Scafaro Contracting Celebrates Thirty-Five Years In Construction
SINK OR SWIM: Insurance Requirements To Know When Construction Hits The Water

A few weeks ago I was sitting 38 miles off the New Jersey coast in a fishing spot called the Glory Hole. Our target species was mako shark, and anyone that has ever been shark fishing before knows that you often have a lot of time on your hands to sit around and think. Usually I go offshore to escape all thoughts of work, especially those of insurance. This trip was a little different though. We were getting crushed by 5 to 7 foot seas with winds hitting 25 knots, and as darkness set in, one of the thoughts at the forefront of my mind was insurance – life insurance … and did I have enough? At around midnight the sharks did show up, and to my surprise, the weathermen were fairly accurate in their forecast, predicting that the winds would subside that evening. However, the experience did prompt me to write about the insurance concerns with using boats during construction operations. Unfortunately, the lone mako we hooked and fought was lost, but hopefully these recommendations won’t be lost on you.

Owned Versus Non-owned

The first consideration when evaluating the insurance requirements for the boats you use in your construction operations is who owns the boat. The standard Commercial General Liability policy provides some limited coverage for non-owned watercraft. This coverage is actually granted as a giveback in coverage in the policy’s watercraft exclusion. It states:

“This exclusion does not apply to:
(1) A watercraft while ashore on premises you own or rent;
(2) A watercraft you do not own that is:
   a) Less than 26 feet long; and
   b) Not being used to carry persons or property for a charge”

As long as the boat you are using in your construction operations is not owned by your company, is less than 26 feet long and is not used as a water taxi, you don’t need to look any further than your Commercial General Liability policy for coverage. Oftentimes, the 26 foot length limitation can be increased to 51 feet or more, and sometimes the length limitation can be deleted altogether. For companies that use boats very infrequently, renting a boat when needed is likely the avenue you would pursue. However, many companies that use vessels more frequently will find it more economical to own some barges and work boats. In this situation, you will not be able to rely on your standard Commercial General Liability policy.

Liability Coverage

For owned vessels or non-owned vessels that exceed the length limitation, there are two ways to obtain liability coverage for the use of these vessels in your construction operations. The simplest way to obtain liability coverage without having to purchase another insurance policy is to see if your Commercial General Liability insurance company will attach endorsement CG 24 12 (Boats) to the policy. You would then specifically schedule all of your vessels on this endorsement. The issue with this approach is that General Liability underwriters are often unwilling to provide this endorsement altogether, or they are only willing to provide this coverage for smaller vessels such as skiffs or jon boats, which are commonly used as safety boats as required by OSHA. You may also be able to schedule some small work barges on this endorsement, but vessels of any real size are not going to be added by the underwriters. In these cases you will need to obtain Protection and Indemnity coverage, more commonly referred to as P&I coverage.

P&I coverage is effectively Commercial General Liability coverage for vessels. There are a limited number of insurance markets that offer the coverage, and reading one of these policies will make you think you were back in the 1700s chasing pirates around the high seas. All kidding aside, P&I policies provide broad protection to the Owners of vessels for damages, expenses or loss for which they may be liable. However, there are many coverage concerns that need to be fully addressed to ensure that a P&I policy adequately protects your interests and fulfills your contractual obligations to others. Some of these issues include naming Additional Insureds (or Assureds as they are referred to in a P&I policy), properly structuring navigation limits and excess coverage, since not all Umbrella carriers will include a P&I policy as a scheduled underlying coverage.

Coverage for the Boat Itself

Companies that invest in owning boats need to make sure that the boats themselves are properly protected. Again, there are two ways to approach this, which go hand-in-hand with what was discussed above in the Liability Coverage section. Smaller vessels, the kind that underwriters will cover by adding the Boats endorsement to the General Liability policy, can easily be covered on your Contractors Equipment policy. This is usually a more cost-effective approach, and coverage is obtained by endorsing the policy to delete the watercraft exclusion that likely exists in the policy. As with liability coverage, larger vessels are less likely to be added to the Contractors Equipment policy. For these vessels you will need to obtain Hull coverage. Any market that is able to offer P&I coverage will likely offer Hull coverage. Important coverage provisions to consider with Hull coverage include Automatic Attachment Clauses, Valuation of the Vessels and deductible structures.

Coverage for the Crew

Probably the most complicated and confusing component to this whole equation of working with boats is how to properly insure your employees who will be working on them. There is much misinformation in the marketplace about what coverage is really needed.

