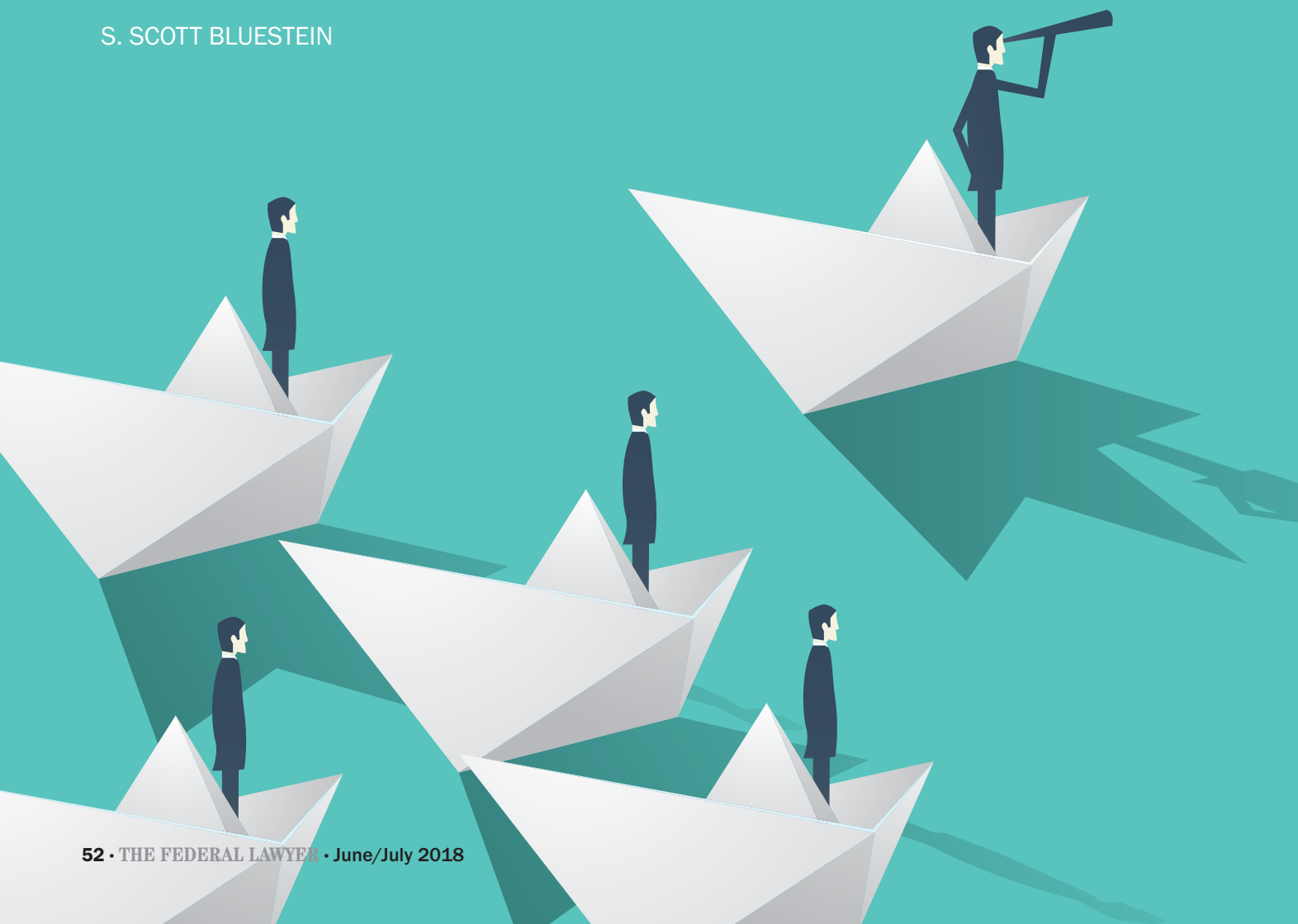
NAVIGATING COMPLEX SEAS: REPRESENTING INJURED MARITIME WORKERS

S. SCOTT BLUESTEIN



Just as the common law derives from ancient precedents—judges' decisions—rather than statutes, baseball's codes are the game's distilled mores. Their unchanged purpose is to show respect for opponents and the game. In baseball, as in the remainder of life, the most important rules are unwritten. But not unenforced.

—George Will

As civilization became more advanced, people began to trade goods across the Persian and Mediterranean Seas and other bodies of water. To allow trade to occur with as little disruption as possible, early seafarers and merchants began to develop their own set of rules and customs. Some of these unique rules and customs were incorporated into the Code of Hammurabi, the law of ancient Mesopotamia and one of the oldest sets of laws dating back to about 2000 to 1754 B.C.[1] The Code of Hammurabi contained provisions governing the duties of seamen to their vessels and special rights for seamen concerning their well-being and care.[2] These ancient codes became the foundation of maritime law and rules throughout Western civilization.

