

The Advocate

KENTUCKY JUSTICE ASSOCIATION

In This Issue

**Medicaid/Medicare
The Jones Act
Right to Enjoy Work
Fee Agreements
Expungement Statutes**

Gary Schaaf, shown here with outgoing president, Sheila Hiestand, is KJA's 2013 president. See pictures starting on page 18.

January/February 2013 •
Volume 41, Number 1



By Justin Lawrence

Injured at Work: Separating Jones Act from State Workers' Compensation Claims

Kentucky has a greater length of navigable waterways and streams than any other contiguous state, but many Kentucky attorneys know precious little about admiralty law.¹ Those of us who represent injured plaintiffs accept as a given that we will, at one time or another, see a prospective plaintiff who was injured at work. Depending upon whether that prospective client was injured while working on land or over a navigable waterway, you may have two entirely different sets of laws under which to work and two vastly different outcomes for your new client.²

Often the employer will attempt to guide the injured employee down the path of workers' compensation, but the plaintiff's attorney can't rely on the employer to make that designation. Seaman status is a combined question of law and fact for the court to decide.³ Although an employer and employee can stipulate to seaman status and federal court jurisdiction without difficulty from the court, many workers' compensation claims have been dismissed because the injured employee's status as a seaman took jurisdiction out of that system.

What's Better for my Client—the Jones Act or State Workers' Compensation?

The Jones Act and Kentucky workers' compensation systems offer very different remedies, although for seriously injured workers, the Jones Act system will almost always offer fuller compensation. Both the Jones Act and unseaworthiness claims under general maritime law allow for damages that are very similar to damages for other tort cases based in negligence. The plaintiff is permitted to present and recover for past and future medical expenses, with a set off to the extent that the employer has already paid (or will pay) Cure toward those expenses.⁴ The plaintiff is permitted to present and recover for past lost wages and future loss of earning capacity.⁵ Further, the plaintiff can recover for past and future pain and suffering, and may also include a separate award for loss of enjoyment of life.⁶ Finally, the plaintiff is

permitted prejudgment interest on any award.⁷

Although a maritime plaintiff's spouse is probably not permitted loss of consortium damages,⁸ the breadth of damages offered under maritime law clearly exceeds the Permanent Partial Disability scheme set forth by Kentucky's workers' compensation statute. Permanent partial disability simply takes an impairment rating created by the American Medical Association, multiplies it by the employee's average weekly wage and some arbitrary, statutorily derived factors, and then presents a weekly amount to be paid to the employee over the course of 425 weeks.⁹ This weekly sum replaces all lost earnings and pain and suffering damages that could be received in a trial under the Jones Act and unseaworthiness laws. Although there are some other benefits received under the workers' compensation system that can match¹⁰ or offer alternatives to¹¹ the maritime trial's more traditional damages, generally a plaintiff will receive greater damages under the maritime system.

The only exception to this rule is a plaintiff who is not seriously injured, and who is likely to return to work with no impairment whatsoever. In that case, the lower cost and relative speed of the workers' compensation system is an advantage to the plaintiff. Further, workers' compensation allows for temporary total disability at two-thirds of the plaintiff's average weekly wage until the plaintiff reaches maximum medical improvement or returns to work. Maritime law's corresponding benefit, Maintenance, is merely the replacement cost of daily expenses and is always far lower. Thus, a plaintiff whose damages are almost exclusively past, related medical bills and missing pay during a short period in which he or she cannot work, may prefer the workers' compensation system.

Determining the Correct Path

In addition to the concerns regarding the nature and the extent of the plaintiff's injury expressed above, there are a few other questions a practitioner should ask when consulting

with a client who may have an injury sounding in admiralty.

First, does the employee work aboard a vessel over a navigable waterway? A worker seeking [seaman] status must prove that his duties contributed to the vessel's function or mission and that his connection to the vessel was substantial in nature and duration.¹² This is a flexible rule, so the plaintiff need not spend all or even most of his time aboard a motor vessel, so long as he spends a substantial portion of his time connected to the vessel and performing tasks related to the vessel's mission. The plaintiff need not go on extended trips away from home. Some seamen work aboard a harbor tug or barge fleet and go home at night. However, if the employee worked in

“hitches” for multiple days travelling away from home via motor vessel, he or she is nearly certain to be a seaman. Although there are exceptions to the rule, you should generally expect the employee to have been hurt while working over the navigable waterway.

Second, what are the employee's duties? The rule is to define ‘seaman’ under the Jones Act, not in terms of the employee's particular job, but solely in terms of the employee's connection to a vessel in navigation.¹³ This having been said, it is still important to get a detailed list of the employee's duties. If the employee spent the vast majority of his or her time making or breaking tows of barges, or actually piloting a motor vessel, he or she will very likely be a seaman. Even if the employee did not

perform such traditional tasks, knowing the employee's duties may help you connect the employee to the vessel in navigation. For example, a cook isn't obviously a seaman but a cook who does 90 percent of his or her job in the kitchen of the motor vessel while it is in navigation should pursue a Jones Act claim. In short, the duties of a seaman can be varied and the status is not defined by the job duties. The United States federal courts have awarded seaman status to: firemen,¹⁴ engineers,¹⁵ carpenters,¹⁶ cooks,¹⁷ bartenders,¹⁸ interpreters,¹⁹ fishermen,²⁰ horsemen,²¹ drillers,²² handymen,²³ pile drivers²⁴ and paint foremen.²⁵

Third, what is the employee's title? This is not even remotely a dispositive issue, and many seamen's employers

CO-COUNSEL

See what a line can do for your firm.