As you know, your employees are covered by Workers’ Compensation for injuries they obtain while in the course and scope of work. However, when you add a boat into the equation, there are two other coverages Utility and Transportation Contractor, AUGUST 2012
that may apply — USL&H and Jones Act coverages. These two coverages are very different but share some similarities. First, both USL&H and Jones Act are federal acts, whereas regular Workers’ Compensation is a state act. Second, both USL&H and Jones Act only apply to work adjoining or upon navigable waterways. To determine if a waterway is considered navigable or not, you can check with the United States Coast Guard, which maintains a list of Navigable Waterway Determinations. However, a waterway may still be considered navigable even if the U.S. Coast Guard has not made a determination on that waterway. For instance, Congress, the federal courts or the U.S. Army Corps of Engineers can deem a waterway navigable. As you can see, this adds even more confusion to the equation.

The coverages are different in that USL&H is a non-tort coverage and is not subject to a negligence requirement. USL&H is a “no fault” coverage like Workers’ Compensation, which means the employee is entitled to the coverage as long as certain requirements pursuant to the act are satisfied. There is no consideration for comparative negligence.

Jones Act coverage, on the other hand, is a tort-based coverage, and the injured employee has to sue their employer and prove negligence by their employer. The benefits that an injured employee can receive from either USL&H or Jones Act are significantly greater than that of regular Workers’ Compensation. You are probably asking, “Which coverage applies to my workers?”

In simplistic terms, Jones Act coverage applies to employees who have a substantial connection to the operation and navigation of a vessel. The coverage is intended to apply only to seamen (i.e., the master and crewmembers of a vessel). For a detailed explanation of the criteria established to be considered a seaman, you can read the Supreme Court’s opinion for the case Chardris v Latisis, U.S., 115 S. Ct. 2172, 132L.Ed.2d314(1995). Most heavy contractors who use barges as work platforms to build bridges or bulkheads likely don’t have a true Jones Act exposure for their employees who work from these barges. However, if you have employees who operate a tugboat or work boat to maneuver these barges into place, these employees would likely be subject to Jones Act coverage, but an employee operating an excavator from a barge would not. These employees would be candidates for USL&H coverage. An important point to remember about USL&H coverage is that it doesn’t just apply to employees working on a vessel, but rather, it applies to employees working on land adjoining navigable waterways.

With all of this said, any employer who uses boats in their construction operations should carry both USL&H and Jones Act coverage on an “If Any” basis. The reason for this is the distinction I made above about Jones Act coverage being a tort-based coverage. In order for an employee to receive Jones Act coverage benefits, they have to sue their employer. As many of you know, companies are sued all the time for baseless and fraudulent claims. An employee who clearly is not subject to the Jones Act can still sue you seeking Jones Act benefits. It can take years and a lot of money in attorney’s fees to determine that the employee is not in fact entitled to Jones Act benefits. Without Jones Act coverage in place, these defense costs would be uncovered and paid out of the contractor’s own pocket. Therefore, I believe it is prudent for any contractor who uses vessels to carry both USL&H and Jones Act coverage. Jones Act coverage can be provided on a standard Workers’ Compensation policy, it can be provided as an endorsement to a P&I policy called Crew Coverage or it can be provided by a standalone Maritime Employers’ Liability policy (MEL policy). Though very tough to accomplish, the best scenario would be to include it on your standard Workers’ Compensation policy so that you have the same insurance company on the hook to pay whatever benefits (standard Workers’ Compensation, USL&H or Jones Act) are ultimately decided an employee is entitled to. This prevents finger-pointing between insurance companies and a smooth defense of the claim.

Coverage for Your Equipment
While on the Boat

The last consideration when using a boat in your operations is covering your contractors’ equipment that you place on the boat. Almost all Contractors’ Equipment policies contain a standard Waterborne Equipment exclusion. Insurance company underwriters who insure cranes, excavators and other heavy equipment get very nervous when this equipment is placed on a barge and therefore exclude it. If you are working from boats, this exclusion must be deleted, and careful attention must be placed on the limit that the underwriter does offer for waterborne equipment. The limit being offered may not be high enough to cover your cranes and excavators if you have a total loss.

Having a project that requires you to work from a boat can be very exciting, but there are many insurance concerns to be aware of. Don’t get bit by not involving your insurance professional when you plan to work from a vessel; you will have a sinking feeling if you find out you are not properly covered.

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Where the LPCL requires that bidders naming multiple subcontractors for any of Utility and Transportation Contractor, AUGUST 2012