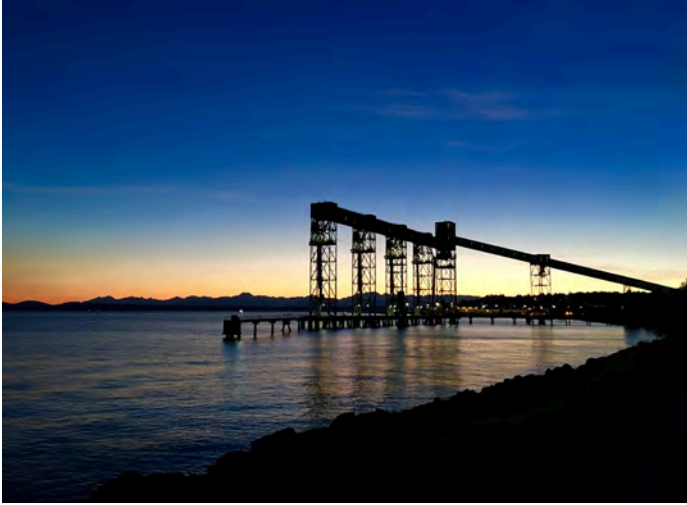




Unravelling the Confusion of USL&H in Washington

Presented by: Katey Noonan :: Maritime Safety Day, March 2024



Agenda

Why is carrying USL&H important?

What is USL&H?

How does it apply in WA?

What is WARP?

