motion for summary judgment, the nonmoving party must show that there "are genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." See *Anderson v. Liberty Lobby Inc.*, 477 U. S. 242, 250 (1986).

B. Preferred Ship Mortgages and Preferred Maritime Liens

It is undisputed that Key Bank holds a preferred ship mortgage against the DONA KAREN MARIE. Under 46 U.S.C. § 31326, the Bank therefore has priority with respect to proceeds of the sale of the vessel over all claims against the vessel except administrative fees and costs and preferred maritime liens. POI and Sabroe contend that they hold preferred maritime liens. Harris contends that it may also have a preferred lien, and that in any event

¹ On October 20, 1992, the court held oral argument with respect to the intervenors' motions in opposition to Key Bank's motion for summary judgment, but continued oral argument with respect to DKMF's motion in opposition to summary judgment and sale until November 5, 1992. An order adjudicating the rights between plaintiff and DKMF will be issued after the November 5 oral argument.

summary judgment is inappropriate because without further discovery it is impossible to tell whether or not its lien has priority over the Bank's preferred ship mortgage.

POI is an independent contracting agent, which is in the business of providing fishing vessels with the observers required by 50 CFR 675.25 and the National Marine Fisheries Service (NMFS), which regulates the observer program. POI bases its claim to a preferred maritime lien on 46 U.S.C. § 31301(5) (D), which states that a lien on a vessel "for wages of the crew of the vessel" is a preferred maritime lien. POI's position is that, by virtue of subrogation, it is entitled to assert a preferred maritime lien for crew wages.

There is nothing in the language of § 31301(5) (D) which is inconsistent with the theory of subrogation per se: the subsection "applies equally to crew members employed directly by the ship and those employed by an independent contractor; . . . one who advances money to pay crew's wages is entitled to a maritime lien of the same rank." The narrow question in this case is whether subrogation is appropriate in the context of the NMFS observer program. An interlinked question is whether observers are properly considered to be crewmembers for the purposes of § 31301(5)(D).

This is apparently a matter of first impression. The parties have provided neither case law nor statutory authority, which directly addresses the question of whether an observer is a crewmember, or whether a contracting agent may assert an observer's lien for crew wages. POI argues that the court should employ the three part test used in cases such as Wells v. Arctic Alaska Fisheries, 1991 A.M.C. 448 (W.D. Wash. 1990)--a test which turns in part on whether a person working on board contributes to the function of the vessel, or to the accomplishment of its mission. Key Bank, on the other hand, argues that the structure of the NMFS observer program makes it inappropriate for this court even to reach the Wells test.

The court finds the Bank's argument unpersuasive. The Bank is correct that under the observer program, both observers and contractors are forbidden to have any financial or personal interest in the vessels to which they are assigned. NMFS Observer Plan, attached as Exhibit A to Plaintiff's Memorandum in Support of Summary Judgment and Sale, at 12, 21-22 (hereinafter "Plan"). But while the Plan broadly defines financial interest as "payment or compensation received directly from the owner or operator of the vessel . . . that results from a property interest or business relationship in that vessel," the Plan also states that "the provision of certified observers for remuneration does not constitute a conflict of interest."

It is important to note that such a savings clause is essential: without it, contractors like POI could never be paid by the ship owners--even though, under the Plan, those owners are clearly responsible for the direct costs of the observer program. Observer Plan at 5. With the savings clause in place, however, contractors clearly may be paid by vessel owners: remuneration is not a prohibited "business relationship." But if that is true, it must also be true that a maritime lien which arises when such remuneration is not forthcoming is not a prohibited "property interest." It would be inconsistent to hold that a ship owner may pay a contractor directly, but that if the owner fails to do so the contractor is barred by the Plan's

conflict of interest rules from securing the payment to which it is entitled by proceeding against the owner's vessel. There is thus nothing in the Plan's conflict of interest provisions which prohibits a contractor from asserting a lien against a vessel.

