



NMA REPORT #R-344-B

DATE: July 3, 2010

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Asserting our right "...to petition the Government for redress of grievances."

Amendment 1, U.S. Constitution, Dec. 15, 1791

## IDENTIFYING JONES ACT CLAIMS

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*[Source: This Article appeared in the Spring 2010 edition of the Trial Lawyer Magazine published by the Tennessee Association of Justice and is reprinted with its permission. The TAJ is Tennessee association of attorneys who represent injured persons. "Jeff" Bloomfield, a longstanding member of the National Mariners Association, wrote the article for Tennessee attorneys to explain the Jones Act. "Jeff" is a past president of the TAJ, and has written numerous articles and spoken at numerous seminars on the Jones Act and the maritime law for the TAJ. Mariners can contact Jeff at Godwin, Morris, Laurenzi, and Bloomfield, P.C., 50 N. Front Street, Suite 800, Memphis, Tennessee 38103. ☎ (901) 528-1702. Email: [lbloomfield@gmlblaw.com](mailto:lbloomfield@gmlblaw.com)]*

### Introduction

The State of Tennessee is not generally known as a state that has a large maritime law practice. However, the State not only has two major navigable waterways, which run through it, the Cumberland and Tennessee Rivers, but its western border is also formed by the Mississippi River.

A large number of people who live in or near the State work on the vessels that ply these waters, and it is therefore not that uncommon for river workers to contact Tennessee plaintiff's attorneys with their maritime claims.

Maritime claims are not like typical Tennessee workers' compensation claims. They involve different practices and procedures, and the benefits to the worker are often more generous. Be advised, however, that the benefits a maritime worker receives will vary, depending on the legal category into which the worker falls. This article is a brief primer on the rights and remedies afforded to those maritime workers who have the status of a Jones Act seaman.<sup>(1)</sup>

A worker who has the status of "seaman," or "member of the crew of a vessel in navigation," has three potential rights of action against his or her employer. These rights are: (1) if the injury was due to the employer's negligence, the worker has a claim under the Jones Act to recover tort damages for personal injury; (2) if the injury was caused by the unseaworthiness of the vessel, irrespective of negligence or fault, the worker has a claim under general maritime law for tort damages; and (3) under general maritime law, the worker has a right to recover maintenance and cure.

### 1. The Jones Act

The Jones Act,<sup>(2)</sup> in pertinent part, states: (a) Cause of action.--A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Incorporating by reference the Federal Employees Liability Act (FELA),<sup>(3)</sup> the Jones Act allows a seaman injured through the negligence of his or her employer to fully recover for their damages. The Jones Act thus affords a potentially greater recovery for an injured worker than that coverage provided by the Tennessee Workers' Compensation Act.<sup>(4)</sup>

Proof of negligence is essential to recovery under the Jones Act.<sup>(5)</sup> Whether an employer is negligent is determined under an "ordinary prudence" standard.<sup>(6)</sup> Once negligence is established, however, the plaintiff need only show that the employer's negligence caused, in whole or in part, the injuries suffered.<sup>(7)</sup> In other words, there is a reduced standard of causation between the employer's negligence and the employee's injury in Jones Act litigation.<sup>(8)</sup> Consequently, the employer's negligence in producing the injury, even if slight, sufficiently establishes causation.<sup>(9)</sup>

Still, the employer must have actual or constructive notice and the opportunity to correct any unsafe conditions before liability attaches.<sup>(10)</sup>

Under the Jones Act, a vessel owner will be deemed negligent if he or she: (1) fails to exercise reasonable care to maintain a reasonably safe place in which to work; (2) fails to provide reasonably safe conditions in which to work; or (3) fails to provide reasonably safe and adequate tools and equipment.<sup>(11)</sup> The owner also has a duty to select a competent master and crew.<sup>(12)</sup> Also, a co-worker's operational negligence can support a finding of the breach of duty.<sup>(13)</sup> Additionally, negligent orders given by supervisory personnel concerning how work should be performed can expose the employer to liability.<sup>(14)</sup>

