

TOPIC 31 PENALTY FOR MISREPRESENTATION-- PROSECUTION OF CLAIMS

31.1 GENERALLY

Section 31 was completely revised by the 1984 Amendments to the LHWCA. Pub. L. 98-426, 98 Stat. 1639, 1650-51, § 19. The amended version of Section 31 was effective on the date of enactment, September 28, 1984. 1984 Amendments, 98 Stat. at 1655, § 28(e).

31.2 CLAIMANT'S CONDUCT

Section 31(a) reads as follows:

(a)(1) Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both.

(2)The United States attorney for the district in which the injury is alleged to have occurred shall make every reasonable effort to promptly investigate each complaint made under this subsection.

33 U.S.C. § 931(a).

As amended, Section 31(a) states that any **false statement or representation**, which is **knowingly and willfully** made for the purpose of obtaining benefits under the LHWCA, is a **felony**, punishable by a fine of not more than \$10,000, or imprisonment not to exceed five years or both. The **United States attorney** for the district in which the injury is alleged to have occurred is to make every reasonable effort to promptly investigate any complaint made under this subsection.

[ED. NOTE: Prior to the 1984 Amendments such conduct constituted a misdemeanor; as of September 28, 1984, it constituted a felony.]

Willful misrepresentation regarding post-injury earnings is dealt with under this section, as well as under Section 8(j) of the LHWCA (suspension of benefits). Freiwilleg v. Triple A South, 23 BRBS 371 (1990).

The **Fifth and Ninth Circuits** have held that the LHWCA does not provide an employer with a right to recover advance payments wrongfully paid, such as through fraud, when no LHWCA compensation is owed and that the federal district court lacks jurisdiction to consider a claim under the LHWCA by an employer to recover payments wrongfully paid when no future compensation

payments were owed. Ceres Gulf v. Cooper, 957 F.2d 1199 (**5th Cir.** 1992); Stevedoring Servs. of America v. Eggert, 953 F.2d 552 (**9th Cir.**), cert. denied, 505 U.S. 1230 (1992).

In Ceres Gulf, the **Fifth Circuit** held that there was no jurisdiction in the district court under 28 U.S.C. § 1331 (general federal question statute) because the LHWCA is the exclusive scheme, and no right of reimbursement exists under the LHWCA. Ceres Gulf states that:

...the LHWCA addresses fraudulent claims in ways different from that urged by Ceres Gulf. First, it provides for a fine or imprisonment for “[a]ny claimant...who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under” the LHWCA. § 931(a)(1). The penalty does not include the recovery of payments obtained as a result of the false statement or representation. Second, an employer may “discharge or refus[e] to employ a person who has been adjudicated to have filed a fraudulent claim,” § 948a. These were part of the amendments in 1984 to address a perceived problem of claimant fraud...At that time, Congress declined to provide for recovery of benefits to combat such fraud, other than by the established offset method against LHWCA payments owing. [citations omitted]

Ceres Gulf, 957 F.2d at 1205-1206, 25 BRBS 130-31 (CRT).

The Board has held that Section 31(a) remedies preclude the award of costs and attorney’s fees to an employer under Section 26 where a claimant has willfully concealed post-injury earnings, although the claimant may be subject to criminal prosecution under Section 31 or sanctions under Section 8(j). Manou Freiwiligg v. Triple A South, 23 BRBS 371 (1990).

In Phillips v. A-Z International, 30 BRBS 215 (1996), vacated on other grounds at A-Z Intern. v. Phillips, 179 F.3d 1187, (**9th Cir.** 1999)(Held: (1) Under LHWCA provision for administrative contempt powers, where ALJ “certifies the facts to the district court,” it is district court, not the Board, which has exclusive jurisdiction over the matter, and (2) absent any clear statutory directive or interpretive regulations setting forth procedural mechanism by which district court hearing was initiated, ALJ took sufficient steps to “certify the facts” to district court within meaning of contempt provision, thus depriving Board of jurisdiction; court did not express any opinion on whether the facts certified by the ALJ constitute a violation of § 27(b).). the Board held that an employer may not achieve the result of recoupment of previously paid compensation through a broad reading of the contempt provisions of Section 27, as **Section 31(a) is the sole remedy against a claimant who has allegedly filed a false claim**. However, an employer may file a state law cause of action to recover LHWCA benefits from a claimant who obtained them under false pretenses. Stevedoring Services of America, Inc. v. Eggert, 914 P.2d 737 (Wash. 1996) (en banc).

