"Is Your Client Covered Under the Jones Act? Navigating the Waters"

by Jeff Bloomfield

Introduction

Although the changes to the Tennessee Workers Compensation Act have drastically diminished the ability of plaintiffs' attorneys in this state to recover adequate benefits for injured workers, many plaintiffs' practitioners still handle these cases. They struggle within the limits that the law imposes to get fair recoveries for their clients. Because this state has three major inland waterways running through and alongside it, however, it is not unusual for attorneys to be presented with opportunities to recover much more for their injured clients, depending on the circumstances of their employment. These clients may be covered not under the Tennessee Workers Compensation Act, but under the federal law known as the Jones Act. It is important for Tennessee attorneys to be able to recognize these cases to assure that they properly represent their clients.

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

The Jones Act, 46 U.S.C.A. § 30104, in pertinent part states as follows:

> 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.

Because it incorporates by reference the FELA, the Jones Act allows a seaman injured through the negligence of his or her employer to recover full damages. Jones Act seaman status also affords the strict liability tort claim for unseaworthiness. The Jones Act thus presents a potentially greater recovery for an injured worker who can qualify for its coverage than that provided by the Tennessee Workers' Compensation Act.

In certain circumstances, it may be fairly easy to identify a covered Jones Act employee. Deckhands, pilots, engineers, and cooks who work on towboats plying the Tennessee, Cumberland, and Mississippi Rivers will generally be covered. However, other workers who spend a substantial time employed on these navigable waters may also be covered under and entitled to the more generous benefits afforded by the Jones Act.

General Requirements for Jones Act Coverage

The determination of Jones Act seaman status is a mixed question of law and fact meant for the jury.[1] The Jones Act does not define the term "seaman," so the definition has been determined by case law. "The inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it."[2] "It is for the court to define the proper legal standard and for the jury to find the facts and apply that standard."[3]

With few exceptions, a jury should be permitted to consider all relevant circumstances bearing on the requirements for seaman status, and if reasonable persons applying the proper legal standard could differ as to whether the employee was a Jones Act seaman, then status is a jury question.[4] The Sixth Circuit has held that "[t]he question of seaman status should only be removed from the trier of fact by summary judgment or directed verdict in rare circumstances, and even marginal Jones Act claims should be submitted to the jury.[5]

With regards to the requirements of Jones Act status, the Supreme Court in 1995 outlined a three-part test in *Chandris v. Latis:*

(1) There must be a vessel in navigation;
(2) The employee's duties must contribute to the function of the vessel, or to the accomplishment of its mission; and,
(3) The employee must have a connection to the vessel that is substantial in terms of both its duration and its nature.[6]

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Vessel in Navigation Requirement

A prospective Jones Act seaman can meet the "vessel in navigation" requirement by showing that he or she has a connection to a "fleet" of vessels.[7] A fleet of vessels is an identifiable group of vessels under common ownership or control.[8]

Whether a vessel is in navigation is a fact-intensive question that can be removed from the jury's consideration only where the facts and the law will reasonably support one conclusion.[9] For purposes of the Jones Act, a vessel is considered to be "every description of watercraft or other artificial contrivance used, *or capable of being used,* as a means of transportation by water."[10] Courts have repeatedly and consistently held that indefinitely moored floating structures, including indefinitely moored barges, fit within this definition.[11]

Active use is not a requirement for vessel status. In finding that a moored dredge was a "vessel" for purposes of the LHWCA, the Supreme Court in *Stewart v. Dutra Constr. Co.* held that "the 'in navigation' requirement in 1 U.S.C. § 3 allows for the mere 'possibility' that a structure could engage in movement across the navigable waters."[12] The *Stewart* Court opined that "§ 3 does not require that a watercraft be used primarily for . . . [transportation] purpose[s];" that a "watercraft need not be in motion to qualify as a vessel;" and that "a structure may qualify as a vessel even if attached—but not 'permanently' attached—to the land or ocean floor."[13] The "*Stewart* Court [] specifically eschewed tests for vessel status focused on either a craft's 'primary purpose' or whether the craft is in 'actual transit' at the time of an accident."[14]

Without overruling *Stewart's* "capability" test, the Supreme Court later held in *Lozman v. City of Riviera Beach, FL,* that a structure is a "vessel" for purposes of the LHWCA if it is capable of regularly transporting equipment (and/or people) over water.[15] The *Lozman* Court articulated that a structure qualifies as a vessel if a "reasonable observer, looking to the [structure's] physical characteristics and activities, would consider it designed to a 'practical degree' for carrying people or things over the water."[16]