Contributory negligence is not an absolute or complete defense to recovery, but is considered in the mitigation of damages.<sup>(15)</sup> Using comparative negligence principles, any negligence on the part of the employee merely reduces recovery, unless the employee's negligence is the sole cause of the injury.<sup>(16)</sup> No risk that can reasonably be controlled by the employer or vessel owner is assumed by the seaman.<sup>(17)</sup>

Damages recoverable under the Jones Act and the Doctrine of Unseaworthiness, discussed in section 2, *infra*, include loss of earnings, past and prospective, impairment of earning capacity, medical expenses incurred and to be incurred, and other economic losses sustained or likely to be sustained.<sup>(18)</sup> Further, the injured person may recover damages for the effects of the physical injuries, including suffering, mental anguish, discomfort, and inconvenience.<sup>(19)</sup> Also included as an element of damages is the loss of enjoyment of life.<sup>(20)</sup>

Jones Act cases can be filed in federal court, either on the law side or on the admiralty side.<sup>(21)</sup> If brought on the law side, the plaintiff can ask for a jury trial.<sup>(22)</sup> If brought on the admiralty side, there is no jury trial.<sup>(23)</sup> Cases are brought in admiralty by designating in the complaint that the claim is brought pursuant to Rule 9(h) of the FRCP.<sup>(24)</sup>

According to the language of the Jones Act, employers can only be sued in the district of the employer's residence or the employer's principal office.<sup>(25)</sup> However, the Jones Act has frequently been held to incorporate federal venue provisions, which allow suit against a corporation in any judicial district where it is incorporated, licensed to do business, or in which it is doing business.<sup>(26)</sup> Pursuant to the Savings and Suits Clause, a Jones Act case can also be brought in state court.<sup>(27)</sup> Such state court suits may not be removed even where diversity exists.<sup>(28)</sup>

As the Jones Act incorporates by reference the FELA, the three (3) year statute of limitations prescribed by that Act is also applicable to Jones Act cases.<sup>(29)</sup>

## 2. Unseaworthiness

The Doctrine of Unseaworthiness provides that a vessel owner owes an absolute and non-delegable duty to a seaman to furnish a vessel that is reasonably safe and fit for its intended purpose.<sup>(30)</sup> Complying with industry customs and practices will not discharge this duty to provide a seaworthy vessel as the duty is both absolute and independent of the Jones Act duty to exercise reasonable care.<sup>(31)</sup> Liability for unseaworthy vessels under the Doctrine of Unseaworthiness is not dependant upon a showing of negligence or fault, but rather is a form of strict liability.<sup>(32)</sup>

There are numerous examples of what constitutes an actionable unseaworthy condition. For instance, an unsafe method of work may create an unseaworthy condition.<sup>(33)</sup> Unseaworthiness may also be established by crew member fatigue or illness resulting from not having an adequate crew in place.<sup>(34)</sup> Additionally, an actionable unseaworthy condition may exist if a vessel lacks a sufficient number of crew members to perform heavy lifting.<sup>(35)</sup> Unreasonably slippery decks or ladders, or obstructions left on deck may constitute an unseaworthy condition.<sup>(36)</sup> Even a temporary or unforeseeable failure of a piece of vessel equipment under proper and expected use is sufficient to establish unseaworthiness, provided that the unseaworthy condition was the proximate cause of the harm suffered by the plaintiff.<sup>(37)</sup>

Since an unseaworthiness claim arises under the general maritime law, the three (3) year statute of limitations provided by the Uniform Statutes of Limitations for Maritime Torts applies.<sup>(38)</sup>

## 3. Maintenance and Cure

Maintenance refers to a ship owner's obligation to provide a mariner with food and lodging if he or she becomes injured or falls ill while in the service of the ship.<sup>(39)</sup> In determining the amount of maintenance required, the general rule is that a seaman is entitled to the reasonable cost of obtaining the same quality of room and board ashore that he or she received aboard the vessel.<sup>(40)</sup>

