

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-