At Counsel Financial, our flexible credit lines give litigators the financial resources to stay in charge of their cases and eliminate the need for co-counsel relationships. By viewing your firm's contingent fees as its most valuable asset, we can provide much more financing than a bank, giving you all the funds necessary for case costs, medical reports, advertising, life care plans and more. Call us today to see how we can help your firm.



Counsel Financial
The power of attorney funding.*

1-888-493-3268
AttorneyLending.com

EXCLUSIVE ENDORSEMENTS



PARTNERSHIPS & ACCREDITATIONS



give them titles other than the traditional deckhand or mate in an effort to *keep* them from being recognized as seamen. However, if the employee was at the time of injury called a mate, deckhand, captain, pilot or engineer while working on the river or has previously been called those titles with similar job duties as those being performed at the time of injury, you should strongly suspect that the employee is a seaman.

By following these steps, you will have a firm foundation for selecting the best venue for your client's case. Although many attorneys recognize the Kentucky workers' compensation system as a distinct area of practice that must be learned before the first claim is filed, many attorneys fail to recognize that admiralty law is similarly distinct and has the similar pitfalls. If you decide to pursue an admiralty claim, be forewarned that the terminology of the waterways is even more challenging to master than the terminology of many other types of cases in which we practice (for example, accidents in the mining industry). If you have satisfied yourself that you have a bona fide injured seaman in your office, but you don't know the difference between a timberhead and a towknee, proceed with caution. Many admiralty defense lawyers specialize in maritime defense (you can be certified as a proctor in admiralty if a high percentage of your practice is devoted to maritime law), and will exploit plaintiff counsel's unfamiliarity with the workings of the river industry. Research the applicable case law carefully or get co-counsel and you may get a very pleasant introduction to admiralty law.



— Justin Lawrence, Contributing Club member, practices in the areas of bankruptcy, worker's compensation, admiralty and

tort in Florence, Kentucky. He is licensed in Kentucky and Ohio at the federal and state levels, and can be reached at (859) 525-1160 or at justin@lawrencelaws.com.

- 1 <http://en.wikipedia.org/wiki/Portal:Kentucky>
- 2 Actually, the choice is three-fold because there is a separate section of maritime laws, the Longshore and Harbor Workers Compensation Act, which sets up a federal workers' compensation like system for land-based workers in maritime situations. Such workers include longshoremen, stevedores and some dry dock workers. Although I practice in state workers' compensation and in Jones Act injury cases, I do not practice in LHWCA cases, and therefore, have omitted discussion of them from this article.
- 3 *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).
- 4 "Under the Jones Act and general maritime law, an injured seaman is entitled to monetary recovery for **past**, **present** and **future** loss of earning capacity and wages, **medical expenses**, and pain and suffering resulting from an injury caused by negligence and/or unseaworthiness." Jones Act, 46 *App. U.S.C.A.* § 688.
- 5 See e.g. *Perkins v. American Electric Power Fuel Supply, Inc.*, 91 Fed. Appx. 370 (6th Cir. 2004).
- 6 *Id.*
- 7 *Id.*
- 8 This is an area of law in a state of flux. Such damages were presumed unavailable following *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), but the Supreme Court partially reversed course in *Atlantic Sounding Co., Inc., v. Townsend*, 557 U.S.404, 417-418 (2009). At least one court has since held that loss of spousal consortium should be an available remedy, but this issue has not been decided on its merits in

the Sixth Circuit. See *Barrette v. Jubilee Fisheries, Inc.*, 2011 WL 3516061 (W.D. Wash. 2011).

- 9 Of course, permanent total disability—defined as impairment of greater than 50 percent—is paid over the course of 520 weeks. This does not change the analysis above.
- 10 The admiralty defendant's duty to pay continuing Cure can be similar to the land-based employer's duty to pay future medical expenses. Further, both systems provide for reasonable medical mileage to be reimbursed.
- 11 The Kentucky workers' compensation system offers vocational retraining that can offset some loss of future earning capacity.
- 12 *Stewart v. Dutra*, 543 U.S. 481, 482 (2005) citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 376 (1995).
- 13 *McDermott International, Inc. v. Wilander*, *supra*, at 353.
- 14 *Wilson v. The Ohio*, 30 F.Cas. 149 (ED Pa. 1834)
- 15 *The Virginia Belle*, 204 F. 692, 693-694 (ED Va. 1913)
- 16 See generally M. Norris, *The Law of Seamen* § 2.3 (4th ed. 1985); Engerrand & Bale, *Seaman Status Reconsidered*, 24 S. Tex.L.J. 431, 432-433 (1983).
- 17 *Allen v. Hallet*, 1 F.Cas. 472 (SDNY 1849)
- 18 *The J.S. Warden*, 175 F. 314, 315 (SDNY 1910)
- 19 *The Ocean Spray*, 18 F.Cas. 558, 560-561 (D Ore. 1876)
- 20 *The Carrier Dove*, 97 F. 111, 112 (CA1 1899)
- 21 *U.S. v. Atlantic Transport Co.*, 188 F. 42 (CA2 1911)
- 22 *Gianfala v. Texas Co.*, 350 U.S. 879 (1955)
- 23 *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957); *Butler v. Whiteman*, 356 U.S. 271 (1958)
- 24 *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 253 (1958)
- 25 *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).