

**DON'T BE FOOLED BY THE IRS MEDICAL MILEAGE DEDUCTION**  
**WHEN SEAMEN ARE REIMBURSED FOR TRAVEL TO MEDICAL APPOINTMENTS**

by John Merriam

A creative fad is afoot amongst marine insurance adjusters that reduces the compensation paid insured seamen who have to travel to medical appointments. For this year, 2010, some adjusters are paying only 16.5 cents per mile traveled, based upon the amount people are allowed to deduct on their tax returns for moving or for travel to medical treatment, rather than the 50 cents per mile paid to federal court witnesses and jurors, injured longshoremen and workers on land, and almost everybody else--as well as the amount of the IRS standard deduction for business travel.

Reimbursement for 'reasonable' travel expenses to obtain medical treatment is part of the 'cure' obligation in the maintenance and cure doctrine, the basic benefits that injured fishermen and other types of seamen are entitled to. Travis v. Motor Vessel Rapids Cities, 315 F.2d 805 (8th Cir. 1963). In addition to actual expenses for meals and a hotel, or a set per diem amount, travel is typically reimbursed at a set rate for each mile driven or flown to a given destination. How much per mile is reasonable? While that determination has been made by statute or regulation for other types of workers, a reasonable rate of travel reimbursement for injured seamen has never been explicitly stated, and there are no cases on point known to this practitioner.

Gary Asgeirsson is a professional fisherman, residing in Bellingham, who has been going to sea for more than 40 years. In 2009, while serving as Master aboard the

71-foot bottom trawler F/V Windjammer he suffered a left shoulder injury. In addition to bringing an injury claim, Mr. Asgeirsson also asserted that he'd been shorted on his wages. Liability for wages and the injury was disputed but his entitlement to maintenance and cure was not. The insurance underwriter assigned the claim to the Seattle adjusting firm Polaris, Ltd. The insurance adjuster started paying the contractual rate of \$25/day in maintenance to Mr. Asgeirsson, and reimbursed him the IRS 'medical mileage' deduction rate for 2009, 24 cents/mile, for travel to his doctor in Seattle--most of which occurred in 2009--rather than the 55 cents/mile allowed that year as a deduction for business travel.

Mr. Asgeirsson's first lawyer filed suit in federal court, where the case was assigned to Judge Richard Jones. Representation of the plaintiff got transferred to the author and Gordon Webb, and a motion was filed to challenge the rate of mileage reimbursement, as well as to make a request for an expedited evidentiary hearing on the appropriate rate of maintenance. The difference between 24 cents and 55 cents per mile for the travel reimbursement sought by Mr. Asgeirsson totaled \$255.38. The motion was noted for decision on April 23, 2010. In the motion, plaintiff argued that IRS deductions on tax returns had nothing to do with a seaman's medical treatment. Federal witnesses and jurors were paid 55 cents/mile in 2009. 28 U.S.C. sec. 1821 (referencing 5 U.S.C. sec. 5704, the IRS rate for 'business mileage'). 55 cents/mile in 2009 (50 cents in 2010) is also the rate recognized by the GSA (General Services Administration) to reimburse travel by federal employees. See, [www.gsa.gov/travelpolicy](http://www.gsa.gov/travelpolicy), referencing the Federal Register and 41 CFR Chaps. 300-304. The Washington Dept. of Labor and Industries and the U.S. Dept. of Labor both lock into the GSA rate for injured

workers traveling to medical appointments. Why should 'the favorites of admiralty', plaintiff argued, receive less for travel reimbursement than everybody else?

The IRS standard deduction for travel expense includes depreciation to one's vehicle. See IRS Publication 463 (2009). The medical travel and moving deductions, on the other hand, include only "actual out-of-pocket expense such as gas and oil" (but not depreciation) "or you can deduct the standard mileage rate for medical expenses" (24 cents in 2009). See IRS website at Topic 202, Medical and Dental Expenses, in the Tax Topic Index. Why shouldn't Mr. Asgeirsson be compensated for depreciation to his vehicle like everybody else, plaintiff asked Judge Jones in his motion. Why should an injured seaman seeking medical attention for injuries suffered in the service of the ship receive a lower rate of travel reimbursement than witnesses and jurors in federal court? Why should the tax code have anything to do with maintenance and cure? Plaintiff posed these questions in the motion because he could find no authority on point and argued that the issue was one of pure policy considerations. In regard to the difference in mileage rates totaling only about \$250 for Mr. Asgeirsson, plaintiff quoted Professor Norris: "The small amount of money involved may bulk largely in the economy of a sick and ailing seaman." Force and Norris, The Law of Seamen, sec. 26-31 (5th ed. 2003).