In Phillips, the Board noted that the claimant had not refused to comply with a “lawful order” of the judge, nor had he disobeyed a “lawful process.” The claimant did not refuse the judge’s exercise of jurisdiction over him and there was no allegation that he misbehaved during the administrative proceedings. Therefore, claimant’s conduct did not fall within the purview of Section 27(b).

The term “**process**” is generally defined as “any means used by a court to acquire or exercise its jurisdiction over a person or over specific property.” Blacks Law Dictionary 1084 (5th ed. 1979); see, e.g., State Farm Fire & Casualty Co. v. Miller Electric Co., 596 N.E.2d 169 (**Ill. App. Ct.** 1992). The term refers to the use of summons, writs, warrants or mandates issuing from a court in order to obtain jurisdiction over a person or property. Black’s Law Dictionary 1085 (5th ed. 1979).

In a case decided under the pre-1984 version of Section 31, the Board and the **Fourth Circuit** held that this section does not bar compensation to a claimant, even if the **injury is causally related to a misrepresentation regarding his medical history**. Newport News Shipbuilding & Dry Dock Co. v. Hall, 674 F.2d 248, 14 BRBS 641 (**4th Cir.** 1982), *aff’g* 13 BRBS 873 (1981). The **Fourth Circuit** noted that the LHWCA did not encompass a misrepresentation exception to Section 3(b) liability and to engraft such an exception into the LHWCA would be to “amend a statute under the guise of ‘statutory interpretation.’” 14 BRBS at 646.

While Section 8(j) sanctions may not be applied retroactively to pre-1984 activity, a claimant may nevertheless be potentially liable for misrepresentation, as it is a crime to use false or misleading statements to obtain benefits under the LHWCA and is punishable by fine, imprisonment or both. Moore v. Harborside Refrigerated Inc., 28 BRBS 177, 180 (1994).

[ED. NOTE: Several ALJs have referred cases to the United States Attorney’s office. See, e.g., Moore, supra. At least one judge has referred a case to a state insurance commission as to the conduct of an insurance adjuster. Hilgert v. Dresser/Atlas, 93-LHC-912 (May 4, 1995). Such referrals can be done by ordering the district director to serve a copy of the Decision and Order on the proper authority, stating the authority and his/her address in the order, and providing that “a cover letter shall state that the Decision and Order is being served for review of the conduct of _____, described on pages _____ and any other appropriate action.”]

The **Fourth Circuit** summed up as follows: “Given Congress’ enunciation of specific limited exceptions to the general rule of compensation without regard to fault, it is well understood that we cannot supply additional exceptions.” 14 BRBS at 647. Thus, the **Fourth Circuit** turned down the employer’s attempt to engraft the “Larson test” for fraud under workers’ compensation to the LHWCA. 1C A. Larson, The Law of Workmen’s Compensation § 47.53 (1980) (under the **Larson test**, compensation benefits are barred where three conditions are found: (1) misrepresentation, (2) reliance, and (3) causation).

[ED. NOTE: Since passage of the Americans with Disability Act (ADA), a potential employee cannot be asked to give a medical history. Where an employee falsifies a pre-employment

questionnaire (presumably now such questionnaires will only deal with non-medical/non-disability related topics), the employee is potentially subject to disciplinary action and this action will not form the basis of a Section 48a discrimination claim.]

