



**A REPORT TO THE LEGISLATURE ON SHIFTING WASHINGTON STATE FERRY  
EMPLOYEES FROM THE FEDERAL JONES ACT TO THE  
WASHINGTON STATE WORKERS' COMPENSATION PROGRAM**

**OFFICE OF FINANCIAL MANAGEMENT**

**RISK MANAGEMENT DIVISION**

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## INTRODUCTION

The 2008 Supplemental Transportation Budget directed the Office of Financial Management (OFM) to make a recommendation to the transportation committees of the Legislature as to whether Washington State Ferries (WSF) marine employees should be covered under workers' compensation. Currently, WSF maritime employee on-the-job injuries are covered under federal law known as the Jones Act (46 USC 688).

## BACKGROUND

Ferry employees who work on vessels are exempt from coverage under the Washington Industrial Insurance Act (Chapter 51.12 RCW) and other state workers' compensation laws because they are maritime workers.<sup>1</sup> Instead, these workers are covered under the federal Jones Act.

The Jones Act was enacted in 1920 when traditionally a sailor could be on a voyage away from home for months or years at a time. When a sailor was injured on the job, he could be put ashore at the first opportunity and stranded, without any guarantee of being picked up again to work his passage home. Because of this situation, traditional maritime law evolved with the understanding that the employer had certain responsibilities toward their maritime employees. Courts eventually declared sailors "wards of the court" and found that employers had a duty to provide for their medical costs and subsistence of their employees who are injured on the job.

## JONES ACT PROVISIONS

Coverage under the Jones Act, instead of workers' compensation, means that WSF's 1,040 vessel employees have the right to three traditional federal maritime legal remedies:

1. **Maintenance and Cure:** Maintenance is a daily living expense stipend set by a collective bargaining agreement. Cure is payment for the costs of medical treatment. The remedies of maintenance and cure are not fault-based. Rather, if the employee is injured or becomes ill while in the service of the vessel, he is entitled to be paid maintenance and cure until recovery or "maximum cure" (the worker has recovered to the point where any further treatment would be merely treating pain or discomfort). There are various definitions of what constitutes "maximum cure," and the issue is often heavily contested. Qualification for this benefit is not limited to the product of injury accidents. For example, if a seaman sustains a hearing injury, becomes ill, or develops some other medical problem while in the service of the vessel, he would qualify for maintenance and cure benefits.
2. **Jones Act Negligence:** This is a fault-based claim based on a showing that there was some employer negligence that had some causal connection to the injury. The level of proof required is minimal. Under the Jones Act, causation is established if the employer's negligence played a

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<sup>1</sup> RCW 51.12.100 provides that the title (RCW 51) shall not apply to a master or member of any crew of any vessels, or to employers and workers for whom a right or obligation exists under the maritime laws of federal employees' compensation act for personal injuries or death of such workers. RCW 47.60.210 provides that the state of Washington consents to suits against the Department [Washington State Department of Transportation] by seamen for injuries occurring upon vessels of the Department in accordance with 46 USC § 688 [The Jones Act]. In *Gross v. Washington State Ferries*, 59 Wn.2d 241, 367 P.2d 600 (1961), the Washington State Supreme Court held that in enacting RCW 47.60.210, the Legislature intended to provide WSF seamen with traditional common law remedies as well as those available under the statutory Jones Act.

part, however slight, in causing injury. This standard, often referred to by courts as a “featherweight” standard, is easily met because it is applied far more liberally than is usually done in personal injury cases. A new Washington state appellate case has complicated matters by excluding evidence of prior injuries if the claimant did not show symptoms of injury immediately before the accident.

3. **Not seaworthy:** This is another fault-based claim. It is based on a “breach warranty” theory rather than on negligence. A WSF seaman can recover for injuries resulting from vessel equipment that was not reasonably safe for the intended purposes. A vessel deemed not seaworthy can be broadly defined to include a slippery deck or insufficient crew available to perform the task at hand. It applies even in the absence of negligence by the ship owner.

### COMPARISON OF COVERAGE

The table below shows the basic differences in coverage between the Jones Act and our state’s workers’ compensation administered by the Department of Labor and Industries (LNI).

Issue	Jones Act	Workers’ Compensation
Medical bills	Paid entirely by employer.	Paid by LNI. WSDOT is assessed an annual premium based on cost history.
Time loss compensation/ unearned wages	Payment of current wages from the date of injury through the end of the voyage or return to work (“unearned wages”). Interpreted by WSDOT as payment of wages until the end of the pay period.	Three-day waiting period, then compensation at 60-75 percent of wages, depending on number of dependents.
Maintenance payments	Daily subsistence payment currently set at \$30 for members of the Inland Boatmen’s Union (IBU) and \$60 for members of the Masters, Mates and Pilots (MM&P).	None.
Standing to bring lawsuit	The injured maritime employee has standing to sue his employer if the injury is the result of negligence or unseaworthiness on the part of the employer.	No standing.
Burden of proof	“Featherweight,” meaning evidence necessary to find that an employer’s negligence or unseaworthiness caused the injury is less than that required in common law negligence.	Not applicable.
Tort payments and defense costs	\$8 million in the last three fiscal years.	Not applicable.
Average annual costs	\$3.4 million (cases and claims).	\$1.8 million (estimated premium).