In Response to plaintiff's motion defendants came out sputtering in indignation that plaintiff's "motion is patently frivolous" for seeking the "trivial amount" of \$255.38, and that defendants should be awarded attorney fees for "responding to this unreasonably burdensome and vexatious motion." Defense counsel argued that, because Mr. Asgeirsson was at maximum cure and no longer receiving maintenance, he no longer was in need of an evidentiary hearing before trial to get a higher rate of maintenance,

and that plaintiff was only trying to run up court costs to try to force the defendants into paying more for settlement to avoid added legal expense. Defendants also argued that the same was true for the plaintiff's attempt to tie up the time of a federal judge over \$250. Defendants basically accused the plaintiff of extortion by running up legal costs until defendants were forced to settle. (Defendants did not share with the court how much the associate and a partner in a large firm were paid to fend off Mr. Asgeirsson's demand for \$250.)

In a substantive defense to plaintiff's motion, defendants wrote that, ". . . it is standard practice to reimburse seamen the IRS medical mileage rate for travel occasioned by their curative treatment." To support this claim of "standard practice", defense counsel cited to the Declaration of Sonja Adams, the Polaris insurance adjuster assigned to Mr. Asgeirsson's claim, attached to the Response memorandum. Sonja Adams' declaration stated that: "(T)he medical mileage rate has been upheld and awarded as the proper basis for this reimbursent." Ms. Adams didn't say which court or agency had "upheld" payment of the low mileage rate to injured seamen.

The plaintiff sought the assistance of James Beard, now Chairman of the WSAJ Maritime Section, to buttress his assertion that the low compensation rate had only recently become "standard practice". In his affidavit supporting plaintiff's Reply memorandum, Jim Beard came out blasting from the hip with a gun in either hand. He stated that Polaris was hardly the "independent" adjusting firm claimed by Sonja Adams, but rather was an agent of the marine insurance industry; that Polaris and some other adjusting firms had only recently started using the 'medical mileage' rate; that there was no "standard rate" for travel reimbursement, and that no court had ever been presented

with this question, let alone "upheld" it. Counsel for the plaintiff submitted a similar declaration, stating that the 'medical mileage' reimbursement practice had manifested only recently, in his experience, and that thousands of dollars were at issue--more than the \$250 snidely dismissed by defense counsel--if Polaris and other adjusting firms were shorting all injured seamen on travel reimbursement.

Defendants were so outraged that they filed a surreply brief (see local federal rule (CR) 7(g)) claiming that plaintiff's Reply "contains inadmissible, speculative, and inflammatory assertions regarding Defendants and their agents." Defendants moved to strike portions of the Reply memorandum and the declaration of this practitioner as "impertinent", and the affidavit of James Beard in its entirety for "assertions which denigrate the marine insurance profession generally." Defendants took issue with plaintiff's assertion that they were trying to starve Mr. Asgeirsson into settling this case for a pittance because he couldn't hold out until the 2011 trial date if he was shorted on maintenance and cure. "Plaintiff's argumentative assertions serve no purpose except to malign Defendants and their agents in a public forum. These unfortunate and regrettable statements should be stricken. They are beneath the dignity of this Court and of Plaintiff's counsel." (Defendants, of course, would never 'malign' the motives of the plaintiff for seeking more maintenance and cure.)

Before the maintenance and cure motion was filed the parties had agreed to early mediation, which took place in February 2010 with mediator Nancy Harriss of Keesal, Young and Logan. The mediation ended when Defendants said they'd pay no

more than \$11,000 in settlement. Ms. Harriss remained involved in trying to resolve the case and was ultimately successful (keep reading).

Immediately after plaintiff filed the 'medical mileage' motion, defendants increased their settlement offer from \$11,000 to \$25,000.

By the middle of June, two months after the noting date, Judge Jones still had not ruled on the motion. Ostensibly, according to his clerk, all his time was taken up by motions for cases closer to trial. While waiting, plaintiff pounded on defendants for more maintenance and cure. Polaris coughed up \$1,000-plus in additional maintenance and another \$172 for transportation, without ever conceding the propriety of either 16.5 cents/mile or \$25/day for travel and maintenance, respectively. Gary Asgeirsson was broke by the end of spring and accepted the \$25,000 offer, which was still on the table.

The case is Asgeirsson v. F/V Windjammer, et al., C09-1053RAJ (W.D. Wash.). Plaintiff was represented by John Merriam and Gordon Webb. Defendants were represented by Bert Markovich and Benjamin Nivision of Schwabe, Williamson & Wyatt.

Although Judge Jones never ruled on the motion, and this is still technically an open issue, don't be fooled. There is no legal, logical or moral justification for paying seamen the lower, 'medical mileage' rate of reimbursement for travel to medical appointments. If insurance adjusters won't back off this practice for a seaman you represent, contact the undersigned for assistance. This fad needs to be nipped in the bud.

Eagle John Merriam is a former merchant seaman, now a sole practitioner at Seattle's Fishermen's Terminal, who restricts his practice to the representation of maritime claimants for wages and injury.