The need for special laws and courts to govern the unique nature of maritime commerce was recognized in the 18th century by the Founding Fathers in the U.S. Constitution, which granted federal courts jurisdiction over admiralty and maritime cases.[3] Article 3, § 2, provides: "The jurisdictional power shall extend … to all cases of admiralty and maritime jurisdiction." This permits federal courts to hear admiralty and maritime cases without the requirements of diversity or federal question jurisdiction.[4]

Across the United States, maritime workers, including seamen, dredge workers, longshoremen, pleasure boat captains, checkers, stevedores, vessel repairers, harbor pilots, bridge builders, and harbor workers are exposed to work-related hazards and job duties that are very different than those to which land-based workers are exposed. This difference has been recognized by both the U.S. Congress and the courts, which have enacted special statutes and created remedies to address personal injuries to maritime workers. U.S. Supreme Court Justice Joseph Story, acknowledging the need to protect the welfare of seamen, wrote in 1823 what became the mantra for admiralty cases: "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel. They are emphatically wards of admiralty … they are treated in the same manner as courts of equity are accustomed to treat young heirs."[5]

If the rules and statutes of the general maritime law, designed to protect injured maritime workers, are not fully understood or grasped, then a lawyer may find himself in a position similar to President Franklin D. Roosevelt's in the last days of his life: "like a baseball team going into the ninth inning with only eight men left to play." This is a position that no lawyer ever wants to find himself in while representing a client. In handling work-related personal injury cases involving a maritime worker, an attorney must first determine the status of the maritime worker. The maritime worker's status determines the type of claim under general maritime law. Unfortunately, there are occasions where the employee's job duties make it extremely difficult to determine his job status. When these situations arise, it is imperative that the necessary steps to protect the client's rights under each statute are taken. This may become problematic in developing a strong strategy since conflicts between the statutes do exist.

A maritime worker who is employed as a seaman is entitled to bring claims for job-related injuries under the Jones Act,[6] for maintenance and cure, for vessel unseaworthiness, and for general maritime law negligence against third parties.[7] Longshoremen, stevedores, harbor pilots, vessel repairers, bridge workers, and other harbor workers are entitled to apply for benefits under the Longshore and

Harbor Workers' Compensation Act (hereinafter "Longshore Act").[8] The types of damages recovered by seamen and harbor workers, in many instances, are unique when compared to the damages land-based workers can recover under state workers' compensation acts. A lawyer must determine if the injured worker is a seafarer or non-seafarer who has a claim under the Longshore Act.[9]

Determining an Injured Worker's Status

The starting point to determining the injured worker's status is the Longshore Act. The Longshore Act is applicable to employees "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include … a master or member of a crew of any vessel."[10] If someone meets the status requirement of the Longshore Act and is not employed as a crew member on a vessel, then they will be considered a non-seafarer with a claim under the Longshore Act and possibly a claim under a state workers' compensation act. Some states have statutes that allow an injured maritime worker to have concurrent compensation claims under both the Longshore Act and the state act.

Courts have consistently found that a master or member of a crew of any vessel (collectively hereinafter referred to as "seamen") do not have claims under the Longshore Act. "Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore."[11] The Longshore Act excludes from coverage those properly covered under the Jones Act.[12] "Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute."[13]

Who is Covered by the Longshore Act?

A maritime worker will be entitled to coverage under the Longshore Act for work-related injuries or death if he satisfies the status and situs requirements of the act. The status requirement requires that a worker be employed in "maritime employment," which includes, but is not limited to, any longshoreman, harbor-worker, ship repairman, shipbuilder, and ship-breaker.[14] Maritime employment encompasses all individuals who are employed in the maritime trade and with job duties that are an essential or integral part of the loading, unloading, repairing, or building of vessels.[15] To satisfy the situs test, a maritime worker must be employed, in whole or in part, upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building ways, marine railway, or any other adjoining area customarily used by a maritime employer in the loading, unloading, repairing, dismantling, or building of a vessel.[16] Additionally, the disability or death of the maritime worker must arise from an injury occurring upon one of the above listed areas.[17] For example, a longshoreman injured while working on a vessel moored at a U.S. port is covered under the Longshore Act. A harbor worker injured on a pier where the loading and unloading of goods from a vessel occurs may be covered under the Longshore Act but excluded from coverage under the Jones Act.

Who is a Jones Act Seaman?