Common Questions

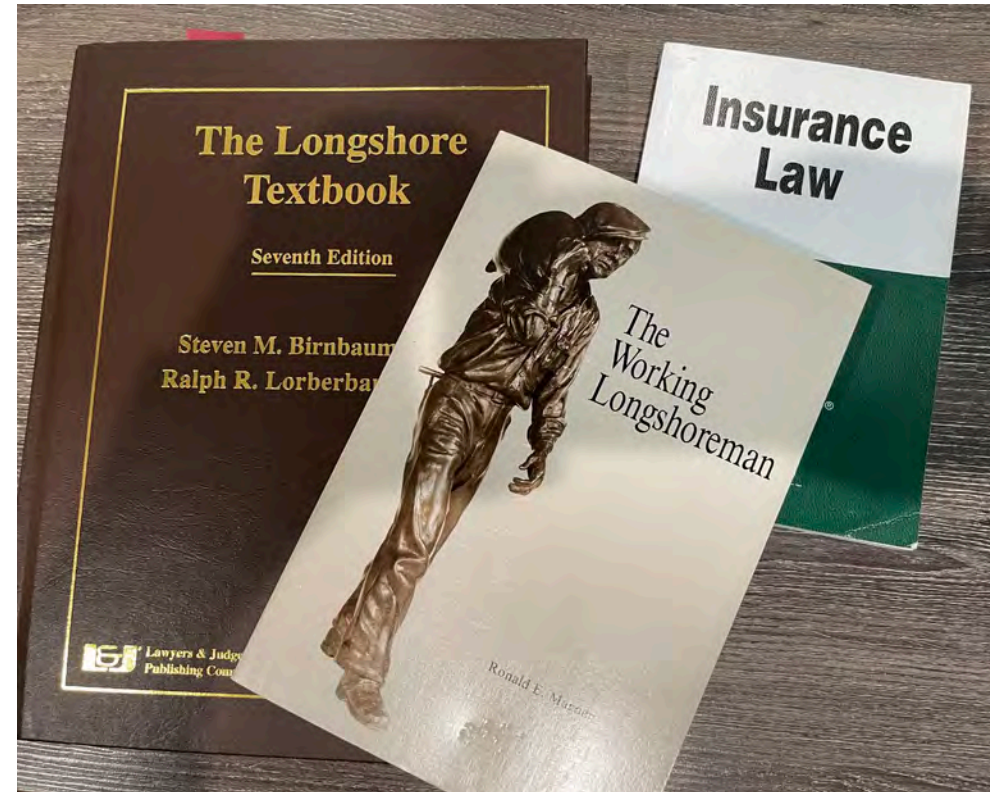
Legal Information

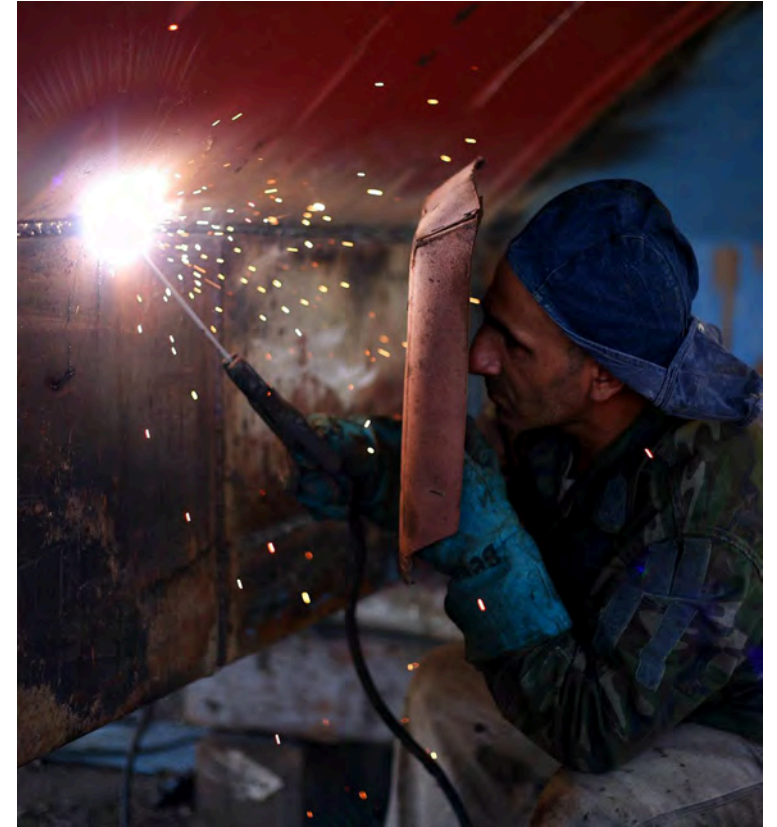
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Introduction

Few topics cause as much confusion as that of USL&H insurance. Because of the nuances between State and Federal jurisdictions, the changing legal precedents and ambiguous regulatory language, keeping on top of how the coverage applies can be a moving target. This presentation aims to give general education about how USL&H insurance works in the State of Washington, as well as how to protect commercial entities from financial liability and risk and employees by making sure they are properly insured.





Why is carrying USL&H important?

Overview of why this is relevant to marine industry in our area.

Benefits to Insureds



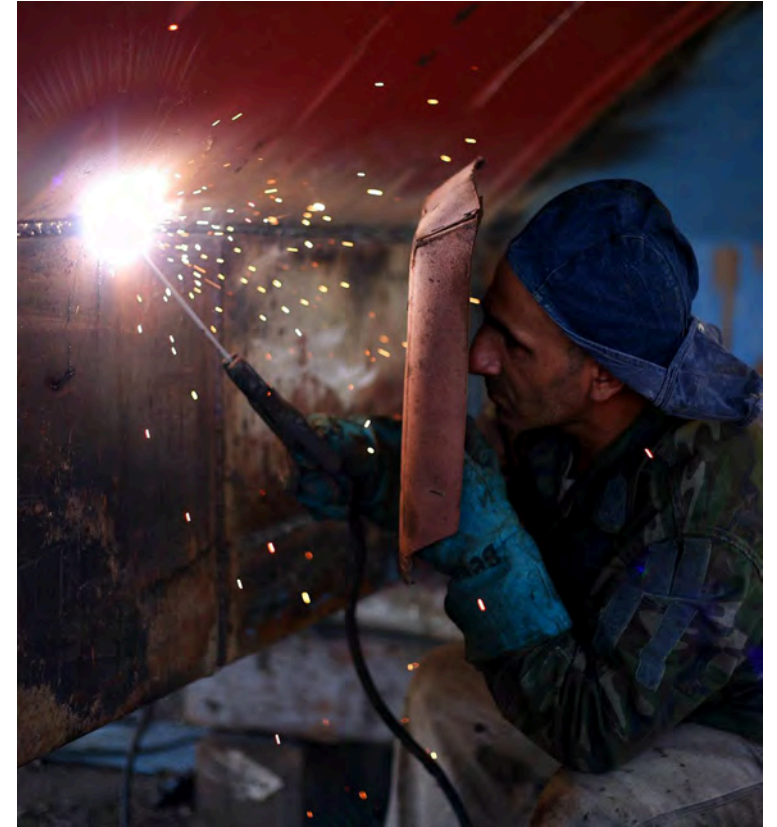
- No deductible
- Avoid steep penalties for non-compliance
- Avoid liability for not properly taking care of employees who are entitled to protection under the Longshore act
- Outside vendors performing work on the vessel may not carry the coverage, in which case responsibility flows upward to you
- USL&H Claims are less costly than P&I crew claims for yard work (example to follow)

Claim Example: Vessel owner - Shipyard Work

Note: This scenario assumes a separate shipyard work contract vetted by a maritime attorney; it is also not a guarantee that the injured employee will not claim Jones Act seaman status.

CLAIM SCENARIO

- Usual crew member on a vessel, owner established a separate contract for shipyard work (end of season and pre-season vessel readiness) versus normal crew work.
- Worker slipped, injured a knee
- To date: \$72,000 medical, \$186,000 time loss and claim is still ongoing.
- USL&H policy premiums the owner paid for the accident year: \$2,848 (What about the year after the injury? Premiums: \$2,278.)
- How would this have looked as a P&I crew claim? (\$10,000 deductible? Rate increases? Angry underwriters?)



What is USL&H?

An overview of the Federal Longshore & Harborworkers' Compensation Act and USL&H Insurance

History of the Longshore & Harborworkers' Workers Compensation Act (LHWCA)

1927: ORIGINAL ENACTMENT

- Provided coverage to employees “only if the disability or death results from an injury occurring upon the navigable water of the U.S. (excluding master or crew of a vessel and including dry dock) and if recovery...may not validly be provided by state law”.
- A number of problems developed over the next forty-five years, as to whether state or federal laws applied.