The Bank argues, however, that it is illogical to allow a contractor to assert a lien, which the observers themselves could not assert. The Bank may well be correct that Observers are barred from asserting a lien against the vessel, since the Plan clearly prohibits them from being compensated by the vessel owners. Plan at 21, ¶ 5(a) (1) (observers "must be employed by an independent contracting agent" (emphasis added)). But this does not mean that POI is also barred from asserting such a lien: as set forth above, the basic structure of the Plan is that contractors like POI may be remunerated by the vessel owner, and in fact that they also must be.

While it may seem strange to allow POI, standing in the shoes of the observers, to assert a lien that the observers themselves could not assert, it is the unique structure of the Plan which dictates this unusual result: the Plan prohibits observers from being paid by vessel owners--and by extension from asserting a lien against a vessel--but places no such restriction upon contractors. It is therefore not illogical to hold that POI under principles of subrogation may actually stand in a stronger position than its employees. POI, unlike its employees, is free from certain restrictions, which bind individual observers--namely, the rule that they may not be paid by vessel owners.

To allow POI to assert a preferred maritime lien for crew wages does not in any way compromise the purpose or the structure of the Plan. The basic structure of the Plan--to interpose contractors between observers and interests associated with the vessel--remains intact. Indeed, the real harm to the Plan would be done if this court were to hold that contractors could not assert preferred maritime liens for crew wages. In that case, contractors like POI might understandably be reluctant to put themselves at risk by compensating their own employees without first being assured of remuneration by vessel owners. Contractors therefore might well insist upon remuneration from a vessel owner before that owner departed on a fishing venture. In the very likely event that the owner was unable to supply the necessary funds at that time, it would be very difficult for him or her to secure observers at all--and this surely cannot be what the Plan intended. For this reason, and for the reasons developed above, the court concludes that a contracting agent employing observers is not barred by the structure of the NMFS Plan from asserting a preferred maritime lien for crew wages.

Since this is the case, the court must now apply the three-part test articulated in Wells, 1991 A.M.C. at 449, to determine whether or not observers are in fact crewmembers. In order for a claimant to be accorded seaman status, "(1) the vessel on which the claimant was employed must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be aboard primarily to aid in navigation." Wells at 449 (quoting Estate of Wenzel v. Seaward Marine Services, Inc. 709 F.2d 1326, 1327 (9th Cir. 1983)).

In the present case, the vessel on which the observers were employed was engaged in navigation. Similarly, the observers had a “more or less” permanent connection with the vessel. This second part of the test requires only that a crewmember have a more than transitory relationship with the vessel. See Bullis V. Twentieth Century-Fox Film Corporation, 474 F.2d 392, 394 (9th Cir. 1973) (movie extras who spent approximately two hours on board do not have a "more or less permanent" relationship with the vessel). The Plan clearly envisions extensive contacts between observers and vessels--contacts going far beyond a merely transitory relationship. See e.g. Plan at 17 (discussing conditions of observers living on board vessels).

Finally, the court finds that the observers satisfied the third part of the Ninth Circuit test because they were on board "primarily in aid of navigation." As this court explained in Wells, the third requirement is broadly construed in the Ninth Circuit: to aid in navigation means simply to perform duties, which contribute to the function of a vessel or to the accomplishment of its mission. Wells, 1991 A.M.C. 450-52 (summarizing Ninth Circuit law). In the Ninth circuit, "it is not inconceivable that an actor, under certain circumstances, might be a seaman in the same manner as a musician or bartender might qualify." Wells, at 451 (quoting Bullis, 474 F.2d at 394, n. 10.) Clearly observers also qualify under this test: since vessels are required by law to have observers on board, a fishing venture, at least legally speaking, would be impossible without them. Thus the court finds that observers are crewmembers and DENIES the Bank's motion for summary judgment with respect to intervenor POI.

Appendix L. Case Law Regarding Seaman Status Of Fisheries Observers

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SUMMARY

The issue of the legal status of fisheries observers has been debated since various federal laws such as the Magnuson Act⁶ and the Marine Mammal Protection Act (MMPA)⁷ mandated the use of observers on certain fishing vessels. Specifically, the issue has frequently been whether or not observers can claim the status of “seamen”, with all the attendant benefits therein. These benefits are considerable as applied to remedies for personal injuries or wage claims.

