

## ADMIRALTY LAW

## Expert Analysis

# New Test in Longshore Worker's Attempted Suicide 'Unchained'

Imagine being so physically and mentally traumatized by a personal injury that the thought of suicide becomes a reality. Worse yet, imagine executing on the idea and failing. The scenario presents a perplexing legal challenge in the field of Workers' Compensation. Indeed, one such case remains unresolved 10 years after a longshore worker's suicide attempt, but a recent ruling may put the issue to rest.

### Fall and Suicide Attempt

In 2001, William 'Willie Boy' Kealoha, a ship laborer on cleaning detail, fell 25 to 50 feet from the top of a barge to the steel deck of a dry dock. He barely survived the fall and suffered severe trauma to the head, chest, and abdomen. Apparently, not thrilled to be so painfully alive after the horrific fall, two years later, Kealoha shot himself and once again barely survived. He sought benefits under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§901-950) (LHWCA or Longshore Act).

The compensation claim is still not resolved 10 years later, but in a decision that has echoed resoundingly in the field of longshore Workers' Compensation, the U.S. Court of Appeals for the Ninth Circuit recently determined that a suicide may be compensable even where there

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is evidence of pre-planning (as opposed to a momentary 'irresistible impulse'), and provided guidance to administrative law judges and the Benefits Review Board on the proper test to apply. Meanwhile, according to his Workers' Compensation attorney, Jay L. Friedheim, Kealoha lives in pain from the barge fall, in addition to facial injuries and a hole in one eye socket from the failed suicide attempt. He continues to seek much needed medical attention, compensation benefits, and an artificial eye.

The 1927 Longshore Act provides that Workers' Compensation is the exclusive remedy for maritime workers against their employer. Notably, the federal act was modeled largely upon New York's Workmen's Compensation Law, which at the time, was the pioneer in the field of similar state statutes.<sup>1</sup> When the federal law was proposed, it was recognized that it would afford maritime workers the same remedies that state legislation provided non-marine workers injured or killed in the course of employment.<sup>2</sup> In exchange for giving up the right to sue in maritime tort, a longshore worker would generally expect prompt and diligent

claim resolution. But, as seen in *Kealoha v. Director, Office of Workers' Compensation Programs, Leeward Marine*, that is not always the case.<sup>3</sup>

New York's Workers' Compensation Law excludes recovery for willful injuries.<sup>4</sup> Similarly, Section 903(c) of the LHWCA (which is similar in substance to New York's law) precludes compensation if the injury was "occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(b). Thus, the haunting legal question is whether and under what circumstances a self-inflicted injury is compensable under Workers' Compensation statutes.

The Ninth Circuit recently determined that a suicide may be compensable even where there is evidence of pre-planning (as opposed to a momentary 'irresistible impulse').

Typically, a death benefit is allowed if an injury results 'naturally' or 'unavoidably' in disease, and the disease leads to death.<sup>5</sup> But, one would expect suicide to fall into the "willful intention" exclusion of the Longshore Act. Nonetheless, two courts that have considered the issue under the Longshore Act have held that there are exceptions to the "willful intention" exclusion that make

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a suicide caused by work-related injuries compensable.<sup>6</sup> In one case, the U.S. Court of Appeals for the Fifth Circuit approved an award upon finding that the accident and injury aboard ship caused a “manic-depressive insanity” such that the longshoreman’s reasoning faculties were so far impaired that his act of self-destruction was not voluntary and willful within the meaning of the act.<sup>7</sup>

The District of Maryland held that a work-related injury caused severe physical and mental impairment from which the longshoreman’s impulse to end his life germinated.<sup>8</sup> Another court awarded benefits under the Longshore Act for a suicide even without a prior physical injury. In that case, the employee’s death resulted from distress and depression over the continuing decline in business.<sup>9</sup>

Similarly, in a non-marine context, the New York Court of Appeals held in 1928 that death benefits might be awarded if a compensable work-related injury causes insanity which, in turn, results in suicide.<sup>10</sup> Indeed, there is an ALR (American Law Reports) article dedicated to this subject.<sup>11</sup>

#### Judicial Process

The *Kealoha* case involved a lengthy judicial ping-pong that would appear to contradict the spirit and purpose of the Longshore Act in which the injured worker’s exclusive remedy is compensation benefits paid promptly. The claim for injury resulting from the suicide attempt was joined with the original barge accident claim and a hearing was held in January 2004, before Chief Administrative Law Judge, Jennifer Gee, of the San Francisco District Office of the Department of Labor.

