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Mr. Antonio Rios
Director - Division of Longshore and Harbor
Workers' Compensation
Office of Workers' Compensation Programs
U.S. Department of Labor
Room C-4315
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: **RIN 1240-AA06**

Re: Comments in Response to Notice of Proposed Rulemaking: Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Maximum and Minimum Compensation Rates

Dear Mr. Rios:

We write on behalf of the Signal Mutual Indemnity Association Ltd. ("Signal") to provide its comments in response to the Notice of Proposed Rulemaking issued by the United States Department of Labor ("DOL" or the "Department") regarding certain proposed regulations implementing the Longshore and Harbor Workers' Compensation Act ("LHWCA"), specifically those impacting "maximum and minimum compensation rates." The Department should be commended for attempting to employ the rulemaking process to prospectively resolve legal questions arising from judicial interpretations to the Act. However, as discussed below, Signal believes that certain components of the proposed regulations are either, unnecessary, premature, or simply an incorrect interpretation of the pertinent statutory and legal authority.

Introduction

Signal is duly authorized under 33 U.S.C. §932(a)(2) as a "group self-insurer" by the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP"), through its Branch of Financial Management, Insurance and Assessments, to secure its Members' obligations under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. §901 et seq., and its extensions, the Defense Base Act ("DBA"), 42 U.S.C. §1651 et seq., the Non-Appropriated Funds Instrumentalities Act ("NAFIA"), 5 U.S.C. §8171 et seq., and the Outer Continental Shelf Lands Act (OCSLA"), 43 U.S.C. §1331 et seq.

Signal is comprised of over 250 full Member employers and in excess of 400 hundred related or otherwise affiliated employers of said Members, as well as over 150 Covered Employers (including stevedores and terminal operators; shipyards and ship repairers; marine construction companies; and offshore oil and gas exploration and drilling companies).

Significantly, all of Signal's Members, in all industries, are impacted by the Proposed Rulemaking. However, stevedores and terminal operators who employ a unionized workforce would be most severely impacted as they are the most likely to have compensation claims influenced by the maximum average weekly wage. Signal, which administers in excess of 4,000 new claims a year and is the largest single payer of traditional longshore benefits, believes it is uniquely situated to comment upon the efficacy and impact of the Proposed Rulemaking.

The Proposed Rulemaking purportedly attempts to address the U.S. Supreme Court's decision in *Roberts v. Sea-Land Services, Inc.,* which dealt specifically and *solely* with the issue of which fiscal year is a claimant "newly awarded compensation" for purposes of determining the appropriate average weekly wage. Significantly, the U.S. Supreme Court did *not* rule on the question of within which fiscal year is a claimant "currently receiving" compensation for purposes of application of the pertinent fiscal year's maximum or minimum weekly wage. Signal's position is that to the extent the U.S. Supreme Court ruled on the matter--and in Signal's opinion ruled correctly--that the appropriate fiscal year for purposes of determining the applicable weekly wage is the fiscal year that included claimant's date of injury, is that the ruling simply affirmed what had been general case law for decades and is now, in any event, unquestionably the law of the land. As such, Signal does not believe that any Rulemaking is necessary on the point as the issue has been settled as a matter of law with finality by the highest court in the land.

As to the second issue raised by the Proposed Rulemaking, i.e. the correct fiscal year for determining the applicable maximum and minimum average weekly wages when a claimant is "currently receiving" compensation, the Department relies upon very recent decisions from only two Circuit Courts of Appeal, one of which, the Ninth Circuit, is generally considered an outlier by the legal community across the country. Even if Signal agreed with these two Circuits' determinations—which it does not—it notes that this issue remains a contested issue in a majority of the Circuit Courts of Appeal and believes it is only appropriate to allow at least a majority of Circuit Courts of Appeal to rule on the issue and otherwise allow the issue to play out in the judicial system *just like the Department did with the AWW issue.*

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The Proposed Rulemaking

I. Applicable Average Weekly Wage

Signal believes that the U.S. Supreme Court correctly decided *Roberts* in holding that the correct fiscal year in which to calculate average weekly wage is the year of injury. The decision is simply a restatement of long standing precedent. Although Signal sees no harm in codifying this truism in the implementing Regulations, it questions the *necessity* of doing so.

Moreover, the OWCP Procedure Manual itself clearly notes that the

> "…**starting point in calculating the rate** of compensation for disability or death in the injured employee's or deceased employee's average weekly wage**.** It is the basis of all benefit calculations….The overriding objective is to arrive at a valid earning capacity at time of injury." (emphasis in original)

Chapter 3-0100 sec. 2. b.

> "The average weekly wage is fixed at the time of injury…."

Chapter 03-0201 sec. 4.

Clearly, prior to *Roberts* the Department saw no need to implement such a Regulation. Signal, therefore, questions the necessity of the Department for doing so at this time.

