

Common Questions and Answers About Defense Base Act Claims

The following are the questions most frequently asked by our clients about the Longshore Act, and its extension, the Defense Base Act (DBA). The answers provided are obviously brief and intended for general information only. If you require further information regarding any of these topics, we'll be happy to discuss them with you in greater detail.

If my employer or co-workers were at fault for my injury, can I sue them?

No. The Longshore Act, like practically all other workers' compensation systems, provides employers and co-workers with "immunity" from suit, based on their fault or negligence. On the other hand, your own fault or negligence, if any, will not affect your right to recover benefits under the Longshore Act. This "no fault" system is intended to allow a worker to receive benefits quickly and without any initial dispute over the cause of the accident.

If someone other than my employer or co-workers causes my injuries, can I sue them?

Possibly. If a "third party" (not your employer or a co-worker) causes your injuries, you may be able to file a civil suit for damages in addition to recovering workers' compensation benefits. Examples of this type of action would include injuries resulting from the negligence of the vessel upon which services were being performed or the negligence of an employee of another employer working on the same project. Whether or not a third party action exists depends upon a highly complex relationship of law and facts in any given situation.

What determines whether I am covered under the state workers' compensation system or by the Defense Base Act?

The Defense Base Act typically covers workers who are employed by Department of Defense contractors working in Iraq, Afghanistan or at any number of Department of Defense facilities around the globe. However, the Defense Base Act is not limited to defense or to bases. The Defense Base Act provides workers' compensation protection to civilian employees working outside the United States on US military bases or under a contract with the U.S. government for public works or for national defense. DBA claims cover injuries incurred during the period of employment, not just on the job.

What coverage do I have for medical treatment?

The Act provides for coverage of medical treatment related to your injury for as long as the nature of the injury and the recovery process may require. Legally, this means, in effect, indefinite coverage, so long as treatment is deemed to be reasonably related to the original injury. Settling

your case will not terminate your right to continued medical treatment, unless you specifically settle out the employer's obligation for future medical care and receive a monetary amount to cover these projected costs.

What determines the amount of temporary total disability compensation?

Temporary total disability benefits equate to two-thirds of your average weekly wage, subject to a statutory maximum. If you have worked essentially the whole of the year immediately prior to your injury, your wages for that period will usually be divided by 52 to arrive at your average weekly wage. If you did not work steadily for that one-year period, computation of the average weekly wage becomes more complicated, and involves looking at earnings for weeks actually worked, the earnings of a similarly situated worker, or your wages over the prior five years.

There are numerous legal decisions which address the average weekly wage issue, and each case depends upon its own particular facts. However, one significant aspect of your compensation which does not get calculated into your earnings for average weekly wage computation is the "fringe benefit" package, i.e., retirement, insurance, etc. Currently, the contract wages of Dept. of Defense contractor employees injured in Iraq and Afghanistan are being used to set the average weekly wage, even if the worker was not employed for a full year at time of injury. However, the case that decided this outcome is currently under appeal and that determination may change in the future.

If my industrial injury or occupational condition results in permanent disability, how will I be compensated?

Injuries under the Longshore Act fall into two categories: "scheduled" or "unscheduled". Scheduled injuries are those for which the law provides a statutory maximum amount of compensation (arm, leg, eye, loss of hearing, etc.). A permanent injury results in an award which is equal to a specific number of weeks of compensation, in turn based upon the extent of the impairment to the body part. Unscheduled injuries (back, neck, lungs, etc.) result in compensation measured by the difference between your pre-injury wages and those wages you are deemed capable of earning following your injury, once your condition stabilizes.

Will it affect my case if I return to work?

Typically, if you return to some form of employment following your injury, it will assist in resolving your case without litigation. This is because your demonstrated ability to earn wages will enable the employer/insurance carrier to get an idea of their potential liability to you, and negotiations for settlement may be initiated by them. Also, your post-injury wages may be a fair indication of the actual wage-earning capacity you have lost, and may provide a solid basis upon which to make a claim for compensation. Even if you return to your former job and suffer no present loss of wages, if you have an impairment which might affect your wage-earning ability in the future, it may be possible to negotiate a disability settlement.