1972 AMENDMENTS

- Congress responded to these uncertainties by expanding coverage of the LHWCA to include any person engaged in longshore operations and any harbor worker, including ship repairers, shipbuilders, and ship breakers.
- The Act was amended again in 1984 to broaden and liberalize the rules for occupational disease, to add several coverage exclusions, and to put certain restriction on death benefits.

What does the LHWCA do?

The LHWCA provides for the payment of benefits for employment-related accidental injury, occupational disease, or death of a **covered maritime employee**. Although its provisions are similar to state workers compensation statutes, benefits under LHWCA are generally more liberal.

Subsets of the LHWCA:

Defense Base Act Coverage: Applies to civilians working on military bases outside the U.S. The act was amended to include civilian employees of contractors performing services outside the U.S. under almost any contract with an agency of the U.S. government in support of U.S. foreign policy.

Outer Continental Shelf Lands Act: extends the benefits of the LHWCA to employees engaged in exploration for and development of natural resources on the outer continental shelf of the U.S.

Non-appropriated Fund Instrumentalities Act: extends the benefits of the LHWCA to civilian employees of the U.S. government whose salary and other benefits are paid with funds generated from earnings rather than funds appropriated to the armed services by Congress.

Who is Covered?

Employees engaged in maritime work
(status):

- On navigable waters or adjoining areas
(situs)
- Not crew on a vessel
- Not otherwise excluded



Challenges



On navigable waters or adjoining areas

- What is a navigable waterway? (not defined)
- What does adjoining area mean? (not defined and depends on the circuit court. 5th circuit- must adjoin the water. 9th circuit- in a marine neighborhood.)

Not crew on a vessel

- What if they are temporarily in the yard? Are they crew?

Not otherwise excluded

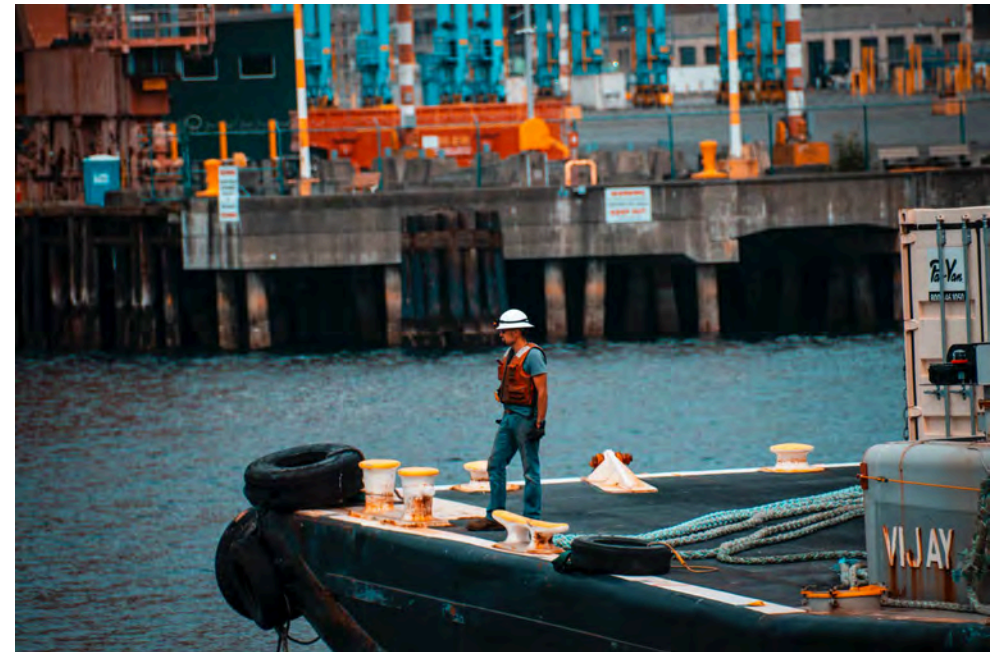
- The exclusions are narrowly construed in the courts and constantly being challenged

Wait, how is this different from the “Jones Act?”

The Merchant Marine Act of 1920, commonly called the Jones Act, gives injured crew members of a vessel the right to sue their employers.

Injured crew member may recover damages if the injury was caused in whole or in part by the negligence of the employer or its agents or employees.

The Jones Act also allows the personal representative of a deceased employee to bring a wrongful death action against the employer on behalf of the employee’s surviving family members



How do you keep them clear?

Usually the best way is to work with a maritime attorney who understands that you need to separate work performed under crew contract versus shipyard work performed before or after the main voyage. Usually there are separate contracts for each.

This is not a guarantee that the claim will fall to USL&H rather than P&I/MEL, but it does help clarify intent.



Penalties for non-compliance

§ 938. Penalty for failure to secure payment of compensation

(a) Failure to secure payment of compensation. Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$ 10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 32 of this Act [33 USC § 932].

