

## Claims Guides

# A vessel owner's guide to claims under The United States Longshore & Harbor Workers' Compensation Act

This Claims Guide will focus on the basics of the law behind US stevedore injury claims and provide some guidance on avoidance and immediate response to those claims as and when they arise. Stevedore injuries in US ports are covered under the Longshore & Harbor Workers' Compensation Act, (the "Act" or the "LHWCA").

As any shipowner who calls to ports regularly in the United States knows, one of the largest exposures faced in the United States is for personal injury claims. One primary category of such claims is those brought by stevedores injured aboard vessels.

The LHWCA is a Workers' Compensation Statute providing compensation to injured longshoremen, stevedores and harbor workers for injuries they suffer in the course of their employment. Although the LHWCA provides compensation benefits paid by the injured worker's employer for accidents arising during the course of employment, potentially shipowners also face exposure under the LHWCA for suits brought by injured stevedores for accidents suffered aboard a vessel. The damages component to these suits includes not only past and future lost wages (to the extent applicable) but also damages for pain and suffering arising from the accident.

### Who does the act apply to?

The Act applies to stevedores loading and unloading the vessel, including terminal crane operators, lashers, and those longshoremen working on the dock assisting in the loading and unloading process. This includes terminal employees driving containers in a container port.

### Who is not covered by the act?

Ship chandlers, Government officials, including US Coast Guard, US Customs and Border Patrol Officers, ship's agents, and other temporary visitors to the vessel are not covered by the LHWCA. As a good rule of thumb, anyone who is involved in the traditional longshoring or stevedoring operations, such as loading and unloading cargo, containers, and lashing containers, will be covered.

### What are the parameters of liability?

Shipowners face exposure to claims under Section 905(b) of the Act, which provides that vessel owners are liable to "persons covered under this Act [for injuries] caused by the negligence of a vessel..." The obligations of a shipowner towards longshoremen and stevedores – and in relation to which



most Section 905(b) claims under the Act are brought against shipowners – are commonly termed the "Scindia Duties". This stems from the case of *Scindia Steam Navigation v. De Los Santos*, ("Scindia"), in which the United States Supreme Court described three general duties which a shipowner owes to a longshoreman working aboard the shipowner's vessel:



### (a) The Turnover Duty

Firstly, the shipowner must use reasonable care to turn over the vessel to the employer in such condition that the expert and experienced employer is able, by the exercise of reasonable care, to carry on its operations with reasonable safety to persons and property. The shipowner must also warn the employer of any hazards that should be known to the vessel but are not open and obvious to the stevedore. The shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop during the course of cargo operations that are assigned to the stevedore. Consequently, the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the shipowner and which he had no duty to discover for himself.

Most LHWCA cases brought against vessel owners involve the turnover duty. However, many of the conditions which could cause these injuries are legally deemed the fault of the stevedore, and not the shipowner. For example, the lighting on a ship is not a hidden defect as a matter of law. The responsibility for illuminating the work area falls on the stevedore rather than the shipowner, because it is subject to separate federal regulation.

### (b) The Active Control Duty

Secondly, once the employer takes over, the shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the active control of the vessel. The shipowner may be liable to a stevedore under the active control duty only when the vessel substantially controlled or was in charge of (i) the area in which the hazard existed, (ii) the equipment which caused the injury, or (iii) the specific activities the stevedore undertook. Cases involving the active control duty usually deal with situations where the vessel crew is assisting in cargo operations, whether by use of vessel equipment or by use of vessel personnel. In this regard, ship's equipment, if utilized in cargo operations, must be free from defect and in good working order. Where the vessel's crew is instructing the stevedore, it must do so in a safe and prudent manner.