Cure refers to the duty to provide necessary medical care and attention.<sup>(41)</sup>

Maintenance and cure is an independent claim that is not contingent upon recovery for negligence under the Jones Act, or the violation of the duty to provide a seaworthy vessel.<sup>(42)</sup> In order to recover maintenance and cure, a seaman

must show that: (1) he or she was working as a seaman; (2) he or she became ill or injured while in the service of the vessel; and (3) he or she lost wages or incurred expenditures relating to treatment for the illness or injury.<sup>(43)</sup>

It is well settled that regardless of whether the seaman's employment caused the injury or illness, maintenance and cure is payable.<sup>(44)</sup> Maintenance should be inclusive and simple, with few exceptions.<sup>(45)</sup> A shipowner must pay maintenance and cure for an illness which occurred, was aggravated, or manifested itself while the seaman is in the ship's service.<sup>(46)</sup> A seaman's burden is feather light and ambiguities or doubts are to be resolved in his or her favor.<sup>(47)</sup> There are few defenses to a claim for maintenance and cure. If, however, a seaman has willfully concealed a disabling condition at the time of hire, this may provide a defense to disabilities related to this condition.<sup>(48)</sup>

The shipowner's obligation to pay maintenance, cure, and unearned wages stops after the seaman has reached maximum cure.<sup>(49)</sup> Maximum cure is reached when a seaman's condition is of a permanent character and will not further improve with additional medical treatment.<sup>(50)</sup>

Because maintenance and cure payments are supposed to be prompt and made without delay, expedited hearings are allowed.<sup>(51)</sup> The three (3) year statute of limitations for maritime tort actions does not apply to claims for maintenance and cure because the action does not sound in tort.<sup>(52)</sup> Rather, the equitable defense of laches applies.<sup>(53)</sup> Laches is defined as the negligent and unintentional failure to protect one's rights.<sup>(54)</sup> A party asserting laches must show: (1) a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting it.<sup>(55)</sup> If the three (3) year statute of limitations has run, the burden shifts to the plaintiff to prove excusable delay and lack of prejudice to the defendant.<sup>(56)</sup>

### Conclusion

While some Tennessee plaintiff's attorneys will not encounter Jones Act claims in their practices, such cases often arise in this State. Often, they are mistaken for workers' compensation claims or are otherwise not handled properly, to the detriment of both the client and their attorney.

Therefore, it is important for plaintiff's attorneys to recognize Jones Act claims in order to maximize the recoveries afforded the injured maritime worker.

### Endnotes

1. Maritime workers who do not have Jones Act status are generally covered by another federal statute, 33 U.S.C. §§ 901, et seq., the Longshore and Harbor Workers' Compensation Act.
2. 46 U.S.C.A. §§ 30104, et seq.
3. 45 U.S.C.A. §§ 51, et seq.
4. T.C.A. §§ 50-6-101, et seq.
5. *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598, 2001 A.M.C. 2780 (6th Cir. 2001); see also *Jacob v. City of New York*, 315 U.S. 752, 755, 62 S.Ct. 854, 86 L.Ed. 1166, 1942 A.M.C. 616 (1942)
6. *Perkins*, 246 F.3d at 598, see also *Gautreaux v Scurlock Marine, Inc.*, 107 F.3d 331, 335, 1997 A.M.C. 1521 (5th Cir. 1997)
7. *Perkins*, 246 F.3d at 598; see also *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199, 1204, 1990 A.M.C. 2049 (6th Cir. 1989)
8. *Perkins*, 246 F.3d at 598
9. *Perkins*, 246 F.3d at 598
10. *Perkins*, 246 F.3d at 599; see also *Rannals v. Diamond Joe Casino*, 265 F.3d 442, 459-50, 2002 A.M.C. 1097 (6th Cir. 2001); *Havens v. F/T Polar Mist*, 996 F.2d 215, 218, 1994 A.M.C. 605 (9th Cir. 1993); *Sinclair v. Long Island R.R.*, 985 F.2d 74, 76-7 (2nd Cir. 1993)
11. *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184, 1994 A.M.C. 304 (6th Cir. 1990); see also *Ober v. Penrod Drilling Co.*, 726 F.2d 1035, 1037 (5th Cir. 1984); *Brogan v. United New York Sandy Hooks Pilots' Ass'n, Inc.*, 213 F.Supp.2d 432, 436, 2002 A.M.C. 1670 (D.N.J. 2002)
12. *Anderson v. Great Lakes Dredge & Dock Co.*, 509 F.2d 1119, 1130, 1975 A.M.C. 1 (2<sup>nd</sup> Cir. 1974); see also *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 726-28, 87 S.Ct. 1410, 1411-13, 18 L.Ed.2d 482, 1967 A.M.C. 579 (1967); *American President Lines, Ltd. v. Welch*, 377 F.2d 501, 504, 1967 A.M.C. 2223 (9th Cir. 1967)
13. *Brogan*, 213 F.Supp.2d at 438-39
14. *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626, 630-31, 2000 A.M.C. 776 (2nd Cir. 1999)
15. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429, 59 S.Ct. 262, 265, 83 L.Ed. 265, 1939 A.M.C. 1 (1939); see also *Cordle v. Allied Chemical Corp.*, 309 F.2d 821, 824, 1963 A.M.C. 2165 (6th Cir. 1962)