The Jones Act does not define the critical term "seaman" and thus "leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection."[18]

In the 1990s, the U.S. Supreme Court decided four cases addressing seaman status.[19] The *Wilander* Court held that seaman status depends upon "the employee's connection to a vessel in navigation" and disavowed prior cases requiring a seaman to "aid in navigation" of the vessel.[20] "It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."[21]

The *Chandris* Court articulated the seaman-status inquiry as a two-part test that ascertains what "'employment-related connection to a vessel in navigation' … [is] required for an employee to qualify as a seaman."[22] First, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission."[23] "But this threshold requirement is very broad: 'All who work at sea in the service of the ship' are eligible for seaman status."[24] Second, "a seaman must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[25] The Supreme Court then endorsed "an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."[26]

Finally, *Papai* expanded upon the reference in the second prong of the *Chandris* test to "'an identifiable group of … vessels' in navigation."[27] To qualify as a seaman, an employee may show a "substantial connection to a vessel or a fleet of vessels."[28] This "latter concept requires a requisite degree of common ownership or control" of the vessels that allegedly make up the "fleet."[29]

Using the guidelines established by the Supreme Court, a lawyer will need to obtain documentation and information from the employer or the injured worker to determine if the worker's status satisfies the requirements to be a seaman. This usually is a factual determination that must be made on a case-by-case basis. Sometimes, it is necessary to obtain employment or travel records to determine if the worker has spent 30 percent of his time working on a vessel or fleet of vessels under common ownership or control of his employer.

However, it is important to review a worker's overall employment and job duties in making this determination in order to distinguish between an actual seaman and a land-based worker whose job duties on the day in question required him to be working on a vessel. This would include vessel mechanics who perform most of their work on land for their employer and can be injured on one of their employer's vessels while making repairs to the vessel.[30]

In the Supreme Court's view, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon."[31] The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.[32]

Thus, if an injured worker spends about 60 percent of his time working on land and the remaining 40 percent working on a vessel in navigation, he will be considered a Jones Act seaman.

Seamen Have Unique Rights For Personal Injuries

In the United States, there are only two types of workers who have the right to sue their employers for work-related injuries. These

are seamen and railroad workers. Due to the different conditions encountered by seamen, they have three distinct rights under the general maritime law when they are injured, which include the right (1) to maintenance and cure, (2) to recover damages for injuries caused by an unseaworthy vessel, and (3) to obtain damages for the employer's negligence under the Jones Act.

A seaman's claim for maintenance and cure under the general maritime law permits every seaman who becomes ill or injured during the course and scope of his employment, regardless of who was at fault in causing the illness or injury, to maintenance, cure, and unpaid wages until the end of the voyage on which the illness or injury occurred. A seaman does not have to show a causal relationship between his employment as a seaman and his injury. Instead, a seaman is entitled to maintenance and cure if he meets the burden of proof that his injury or disability occurred while he was generally answerable to the call of duty or in the service of the vessel.[33]

Employers will sometimes attempt to delay the payment of maintenance and cure. Unlike workers' compensation cases, where a claim can be filed with a workers' compensation commission to request a hearing for medical benefits, no such commission exists for a seaman who does not receive maintenance and cure. Instead, a seaman must file suit in either state or federal court for the failure to pay maintenance and cure. These types of suits sometimes take as long as a civil suit to resolve. During this time period, the seaman may have no means of supporting himself.

"Maintenance" is defined as the reasonable cost of the seaman's room and board while living ashore until the seaman is fit to return to duty or has reached maximum medical cure.[34] Maximum medical cure occurs when the maximum benefit of medical treatment has been received by the seaman and further treatment either will not be curative in nature or the seaman's injuries will not improve with additional treatment.[35] "Cure" is defined as the reasonable cost of curative medical treatment until the seaman reaches maximum medical cure.[36] Thus, the seaman's employer must pay the seaman maintenance money for his food, room, and board until he reaches maximum medical cure.

The amount of maintenance to be paid is determined by the cost of the seaman's monthly living expenses for necessities such as electricity, water, and food while he is injured and not living on board his vessel. The purpose of maintenance is to provide the seaman with room and board during the period he is recovering from his injuries; it is not to compensate him for his lost wages during this period. Recent court decisions have indicated that the portion of a seaman's maintenance check allocated for room and board should not be reduced due to other people, such as his family, living with the seaman.

"Cure" is the payment of medical expenses associated with the injury. Regardless of liability, an employer is required to pay for a seaman's medical expenses associated with his injury or sickness until a doctor indicates that any future medical treatment will no longer be curative in nature.[37] "Curative nature" is defined as medical treatment that will improve a seaman's injuries as compared to medical treatment that will make the seaman's injuries more "palatable" or less painful.

The Supreme Court has instructed that the duty to provide maintenance and cure should be liberally interpreted "for the benefit and protection of seamen who are [the admiralty courts'] wards."[38] "The shipowner's liability for maintenance and cure [is] among 'the most pervasive' of all and [is] not to be defeated by restrictive distinctions nor 'narrowly confined.'"[39] In order to ensure that injured seamen were protected, the *Vaughan* Court instructed that "when there are ambiguities or doubts [related to maintenance and cure], they are resolved in favor of the seaman."[40]

The Court further explained:

> The seaman's right to maintenance and cure is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations.[41]

The shipowner's liability should not be narrowly confined nor "whittled down by restrictive and artificial distinctions" that defeat its broad purposes.[42] "If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf."[43] In other words, any ambiguity or doubt is to be resolved in favor of the seaman.