In the area of personal injuries, three traditional remedies have been available to seamen for maritime related injuries. The first is Maintenance and Cure. Any seaman who becomes sick or injured as a result of his employment, when not caused by the unseaworthiness of the vessel or the negligence of the shipowner, is entitled to food and lodging “maintenance”, necessary medical services “cure”, and unearned wages from his employer.

The second remedy is the Doctrine of Unseaworthiness, which provides that a vessel owner owes a duty to all seamen on board to furnish a seaworthy vessel, i.e., one free of defects and “fit for its intended use”. To a seaman, this duty is absolute, meaning it does not require a finding of fault or negligence, and applies to all seamen on board the vessel, regardless of whether the vessel owner is the seaman’s employer.

The third remedy is an action for negligence under the Jones Act⁸. This statute allows seamen who are injured in the course of their employment by the negligence of their

⁶Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801, et seq.

⁷Marine Mammal Protection Act, 16 U.S.C. §1361.

⁸46 U.S.C. §688.

employer (or fellow employees), an action against the employer for damages at law, with the right of trial by jury. The burden of proving causation, often described as a “featherweight causation standard”, requires only a minimal showing of negligence by the employer or fellow employees. Damages under the Jones Act include past and future medical expenses and wages, pain and suffering, loss of life’s enjoyment, etc.

Another important benefit of seaman status is the right to perfect a maritime wage lien. Federal law provides that preferred maritime liens have priority over all other types of maritime liens⁹. A preferred maritime lien includes a maritime lien based upon unpaid wages of the crew of a vessel. Thus, are fisheries observers “crew members”, i.e., “seamen”, for purposes of perfecting maritime wage liens?

This leads to the logical question, what is a seaman? This issue has been litigated extensively, including recently by the Supreme Court in McDermott v. Wilander, 498 U.S. 337 (1991), and Chandris v. Latkis, 515 U.S. 347 (1995). As a result, the test for seaman status has been narrowed down to (1) employment-related connection to a vessel in navigation, (2) the worker’s duties must contribute to the function of the vessel or to the accomplishment of its mission, and (3) the claimant’s connection to the vessel must be “substantial in both its duration and nature”.

CASE LAW

In 1995, Alecia Van Atta, a NOAA attorney, published a law review article entitled “Lost at Sea: An Argument for Seaman Status for Fisheries Observers”.¹⁰ The article contains an excellent analysis and history of this issue, including case law, and presents a good argument for seaman status for fisheries observers. However, the weight of case law on this matter would seem to be at odds with her argument. A review of the relevant case law, in chronological order, follows:

Key Bank of Puget Sound v. F/V ALEUTIAN MIST (No. C91-107, W.D. Wash. Jan 10, 1992) - In rem proceeding against the vessel to establish bank’s priority lien status. Observer contractor had claimed that wages due observers were entitled to preferred maritime lien status, since observers were seamen. Court (Judge Zilly) held that the test for determining seaman status was the same whether the claims arose in the maritime lien or personal injury context, and in this case the **observers were not seamen**. They were independent scientific personnel who did not perform crew functions or duties.

Key Bank of Washington v. DONA KAREN MARIE, (No. C-92-1137R, W.D. Wash. Oct. 26, 1992) - In rem suit holding that an **observer was a seaman** for purposes of

⁹46 U.S.C. § 31326 (b)(1).

¹⁰18 Seattle U. L. Rev. 629 (Spring, 1995).

asserting a preferred maritime lien for crew wages. Cites Wells v. Arctic Alaska Fisheries, No. C89-1490R, W.D. Wash. Oct. 16, 1990 (1991 AMC 448) for 9th Circuit authority on when a claimant is a seaman: 1) if the vessel on which claimant is employed is in navigation; 2) the claimant had a more or less permanent connection to the vessel; and 3) the claimant was on board the vessel to assist in navigation. The Court (Chief Judge Rothstein) found that in this case the observers satisfied all three prongs of this test. The third prong was the most troublesome, but the Court reasoned that since the vessels were required by law to have observers on board, the fishing venture would be impossible (legally) without them. Therefore, the observers were indispensable members of the crew contributing to the vessel's mission, and hence were seaman for purposes of perfecting maritime wage liens.