### (c) Duty to Intervene

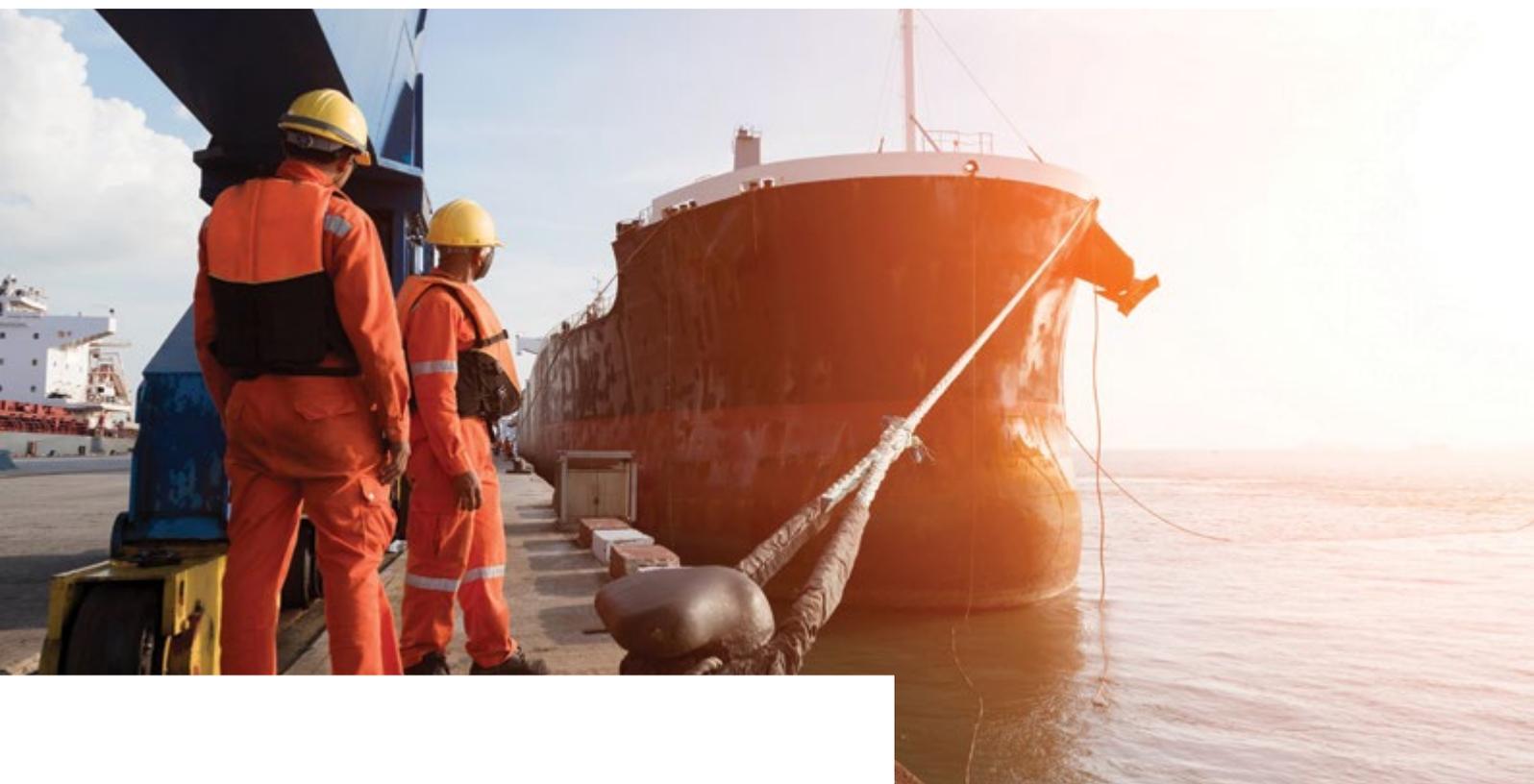
Thirdly, if the vessel has knowledge of the danger and should anticipate that the employer will not, or cannot, correct the danger, then the vessel must intervene and eliminate or neutralize the hazard. The duty to intervene "concerns the vessel's obligations with regard to operations in areas under the principal control of the independent stevedore." The shipowner has a duty to intervene to protect the longshoreman if "the stevedore's judgment was so obviously improvident that the owner, if it knew of the defect and that the stevedore was continuing to use it, should have realized the defect presented an unreasonable risk of harm." The duty to intervene applies "only when the shipowner has actual knowledge both of the dangerous condition and of the stevedore's unreasonable conduct in dealing with the dangerous condition."

If the shipowner is aware of the defective condition, there is a duty to intervene when "it should know that the stevedore would not or could not adequately remedy the dangerous condition." The intervention duty requires the ship to take affirmative steps to rectify hazardous conditions even though they did not exist at the point of "turnover," at least where the ship has actual knowledge and the condition is not obvious. Accordingly, in order to trigger the duty to intervene, the shipowner must have gained actual knowledge post-turnover that the stevedore was not exercising reasonable care to protect its employees.

