



NMA REPORT #R-433-A

DATE: March 22, 2010

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

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

ANOTHER ACL TOWBOAT DECKHAND FALLS OVERBOARD AND IS CRUSHED TO DEATH

[Source: Letter from Nelson G. Wolff, Esq. Schlichter, Bogard & Denton, LLP, 100 South Fourth Street, Suite 900, St. Louis, Missouri 63102. Phone: (314) 621-6115. Fax: FAX (314) 621-7151 e-mail: nwolff@uselaws.com. Emphasis is ours.]

March 16, 2010

Mr. Richard A. Block
National Mariners Association
124 North Van Avenue
Houma, LA 70363-5895

Re: Estate of Brian Edwin Messinger, Jr. v. ACL

Dear Richard:

I am writing to provide you and the Association with information regarding a recent Maritime/Jones Act case, which we handled involving another avoidable death of an American Commercial Lines (ACL) crew member. This case arises from the death of Brian Edwin Messinger, Jr., age 35, who was working as a lead deckhand for ACL on one of its barges when he was killed on November 29, 2007. He is survived by a young daughter. Brian was described by his crew mates as a friendly, competent deckhand who wanted to be captain of his own boat one day and, in fact, had recently taken his pilot's tests before his death. Brian had worked for ACL for a few years prior to his death.

The incident occurred around 4:00 a.m. at Lock and Dam 14 on the upper Mississippi River near LeClaire, Iowa. Brian was standing on the head of a recently added barge. Conditions were dark and cold. Ice had been reported on the head of the barges earlier in the evening. The crew was moving the first cut of barges through the lock. Brian was attempting to tie up the starboard corner of the lead barge in the first cut when he slipped on the barge deck and fell into the icy water between the lock wall and the barge. Brian yelled for another deckhand to call on the radio to the stern man to cut away the stern lines because the barges were scissoring in on him. The deckhand panicked and failed to make the call and was unable to place a safety block between the barge and lock wall or pull Brian from the water. Brian struggled screaming in the waters as the barge drifted closer to him and eventually pinned him against the lock wall, crushing him and causing him to suffocate. The autopsy report confirmed that Brian died from blunt force trauma to the chest, head and pelvis. Brian's body was not retrieved from the water until it had floated downriver and was fished out of the river by first responders using a hook.

The Coast Guard concluded that the lack of adequate safety blocks and their spacing were a contributing factor in Brian's death. It found that inadequate crew training also contributed to his death. We began our investigation in February of 2008. We conducted depositions of crew members, the captain, pilot and a Marine Superintendent for ACL. We also engaged a maritime expert to examine the barge even though ACL had attempted to destroy it for scrap in Pittsburgh. The expert, Captain William M. Beacom, Sioux City, Iowa, also inspected Lock and Dam 14. We were successful in compelling ACL to turn over numerous documents allowing us to piece together the following facts:

1. Improper training by ACL was a major factor. *The captain, pilot and other members of the crew admitted that they had only conducted 3 "man-overboard" drills in the 9 months preceding Brian's death.* ACL's Marine Superintendent admitted this was inadequate. Also, *the crew members seemed confused as to the location of safety blocks on the lock and dam wall and how and when to use these blocks.* The crew also seemed confused as to how to use the pike pole, which was located within 10 feet of the deckhand on the lock wall where Brian went into the water. *The crew admitted that the pike pole could have been used to push Brian to safety if they had known it was there and how to use it in that manner.* *The crew admitted that they had never been trained to deal with a man-overboard situation in a lock and dam.*

2. The barge from which Brian fell had been added to the tow shortly before Brian's death. Despite the fact that slick conditions should have been expected, the *barge deck had not been inspected for ice before Brian was called for duty.* Upon our inspection, we discovered that the *barge deck also lacked necessary non-skid paint.* Thus, the deck was slippery in the best of conditions and absolutely hazardous when coated with ice.

3. *A proper pre-work safety briefing had not been conducted* to discuss which fittings to use when tying up the tow. The head end fittings should have been used according to the expert.