16. *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193, 1195-96, 1983 A.M.C. 283 (6<sup>th</sup> Cir. 1980)
17. *Tolar*, 618 F.2d at 1196, quoting *Reyes v. Vantage S.S. Co.*, 558 F.2d 238, 244 1979 A.M.C. 1450 (5<sup>th</sup> Cir. 1977)
18. *Downie v. U.S. Lines Co.*, 359 F.2d 344, 347, 1968 A.M.C. 236 (3<sup>rd</sup> Cir. 1966); see also *Bartholomew v. Universe Tankships, Inc.*, 279 F.2d 911, 916, 1960 A.M.C. 1816 (2<sup>nd</sup> Cir. 1960)
19. *Downie*, 359 F.2d at 347
20. *Id.*
21. *Willis v. Woodson Const. Co.*, 593 F.Supp. 464, 465-66, 1985 A.M.C. 2111 (W.D.La. 1983); see also *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252, 1975 A.M.C. 1905 (5<sup>th</sup> Cir. 1975)
22. *Willis*, 593 F.Supp. at 465; see also *Panama R. Co. v. Johnson*, 264 U.S. 375, 383-84, 44 S.Ct. 391, 302-93, 68 L.Ed. 748, 1924 A.M.C. 551 (1924)
23. *Willis*, 593 F.Supp. at 465
24. *Id.*
25. 46 U.S.C.A. § 30104; see also *Panama R. Co.*, 264 U.S. at 384
26. 28 U.S.C.A. § 1391(c); see also *Pure Oil Co. v. Saurez*, 384 U.S. 202, 203-4, 86 S.Ct. 1394, 1394-95, 16 L.Ed.2d 474, 1966 A.M.C. 1117 (1966); *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899-900, 1977 A.M.C. 2314 (3<sup>rd</sup> Cir. 1977)
27. This gives a plaintiff the right to pursue an in personam maritime claim in state court in a civil, jury action. See also 28 U.S.C.A. § 1333; see also *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2008 WL 5132840, at \*5 (E.D.La. Dec.1, 2008)
28. *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 356 (5<sup>th</sup> Cir. 1999)
29. 46 U.S.C.A. § 30106
30. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50, 80 S.Ct. 926, 932-33, 4 L.Ed.2d 941, 1960 A.M.C. 1503 (1960)
31. *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1354, 1990 A.M.C. 1214 (5<sup>th</sup> Cir. 1988)
32. *Westbrook v. U.S. United Barge Line, L.L.C.*, No. 5:08-CV-00161-TBR, 2009 WL 3834101, at \*3 (W.D.Ky. Nov. 13, 2009)
33. *Rogers v. Eagle Offshore Drilling Services, Inc.*, 764 F.2d 300, 303 (5<sup>th</sup> Cir. 1985)
34. *Andrews v. Chemical Carriers, Inc.*, 457 F.2d 636, 638-39, 1972 A.M.C. 1113 (3<sup>rd</sup> Cir. 1972)
35. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 728, 87 S.Ct. 1410, 1412-13, 18 L.Ed.2d 482, 1967 A.M.C. 579 (1967)