Arctic Alaska Fisheries Corp. v. Feldman, No. C93-42R (W.D. Wash., Mar. 5 1993) - A few months later Judge Rothstein applied the same three prong test for seaman status to an observer's personal injury action, and found that the observer did not satisfy the third prong in that she had not been engaged to perform duties in service to the vessel, and therefore **was not a seaman** under the Jones Act. The Court applied the restrictions of the Marine Mammal Protection Act (MMPA), 16 U.S.C. §1383a(e)(7), which preclude personal injury suits by observers under that Act, to personal injury suits by observers operating under the Magnuson Act.

James O'Boyle v. United States, et al., 993 F. 2d 211 (**11th Cir. 1993**) - O'Boyle was employed by Frank Orth & Associates which had been contracted by the Department of Commerce to provide observers on fishing vessels. In this case he was on board a Japanese fishing vessel in international waters pursuant to the Driftnet Impact Monitoring, Assessment, and Control Act of 1987¹¹, and the Shima-Asselin Treaty, when he slipped and fell and was injured. In the District Court (S.D. Fla.), O'Boyle sued Orth and the United States (under a borrowed servant theory) for Jones Act damages, maintenance and cure and other damages, and also sued the U.S. claiming benefits under the Federal Employees Claims Act (FECA). The District Court dismissed the case for lack of subject matter jurisdiction, noting, among other things, that his complaint was contradictory in that he was alleging he was a federal employee for FECA purposes, but also entitled to Jones Act benefits, noting that a litigant could be eligible for only one, but not both of these remedies, at the same time.

The 9th Circuit looked at the issue of seaman status as per the criteria outlined by the Supreme Court in McDermott v. Wilander, and determined that O'Boyle was **not a seaman**, holding that it was clear that as an observer he "was not a member of the crew, was not involved with the navigation of the vessel, . . . and was not performing the ship's work nor furthering its purpose". The Court specifically rejected the argument that because the ship could not legally go fishing without him, this made him an indispensable member of the crew, and essential to the ship's mission and thus a seaman.

¹¹P.L. 100-220, 101 Stat. 1477, note to 16 U.S.C. §1822.

State Street Bank and Trust v. F/V YUKON PRINCESS, No. C93-5465C (W.D. Wash. Dec. 22, 1993) - Judge Coughenour, relying on the Key Bank of Washington v. DONA KAREN MARIE case, held that **observers were seamen** for purposes of perfecting preferred maritime liens. The Court found that observers had the requisite employment connection to a vessel pursuant to the Wells three prong test (vessel in navigation, observer had more or less permanent connection to vessel, observer on board primarily to contribute to mission of vessel), even when the observer was paid by an independent contractor serving the vessel owner. No mention was made of the O'Boyle case.

West One Bank v. CONTINUITY ,et al., No. C93-1218C (W.D. Wash. Jan. 19, 1994)(1994 AMC 2059) - In another maritime lien case, Judge Coughenour affirmed his earlier ruling in the YUKON PRINCESS case that **observers were seamen** under 46 U.S.C. §10101(3). No mention of O'Boyle.

Coyne v. Seacatcher Fisheries, Inc., C93-510Z (W.D. Wash. Feb. 1, 1994) – This case involved an observer's claim under the Jones Act for verbal and sexual harassment by a crewmember. Judge Zilly, relying on the holding in the Feldman case that the provision barring suits by observers against vessel owners under the MMPA applied to a Magnuson Act observer, held that the **observer was not a seaman**. No mention of O'Boyle.

Key Bank of Washington v. YUKON CHALLENGER, No. C93-1157D (W.D. Wash. Feb. 22, 1994) - Another maritime lien case (Judge Dimmick) holding that an **observer was a seaman** because the observer had an employment related connection to a vessel in navigation. No mention of O'Boyle.