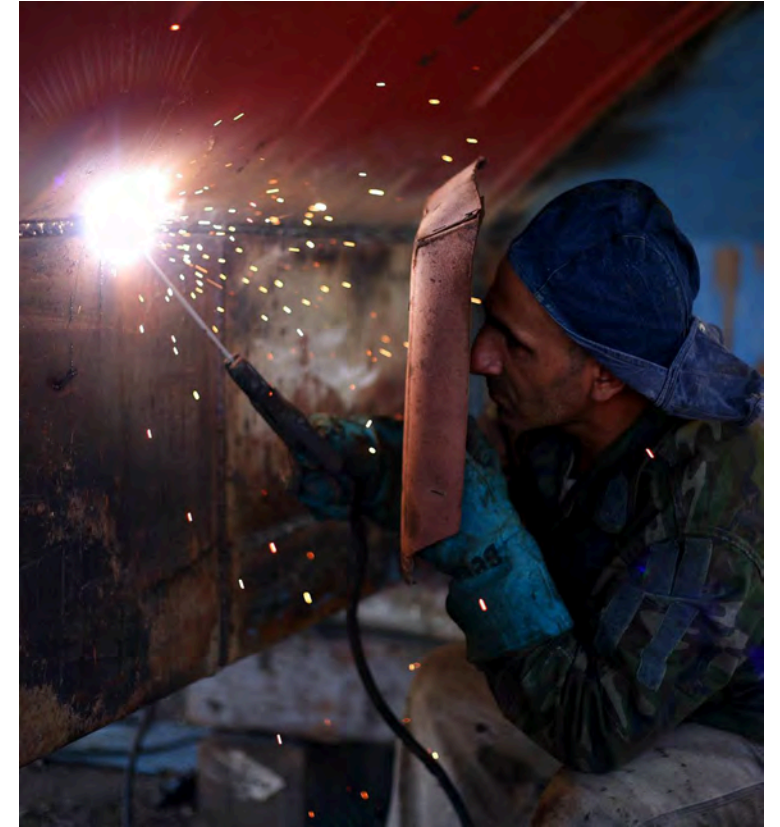
Penalties for non-compliance

FINES & IMPRISONMENT

- Up to \$10,000 fine under the federal law if no coverage for the claim
- Up to 1 year imprisonment, can be combined with fines
- Imprisonment and fines can apply to ALL OFFICERS OF A CORPORATION

LIABILITY ISSUES

- While such assessments are rare, the USL&H Act provides that an employer who fails to secure coverage cannot limit the amount of the injured employee's claim to the Act's compensation schedule- so the employee can sue for damages.
- The Act further declares that a non-insured employer cannot assert affirmative defenses against the claimant- like comparative negligence and the claimant's assumption of risk (a.k.a. they knew the job had risks when they took it on.)



How does USL&H apply in Washington?

Treatment of USL&H versus Washington L&I

Ways to get USL&H Coverage

STANDARD INSURANCE COMPANIES

- Very few companies write just USL&H in Washington- usually requires exposure outside the state as well
- Rates subject to underwriting review, experience rating
- Minimum premium is usually \$10,000 at least
- State Guarantee Fund applies

SELF INSURANCE/ MUTUALS

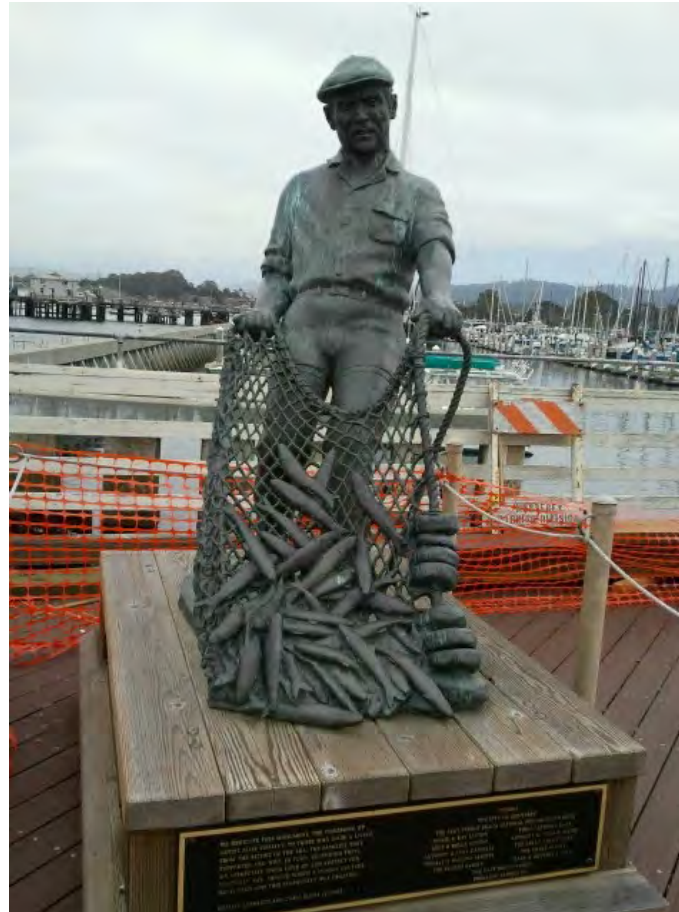
- Large clients can self-insure if they follow set protocol
- Associations (ALMA/AEU, Signal)- Clients accepted based on underwriting criteria
- Rates are subjective, not filed; minimum premium usually at least \$10,000
- State Guarantee Fund does NOT apply
- **Be careful of policy terms!**

WARP ASSIGNED RISK

- Accepts all employers in good standing
- Low minimum (\$900) but higher rates (is not meant to be competitive)
- Will accept business even with high claims- but will also experience rate
- State Guarantee Fund applies

Wait, doesn't L&I pay these claims?