A shipowner's duty to pay maintenance and cure is so broad that it arises regardless of the shipowner's fault or negligence or the seaman's contributory fault.[44] The penalties for an employer not paying maintenance and cure are severe and include the recovery of the seaman's attorney's fees for having to obtain maintenance and cure and punitive damages.[45] When a Jones Act employer is faced with a situation where maintenance and cure may be owed to an injured seaman, it is always prudent to resolve doubts in favor of the seaman and to provide maintenance and cure.

A Seaman's Jones Act Claim

Although a federal workers' compensation statute has not been enacted that applies to seamen, the Jones Act provides a cause of action for negligence against an employer for any seaman injured in the course his employment.[46] To recover damages under the Jones Act, the seaman's injuries or death must arise from the negligent acts of the employer, its agents, or its employees or from a defect in the employer's equipment that resulted from the employer's negligence.[47]

To prevail on a Jones Act negligence claim against his employer, a seaman must show (1) that he is a seaman under the act, (2) that he suffered injury in the course of his employment, (3) that his employer was negligent, and (4) that his employer's negligence caused his injury at least in part.[48] To establish negligence by his employer, a Jones Act plaintiff must prove by a preponderance of the evidence that his employer "breach[ed] … a duty to protect against foreseeable risks of harm."[49] Although the elements of duty, breach, and injury draw on common-law principles, the standard of proof for causation in a Jones Act negligence action is relaxed.[50]

To obtain these unique remedies under the Jones Act, a seaman must show that his employer's negligence is the cause, in whole or in part, of his injury.[51] Thus, the burden on the seaman to prove proximate cause in actions based on the Jones Act is very light, and the seaman need show only that the defendant's negligence was a cause of his injuries. Under this statute, liability will be found when the proofs justify the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[52]

The Jones Act creates an affirmative duty on the part of the seaman's employer to provide the seaman with "a reasonably safe

continued on page 85

place to work."[53] It is often necessary to retain a qualified maritime expert to assist with proving liability, which is not always easy to accomplish.

Jones Act Procedure Matters

"Jones Act actions can only be brought against a seaman's employer" and are in addition to unseaworthiness claims that may be maintained against the vessel owner or operator.[54] A Jones Act claim may be brought in either federal court or state court. Pursuant to 28 U.S.C. § 1333, federal courts have jurisdiction over Jones Act claims. This permits a Jones Act claim to be filed in federal court under the court's admiralty jurisdiction. The $75,000 amount in controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332 does not exist for Jones Act claims. This allows the filing in federal court of a Jones Act claim with an amount in controversy of less than $75,000. Jones Act claims may also be filed in state court pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333. Most of the time, there is no right to trial by jury in a civil action involving the general maritime law. However, the Jones Act provides the seaman with the right to elect either a trial by jury or a judge trial. As such, an injured seaman can request a bench trial in federal court in his properly pled complaint and the defendant is prohibited from requesting and receiving a jury trial.

Jones Act Damages

Jones Act damages are much broader than the compensation an employee can receive under state workers' compensation acts. A Jones Act seaman can recover both special and general damages from his employer. Special damages are medical care not paid as "cure" through the date of trial, loss of income not paid as unearned wages, and other out-of-pocket damages through the date of trial.[55] The out-of-pocket damages include the cost of paying for yard maintenance, domestic services, and any other services the Jones Act seaman would have been otherwise able to perform but for his injuries. Special damages also include the maritime doctrine of "found." Loss of found is the value of room and board a seaman would have received while working on a vessel if he had not been injured.

A seaman is entitled to general damages of compensation for past, present, and future pain and suffering, disfigurement, mental anguish, emotional distress, loss of enjoyment of life, future medical expenses, and future loss of earnings or loss of earning capacity.[56] Extensive litigation has occurred regarding the recovery of non-pecuniary damages under the Jones Act, which are not recoverable as general damages for injuries or deaths to seamen.[57] Non-pecuniary damages consist of compensation for loss of society, loss of consortium, and punitive damages.[58]

Depending on the facts of a particular case, the recovery in a Jones Act case can be much greater than the recovery in a workers' compensation case. Even though the potential for recovery in a Jones Act case may be great, Jones Act litigation can be very complicated and expensive when compared to a state workers' compensation case. Moreover, employers and their insurance companies routinely retain defense counsel who specialize in maritime litigation and have extensive experience with the general maritime law. Thus, a lawyer handling a Jones Act case must be fully aware of the case law that could have a negative impact on a client's recovery. If not, then the defense attorney will develop a successful strategy that will allow the employer to prevail.