Key Bank of Washington v. F/T PACIFIC ORION, No. C93-806Z (W.D. Wash. Feb 1, 1995) – Judge Zilly again, relying on his earlier decision in the F/V ALEUTIAN MIST case, held that **observers were not seaman** and thus not entitled to a preferred maritime wage lien. No mention of O'Boyle.

Joan Schaller v. Arctic Alaska Fisheries Corp., et al., No. 3K0-94-585CI (Alaska Superior Ct., Kodiak, December 13, 1995)(1996 AMC 438). – This was a state court case involving a suit by a fisheries observer for the State of Alaska for Jones Act benefits against her employer, which had contracted with the vessel owner to provide her services. The contract provided that she would perform no crew duties, and that her only contribution to the vessel's mission was that the vessel could not legally operate without her.

The Court concluded that the **observer was a seaman** under the Jones Act and that she met the three-prong test under Wells for seaman status (vessel in navigation, more or less permanent connection to the vessel, and on board to assist in navigation). The Court adopted the reasoning of the Key Bank of Washington v. F/F YUKON CHALLENGER case in that because the vessel could not legally fish without the presence of an observer on board, this meant that the observer's employment was "connected with navigation" under

the McDermott test of contributing to the accomplishment of the vessel's mission. No mention of O'Boyle.

Bank of America N.A. v. PACIFIC LADY, et al., No. C00-1114P (W.D. Wash. Nov. 23, 2000)(2001 AMC 727) – Suit by Alaska Observers (Plaintiff-Intervenor) to establish a preferred maritime lien for wages. The Court (Judge Pechman) framed the issue as whether fisheries observers on board the vessel were “crew of the vessel” under 46 U.S.C. 31301(5)(D). It noted that there was a split in decisions in the Western District of Washington on the issue, and that the 9th Circuit had not addressed the issue. It then noted that the only appellate court case on the observer-seaman issue was O'Boyle v. United States. Citing O'Boyle as precedent, the Court held that even though that case had determined that an observer was not a seaman for purposes of a Jones Act suit for injuries, the reasoning of the decision should also apply with equal force to maritime lien cases, and therefore in this case the **observer was not a seaman**.

The Court also cited federal regulations¹² providing that it was unlawful to require observers to perform duties normally performed by crewmembers, and that this strongly suggested that observers were not crew members, and hence not seamen.

In addition, the Court noted that Magnuson Act amendments¹³ provided that an observer on board a vessel shall be deemed to be a federal employee for purposes of the Federal Employees Compensation Act, further suggesting that observers should not be regarded as crew members or seamen.

SUMMARY

As you can see, most of these cases have come out of the Western District of Washington, and are contradictory. Unfortunately, the 9th Circuit has not opined on the issue. The only circuit court case on the matter is the O'Boyle case out of the 11th Circuit, which unequivocally holds that observers are not seaman. The Bank of America v. PACIFIC LADY case is the most recent out of the W.D. of Washington, and the only case from that district to mention the O'Boyle case. This case, citing O'Boyle and federal law, also decisively holds that observers are not seaman.

Therefore, whether you agree with these holdings or not, or advocate an opposite position such as Ms. Van Atta has done, these are the leading cases on the matter at present.

¹² 50 C.F.R. 679.7(g)(7).

¹³ 16 U.S.C. 1881b(c).

Appendix M. Chandris, Inc. v. Latsis

U.S. Supreme Court
CHANDRIS, INC. v. LATSIS, ___ U.S. ___ (1995)

CHANDRIS, INC. ET AL., PETITIONERS v. ANTONIOS LATSIS
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT No. 94-325.