Legal Analysis

Under the Jones Act, a maritime employer is liable for damages caused in whole or in part by its negligence. A death claim inures to the surviving children of an employee. In this case, Brian was survived by his 8 year-old daughter. Under the law, she is entitled to *compensation for the lost economic support she reasonably expected to receive, as well as compensatory damages for her loss of counsel, support, and guidance she would have received from her father; and for the conscious pain, suffering, and emotional distress experienced by Brian before he died.* We developed evidence to show that Brian had and would have continued to provide this economic support and guidance. *ACL argued in the case that she was not entitled to economic support damages and that the value of the loss of his life was minimal.*

This is the third on duty death of an ACL crew member to have been investigated and successfully prosecuted by attorney Nelson G. Wolff, a partner in the maritime injury firm of Schlichter, Bogard & Denton. The cases of *Gary Duncan*⁽¹⁾ and *Joseph Hulen*⁽²⁾ were previously reported in GCMA and National Mariners Association Newsletter #33 & #68 articles. Duncan suffered a fatal heart attack after years of being overworked and sleep deprived as a chief engineer for ACL. Hulen, a green deckhand, was crushed and killed, much like Messinger, in an incident a few years ago when he also fell between a barge and boat. *These three cases demonstrate the safety hazards that continue to be present at ACL and other companies. Management's failure to commit adequate resources to train and staff vessel crews was determined to be a significant factor in all three deaths.* Until the industry invests more of its profits into safety, workplace hazards will continue unabated. Sadly, governmental oversight has not adequately addressed these needs. While the success in these legal cases will not bring these crew members back, their families have received economic security and the satisfaction that the responsible companies have been held accountable. [⁽¹⁾In reference to the Gary Duncan case, see NMA Report #R-412, *Towboat Engineer's Death Points to Need for Changes in the Law.* ⁽²⁾In reference to the Hulen case, see NMA Report #R-433, *Towing Vessel Fatalities. GCMA Coverage of Two Accidents on TSAC Sept. 2006 Agenda.*]

Please let me know if you have any questions, or need any further information (1-800-873-5297).

Very Truly Yours, s/Nelson G. Wolff

[NMA Comment: While the Coast Guard is unwilling to connect the dots, American Commercial Lines' poor business practices were involved in the bridge allision that took down the South Padre Island bridge in Texas in 2001 with 8 fatalities as well as in the huge Mississippi River Oil Spill at New Orleans in July 2007 that stopped traffic on the river below New Orleans for five days.]

[NMA Comment: Current Coast Guard regulations for towing vessels are deficient in that they do not mandate man overboard drills. 46 CFR §27.209 only calls for fire drills. Our Association notified the Coast Guard of this shortcoming in the past but were ignored. *Perhaps* this shortcoming will be remedied in the proposed towing vessel inspection rulemaking, but don't hold your breath in anticipation.]

COAST GUARD PROVIDES INADEQUATE WORKPLACE SAFETY PROTECTION

February 26, 2010

Dear Mr. Block,

Thank you for your reply to our letter of January 16, 2010. We appreciate your commitment in this matters, and, in response to your questions, we offer the following comments:

Regarding your questions pertaining to hearing conservation, the *United States Coast Guard Requirements for Uninspected Towing Vessels* guidebook does not seek to address requirements which may be applicable from other agencies, such as the Public Health Service or the Occupational Safety and Health Administration (OSHA). Guidance on OSHA regulations, including noise regulations contained in Title 29 Code of Federal Regulations (CFR) §1905.95, is available through their website or any of their regional offices. If you wish to know more about OSHA's enforcement activities and steps they have taken in the past to improve hearing conservation aboard uninspected towing vessels. I recommend you contact them directly.

[NMA Comment: The Coast Guard does not seem to understand that it, rather than OSHA, is supposed to protect mariner hearing. It still treats towing vessels as “uninspected” vessels. This leaves mariners without any workplace protection that OSHA provides to shoreside industry!]

Concerning your inquiries related to asbestos exposure, the Coast Guard's inspector training program is designed to train inspectors to assess compliance with regulations contained in Titles 33 and 36 of the CFR. As part of that training, Coast Guard inspectors are familiarized with the Navigation and Vessel Inspection Circulars (NVIC). However, we do not prepare our inspectors to enforce OSHA regulations, or any other agency's regulations, on uninspected vessels. Neither the Towing Vessel Center of Expertise nor the Offshore Operations Center of Expertise has been contacted by industry with concerns regarding asbestos; however, our office has forwarded your letters and Gulf Coast Mariner's Report #R-205 to ensure they are aware of the potential concerns.

A copy of MSC 83/25/13 is enclosed per your request.

[NMA Comment: Key sentence: “We do not prepare our inspectors to enforce OSHA regulations” Translation: For 40 years, mariners have not been adequately protected in their workplace as promised by the Occupational Safety and Health Act of 1970.]

[NMA Comment: OSHA regulations deal with “slips, trips, and falls.”]

Sincerely,
s/B.J. Hawkins
Commander, U.S. Coast Guard
Acting Chief, Office of Design and Engineering Standards By direction