A Seaman's Claim For Unseaworthiness

A vessel owner or a vessel operator owes a seaman the duty to provide a seaworthy vessel and hence, is liable to the seaman at law for personal injuries caused by the unseaworthy condition of a vessel. It is well settled that the warranty of seaworthiness is separate and independent of any statutory or other general maritime remedies.[59] An unseaworthiness claim and a Jones Act negligence claim overlap to a certain extent since a seaman is entitled to recover the same types of damages for an unseaworthiness claim as he is entitled to recover under the Jones Act, except possibly with regard to punitive damages.[60] A seaman is not entitled to a double recovery of his damages when he demonstrates that his injuries were caused both by Jones Act negligence and an unseaworthy condition.

Under the general maritime law, a vessel owner or operator owes to every member of the crew on board the vessel a nondelegable duty to keep and maintain the ship and all decks, passageways, appliances, gears, tools, and equipment of the vessel in a seaworthy condition at all times.[61] The duty of seaworthiness obligates a vessel owner "to furnish a vessel and appurtenances reasonably fit for their intended use."[62] While the duty of seaworthiness does not require a vessel owner to provide an "accident-free ship," the doctrine imposes a very strict standard of liability that is completely divorced from concepts of negligence.[63] Liability for an unseaworthy condition does not depend upon negligence.[64]

To recover on his claim of unseaworthiness, a seaman must establish by a preponderance of the evidence that (1) he was a member of a vessel in navigation at the time he suffered injury, (2) the vessel was unseaworthy (i.e., some part of the vessel was not reasonably fit to be used for the purpose intended), and (3) the unseaworthy condition caused or contributed to the injury and consequent damage sustained by the seaman. A claim for unseaworthiness exists where "the unseaworthy condition of the vessel was the proximate or direct and substantial cause of the seaman's injuries."[65]

The seaman's causation burden for an unseaworthiness claim is "more demanding" than that of a Jones Act negligence claim.[66] A finding of unseaworthiness is not limited to a determination that a physical attribute of the ship itself is defective. Indeed, a vessel's unseaworthy condition may arise from any number of circumstances, including situations such as defective gear or appurtenances, an unfit or incompetent crew, or improper methods utilized by a vessel in loading or storing cargo or in handling equipment.[67] Usually, the same maritime expert retained to assist with proving Jones Act negligence can assist in establishing that the vessel owner violated its duty to provide a seaworthy vessel.

If the U.S. Supreme Court decides the punitive damages question in favor of seamen, the unseaworthiness claim will probably become the main focus of seamen personal injury claims in the event that a vessel owner or operator's conduct warrants punitive damages.

Longshore and Harbor Workers' Compensation Claims

The Longshore Act[68] is a federal workers' compensation act designed to protect maritime workers who are neither members of the crew of any vessel nor seamen. State compensation acts and the Longshore

Act often have concurrent jurisdiction over work-related injuries that satisfy the requirements of both acts.[69] While the Longshore Act's purpose is very similar to the purpose of state compensation acts (i.e., to provide medical care and compensation benefits to workers who are injured during the course and scope of their employment, regardless of the negligence of the employer or employee), substantial differences usually exist between the Longshore Act and state compensation acts.

Normally, the Longshore Act provides the injured maritime worker with much greater compensation benefits than state compensation acts. The current maximum weekly compensation rate under the Longshore Act is $1,471.78 per week[70] in compensation benefits, while the maximum under state compensation acts is much less. For example, in South Carolina, the maximum weekly compensation rate is $838.21.[71] The difference in the amount of the maximum compensation rates can result in a maritime worker, under the Longshore Act, receiving almost double the amount of weekly compensation than he would receive for the same injury under the South Carolina Workers' Compensation Act.

A second major difference between the Longshore Act and most state workers' compensation acts is that the Longshore Act permits the maritime worker to select his treating physician for the injury. Most state acts usually do not permit the injured maritime worker to select his treating physician. The Longshore Act does permit the employer and its carrier to select a physician at its expense to perform an examination of the maritime worker with regard to his claimed injuries.

Another major benefit to the injured maritime worker under the Longshore Act is lifetime medical care for the work-related injuries. The maritime worker receives paid medical treatment for his lifetime for the injuries he suffered while at work. In most situations, state workers' compensation acts do not permit an injured worker to receive lifetime medical care for work-related injuries. Other differences between state acts and the Longshore Act exist, which are beyond the scope of this article.

When representing a client who has a potential state claim and a Longshore claim, it is critical to realize that the client may be entitled to greater benefits under the Longshore Act than for a state claim. To protect the client, a claim should be filed under both the Longshore Act and state act, when permitted to do so by state law.