Actually no, L&I doesn't handle USL&H claims. If a claim is submitted to L&I and they determine it should be USL&H, they will send it to your USL&H carrier. If you don't have coverage in place- penalties can then be activated. But- there is no "bright line" for what is L&I vs. USL&H



A Cautionary Tale: M/V Sahara

In June of 2013, a jury in Seattle awarded a judgment against a non-insured employer and its vessel in the amount of \$3,450,000, plus interest in excess of \$600,000.

The court ordered the vessel to be sold at a federal auction.

The owner of the vessel intended to convert it into a luxury floating hotel. The vessel was moored at a pier in Seattle while the conversion work took place. Several workers were hired by the owner to assist in the conversion work but the owner failed to purchase USL&H Act coverage.



A Cautionary Tale (continued)

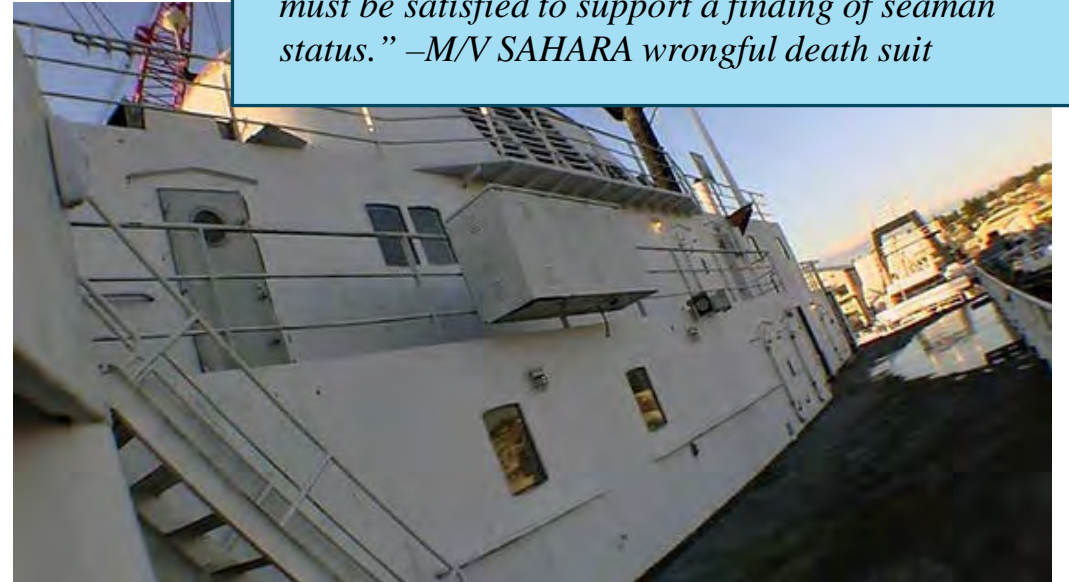
One of the workers fell, hit her head, and drowned. Her estate sued the vessel and its owner for the damages resulting from her death. The vessel was arrested and all conversion work ceased.

If the owner had purchased USL&H Act coverage, the benefits scheduled in the Act would have been paid by the insurer.

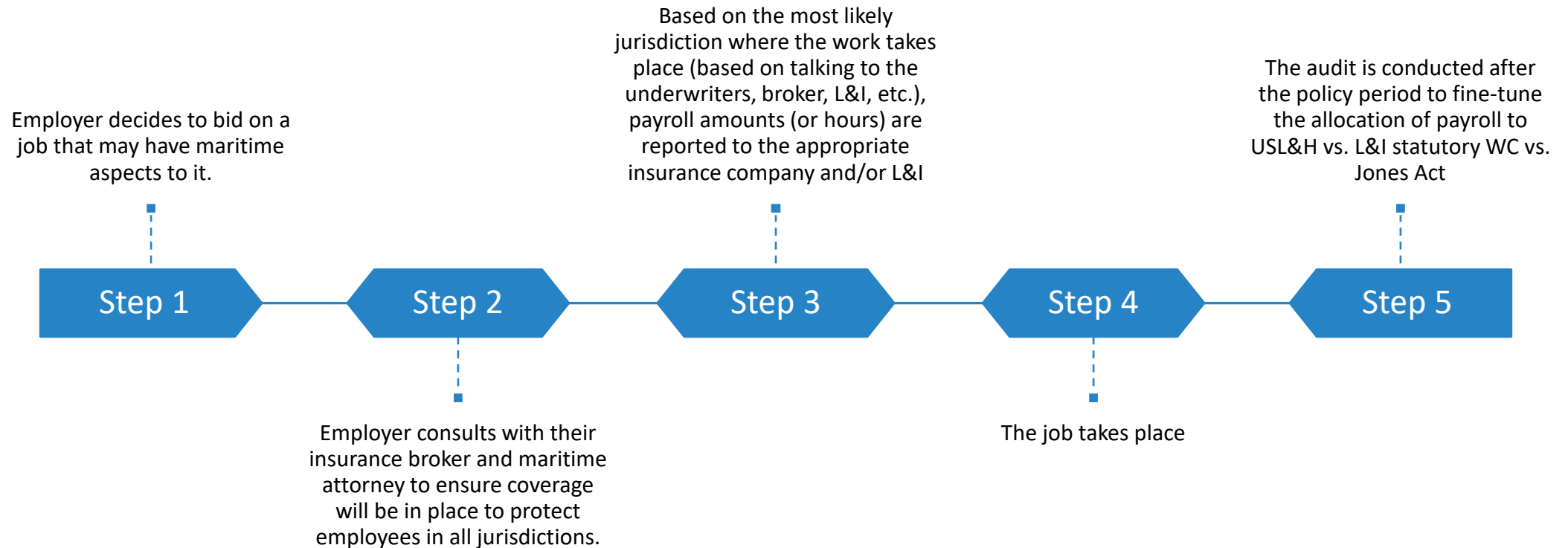
The owner could have asserted affirmative defenses, if any existed.