Argued February 21, 1995
Decided June 14, 1995

Respondent Latsis' duties as a superintendent engineer for petitioner Chandris, Inc., required him to take voyages on Chandris' ships. He lost substantial vision in one eye after a condition that he developed while on one of those voyages went untreated by a ship's doctor. Following his recuperation, he sailed to Germany on the S. S. Galileo and stayed with the ship while it was in drydock for refurbishment. Subsequently, he sued Chandris for damages for his eye injury under the Jones Act, which provides a negligence cause of action for "any seaman" injured "in the course of his employment." The District Court instructed the jury that Latsis was a "seaman" if he was permanently assigned to, or performed a substantial part of his work on, a vessel, but that the time Latsis spent with the Galileo while it was in drydock could not be considered because the vessel was then out of navigation. The jury returned a verdict for Chandris based solely on Latsis' seaman status. The Court of Appeals vacated the judgment, finding that the jury instruction improperly framed the issue primarily in terms of Latsis' temporal relationship to the vessel. It held that the "employment-related connection to a vessel in navigation" required for seaman status under the Jones Act, *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355, exists where an individual contributes to a vessel's function or the accomplishment of its mission; the contribution is limited to a particular vessel or identifiable group of vessels; the contribution is substantial in terms of its duration or nature; and the course of the individual's employment regularly exposes him to the hazards of the sea. It also found that the District Court erred in instructing the jury that the Galileo's drydock time could not count in the substantial connection equation.

Held:

1. The "employment-related connection to a vessel in navigation" necessary for seaman status comprises two basic elements: the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, *id.*, at 355, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in both its duration and its nature.

(a) The Jones Act provides heightened legal protections to seamen because of their exposure to the perils of the sea, but does not define the term "seaman." However, the Court's Jones Act cases establish the basic principles that the term does not include land-

based workers, *id.*, at 348, and that seaman status depends "not on the place where the injury is inflicted. . . but on the nature of the seaman's service, his status as a member of the vessel, and his relationship . . . to the vessel and its operation in navigable waters," *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 4. Thus, land-based maritime workers do not become seamen when they happen to be working aboard a vessel, and seamen do not lose Jones Act coverage when their service to a vessel takes them ashore. Latsis' proposed "voyage test" under which any maritime worker assigned to a vessel for the duration of a voyage, whose duties contribute to the vessel's mission, would be a seaman for injuries incurred during that voyage - conflicts with this status-based inquiry. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190, and *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 255, distinguished.

(b) Beyond the basic themes outlined here, the Court's cases have been silent as to the precise relationship a maritime worker must bear to a vessel in order to come within the Jones Act's ambit, leaving the lower federal courts the task of developing appropriate criteria to distinguish "ship's company" from land-based maritime workers. Those courts generally require at least a significant connection to a vessel in navigation (or to an identifiable fleet of vessels) for a maritime worker to qualify as a seaman under the Jones Act.

(c) The test for seaman status adopted here has two essential requirements. The first is a broad threshold requirement that makes all maritime employees who do the ship's work eligible for seaman status. *Wilander*, *supra*, at 355. The second requirement determines which of these eligible maritime employees have the required employment-related connection to a vessel in navigation to make them in fact entitled to Jones Act benefits. This requirement gives full effect to the remedial scheme created by Congress and separates sea-based maritime employees entitled to Jones Act Page III protection from land-based workers whose employment does not regularly expose them to the perils of the sea. Who is a "member of a crew" is a mixed question of law and fact. A jury should be able to consider all relevant circumstances bearing on the two requirements. The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether he is a seaman, because the ultimate inquiry is whether the worker is part of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. Although seaman status is not merely a temporal concept, it includes a temporal element. A worker who spends only a small fraction of his working time aboard a vessel is fundamentally land-based and therefore not a crew member regardless of his duties. An appropriate rule of thumb is that a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. This figure is only a guideline that allows a court to take the question from the jury when a worker has a clearly inadequate temporal connection to the vessel. On the other hand, the seaman status inquiry should not be limited exclusively to an examination of the overall course of a worker's service with a particular employer, since his seaman status may change with his basic assignment.

2. The District Court's drydock instruction was erroneous. Whether a vessel is in navigation is a fact intensive question that can be removed from the jury's consideration only where the facts and the law will reasonably support one conclusion. Based upon the record here, the trial court failed adequately to justify its decision to remove that question from the jury. Moreover, the court's charge to the jury swept too broadly in prohibiting the jury from considering the time Latsis spent with the vessel while in drydock for any purpose.