Longshore Procedural Matters

In contrast to state compensation claims, which are administered by state workers' compensation commissions, Longshore Act claims are initially administered by the U.S. Department of Labor (DOL), Office of Workers' Compensation Programs, Longshore Division and assigned to a claims examiner. If the claims examiner is not able to assist the parties in reaching an agreement resolving the issues that arise with each claim, the claims are then forwarded to the Office of Administrative Law Judges for a formal hearing. The formal hearing normally occurs in a city close to where the injured worker lives by the administrative law judge (ALJ) to whom the case is assigned, unless the parties agree otherwise,

The injured maritime worker has reporting requirements on special forms designed by the DOL.[72] Within 30 days after the date of the accident, or the date he becomes aware that a relationship exists between the traumatic injury and his employment, the injured maritime worker is required to provide both the employer and the district director in whose district the accident occurred with notice of his injury.[73] In the event that the maritime worker has suffered a permanent disability or is entitled to unpaid compensation benefits as a result of his traumatic injuries, he is then required to file a claim for compensation benefits with the district director within one year of the date of the accident or when he became aware of the connection between the injury and his employment.[74] If the maritime worker fails to file the claim for compensation resulting from traumatic injuries within one year of this date, then the claim for compensation may be barred.[75]

If a dispute results between the parties, then an informal conference with a claim examiner from the DOL should be requested.[76] During the informal conference, which is now usually conducted by the telephone, the parties are permitted to introduce documents to support their respective positions on an issue. Thereafter, the DOL will issue a Memorandum of Informal Conference stating its opinion on the issue. If either party does not comply with the Memorandum of Informal Conference, then a request can be made to have the claim forwarded to the Office of Administrative Law Judges for a hearing.[77] The Office of Administrative Law Judges will produce a hearing notice that provides deadlines for documents that are to be exchanged by the parties, filed with the ALJ assigned to the claim, expert reports, exhibits, and other requirements. This scheduling order is very similar to scheduling orders issued by federal judges for cases filed in federal court.

A hearing will eventually occur with the ALJ where the parties are required to submit into evidence pre-marked exhibits and present oral testimony, either in person or by deposition. Doctor reports and expert reports may be submitted in lieu of live testimony. After the hearing is over, the ALJ will often require the parties to submit post-trial briefs on their respective positions, with specific citations to the testimony that occurred at the hearing. The ALJ will issue a written opinion that can be appealed to the Benefits Review Board (BRB). Appeals from BRB decisions are heard by the federal court of appeals.[78]

Rights Under the Longshore Act

"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require."[79] The employer is liable for all medical expenses that are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, they must be both reasonable and necessary.[80] Medical care should also be appropriate for the injury.[81] It is the claimant's burden to establish the necessity of treatment rendered for his work-related injury.[82]

Like most state workers' compensation acts, the Longshore Act provides for payment of both temporary compensation and permanent compensation.[83] A claimant will be entitled to an award of permanent disability when he shows he has a disability. Permanent compensation will be awarded based upon a permanent impairment rating to scheduled body parts or a wage loss for injuries that are not scheduled.[84] With regard to a wage loss claim, a disability under the Longshore Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment."[85] Therefore, for a claimant to receive a disability award, he must have an "economic loss coupled with a physical or psychological impairment."[86] Under this standard, an

injured claimant will be found to have either no loss of wage earning capacity, a total loss, or a partial loss.

Conclusion

As a result of the unique and hazardous perils seamen and maritime workers are exposed to on a daily basis in the course of their employment, the general maritime law, through a series of federal statutes and judicial decisions, has attempted to protect injured seamen and maritime workers in a uniform manner across the United States. The general maritime law provides injured seamen and workers with rights that are unique and different from the rights of injured land-based workers. In many instances, these rights are much greater than the rights of land-based workers and can effectively be used by attorneys to benefit their injured maritime clients. ⊙

S. Scott Bluestein practices admiralty and maritime law across the United States. He has a Master of Laws in admiralty law from Tulane University. His office, Bluestein Law Firm, P.A., is based in Charleston, S.C.

