

Longshoremen's and harbor workers'  
Compensation act.

( 85TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT  
2d Session } No. 2286 )

U.S. Congress, House, Committee on  
education and labor.

COMPENSATION FOR INJURIES UNDER LONGSHORE-  
MEN'S AND HARBOR WORKERS' COMPENSATION ACT  
WHERE THIRD PERSON IS LIABLE

JULY 28, 1958.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. BARDEN, from the Committee on Education and Labor, submitted  
the following

REPORT

[To accompany H. R. 12728]

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The Committee on Education and Labor, to whom was referred the  
bill (H. R. 12728) to amend the Longshoremen's and Harbor Workers'  
Compensation Act, with respect to the payment of compensation in  
cases where third persons are liable, having considered the same,  
report favorably thereon with amendments and recommend that the  
bill as amended do pass.

The amendments are as follows:

Page 3, line 18, after "registered" insert the following: "or certified".

Page 6, line 10, strike out "killed" and insert the following: "to his  
eligible survivors or legal representatives if he is killed,".

EXPLANATION OF AMENDMENTS

The first amendment was made at the suggestion of the Post  
Office Department since certified mail is the new name for registered  
mail.

The second amendment merely specifies those who can act on behalf  
of the deceased which was inadvertently omitted when the bill was  
drafted.

PURPOSE

The purpose of H. R. 12728 is to rectify a hardship which under the  
present law is suffered by harbor workers, longshoremen, and their  
survivors.

Ordinarily when such a worker is injured during the course of his  
employment, he receives compensation. Sometimes, the injury or

death is caused as a result of the negligence of a third party, in which event he is entitled to sue that third party and, usually, if he prevails, receives far more than he would under the compensation law. In such a case, that is, injury through a third party, under the present statute he or his survivors are obliged to elect either to receive compensation or to sue the third party. Many times, in spite of the fact that they have a good cause of action and could receive a greater sum of money against the third party, they are afraid to do so because in the event of the loss of the case they would then have neither recovery in that suit nor the compensation. A further evil sometimes occurs when these people find it necessary to practically sell their claim in order to obtain support during the course of the case.

This bill will rectify this situation. It will permit the claimants to receive compensation and also to pursue the third party law suit at the same time.

The claimant will not receive two sums, for the bill provides proper adjustments between the recovery in either event. If the third party lawsuit brings in more money than compensation, then the claimants receive the larger sum and the insurance compensation carrier has its money returned. If the sum recovered is less than the compensation, the insurance compensation carrier does not suffer as it merely pays the difference, which it would be obliged to do in any event. The bill provides safeguards for the insurance carrier and even has a provision that where a claimant does not pursue a good third party action the insurance company may do so in certain instances in his behalf. In that event if the sum recovered is larger than the compensation, the claimants receive two-thirds of the difference over what the compensation would be and the compensation carrier receives one-third of the coverage for its efforts.

Enactment of this bill will also result in the Federal law conforming to the views held by most States on this subject.

#### BACKGROUND

All workmen's compensation acts are based upon a quid pro quo between employer and employee. Employers relinquish certain rights otherwise protected by law in return for which employees relinquish certain of their legal rights. By reason of this, employees are assured hospital and medical care and subsistence during the convalescence period. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances an employee is injured by the negligence of a stranger to the employer-employee relationship. When such a situation develops, section 33 of the Longshoremen's and Harbor Workers' Compensation Act reserves to the employee the right to seek damages against the stranger, thereby enabling him to obtain, if successful, an amount larger than he would receive as compensation.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of the employment. This section also reserves to the employee the right to recover damages against third parties who may be responsible for the injury.

Section 33 pertains to employee actions against third parties responsible for the injury. This section requires the employee to elect whether to accept a compensation award or pursue his third-party

action. Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim.

Developments under the act which concerned the Subcommittee on Safety and Compensation have been suits by injured workers against coemployees which have resulted in large recoveries ultimately paid by the employer; successful employee suits against a third party, who subsequently was successful in obtaining indemnification from the employer; the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest; denial of compensation to an injured workman pending his election to bring action against a third party; extension of the maritime doctrine of "warranty of seaworthiness" to include employees covered by the act.