When discussing the "primary purpose" test, *Lozman* differentiated between the *Stewart* dredge, which was "regularly used to transport workers and equipment over water," and the plaintiff's wharfboat, which was permanently affixed with an unraked hull, a rectangular bottom, no capacity to generate electricity without a land-based electrical hookup, and no practical ability to transport persons or things over the water.[17] In explaining the distinction, *Lozman* specifically cited as good law *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 535 (1995) (barge sometimes attached to river bottom to use as a work platform remains a "vessel"); *Great Lakes Dredge & Dock Co. v. Chicago,* 3 F.3d 225, 229 (7th Cir. 1993) ("[A] craft is a 'vessel' if its purpose is to some reasonable degree 'the transportation of passengers, cargo, or equipment from place to place across navigable waters'."); and *Cope v. Vallette Dry–Dock Co.,* 119 U.S. 625, 630 (1887) (describing "hopper-barge," as potentially a "vessel" because it is a "navigable structure[,] used for the purpose of transportation").[18]

Contribute to Mission of a Vessel Requirement

This requirement is very broad and generally not contested. The Supreme Court in *Wilander, supra,* held that all who work at sea in the service of a ship are eligible for seaman status.[19]

Substantial Connection to Vessel Requirement

The determination of whether a maritime employee is a seaman is made by looking at the totality of a worker's employment, the duration of his or her connection to the vessel, and the nature of his or her activities, taken together. It is not the employee's particular job that is determinative of seaman status, but rather, the employee's connection to a vessel.

The Supreme Court's concern in *Chandris, supra,* was that a worker who has only a transitory or sporadic connection to a vessel should not be covered by the Jones Act. The Court sought to distinguish between land-based workers who do not qualify for Jones Act status, and sea-based workers who do, and generally adopted as "an appropriate rule of thumb for the ordinary case," a percentage approach known as the 30% rule of thumb, to be used in determining whether the duration of a worker's connection to a vessel is sufficient.[20] As a general rule, a worker who spends less than about 30% of his time in the service of a vessel in navigation will not qualify for Jones Act status. A worker who spends a greater percentage of time however, may be covered.

The Supreme Court also makes clear that Jones Act coverage does not depend on the location of a worker's accident. A maritime worker who attains Jones Act status by virtue of a relationship to a vessel does not lose such status when injured on shore.[21] A worker should not move back and forth between Jones Act coverage and other remedies, depending on the activity in which he or she was engaged at the time of injury, or the fortuitous location of the accident.

The Supreme Court revisited *Chandris* in the case of *Harbor Tug and Barge Co. v. Papai.*[22] The Court in *Harbor Tug* explained that the inquiry into the worker's employment-related connection to the vessel must concentrate on whether the employee's duties take him or her to sea. This, the Court felt, would "give substance to the inquiry both as to the duration and the nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees."[23]

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The Fifth Circuit decision in *Endeavor Marine v. Crane Operators, Inc.* dealt with application of the "going to sea" test set forth in *Harbor Tug.*[24] This case involved an employee of a company that provided personnel on an as-needed basis to crane and heavy equipment businesses. The plaintiff was a crane operator assigned to a derrick barge, who was injured while attempting to moor the derrick barge to a cargo barge in the Mississippi River. The district court found that his duties did not take him to sea and thus he was not a Jones Act seaman. The Fifth Circuit reversed, holding that the "going to sea" passage in *Harbor Tug* is an abbreviated way of conveying that the employee has a connection to a vessel which exposes him or her "to the perils of the sea."[25] The *Endeavor Marine* court concluded that *Harbor Tug* did not "articulate a new and specific test for seaman status," and that a worker's duties do not literally have to carry him or her to sea for there to be Jones Act coverage.[26]

The Fifth Circuit applied its holding in *Endeavor Marine* in the 2014 case of *Naquin v. Elevating Boats, LLC.*[27] In *Naquin,* the plaintiff was a vessel repair supervisor at defendant's shipyard. His primary job was the maintenance and repair of a fleet of lift boats. The plaintiff spent 70% of his time working aboard these lift boats while they were moored, jacked up or docked. He also performed repairs, painted, and went on test runs. The remaining 30% of his time was spent working on shore. While working on shore, he was injured while operating a land-based crane. A jury found Jones Act status and awarded damages.