Can I get vocational rehabilitation assistance if I can't return to shipyard work or the work of my DBA employment?

The Longshore Act provides that the Department of Labor will direct vocational rehabilitation in appropriate cases, particularly when your physician says you will be unable to return to your job at

time of injury. The Vocational Rehabilitation department of the Office of Workers' Compensation Programs (OWCP) of DOL will typically refer you to a contract rehabilitation firm, and the assigned counselor there will determine what kind of retraining program is appropriate. If the vocational program decided upon is approved by OWCP and not challenged by the employer/carrier, you will receive temporary total disability benefits, and some additional income supplements, while you are engaged in retraining. If your physician makes a judgment early in your claim that you will be disabled permanently from shipyard work, you should initiate contact with OWCP's vocational rehabilitation department.

What happens if the employer/carrier terminates my compensation?

You must then request DOL to intervene, either by requesting a conference or by asking that your case be referred to an administrative law judge for formal hearing. In most cases, you should have legal representation at this stage of the claim, since it will be necessary to present medical-legal issues to DOL and further medical and/or vocational evidence in support of your entitlement to additional compensation.

What is the legal process for presenting my claim, and how long will it take?

Sometimes an issue in the claim can be presented to DOL, and a claims examiner there will issue a recommendation that all parties can accept. The recommendation, however, is not binding, and either party is free to pursue the claim to formal hearing. If that occurs, the claim file is referred to the Office of Administrative Law Judges (OALJ) for the scheduling of a hearing. Several months later, the case will be set for hearing in a week in which many other cases will also be heard. Weeks before the trial date, the parties will be required to identify witnesses, exchange documents to be used at trial, and to discuss settlement. The case will then be presented in a formal administrative hearing procedure, although not all rules of evidence and procedure applicable to other court cases are observed.

At this time, it is typically taking at least a year, and sometimes two, before the administrative law judge issues a written decision in any case. At that time, your entitlement, if any, will be spelled out and the file will be returned to DOL for implementation of the decision. However, either party may appeal the judge's decision to the Benefits Review Board (BRB) in Washington, D.C. This appeal process is lengthy, taking in excess of three years on average, and involves only a review of the administrative record. Appeal to federal court by either party is possible following a BRB decision, which can add additional years to a final determination. Because of the increasing length of time to get to a final decision in the litigation process, claimants, employers and their insurance carriers are increasingly using the mediation process to resolve these claims.

How can an experienced attorney assist in handling my claim?

There are thousands of cases interpreting various sections of the Longshore Act which may affect your entitlement to benefits. An attorney knowledgeable about that body of law, and how the Act is administered by DOL, can ensure that you receive the maximum benefits realistically obtainable under the circumstances of your case. This often entails dealing with complex medical-legal issues which the unrepresented claimant may be unable to present adequately. Moreover, the Act encourages legal representation by making the employer/carrier responsible for legal fees if an attorney improves a claimant's recovery in a case.

How are attorney fees handled under the Longshore Act?

As in most other workers' compensation cases, fees are contingent upon the attorney gaining some measure of recovery. That is, if your position in the claim is not improved, there is no fee paid. The Longshore Act differs from many other statutes in that, if your attorney does improve your position against the employer, he or she will be entitled to petition the DOL to assess fees against the employer. Thus, in most instances, the worker will not be responsible for paying attorneys' fees from whatever additional funds are recovered. In some cases, where a bonafide dispute exists between the worker and the employer, and the claim is settled on a compromise basis, the worker may share in paying some or all of the attorneys fee from the additional compensation negotiated. In any case, all fees and costs must receive approval by DOL.

Please feel free to contact us to discuss the details of your case.

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