Remedial legislation was introduced in the 84th Congress and extensive hearings were held by a subcommittee. That subcommittee on December 1956 recommended unanimously that the legislation be reported favorably to the full Committee on Education and Labor, since there was almost unanimous approval of the principle of the legislation by the Labor Department, management and labor organizations. During the present session of Congress this legislation was again introduced and considered by the Subcommittee on Safety and Compensation and reported favorably to the full committee.

#### SECTION-BY-SECTION ANALYSIS

The bill will entirely rewrite section 33 of the Longshoremen's and Harbor Workers' Compensation Act which relates to compensation for injuries where a third person is liable.

Under the existing law, an employee who is injured may receive compensation under the act even though someone other than the employer is liable to him in damages on account of the injury. In such a case, the employee may elect whether to take the compensation or to recover damages against the third person.

If the employee elects to proceed against the third party, he will be entitled to all sums he receives as damages and, in the event the amount he receives in damages is less than the amount he would have received as compensation, he will be entitled to receive the difference from his employer.

If, on the other hand, the employee accepts compensation under an award in a compensation order filed by the Deputy Commissioner, his acceptance acts as an assignment to the employer of his rights against the third party. The employer may then either sue the third party for damages or compromise with him. Amounts received from the third party by the employer will be retained by him except that if such amounts exceed the compensation he has paid or will pay the employee, his expenses of obtaining the funds, and for medical services and supplies, he will pay over the difference to the employee or other person entitled to the compensation.

Under subsection (a) of section 33 as it would be amended by the bill, where an employee entitled to compensation is injured or killed by the negligent or wrongful act of a third person (not employed by

the same employer) he or the person entitled to compensation on his behalf may receive compensation and medical benefits under this act and at the same time pursue his remedy against the third person. In other words, the employee need not elect which remedy to pursue.

Such a person will be able to commence his remedy at law at any time within 6 months after the compensation order or within 9 months after the enactment of any new laws creating, establishing, or affording a new or additional remedy. If the employee or other person entitled to compensation on his behalf receives any funds in a civil action, through settlement, or otherwise, the employer or his insurance carrier will have a lien on such funds to the extent of the total amount of compensation awarded under, or provided, or estimated, by this act for such case and the expenses for medical treatment.

Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representatives do not commence action against the third person within the time limit set forth above, the failure will operate to assign the cause of action to the employer or his insurance carrier if the employer or his insurance carrier has given notice to the employee or other person entitled to compensation that his failure to commence action will operate as an assignment of the cause of action. If the employer or his insurance carrier doesn't give such notice until after a date at least 30 days from the last date on which he may commence the action, the period during which he may commence the action will be extended for 30 days after he has received the notice. If he hasn't begun such action by then, his failure will then operate to assign the cause of action to the employer or his insurance carrier.

In the event an employer or his insurance carrier to whom a cause of action has been assigned as described above recovers from the third person a sum in excess of the total amount of compensation awarded for the death or injury involved, expenses for medical treatment paid by it, and certain expenses of recovery, then the employee or his eligible survivors will be paid an amount equal to two-thirds of the excess.

Where the total amount of compensation is not fixed and definite, the Secretary of Labor will estimate the probable total value of it on the basis of certain actuarial tables and other facts.

Subsection (c) deals with the situation which will arise where an award of compensation is subsequently modified, or where the total amount of compensation was not fixed and definite and the amount of such payments have actually become known. It provides for appropriate adjustments between the employer or his insurance carrier and the employee or other person entitled to compensation on his behalf.

Subsection (d) provides that if the employee proceeds against the third party but recovers less than he would have received as compensation, the employer or his insurance carrier will be responsible for the difference, except that if the recovery is by way of settlement the excess will be payable only if the employer or his insurance carrier consented to the settlement.

Subsection (e) provides that compensation or benefits under this act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of another in the same employ.

CHANGES IN EXISTING LAW

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics):

SECTION 33 OF LONGSHOREMEN'S AND HARBOR WORKERS'  
COMPENSATION ACT, AS AMENDED (44 STAT. 1440)

[COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

[SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission<sup>1</sup> may provide, to receive such compensation or to recover damages against such third person.