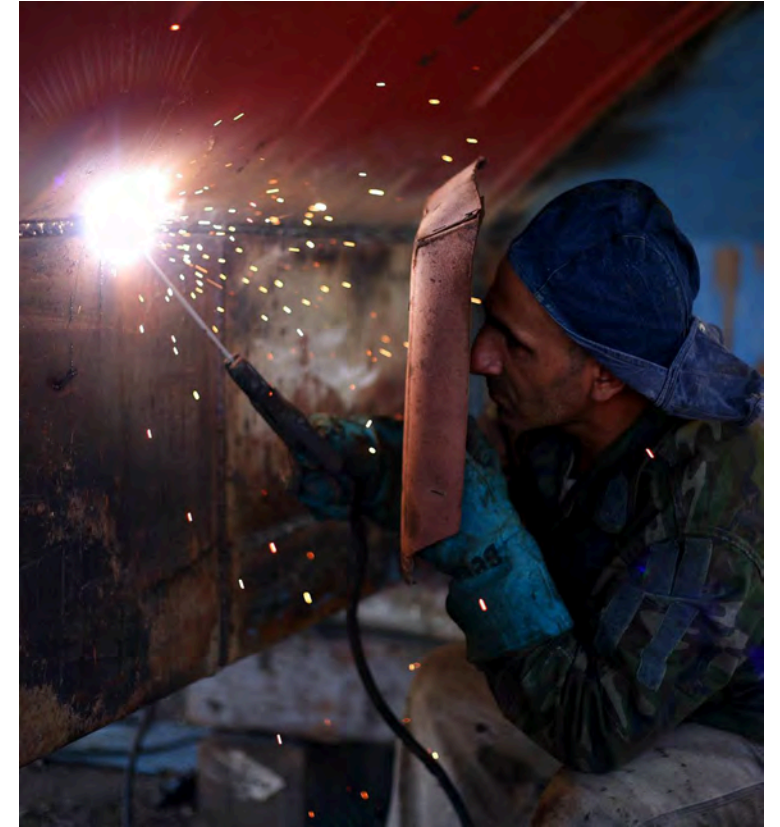
The vessel owner probably would not have been subject to such a large judgment and would not necessarily have forfeited the vessel.

*“A plaintiff has seaman status if (1) his duties contribute to the function of the vessel or the accomplishment of its mission, and (2) he has a connection to a vessel **in navigation** that is substantial both in duration and nature. Id. (citations omitted) (emphasis added). Both prongs must be satisfied to support a finding of seaman status.” –M/V SAHARA wrongful death suit*



How should this work ideally?





What is WARP?

An overview of the Washington USL&H Assigned Risk Plan

In 1992 the state assigned risk plan was ending, and the State studied the problem. They knew they needed a solution because of the high cost of USL&H coverage for smaller local maritime business.

They engaged a working group to come up with solutions. The result was WARP- the Washington USL&H Assigned Risk Plan.

Finding—Declaration—1992 c 209: "The legislature finds and declares that the continued existence of a strong and healthy maritime industry in this state is threatened by the unavailability and excessive cost of workers' compensation coverage required by the United States longshoreman's and harbor worker's compensation act. The legislature, therefore, acting under its authority to protect industry and employment in this state hereby establishes a commission to devise and implement both a near and long-term solution to this problem, for the purpose of maintaining employment for Washington workers and a vigorous maritime industry."
[[1992 c 209 § 1.](#)]

Enabling Statutes

WARP Basics

STRUCTURE

- The Washington United States Longshore and Harbor Workers' Compensation Act Assigned Risk Plan (WARP) was established by Washington state to make available USL&H workers' compensation insurance coverage for Washington state employers unable to purchase it through the normal private insurance market.
- WARP is authorized by RCW 48.22.070 and Chapter 22 of Title 284 of the Washington Administrative Code. This makes us a 501(c) 27, or a statutory non-profit.