## ISSUES TO CONSIDER

There are many issues to consider in making a change in the current Jones Act coverage:

- Exempting maritime employees from workers' compensation results in inconsistencies in the way employee injuries are handled within the Department of Transportation (WSDOT).
- It is possible for some maritime employees, in the short term, to be paid more money while they are injured and off work than they would receive while working.
- Because maritime employees, under the Jones Act, can sue WSF for damages related to their injury, there is the possibility for some employees to recover larger dollar amounts for their injury than would be allowed under workers' compensation.
- Because of the difference in benefits between the two systems, it is possible that an injured employee may end up with much smaller benefits if the injury is long-term and there are no grounds for a lawsuit.
- The ability of state maritime employees to sue their employer under the Jones Act can lead to increased costs for WSF. Such costs may include attorneys' fees for defending claims, trial verdict costs, or settlements of claims and cases. The inability to predict trial outcomes also hinders WSF's future budget planning.
- When Alaska moved its ferry employees from the Jones Act to its workers' compensation program, it reportedly had the support of the unions. However, the enabling legislation was almost immediately challenged in Alaskan courts. Ultimately, the transfer was upheld.
- Covering employees under the Jones Act increases tension between management and employees because WSF management must determine whether a particular claim will be accepted, as opposed to LNI making that determination under workers' compensation.
- Under the current system, WSF payouts are paid from WSDOT's budget up to the first \$1 million for each claim. A commercial marine insurance policy is in place for crew injury claims in excess of \$1 million. While these reimbursements and costs are actuarially projected, unexpected costs may still occur. Conversely, under workers' compensation, WSF would pay a premium based on the claims history of the agency. There is the potential for the premium to increase if the number of worker injuries increase.

## RETURN TO WORK

When a WSF employee is out for a long-term injury, WSF actively works to accommodate and/or return the individual to work early where possible using the WSDOT accommodation procedures. However, there are additional challenges in accommodating WSF vessel employees. The U.S. Coast Guard has set a standard requiring maritime employees to be 100 percent fit for duty before they may return to work. Thus, any employee who wishes to be accommodated must be moved into another position, if they are not completely fit to return to their former position.

Moving an employee into another position is complicated by the fact that each union representing WSF employees has a separate contract. Each of these contracts has its own rules and regulations about how and when an employee may be assigned to a particular position. In most cases, each of these contracts requires that seniority be the determining factor as to whether an individual may be placed in a particular position. In addition, each position must be open for bidding to all union

employees. These provisions limit WSF's ability to move employees into different positions when returning to work from an injury.

These issues exist whether WSF employees are covered under the Jones Act or workers' compensation.

## **COST COMPARISON**

If WSF crew injuries were paid through the workers' compensation program, a premium would be required. WSDOT requested a preliminary premium estimate for ferry employees from LNI in 2008. LNI estimated an annual cost of approximately \$1.8 million based on worker hour information from Fiscal Years 2006 through 2008 and a proposed average workers' compensation premium formulated in December 2008. However, this preliminary estimate was based on generic employee characteristics rather than specific job classifications.

By comparison, the average annual cost of Jones Act claims as referenced in the preceding table was \$3.4 million. This is based on the cost to WSF as a result of its wage loss, maintenance and cure payments, claims payouts and defense costs. This number does not include costs related to its third-party administrator contract, excess insurance costs, annual or sick leave, resulting in a projected annual savings of \$1.6 million.

## **STAKEHOLDERS**

Substantial stakeholder work will need to be done to communicate the benefits of moving WSF crew injury claims to the workers' compensation system. A partial list of stakeholders includes:

- WSF employees and management
- The unions representing WSF employees covered by the Jones Act:
  - Inland Boatman's Union (IBU)
  - International Organization of Master's Mates and Pilots (MM&P)
  - Marine Engineers Benevolent Association (MEBA)

## **SUMMARY**

Moving crew injury costs to our state's workers' compensation program would have a number of benefits, including: (1) consistency in managing all employee on-the-job injury claims; (2) the possibility of lower liability payments; (3) more predictability and stability in projecting costs through a monthly premium; and (4) elimination of the adversarial nature of negligence claims.

However, the move could be controversial and may be subject to a legal challenge. Significant stakeholder work remains to be done. The cost savings is based on a claims analysis that could be inadequate because it is short term. The preliminary estimate of expected premiums provided by LNI will change as the claims history develops. The WSDOT is implementing significant improvements to its safety and injury reduction plans, which, if successful, could reduce costs with either approach to covering employee injuries.

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