



Senator Johnny Isakson (R-GA) Reintroduces Longshore Reform Bill

Senator Johnny Isakson (R-GA) reintroduced [the Longshore and Harbor Workers Act Amendments of 2011](#) (S 669) on March 29th. The bill is a reintroduction of S 236 from 2009, and the updated version is attached. The bill continues to enjoy the support of the Coalition for Longshore Act Reform that was formed to develop this legislation. UWC has played a coordinating role for this group and supports the legislation.

I have attached the summary of the list of reforms we have supported for a number of years. We will be looking for reform provisions that may attract bi-partisan support this Congress and recognize Senator Isakson's leadership in reintroducing this important legislation to improve the Longshore and Harbor Workers' Compensation Act.

LONGSHORE ACT REFORM

SUMMARY

I Improve Access to High Quality Medical Treatment for Injured Workers at a Cost Affordable to Employers

- Require all treatment to be delivered through provider networks, where employer/carrier offers, or a panel of providers if network is not available.
- Require treatment to be consistent with nationally recognized evidence-based guidelines developed and maintained by the American College of Occupational and Environmental Medicine (ACOEM), with treatment thereby presumed to be reasonable and necessary.
- Provide for review of medical necessity dispute (utilization review) pursuant to internal network standards, initially, with subsequent appeal in conformity with guidelines for workers' compensation treatment review promulgated by Utilization Review Accreditation Association (URAC).

II Improve Return-to-Work Incentives and Equity in Post-Injury Wage Replacement

- Alter benefit formula from two-thirds of gross wages to 75% of after-tax wages.
- Refine "wages" to more closely reflect actual wages lost due to injury; exclude payments such as incentive or one-time payments, severance pay, settlements of employment law claims, bonuses that are not guaranteed, container royalties, stock and stock options.
- Preclude multiple awards resulting in payment of benefits greater than 100% of the maximum benefit rate.
- Increase wage replacement rate for spouses with no dependents.
- Increase funeral benefit.
- Enable enforcement of child support orders.

III Strengthen Nexus Required Between Injury and Maritime Work

- Apportion causation by recognizing the role of natural aging.
- Require that work be the major contributing cause with proof of work causation for occupational disease or cumulative trauma by clear and convincing evidence.
- Protect Longshore employers against claims based on exposure in successive employments when the last injurious exposure occurred in employment that is not subject to the Longshore Act.
- Clarify that workers who are not primarily performing Longshore work on the day of the injury are not covered employees.

- Pain and subjective complaints without objective medical findings are not compensable.
- Exclude “junk science” by requiring expert testimony to meet Federal Rules of Evidence and by requiring medical opinion based on peer-reviewed studies.
- Define hearing loss to account for pre-employment loss, loss naturally occurring due to aging (presbycusis), and other non-employment causes. Give greater legal weight to audiograms performed by a qualified hearing practitioner. Require notice of hearing loss within 1 year after leaving employment.
- Cover dentures, eyeglasses, and hearing aids or prosthetics only when provided in connection with medical treatment for a compensable injury or the damage occurs in connection with a traumatic injury.
- Broaden the intoxication defense by eliminating the requirement that intoxication was the “sole” cause of injury, and by allowing rebuttal of the presumption that an injury was not due to intoxication by allowing evidence of refusal of, or unavailability for, drug testing, a positive drug test, or alcohol test exceeding state DUI limits.
- Exclude claims for radiation exposure from federal cargo scanning devices which are not under the control of the employer.
- Codify personnel decision defense to stress claims (codify existing case law).

IV Eliminate Subsidization of Losses Involving Subsequent Injury Claims and Over Time, the “Tax” on Funding These Losses

- Repeal “second injury” component of the Special Fund.
- Alter the assessment basis for insured employers from paid losses to premiums, recognizing accounting rules adopted in recent years intended to improve transparency of incurred financial obligations.

V Strengthen Protections Against Fraud, Abuse & Improper Payments

- Provide authority to recoup benefits procured through fraud.
- Provide authority to obtain restitution for improper payments.
- Give greater priority to fraud by requiring reports of known or suspected fraud. Provide qualified immunity for making such reports.
- Allow defense for material false statements of claimant, and allow non-material false statements to be considered with respect to the general credibility of the person making the statements.

- Payment of disputed amounts is stayed at any stage of administrative or judicial adjudication process until the determination is final.
- Employer may require claimant to report wages regardless of whether the employee is receiving compensation payments.

VI Strengthen Exclusive Remedy

- Eliminate dual state jurisdiction over Longshore claims, as Congress intended by the 1972 Amendments.
- Bar claims or actions under state law or Jones Act, and in tort, and empower the Secretary to issue a stay and seek an injunction in federal district court.
- Extend the statutory employer defense to common worksites and in case of borrowed workers.

VII Improve Administration and Eliminate Unnecessary Litigation

- Require balanced, neutral interpretation of the statute.
- Prevent abuses by repealing the mandate to provide a second IME on request unless the Secretary finds it is “clearly unwarranted.” Repeal prohibition against service as an IME if the physician was involved in a claim in prior 2 years on behalf of an employer or insurer. Require suspension of compensation absent good cause for failure to obtain needed treatment or show up for IME.
- Eliminate deference to DOL litigation positions.
- Put teeth in statutes of limitations by requiring notice of traumatic injury or death within 1 year. For non-traumatic injury or death resulting from non-traumatic injury, notice must be within 1 year after discovery, provided that the notice is given no more than 1 year after diagnosis or death. A claim must be filed no later than 90 days after the deadline for notice of injury or death or 90 days after last payment when payment is made voluntarily.
- Claimant must be reasonably available for examination by employer or notice is not timely.
- Limit evidence of causation, injury or medical disability to objective medical findings.
- Make clear that the Section 920 presumptions (claim comes under the Act, notice was sufficient notice, injury not solely due to intoxication or caused by intentional self-harm) are rebuttable. Make clear that a presumption is not evidence once rebutted and the burden of production

of evidence and persuasion are governed by the Administrative Procedures Act.

- Section 920 intoxication provisions rebutted by refusal of drug/alcohol test, worker unavailability for testing, and positive drug or alcohol test.
- Make clear there are no other presumptions
- Codify appropriations mandate limiting Benefits Review Board review to one year. Permit workers to request expedited hearings.
- Clarify benefit payment penalty trigger as 10 “working” days; payment is date postmarked; and payment to attorney constitutes “payment.”
- Permit civil suit by the Secretary against an employer’s control group to collect civil penalties and unpaid assessments.