OPERATIONS

- WARP enlists the services of a servicing carrier via a competitive bid process. Our current servicing carrier is Alaska National (Copperpoint). The servicing carrier handles the mechanics of policy underwriting and issuance, audits, claims, premium collection, etc.
- WARP employs one Executive Director and is managed by a governing committee. The committee meets quarterly.
- WARP also uses subcommittees for Reinsurance, Insurance, Education and Investment. There is also an executive subcommittee.

Governing Committee Makeup

LABOR & INDUSTRIES

- One representative

MARITIME EMPLOYERS

- 3 members

INSURANCE COMPANIES

- 3 members

INSURANCE BROKERS

- 3 members

LABOR UNIONS

- 3 members

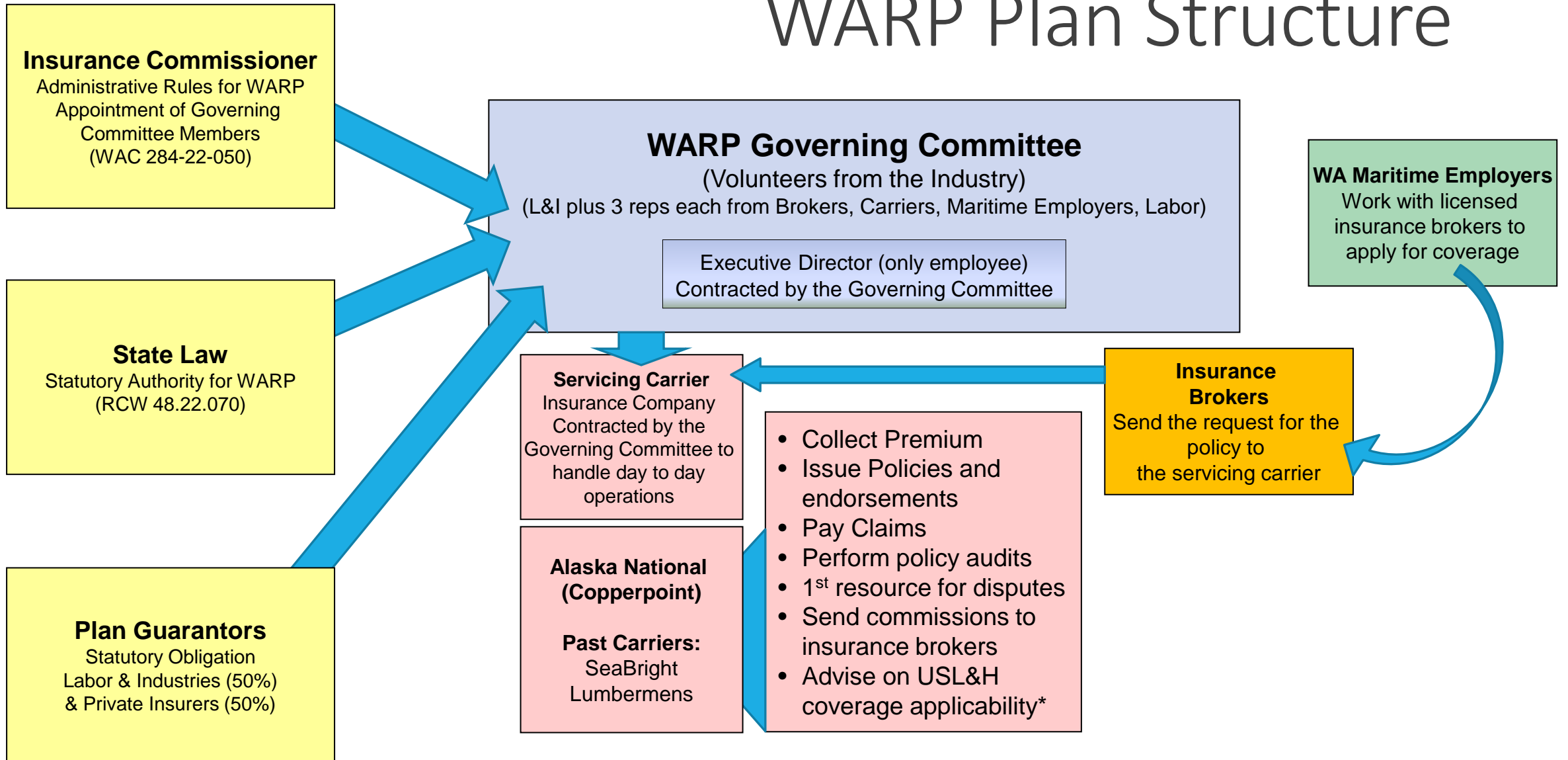
OFFICE OF THE INSURANCE COMMISSIONER (OIC)

- No formal membership but they send a representative who is invited to all meetings and proceedings.