Endnotes

[1]Walter Macarthur, *The Seaman's Contract* 1790-1918 ix (1919).
[2]*Id.*
[3]Admiralty law, or maritime law, concerns shipping of cargo by water, navigation of vessels, towage of vessels and cargo, recreational boating, piracy, and people and contracts related to maritime activities, including seamen, marine insurance contracts, and maritime liens.
[4]28 U.S.C. § 1333; *Sisson v. Ruby*, 497 U.S. 358, 361-67 (1990).
[5]*Harden v. Gordon*, 11 Fed. Cas. No. 6047 (Cir. Ct. D. Ma. 1823).
[6]46 U.S.C. App. 688.
[7]*Mitchell v. Trawler Racer Inc.*, 362 U.S. 539 (1960). The first three claims are referred to as the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the "perils of the sea." Grant Gilmore & Charles Lund Black, *The Law of Admiralty* 328-29 (2d ed. 1975).
[8]33 U.S.C. §§ 901-50.
[9]*Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, n. 2 (1996).
[10]33 U.S.C.A. § 902(3)(G).
[11]*Chandris Inc. v. Latsis*, 515 U.S. 347, 361, .
[12]*Gizoni v. Southwest Marine Inc.*, 590 U.S. 951, 1992 AMC 305 (1991).
[13]*McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 347, 1991 AMC 913, 920 (1991).
[14]33 U.S.C. § 902(3).
[15]*Weyher/Livsey Constructors Inc. v. Prevetire*, 27 F.3d 985, 1995 (4th Cir. 1994).
[16]33 U.S.C. § 902(4); 33 U.S.C.A. § 903(a).
[17]33 U.S.C. § 903(a).
[18]*Chandris*, 515 U.S. at 354.
[19]*See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997); *Chandris*, *supra*; *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81 (1991); *Wilander*, 498 U.S. at 347.
[20]*Wilander*, 498 U.S. at 353-54.
[21]*Id.* at 355.
[22]*Id.* at 368 (quoting *Wilander*, 498 U.S. at 355).
[23]*Id.* (internal quotation marks omitted).
[24]*Id.* (quoting *Wilander*, 498 U.S. at 354).
[25]*Id.*
[26]*Id.* at 371.
[27]*Papai*, 520 U.S. at 550 (quoting *Chandris*, 515 U.S. at 368).
[28]*Id.* at 560.
[29]*Id.*
[30]*Naquin v. Elevating Boats LLC*, 744 F.3d 927 (5th Cir. 2014), held that the time spent working on vessels docked or at anchor in navigable water counted in establishing the worker's connection with a fleet of vessels that is substantial in terms of both duration and nature.
[31]*Wilander*, 498 U.S. at 370.
[32]*Chandris,* 515 U.S. at 368-69 (citations omitted).
[33]*Farrell v. United States*, 336 U.S. 511, 1949 AMC 613 (1949); *Waterman S.S. Corp. v. Jones*, 318 U.S. 724, 1943 AMC 451 (1943).
[34]*Lewis v. Lewis & Clark Marine Inc.*, 531 U.S. 438, 441 (2001); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938).
[35]*Vella v. Ford Motor Co.*, 421 U.S. (1975); *Morales v. Garijak Inc.*, 829 F.2d 1355, 1359 (5th Cir. 1987) (maximum medical cure occurs at "the point at which further treatment will probably not improve [the seaman's] condition."); Thomas J. Schoenbaum, *Admiralty and Maritime Law* 393 (4th ed. 2004).
[36]*Lewis & Clark Marine Inc.*, 531 U.S. at 441; *Calmar S.S. Corp.,* 303 U.S. at 528.
[37]*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).
[38]*Vaughan v. Atkinson*, 369 U.S. 527, 531-32 (1962) (quoting *Taylor*, 303 U.S. at 529).
[39]*Id.* at 532 (quoting *Aguilar*, 318 U.S. at 735).
[40]*Id.* (citing *Warren v. United States*, 340 U.S. 523 (1951)).
[41]*Farrell*, 336 U.S. at 516.
[42]*Aguilar*, 318 U.S. at 735.
[43]*Id.* at 735-36.
[44]*Id.* at 730-31.
[45]*Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009); *Vaughan*, 369 U.S. at 530.
[46]*Chandris*, 115 S. Ct. at 2182.
[47]*Hernandez v. Trawler Miss Vertie Mae Inc.*, 187 F.3d 432, 436 (4th Cir. 1999).
[48]*Kernan v. Am. Dredging Co.*, 355 U.S. 426, 437 (1958).
[49]*Id.*
[50]*Hernandez*, 187 F.3d at 436-37.
[51]*Id.* at 436; *Gautreaux*, 107 F.3d at 335.
[52]*Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957)); *Ferguson v. Moore-McCormack Lines Inc.*, 352 U.S. 521 (1957) (under the Jones Act, liability exists if any negligence on the part of the employer contributed even in the slightest to the plaintiffs injuries); *see also Estate of Larkins v. Farrell Lines Inc.*, 806 F.2d 510, 512 (4th Cir.1986) (characterizing the burden of proving causation as "light).
[53]*Gautreaux*, 107 F.3d at 335.
[54]*Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949); *Davis v. Hill Engineering Inc.*, 549 F.2d 314 (5 Cir. 1977).
[55]*Pfeiffer v. Jones & Laughlin Steel Co*rp., 678 E 2d 453, 460 (3d Cir. 1982).
[56]*Id.*