While Section 919(c) of the Longshore Act mandates that an ALJ “shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim,” there is no viable remedy for non-compliance. Here, the record indicates that Gee’s initial decision denying the claim was issued 17 months after the hearing. A year later, the Benefits Review Board (BRB) reversed and remanded to the

ALJ for further consideration. With no further hearing or briefing, Gee issued her decision—again denying the claim—in April 2010, nearly four years after it was remanded. A year after that, the BRB affirmed the ALJ’s renewed denial, setting the stage for the appeal to the Ninth Circuit which reversed and remanded the case in an April 2013 published opinion back to the ALJ, where the claim again remains pending.

The Ninth Circuit decided that a broader test should apply in LHWCA cases, namely that a suicide or injuries from a suicide attempt are compensable when there is a direct and unbroken “chain of causation” between a work-related injury and the suicide attempt.

The ALJ had initially decided that Kealoha’s self-inflicted injuries were not compensable because the suicide attempt was not the ‘natural and unavoidable’ result of his fall, or the result of a momentary ‘irresistible impulse,’ but rather a planned and intentional action related to other factors such as employment and marital problems, a withdrawn settlement offer, and stress of an upcoming deposition.<sup>12</sup> However, on remand, the ALJ determined that Kealoha’s fall from the barge was indeed a cause of his suicide attempt, but decided that compensation was barred because the facts still demonstrated his actions were planned and premeditated and therefore not the result of an “irresistible impulse” (one narrow exception to the LHWCA’s “willful intent” exclusion).

On appeal, the Ninth Circuit held that evidence that a claimant planned his suicide (or attempt) does not necessarily preclude an award under the “willful intention” exclusion of the Longshore Act.<sup>13</sup> The court considered the “irresistible impulse” exception that other courts have applied in state Workers’ Compensation and life

insurance self-inflicted injury cases, but determined that the operative question or “proper inquiry” on remand, should be whether the work-related injury caused the claimant to attempt suicide. Thus, the court decided that a broader test should apply in LHWCA cases, namely that a suicide or injuries from a suicide attempt are compensable when there is a direct and unbroken “chain of causation” between a work-related injury and the suicide attempt. According to the court, a “chain of causation” test better reflects the Longshore Act’s focus on causation, rather than fault. 33 U.S.C. §904(b) (“Compensation shall be payable irrespective of fault as a cause for the injury”).<sup>14</sup>

#### Conclusion

In view of the interest in ‘uniformity’ of admiralty law, the Ninth Circuit’s “chain-of-causation” analysis applied in *Kealoha*, if adopted by other circuits, should narrow the focus on the test to be applied in LHWCA suicide or self-inflicted injury cases.

As for the claims process, the attention a case such as this brings may precipitate changes that provide for the expeditious resolution of claims under the Longshore Act, including perhaps enforcement of section 919(c) of the act’s time limit to render a decision.

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1. Liability for Compensation, NY WORK COMP Consol. Laws c.67 §10 (1913); see also *Branham v. Terminal Shipping*, 136 F.2d 655 at 658 (4th Cir. 1943).

2. See H.R. Rep. No. 69-1767, at 20 (1927).

3. 713 F.3d 521 (9th Cir. 2013).

4. Liability for Compensation, NY WORK COMP §10.

5. 33 U.S.C. §902(2); *Voris v. Tex. Employers Ins. Ass’n*, 190 F.2d 929, 934 (5th Cir.).

6. *Voris v. Tex. Employers Ins. Ass’n*, 190 F.2d 929, 934-35 (5th Cir. 1951); *Terminal Shipping v. Traynor*, 243 F.Supp. 915 (D.Md. 1965).

7. *Voris*, 190 F.2d 929.

8. *Terminal Shipping v. Traynor*, 234 F.Supp. 915.

9. *Director, OWCP v. Cooper Assoc.*, 607 F.2d 1385, 1387-88 (D.C. Cir. 1979) (per curiam). *Kealoha v. Director, OWCP*, 713 F.3d 521, 524 (9th Cir. 2013).

10. *Delinousha v. Nat’l Biscuit*, 248 N.Y. 93, 96 (1928).

11. Suicide as Compensable Under Workmen’s Compensation Act, 15 A.L.R.3d 616 §5[b].

12. *Kealoha v. Director, OWCP*, 713 F.3d 521, 524 (9th Cir. 2013).

13. *Id.*

14. *Id.*