In another case decided under the pre-1984 version of Section 31, the Board held that claimant's failure to disclose at the time he was hired a pre-existing knee injury did not bar him from receiving compensation but the employer might be entitled to **Section 8(f)** relief. Hallford v. Ingalls Shipbuilding Div., Litton Sys., Inc., 15 BRBS 112 (1982).

31.3 DEBARRED REPRESENTATIVES

Section 31(b) reads as follows:

(b)(1) No representation fee of a claimant's representative shall be approved by the deputy commissioner, an administrative law judge, the Board, or a court pursuant to section 28 of this Act, if the claimant's representative is on the list of individuals who are disqualified from representing claimants under this Act maintained by the Secretary pursuant to paragraph (2) of this subsection.

(2)(A) The Secretary shall annually prepare a list of those individuals in each compensation district who have represented claimants for a fee in cases under this Act and who are not authorized to represent claimants. The names of individuals contained on the list required under this subparagraph shall be made available to employees and employers in each compensation district through posting and in such other forms as the Secretary may prescribe.

(B) Individuals shall be included on the list of those not authorized to represent claimants under this Act if the Secretary determines under this section, in accordance with the procedure provided in subsection (j) of section 7 of this Act, that such individual--

(i) has been convicted (without regard to pending appeal) of any crime in connection with the representation of a claimant under this Act or any workers' compensation statute;

(ii) has engaged in fraud in connection with the presentation of a claim under this or any workers' compensation statute, including, but not limited to, knowingly making false representations, concealing or attempting to conceal material facts with respect to a claim, or soliciting or otherwise procuring false testimony;

(iii) has been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct which are similar in nature to those which would be grounds for disqualification under this paragraph; or

(iv) has accepted fees for representing claimants under this Act which were not approved, or which were in excess of the amount approved pursuant to section 28.

(C) Notwithstanding subparagraph (B), no individual who is on the list required to be maintained by the Secretary pursuant to this section shall be prohibited from presenting his or her own claim or from representing without fee, a claimant who is a spouse, mother, father, sister, brother, or child of such individual.

(D) A determination under subparagraph (A) shall remain in effect for a period of not less than three years and until the Secretary finds and gives notice to the public that there is reasonable assurance that the basis for the determination will not reoccur.

(3) No employee shall be liable to pay a representation fee to any representative whose fee has been disallowed by reason of the operation of this paragraph.

(4) The Secretary shall issue rules and regulations as are necessary to carry out this section.

33 U.S.C. § 931(b).

In a new addition to the LHWCA, under Section 31(b), the Secretary of Labor is authorized to prepare and maintain a **list** of persons who have previously represented claimants for a fee in cases under the LHWCA and who are not authorized to represent claimants. Such persons may not receive a representation fee.

Disqualified representatives include persons who have been convicted of any crime in connection with the representation of a claimant **under the LHWCA or any workers' compensation statute**, who have engaged in fraud in connection with the representation of a workers' compensation claim, who have been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct similar to those enumerated here or who have accepted fees for representing claimants under the LHWCA which were not approved or were in excess of the amount approved under Section 28. 33 U.S.C. § 931(b)(2)(B)(i)-(iv).

There are **exceptions**, however, under which a disqualified representative may nevertheless serve as a representative in a **limited capacity**. A disqualified individual is not prohibited from representing himself or from representing without a fee a claimant who is a spouse, mother, father, sister, brother, or child of such individual.

A **determination** that an individual is a disqualified representative **remains in effect for at least three years**. 33 U.S.C. § 931(b)(2)(D). Under Section 31(b)(3), no employee is liable to pay a representative fee to any representative whose fee has been disallowed under this section.

31.4 EMPLOYER MISREPRESENTATION

Section 31(c) of the LHWCA reads as follows:

(c) A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 9 if the injury results in death, shall be punished by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. § 931(c).

Section 31(c) provides that a person, including but not limited to, an **employer**, his **authorized agent**, or an **employee of an insurance carrier** who **knowingly and willfully** makes a **false statement** or representation **for the purpose of reducing, denying or terminating benefits** is subject to a fine not to exceed \$10,000, five years imprisonment or both.