[57]*Miles v. Apex Marine*, 498 U.S. 19 (1990); *Allen v. Seacoast Prod. Inc*., 623 F.2d 355, 365 n.23 (5th Cir. 1980) (The jury was properly instructed that the damage award may include compensation for impairment of future earning capacity, lost wages, medical expenses, and pain and suffering.), overruled on other grounds, *Gautreaux v. Scurlock Marine*, 107 F.3d 331 (5th Cir. 1997); *Johnson v. Offshore Exp. Inc*., 845 F.2d 1347 (5th Cir. 1988). "The injured seaman is … entitled to compensation … for the physical and mental effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life, including, for example, his avocations." *Downie v. United States Lines Co.,* 359 F.2d 344, 347-48 (3d Cir. 1966), *Schwartz v. Neches-Gulf Marine Inc*., 67 F. Supp. 2d 698, 702 (S.D. Tex. 1999) (allowing recovery for intangibles).
[58]*Miles*, 498 U.S. at 325-26.
[59]*Usner v. Luckenbach Overseas Corp*., 400 U.S. 494, 498 (1971).
[60]Based upon the Supreme Court in *Townsend* that allowed punitive damages for a Jones Act employer's failure to pay maintenance and cure, a split has developed between the circuits on whether a seaman may recover punitive damages under the general maritime law for an unseaworthiness claim. In *Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir. 2018), the Ninth Circuit held that a punitive damages are available under general maritime law for claims of unseaworthiness in a seaman's personal injury suit. This is in direct conflict with the Fifth Circuit decision in *McBride v. Estis Well Serv.*, 768 F.3d 382 (5th Cir. 2014) (en banc), which held that *Miles* prevented the recovery of punitive damages for an unseaworthiness claim. It is expected that this conflict will eventually be decided by the Supreme Court.
[61]*Mahnich v. Southern S.S. Co*., 321 U.S. 96, 99 (1944).
[62]*Mitchell v. Trawler Racer Inc*., 362 U.S. 539, 550 (1960).
[63]*Id*.
[64]*Mahnich*, 321 U.S. at 100-01.
[65]*Hernandez*, 187 F.3d at 439 (citing *Gosnell v. SeaLand Sem Inc*., 782 R2d 464, 467 (4th Cir. 186)); *Williams v. U.S.*, 12 F. Supp. 1132 (S.D.N.Y. 1989).
[66]*See Hernandez*, 187 F.3d at 439.
[67]*Usner*, 400 U.S. at 499.
[68]33 U.S.C.A. §§ 901-50.
[69]*Sun Ship Inc. v. Commonwealth of Pa.*, 447 U.S. 715 (1980).
[70]*NAWW Information,* Division of Longshore and Harbor Workers' Compensation (DLHWC), U.S. Dep't of Labor, https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Mar. 20, 2018).
[71]*Compensation Rates: 2018 Maximum Weekly Compensation Rate*, S.C. Workers' Comp. Comm'n, http://www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx (last visited Mar. 20, 2018).
[72]*DLHWC Longshore Forms*, Division of Longshore and Harbor Workers' Compensation (DLHWC), U.S. Dep't of Labor, https://www.dol.gov/owcp/dlhwc/lsforms.htm (last visited Mar. 20, 2018). A list of district directors and their locations, can be found on the Department of Labor website. *See District Office Locations*, Division of Longshore and Harbor Workers' Compensation (DLHWC), U.S. Dep't of Labor, https://www.dol.gov/owcp/dlhwc/lscontactmap.htm (last visited Mar. 20, 2018).
[73]33 U.S.C. §§ 912 (a) and (d).
[74]33 U.S.C. §§ 913(a) and (b)(2).
[75]*Ceres Gulf Inc. v. Director, OWCP*,113 F.3d 17 (5th Cir. 1997).
[76]20 C.F.R. § 702.314.
[77]*Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 477 F.3d 123, 126 (4th Cir.2007); *Va. Int'l Terminals Inc. v. Edwards*, 398 F.3d 313, 318 (4th Cir. 2005).
[78]33 U.S.C. § 921(c); *Bolling v. Director, OWCP,* 823 F.2d 165 (6th Cir. 1987). In *Director*, *OWCP v. Hileman*, 897 F.2d 1277 (4th Cir. 1990).
[79]33 U.S.C. § 907(a).
[80]*Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[81]20 C.F.R. § 702.402.
[82]*See Schoert v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc.,* 21 BRBS 33 (1988); *Pardee v. Army and Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981); *Pernell v. Capital Hill Masonry*, 11 BRBS 532, 539 (1979).
[83]*See* 33 U.S.C. §§ 904, 906, 907, 908, 909.
[84]33 U.S.C. § 908 (list of scheduled body parts). To determine the extent of the claimant's disability, the evidence must be viewed under a shifting proof scheme. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997) (citing *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988)). Initially, the claimant must establish that he is incapable of returning to his prior employment. *Id*. Thereafter, "the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of other jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified." *Id*. To satisfy this burden, the employer must show that jobs exists that are reasonably available and can realistically be secured and performed by the claimant. *Lentz v. Cottman Co*., 852 F.2d 129, 131 (4th Cir. 1988). If the employer establishes that suitable alternate employment is available, the burden then shifts back to the claimant to show that he diligently tried and was not able to secure employment. *Trans-State Dredging v. Benefits Review Ed.*, 731F.2d 199, 201-02 (4th Cir.1984). Compensation for the death of a claimant is determined under 33 U.S.C. § 909.
[85]33 U.S.C. § 902(10).
[86]*Sproull v. Stevedoring Servs. of Am.*, 25 BRBS 100, 110 (1991).