II. Applicable Maximum and Minimum Average Weekly Wages

The Proposed Rulemaking revolves around the language of Section 906(c), specifically the interpretation of "newly awarded" and "currently receiving" compensation. The U.S. Supreme Court settled the issue of how "newly awarded" should be interpreted. However, the U.S. Supreme Court specifically declined to comment on the term "currently receiving". However, the U.S. Supreme Court did state two premises very clearly in *Roberts:* 1) that average weekly wage is calculated at the time of disability/injury, and 2) that the Act should be interpreted in a manner to avoid *incongruous* results. Clearly, applying an average weekly wage from the time of injury/disability and a maximum average weekly wage from some other point in time runs afoul of both the premises noted above.

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a) Practical Implications

The Act includes a *maximum* average weekly wage for a reason. Not only does it encourage the return to work by an injured employee, it also provides a stable guideline for purposes of reserving a claim. Moreover, Congress was quite conscious that the maximum rate should be fair and, in fact, provided a mechanism to provide cost of living adjustments in section 910(f), which addressed the issue of inflation. *All* such calculations of both the average weekly wage and the maximum average weekly wage have traditionally—and by law—been tied to the fiscal year of injury. This is not only to maintain a consistent philosophy in the statute, but it holds practical implications as well. An employer, and/or its carrier or group self-insurer are required to set reserves for each lost time claim; reserves that are required to be reported on an LS-274. The very *purpose* of reserving is to ensure that necessary funding is available over the lifetime of the claim. Reserving for future compensation to be paid is a math problem. The only logical and most accurate method for doing so is by establishing fixed parameters. One of those parameters is the maximum weekly wage. Setting the maximum weekly wage for reserve calculations, based upon the maximum of the fiscal year of the jury accomplishes this task with some certainty. Adjustments for inflationary forces under section 910(f) are easily accountable due to the 5% maximum cap on inflation built into the section. However, jumps in the maximum weekly rate at random points in time over the course of a claim are not and cannot be predicted in this math problem and could potentially lead to gaps in reserves and gaps in security held by the OWCP backing those reserves.

b) Department's Rationale

The Department has seized upon a decision from the 9th Circuit Court of Appeals, the *Roberts* case on remand from the U.S. Supreme Court, and a second decision from the 11th Circuit Court of Appeals, *Boroski* as a basis for the Proposed Rulemaking. It is noted that the 9th Circuit is considered a minority Circuit by the legal community and that the 11th Circuit has already flipped flopped once in deciding *Boroski.* Therefore, Signal does not believe that these two decisions are the bedrock upon which to build a sweeping Rulemaking. The fact that the Benefits Review Board ("BRB") has agreed to follow these Circuits is for all intents and purposes practically meaningless as the remaining Circuit Courts, which have not decided the issue, are not bound by the BRB's decision.

i) Legislative History

The vast amount of time and effort spent parsing the meanings of "newly awarded" and "currently receiving" contained in section 906(c) is somewhat confounding. The undersigned believes that the entire argument was no more than a red herring, one that, unfortunately, was accepted by both the employer/carrier and the Solicitor's Office in its briefings in the above-cited cases. When one reads the legislative history of the Act, particularly the

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legislative history of the 1972 amendments to the Act, it is quite clear that section 906(c) was not meant to play any on-going role in administration of the Act after the amendments were passed. The 1972 amendments in sections 906(b) (1) (A)-(D) Congress provided a graduated basis for raising the maximum average weekly wage over the course of four fiscal years. However, as a basic rule of statutory construction is that legislation does not apply retroactively unless specifically provided for in the legislation, it was necessary to provide guidance as to the impact of sections 906(b)(1)(A)-(D) on claims either open at the time of the enactment of the amendment and claims occurring in those four fiscal years. Therefore, as the intent of the drafters was to have the section apply retroactively, it was necessary that this be explicitly stated. The writer believes that *this* is/was the purpose of section 906(c). In stating that section 906(b)(1) applied to "newly awarded" compensation calculations, i.e. *new claims occurring in the aforementioned four fiscal years,* and claims where a claimant was "currently receiving", i.e. *claims that were in existence at the time of the enactment of the amendment*, the drafters were simply addressing the issue of retroactive application to claims already in existence and claims that came into existence during the graduated process of increasing the maximum average weekly wage. The language was then simply carried over in the 1984 amendments as those amendments dropped the phase in language of the 1972 amendments and again there was a necessity to state whether the new language applied to legacy claims. Although this argument was not made in either the *Roberts* or *Boroski* briefings, it appears blatantly obvious to the writer in a plain reading of the amendments—particularly the 1972 amendments.

ii) Appropriateness of Proposed Rulemaking

Signal views with some concern the Department's motivation for pressing for a Proposed Rulemaking at this time. Clearly, the Department had a policy on the issues raised prior to the U.S. Supreme Court's *Roberts* decision as such was necessary for the administration of the Second Injury Fund. This policy, if not in writing or promulgated, was demonstrated in practice in in how it administered the Fund. The fact that there was no regulation regarding the topic is, in and of itself telling, in that the Department never saw the need to codify long-standing case law. Our understanding has been that the Second Injury Fund, in applying both annual weekly wage and maximum/minimum average weekly wages, looked/looks to the fiscal year in which the injury/disability arose.