36. *Barlas v. U.S.*, 279 F.Supp.2d 201, 213-16, 2003 A.M.C. 2927 (S.D.N.Y. 2003); *Billedeaux v. Tidex, Inc.*, No. 93-3112, 1993 WL 347039, at \*1-2, 1994 A.M.C. 1103 (5<sup>th</sup> Cir. Aug. 13, 1993)
37. *Perkins v. American Elec.Power Fuel Supply, Inc.*, 246 F.3d 593, 602, 2001 A.M.C. 2780 (6<sup>th</sup> Cir. 2001)
38. 46 U.S.C.A. § 30106
39. *Barlas*, 279 F.Supp.2d at 208; see also *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441, 121 S.Ct. 993, 997, 148 L.Ed.2d 931, 2001 A.M.C. 913 (2001)
40. *McWilliams v. Texaco, Inc.*, 781 F.2d 514, 517-18, 1986 A.M.C. 2474 (5<sup>th</sup> Cir. 1986)
41. *Blainey v. American S.S. Co.*, 990 F. 2d 885, 887, 1993 A.M.C. 2462 (6<sup>th</sup> Cir. 1993)
42. *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616 (6<sup>th</sup> Cir. 2000); see also *Alrayashi v. Rogue Steel Co.*, 702 F.Supp. 1334, 1338 (E.D.Mich. 1989)
43. *West*, 227 F.3d at 616
44. *Calmar S.S. Corp. vs. Taylor*, 303 U.S. 525, 527-28, 58 S.Ct. 651,652, 82 L.Ed. 993, 1938 A.M.C. 341 (1938)
45. *Boyden v. American Seafoods Co.*, No. C99-1420R, 2000 WL 33179294, at \*1 (W.D. Wash. Mar. 21, 2000)
46. *Stevens v. McGinnis, Inc.* 82 F. 3d 1353, 1357-58, 1996 A.M.C. 1922 (6<sup>th</sup> Cir. 1996)
47. *Hall v. Noble Drilling Services, Inc.*, 242 F.3d 582, 588, 2001 A.M.C. 1099 (5<sup>th</sup> Cir. 2001); see also *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 1000, 8 L. Ed. 2d. 88, 1962 A.M.C. 1131 (1962)
48. *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074, 1080-81, 1995 A.M.C. 2520 (3<sup>rd</sup> Cir. 1995)
49. *Rashidi v. American President Lines*, 96 F.3d 124, 128, 1997 A.M.C. 262 (5<sup>th</sup> Cir. 1996)
50. *Rashidi*, 96 F.3d at 128
51. *Campbell v. Teledyne Movable Offshore, Inc.*, 714 F.2d 429, 430, 1984 A.M.C. 2049 (5<sup>th</sup> Cir. 1983); *Felice v. Ingram Barge Co.*, No. 5:00 CV163, 2000 WL 33382210, at \*1 (W.D.Ky. Nov. 3, 2000)
52. *Cunningham v. Interlake S.S. Co.*, 567 F.3d 758, 761, 2009 A.M.C. 1991 (6<sup>th</sup> Cir. 2009)
53. *Id.*

54. *Cunningham*, 567 F.3d at 761; *see also Elvis Presley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)
55. *Cunningham*, 567 F.3d at 762; *see also Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F.2d 358, 367 (6th Cir. 1984)
56. *Cunningham*, 567 F.3d at 762; *see also Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1056 (6th Cir. 1983)