[(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

[(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

[(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

[(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

[(1) The employer shall retain an amount equal to—

[(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

[(B) the cost of all benefits actually furnished by him to the employee under section 7;

[(C) all amounts paid as compensation;

[(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

<sup>1</sup> The functions of the Commission have been transferred to the Secretary of Labor. See Reorganization Plan No. 19, 1950.

[(2) The employer shall pay any excess to the person entitled to compensation or to the representative.]

[(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.]

[(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.]

[(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.]

[(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.]

#### COMPENSATION FOR INJURIES WHERE THIRD PERSON IS LIABLE

*SEC. 33. (a) If an employee entitled to compensation under this Act be injured or killed by the negligence or wrong of a third person not in the same employ, such employee or, in case of death, his eligible survivors or legal representative, if any, need not elect whether to take compensation and medical benefits under this Act or to pursue his remedy against such third person but may take such compensation and medical benefits and (within the time periods hereinafter set forth) pursue his remedy against such third person subject to the provisions of this Act. If such employee, or, in case of death, his eligible survivors or legal representative, if any, takes compensation under this Act and desires to bring action against such third person, such action should be commenced not later than six months after the entry of an order awarding compensation or not later than nine months after the enactment of such law or laws creating, establishing, or affording a new or additional remedy or remedies. In such case, the carrier liable for the payment of such compensation shall have a lien on the proceeds of any recovery from such third person, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act for such case and the expenses for medical treatment paid or to be paid by it, and to such extent such recovery shall be deemed for the benefit of such carrier. Notice of the commencement of such action shall be given thirty days thereafter to the Secretary of Labor, the employer, and the carrier upon a form prescribed by the Secretary.*

*(b) If such employee or, in case of death, his eligible survivors or legal representative, if any, has been awarded compensation under this Act but has failed to commence action against such third person within the time*

limited therefore by subsection (a), such failure may operate as an assignment of the cause of action against such third person to the carrier liable for the payment of such compensation. The failure of such employee or his eligible survivors or legal representative to commence an action pursuant to the provisions of subsection (a) of this section, shall operate as an assignment of the cause of action: Provided only, however, That the carrier shall first, after award of compensation, have notified the employee, or in the event of his death, the employee's eligible survivors and legal representative if any has been appointed, in writing by personal service or by registered mail at least thirty days prior to the expiration of the longer time limited for the commencement of an action by subsection (a), that such failure to commence such action shall operate as an assignment of whatever cause of action may exist from the employee to the carrier. If the carrier shall fail to give such notice, the time limited for the commencement of an action by subsection (a) shall be extended until thirty days after the carrier shall have served the notice required by this section, and in the event the claimant fails to commence such action within thirty days after service of such notice, such failure shall operate as an assignment of such cause of action to such carrier. If such carrier as such an assignee, recovers from such third person, either by judgment, settlement, or otherwise, a sum in excess of the total amount of compensation awarded for the death or injury of such employee and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such employee or his eligible survivors at the time of death two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his eligible survivors. When the compensation awarded requires periodical payments, the number of which cannot be determined at the time of such award, the Secretary shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institute, and such facts as he may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery, subject to the modification thereof as hereinafter provided.

(c) In the event of a modification of an award increasing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall exceed the total thereof as estimated by the Secretary, the principal of any of such excess recovery theretofore paid to such employee or his eligible survivors shall be credited against such increase or such excess. In the event of a modification of an award ending or diminishing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall be less than the total thereof as estimated by the Secretary, such carrier shall forthwith pay to the person entitled to compensation any additional amount of such excess recovery to which such person may be entitled by reason of such modification or such deficiency, determined as hereinbefore provided. (d) If such employee proceeds against such third person the carrier shall contribute only the deficiency, if any, between the amount

*of the recovery against such third person actually collected, and the compensation provided or estimated by this Act for such case, except that in the case where the amount of settlement of a claim or action against a third party is less than the compensation provided or estimated by this Act, prior approval of the employer or insurance carrier shall be required or else the carrier shall be relieved of all liability for such deficiency.*

*(e) The right to compensation or benefits under this Act, shall be the exclusive remedy to any employee when he is injured or killed by the negligence or wrong of another in the same employ.*