Thus, when a stevedore was injured when he used cargo nets, instead of ropes, to discharge cartons of cocoa butter, his suit was dismissed. The plaintiff argued that the shipowner should have known that this method was unsafe and it should have intervened after observing this clearly imprudent method of discharge. The court disagreed, stating that a shipowner merely needs to keep his ship and equipment in a safe condition, not to interfere in normal cargo operations.

### Case law examples of Scindia Duties

- A court held there was no violation of the turnover duty to a longshoreman who fell through a darkened open hatch while returning there to retrieve keys two hours after cargo operations had ceased, because the longshoreman retained responsibility as to lighting and because he should have had a flashlight
- A shipowner was not liable to a stevedore who slipped and fell while loading cargo aboard a ship in a hold. The oil spillage which caused the fall was held to be an open and obvious condition and the shipowner was absolved from liability, as he could have reasonably relied on the stevedore to either clean the spillage up or ensure others would do so before continuing in operations. Further, the stevedores themselves were required to keep a proper lookout to notice any open and obvious conditions
- A longshoreman that fell and sued a vessel for negligence after attempting to walk across a board made of dunnage in a cargo hold had his lawsuit dismissed. The court held that the ship had no duty to warn about an obvious hazard in the work area that a competent longshoreman would have been expected to discover while performing his duties. Accordingly, the presence of the dunnage, which was often used to fill empty spaces in cargo-holds, was an “open and obvious” hazard, one that met the exception for the purposes of dismissing the claim
- Open gratings on walkways are usually “open and obvious”. Thus, a shipowner did not breach any duty of care under Scindia when an employee of a stevedore was injured in a fall through an open grating in a catwalk in a darkened area of the ship. The gap in the grating, according to the court, was an open and obvious condition that an experienced longshoreman could have easily corrected by closing the cover
- A missing ladder rung is an open and obvious condition. The plaintiff longshoreman missed the lower rung of a ladder, falling and injuring himself. The court dismissed plaintiff’s argument that the poor lighting conditions created a “hidden defect”, noting that the plaintiff could have equipped themselves with a torch, thus adequately addressing what was an “open and obvious” condition. The court further ruled that the open hatch was rendered a “hidden defect” only because the plaintiff proceeded to work in lighting conditions so poor that he was unable to see the ladder he was climbing



## Can the employer be counted on to contribute?

No. By statute, the employer is not liable to the vessel for such damages, either directly or indirectly, and any agreements or warranties to the contrary are considered void. If the stevedore was employed by the vessel to provide stevedoring services, no action by Owners against the stevedore shall be permitted, even if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. However, it is important to note that the injured worker's employer generally pays for the worker's medical costs and two thirds of the worker's average weekly wage in the first instance. The employer will therefore possess a lien for these amounts, which it will assert against any recovery made by the worker against the shipowner. This lien cannot be contested, although most employers are willing to negotiate. The presence of this lien must consequently be accounted for when evaluating these cases and certainly when attempting to reach an amicable resolution of them. Every effort should therefore be made to keep the employer advised as the claim progresses.

## Conclusion

Scindia provides shipowners with a roadmap to both take the appropriate actions when arriving in the United States to avoid accidents and defend claims should they arise. Familiarisation with the three Scindia duties is therefore critical. It is recommended that if a stevedoring injury occurs on a Member's vessel in the United States, they should:

- a) Immediately inform the Club, either directly or via the local correspondent;
- b) Immediately preserve any offending equipment or material;
- c) Conduct an investigation of the area in which the injury occurred to see if any of the conditions which may have caused the accident were "open and obvious";
- d) Conduct interviews of all crew as advised by the Club or its advisors;
- e) Take and preserve any photographs and other evidence at the scene of the accident

Ensuring that all documentation and physical evidence is preserved with respect to any alleged condition is critical with respect to United States litigation. Finally, maintaining close communication with the stevedoring company could be critical to monitor the status of any injured stevedore.



Personal injury litigation in the United States differs from almost everywhere else in the world. There is no statutory limit to an award for pain and suffering and these awards are usually left up to sympathetic juries to decide. Therefore, diligence must be used to ensure that vessels arriving in the United States comply with the requirements of Scindia and to undertake all necessary investigations of any stevedoring accidents immediately after they occur.

This Guide was prepared by John Karpousis of US attorneys Freehill Hogan & Mahar and to whom the Managers are most grateful.