This was, of course, the prevalent case law before the U.S. Supreme Court's decision in *Roberts*. As noted elsewhere, the U.S. Supreme Court affirmed the prevalent case law in holding that the average weekly wage at time of injury was pertinent to calculation of compensation. What the U.S. Supreme Court did *not* do is comment upon the maximum/minimum average weekly wage issue and it most certainly did *not* overturn any prior precedent on the issue. Therefore, it does not appear that the Proposed Rulemaking as to application of average weekly wage at this time serves any tangible purpose.

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The second part of the Proposed Rulemaking, which deals with an issue that the U.S. Supreme Court did *not* comment upon, relies on the 9th Circuit decision in *Roberts* on remand. In reviewing the Solicitor's Office's briefs on behalf of the Director in the matter, it is curious to note that nowhere in the briefing is the Department's prior (at that time then) policy disclosed to the Court. One would think the question of whether or not the Department is arguing for a *change* in its position would be relevant to the Court, if for no other reason as to provide the Court with a basis to determine what deference should be given to the Department's position. In any event, although the Department did not take a position as extreme as claimant's in *Roberts,* it did take one unfavorable to practice.

Unfortunately, this appears to be an attempt to "legislate through litigation" on behalf of the Department. In basing a Proposed Rulemaking on a decision, particularly a decision thought to be incorrectly decided by a large portion of the industry, from an outlier Circuit Court of Appeals, raises questions as to whether the Proposed Rulemaking is a true reaction to a perceived change in law or simply and opportunity for the Department to change policy. This turn raises further questions in regard to the alacrity in which the Department is moving forward with the Proposed Rulemaking, i.e. without rulings from a majority of the Circuit Courts of Appeal or further guidance from the U.S. Supreme Court. Is this merely an attempt to forestall what would inevitably be a split in the Circuits once more Circuit Courts of Appeal weigh in on the issue? Particularly where a U.S. Supreme Court challenge, which would follow on logically from such a split, would have a high likelihood of success in light of the Court's position on tying calculation of compensation to date of injury and avoidance of incongruous results? If the Department has made a value judgment in changing policy rather than simply changing a litigation position, then indeed a Proposed Rulemaking would be necessary. However, that Proposed Rulemaking should have occurred at the time of the change in policy and not have been treated as a mere change in litigation position during the litigation process in *Roberts.* Therefore, we believe that the Department should clarify the Director's position on the point, identify the policy issues involved, identify when the Director changed his policy on these issues and further clarify if/how the Solicitor's position in *Roberts* harmonized with the Director's position.

iii) Effective Date of Rulemaking

The Department, in justifying the Proposed Rulemaking, suggests that the Rulemaking will avoid further legislation on the issue. Signal believes that in light of the unorthodox "legislation through litigation" process to date described above, this is highly unlikely to be the case. Setting aside the potential judicial challenges to the Rulemaking process itself, the Proposed Rulemaking does not speak to whether it applies retroactively or not. If this Rulemaking is enacted in a manner that does not prevent its application to claims already in existence, the

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proverbial floodgates will be opened as claimant attorneys empowered by the fee shifting mechanism of the Act will undoubtedly scour every file past or present in their offices in search of fee windfalls. Depending upon the number of cases involved, the impact upon employers, carriers, and the Second Injury Fund could be dramatic as obviously current claims would not be reserved in accordance with the new Rulemaking. This would in turn cascade into a lack of security held by the Department. The additional burdens upon administrative system could in turn have a deleterious impact upon the claim resolution process. Therefore, Signal urges that the Proposed Rulemaking should it be implemented apply only to claims with dates of injury after its enactment. Those currently pending in the system should be allowed to follow the normal judicial process.

Conclusion

Signal lauds the Department's initiative and proactive stance in attempting to ensure an efficient and consistent administration of the Act. However, it respectfully believes that the Proposed Rulemaking does not achieve that purpose. As described in detail above, part of the Proposed Rulemaking would appear to be unnecessary and part would appear to be extremely premature and could hinder the efficient and timely administration of the Act.

Sincerely,

Anthony R. Filiato, Esq.
Vice President & General Counsel
Signal Administration, Inc.
Managers' Agents for the
Signal Mutual Indemnity Association Ltd.

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