20 F.3d 45, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which THOMAS and BREYER, JJ, joined. [CHANDRIS, INC. v. LATSIS, ___ U.S. ___ (1995), 1]

Appendix N. Northeast Region – Management Control Review Findings/Conclusions

MANAGEMENT CONTROL REVIEW OF NATIONAL MARINE FISHERIES SERVICE OBSERVER PROGRAM/SERVICE DELIVERY MODELS (Excerpt from NER NMFS Contracted Observer Program)

F2. CONTROL TECHNIQUE

The NMFS encourages vessel owners to obtain insurance that would protect them in the event an observer is injured.

F2. TEST QUESTION(S)

Interview a sample of vessel owners in MMPA and SFA fisheries to determine if NMFS encouraged them to indemnify themselves against loss because of accidents or loss caused by the vessel, if they carry P&I insurance against loss, if their insurance extends to the observers as well as the crew and, if no, have they acquired other insurance coverage that does extend to observers and would they be more likely to do so if they were reimbursed by NMFS.

F2. FINDINGS

Only two of 20 respondents indicated they were encouraged to indemnify themselves against loss while 17 indicated they carried insurance that covered their vessel. Only three of 17 had coverage that extended to the observer and none had specifically purchased coverage that extended to the observer. Most (13 of 20), indicated they would carry P&I that extended to the observers if they were reimbursed by NMFS.

F2. CONCLUSIONS Few vessels carry P&I insurance that covers the observer, but most would if reimbursed by NMFS. However, the test did not determine if the responding vessels were aware that PTSI had a blanket policy to provide coverage for all vessels taking PTSI employed observers. Observers provide vessel captains a summary of the PTSI coverage and a phone number to call for details. Therefore, the data are difficult to interpret since the vessels may have known about the PTSI coverage and decided that they didn't need additional coverage of their own.

F2. RECOMMENDATIONS Expand the survey of vessel operators so that the responses may be better understood. Explain the coverage through outreach efforts such as letters to all permit holders. Inform vessel owners that they will be reimbursed for insurance coverage for observers. Make sure that observers are aware of their insurance related responsibilities, such as completing the necessary paperwork.

Appendix O. Southwest Region – Management Control Review Findings/Conclusions

MANAGEMENT CONTROL REVIEW OF NATIONAL MARINE FISHERIES SERVICE OBSERVER PROGRAM/SERVICE DELIVERY MODELS (Excerpt from SWR NMFS Contracted Observer Program)

F2. CONTROL TECHNIQUE

The NMFS encourages vessel owners to obtain insurance that would protect them in the event an observer is injured.

F2. TEST QUESTIONS AND FINDINGS

Interview a sample of vessel owners in the drift gillnet fishery.

- Last year, did NMFS encourage you to indemnify yourself against financial loss because of accidents involving, or loss caused by, your vessel?

Only two vessels were interviewed. Both vessels indicated that NMFS did not encourage them to indemnify themselves against financial loss because of accidents involving, or loss caused by, their vessel.

- Do you currently carry P&I insurance? If yes, does this coverage extend to observers as well as to crew working on your vessel? If no, have you acquired other insurance coverage that does extend to observers?

One vessel does not carry P&I insurance. The other vessel does. One vessel operator indicated that he could not afford the insurance premium. The vessel with P&I insurance indicated that the coverage does extend to the observer.

- Were you reimbursed for this expense by NMFS after providing supporting documentation?

The vessel with P&I insurance indicated that he was not reimbursed by NMFS nor did he submit an invoice for reimbursement.

F2. CONCLUSIONS

NMFS does not encourage drift gillnet vessels to obtain P&I insurance. However, if a vessel were to submit a reasonable claim for reimbursement with supporting documentation, NMFS would reimburse the vessel through the contractor. Many of the drift gillnet vessels do not carry P&I insurance. The larger vessels are more apt to carry P&I insurance than the smaller vessels.