The *Naquin* defendant appealed, arguing that the plaintiff was not covered under the Jones Act, but rather was a land-based ship repairman who performed classic harbor worker duties. In holding for the plaintiff, the Fifth Circuit found that the evidence was sufficient to establish that he was a seaman entitled to Jones Act coverage. The court stated:

> Importantly, an individual can still qualify for seaman status even if he divides his time among multiple vessels under common ownership or control. The relevant question is whether, in the course of his current job, he substantially contributes to the vessels' functions and maintains a substantial connection with the fleet.[28]

The *Naquin* court further concluded that it did not matter that the vessels the plaintiff worked upon were ordinarily docked, and that he almost never ventured beyond the immediate canal area or onto the open sea.[29] The court noted that certain traditional longshoreman work may qualify for seaman status where the plaintiff can establish the requisite employment-related connection to the vessel.[30] In its opinion, the *Naquin* court clearly indicated that the key inquiry is whether the worker is "exposed to the perils of a maritime work environment."[31]

A recent decision from the Eastern District of Louisiana, *Starks v. Advantage Staffing, LLC,* further illustrates that a "substantial connection" to a vessel may be established even where a plaintiff performs most of his work on stationary barges that are tied to a dock.[32] In *Starks,* the plaintiff was a contract laborer who cleared the remnants of grain from hoppers of barges being run though a conveyor system alongside a facility referred to as a "loading rig." The plaintiff and his co-worker would clear the remnants using a bobcat that would be lowered into a given barge by a lift. A worker located on the loading rig would operate the bobcat lift and guide a ladder into the barge. The other worker would descend the ladder into the barge and operate the bobcat. The plaintiff and his co-worker took turns operating the bobcat in the barges and operating the ladder and bobcat lift from the loading rig.

The *Starks* plaintiff suffered an injury while operating the ladder and bobcat lift from the loading rig. He asserted claims against several defendants under the Jones Act and the general maritime law. The defendants moved for summary judgment on the issue of Jones Act status. They argued that the plaintiff did not qualify as a seaman for purposes of the Jones Act because he did not have a connection to the fleet of vessels that was substantial in duration, and that he spent less than 30% of his work time on the barges.

In discussing motions for summary judgment in Jones Act status cases, the *Starks* court noted that the Jones Act is remedial legislation and as such should be liberally construed in favor of injured seamen, and if reasonable persons could draw conflicting inferences, it is a question for the jury and summary judgment must be denied, even when the claim to seaman status is marginal.[33] The court held that because "the issue of seaman status is ordinarily a jury question, even when the claim to seaman status is marginal[,] . . . [s]ummary judgment on seaman status in Jones Act cases is rarely proper."[34]

The *Starks* court denied the defendant's motion for summary judgment and determined that "in light of *Naquin,* [] Starks [] adequately established that his work involved a substantial connection in nature to the barges in question."[35] Although the court noted that it did appear the plaintiff worked aboard the barges only while they were connected to the loading rig's conveyor system, the court nevertheless found his work to be sufficiently analogous to the sort of work performed by the plaintiff in *Naquin*.[36] The plaintiff's work inside the grain barges, according to the court, exposed him to the perils of a maritime work environment.[37] Thus, the court concluded that "Starks' connection to the barges in question could be sufficiently substantial in nature to satisfy the test laid out in *Chandris.*"[38]

On the issue of whether the *Starks* plaintiff met the 30% threshold for his connection to the barges to be substantial, the

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court found that barge records submitted by the defendants did not "decisively settle how much time the plaintiff spent on the barges."[39] In light of the plaintiff's deposition testimony that he spent roughly 80-85% of his time on the barges, the court concluded that there was a genuine issue of material fact as to whether the plaintiff spent roughly 30% of his time working on the barges.[40]

Another case holding that dockside vessel time counts toward the 30% is *Smith v. Kanawha River Terminal LLC.*[41] The *Smith* court held that that the plaintiff was exposed to the perils of the sea where he was exposed to the elements, adjusted lines on customer barges, operated a Bobcat on customer barges, and tended to the operations of a transloader barge.[42]

Unfortunately, other courts have denied Jones Act coverage when the employee spent his vessel time dockside.[43]

Conclusion

While Tennessee is a "landlocked" state, and therefore knowledge of the Jones Act and maritime law is thought to be unnecessary for the typical plaintiffs' injury attorney in this state, the ability to at least identify a potential Jones Act case is important. Not every injured employee who walks in your door is limited to the sparse benefits provided by the Tennessee Workers Compensation Act. Some may qualify for damage benefits under the Jones Act. It is important to know what to look for to make sure that you are able to identify these claims and handle them properly.