Subcommittees

- Executive (Chair, Vice-Chair, Secretary, Treasurer and L&I)
- Finance/ Investment
- Reinsurance
- Insurance
- Education

WARP Plan Structure



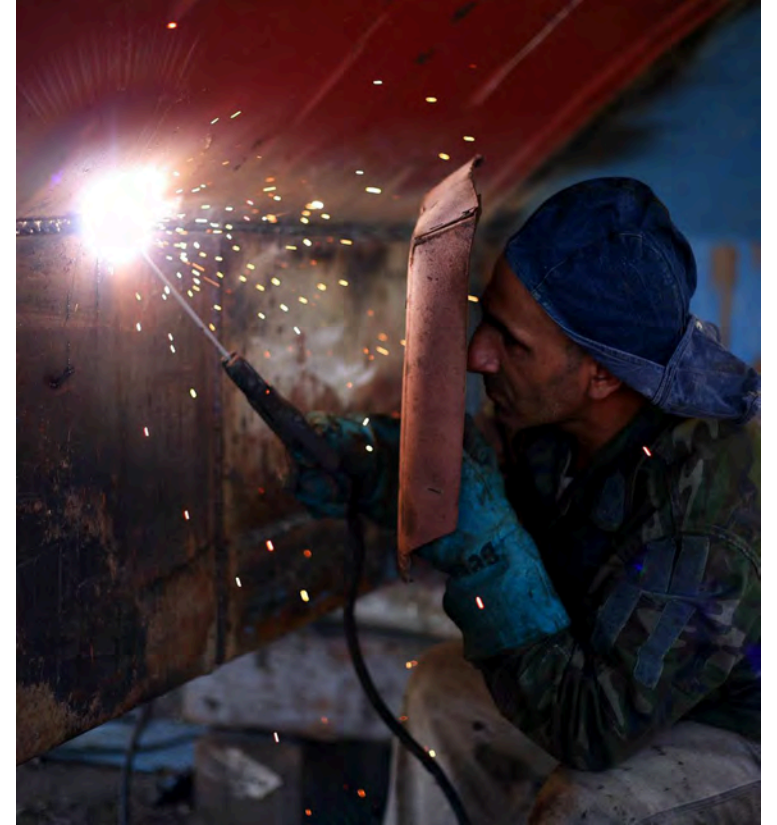
Alaska National Advice- USL&H applicability

The majority of calls that Alaska National (ANIC), WARP, and USL&H brokers receive in the realm of Longshore insurance is whether or not USL&H exposure would apply in a certain situation.

Generally, WARP and ANIC will err on the side of caution and if something could be USL&H, we will recommend reporting it as such. This is for two major reasons.

The first and most important is that we need to make sure that the workers are adequately protected. USL&H work is performed near the water and is therefore riskier. The benefits are designed to reflect that.

Second, if a claim arises where there is a question, ANIC would defend the claim. So when they are looking at a situation, they are deciding whether Longshore applies but also whether there is a chance they would need to defend the insured, which can be costly.



Common Questions

Frequently asked questions about WARP and USL&H



Anyone who isn't
confused really
doesn't
understand the
situation.

Edward R. Murrow

Question

If your company has only one employee, do you still need USL&H insurance?

Answer

It depends. Sole Proprietors are not considered a “maritime employer” but if you are a member of an LLC with only one employee (you), you would be.

Question

Is work on recreational vessels subject to USL&H?

Answer

It depends. The USL&H Act § 902 excludes "individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel..." However, the USL&H Act includes individuals building recreational vessels 65' or longer or dismantling a recreational vessel when it is not in connection with the repair of that vessel.

Work, such as repair or installation of equipment, on recreational vessels may be subject to the USL&H Act if the vessel is chartered with a skipper or crew on "more than an infrequent basis" or chartered as a bareboat with more than 12 passengers. Additionally, workers who perform work on both recreational vessels under 65' and commercial vessels may be subject to the USL&H Act, even for those periods of time when they are working on recreational vessels under 65'.

Question

Is USL&H coverage available through WARP for employees while working in foreign ports?

Answer

No. The Ninth Circuit Court of Appeals ruled that, although the USL&H Act applies on the high seas subject to certain conditions, the Act does not apply to U.S. workers while working in the territorial waters of other countries. Therefore, USL&H coverage is not available through WARP for work in foreign ports. A copy of the Ninth Circuit decision (Keller v. Tracy) can be downloaded from WARP's website.

Question

What about the aquaculture exclusion for processors and fishing vessels?

Answer

Yes, fishing and seafood processing operations are exempt from Longshore as they are considered aquaculture employees- this payroll goes to L&I. HOWEVER any supporting activity- such as stevedoring (unloading of fish from vessels) and warehousing is still subject to the act. Because courts do not like employees going in and out of coverage, the full payroll for any day that you are doing this work has to be reported as Longshore.

Question

What if the Port/ Navy/ General Contractor I'm working for doesn't require USL&H in the contract? I even checked with the contract guy and he said no. Doesn't that exempt me?

Answer

Nope! You are still required to carry USL&H if you are working on a maritime situs and the work has maritime status. Many times the folks working on contract requirements are not permitted to include specific requirements, or might not understand when it is needed; however even confirmation from these entities will not exempt you from the Federal Requirements.



Thank you

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(Application and Rates available!)