ABOUT THE AUTHOR

Jeff Bloomfield received his J.D from the University of Tennessee law school in 1974. He is a partner in the Memphis law firm of Godwin, Morris, Laurenzi & Bloomfield, P.C. He has 35 years of experience representing clients in Jones Act and Maritime personal injury claims in Tennessee, Kentucky, Arkansas, Mississippi, Alabama, and Missouri. He is admitted to the Bar in Tennessee and Kentucky, and he has practiced in courts in Tennessee, Kentucky, Arkansas, Mississippi, Alabama, and Missouri and before the United States Court of Appeals for the Sixth Circuit and the Eleventh Circuit. He is a former Chair of the Admiralty Section of the American Association of Justice and is a former President of the Tennessee Trial Lawyers Association. He is a former Member of the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee. He is named to Woodward White's "Best Lawyers in America," in Admiralty and Maritime Law.

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1 515 U.S. 347, 369 (1995).
2 *McDermott Intern., Inc. v. Wilander,* 498 U.S. 337, 356 (1991).
3 *Id.* at 338.
4 *Chandris,* 515 U.S. at 369. *See also Wilander,* 498 U.S. at 356.
5 *Taylor v. Anderson Tully Co.,* 960 F.2d 150, 1992 WL 78101 at *3 (6th Cir. 1992) (emphasis added).
6 *Chandris,* 515 U.S. at 368-371.
7 *Id.* at 368.
8 *Roberts v. Cardinal Services, Inc.,* 266 F.3d 368, 375 (5th Cir. 2001).
9 *Id.* at 349.
10 1 U.S.C.A. § 3 (emphasis added).
11 *See Bunch v. Canton Marine Towing Co., Inc.,* 419 F.3d 868 (8th Cir. 2005) (holding that a stationary floating barge used to clean other barges, that was moored by spud poles embedded into the bed of the waterway, was a vessel, as the barge remained afloat, was not permanently moored, and could be released from its moorings); *Jordan v. Shell Offhshore, Inc.,* 2007 WL 128313 (S.D. Tx. 2007) (holding that a floating quarters barge at an oil well was a "vessel" in that it was expected to be towed to another location for use upon expiration of the production life of the well to which it was moored). *See also BW Offshore USA, LLC v. TVT Offshore AS,* 2015 U.S. Dist. Lexis 153840 (E.D. La. 2015) (finding that floating, production, storage, and offloading units (FSPOs) are vessels because they "can detach from the oil well and relocate under their own power within six hours, transporting the crew, equipment, and stored oil along with them."); *Luckhart v. Southern Illinois Riverboat/Casino Cruises, Inc.,* 2010 WL 2137451 (S.D. Il. 2010) (denying motion for summary judgment on whether an "indefinitely moored" casino barge that was served with land-based utility lines but could be moved on short notice was a "vessel"); *Pipia v. Turner Const. Co.,* 980 N.Y.S.2d 392 (N.Y. App. 2014) (holding that a "float stage" designed and used to transport materials along a pier, using only lines and a wooden stick for propulsion, was a "vessel" because a reasonable observer would consider it to be designed to a practical degree for carrying things over water).
12 543 U.S. 481, 496 (2005).
13 *Lozman v. City of Riviera Beach, FL,* 568 U.S. 115, 124 (2013) (quoting *Stewart, supra,* at 493-495).
14 *Bunch v. Canton Marine Towing Co.,* 419 F.3d 868, 873 (8th Cir. 2005) (citing *Stewart* at 1127-28).
15 568 U.S. at 121-22.
16 *Id.*
17 *Lozman* at 125.
18 *Id.*
19 498 U.S. at 354.
20 515 U.S. at 349.
21 *Id.* at 348.
22 520 U.S. 548 (1997).
23 *Id.* at 555.
24 234 F.3d 287 (5th Cir. 2000).
25 *Id.* at 291.
26 *Id.*
27 744 F.3d 927 (5th Cir. 2014).
28 *Id.* at 933.
29 *Id.* at 934.
30 *Id.* at 934-35.
31 *Id.*
32 202 F.Supp.3d 607 (E.D. La. 2016).
33 *Id.* at 611.
34 *Id.* (quoting *White v. Valley Line Co.,* 736 F.2d 304, 305 (5th Cir.1984); *Bouvier v. Krenz,* 702 F.2d 89, 90 (5th Cir.1983)).
35 *Id.* at 614.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* at 615.
40 *Id.* at 615-16.
41 I829 F. Supp. 2d 401 (S.D. Va. 2011).
42 *Id.* at 408.
43 *See, e.g., Turner v. Wayne B. Smith, Inc.,* 2014 U.S. Dist. Lexis 166835 (E.D. Mo. 2014); *Duet v. American Commercial Lines LLC,* 2013 WL 1682988 (E D. La. 2013); *Leblanc v. AEP Elmwood, LLC,* 2012 WL 669416 (E.D. La. 2012).