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Maritime law

Icicle Seafoods using Alaska Workers' Compensation to Cheat Processors out of Maintenance and Cure

by John Merriam

Injury benefits under the Jones Act and the general maritime law, and under state-based systems of workers' compensation, are mutually exclusive for the most part. There are a few exceptions, however. In 1988 the Alaska Legislature extended workers' compensation coverage to fish processors on factory vessels operating close to shore in Alaska waters. Thus was created a "twilight zone" of dual coverage, because these workers were "seamen" in the eyes of the law and already entitled to maritime remedies for illness and injury.

> (T)he "twilight zone" doctrine allows concurrent jurisdiction of state and federal workers' compensation statutes for workers injured while engaged in "maritime but local" employment . . .

Trident v. Murray, 2000 A.M.C. 288, 294 (Alaska Superior Court 1999).

Processors who suffer illness or injury aboard fish factory barges and ships now have a choice of either Alaska Workers' Compensation on the one hand, or, on the other, the Jones Act--with right to trial and general maritime law remedies of unseaworthiness, maintenance, and cure. The choice is not irrevocable and processors can switch from Alaska Comp. to maritime remedies, but they can't double-dip. Benefits received under one system must be paid back if duplicative benefits are received under the other system.

Maritime remedies are generally preferable in liability situations, where fault on the part of the employer or vessel owner can be proven. The no-fault remedy of maintenance and cure roughly approximates Alaska compensation benefits, but the different entitlements are fact-specific and require analysis in each case. One big difference is time-loss compensation. Time loss payments under Alaska Comp. are based on the worker's earnings history for the two calendar years prior to becoming disabled. Those with high earnings in the past will receive generous benefits. Those with spotty past earnings (processors are often immigrants, students, and others outside the mainstream workforce) will receive less than $20 per day (the rate of maintenance in contracts of employment with Icicle Seafoods--see *infra*). For maintenance and cure, on the other hand, the component of

'unearned wages' is paid only to the end of the contracted term of employment, and often not at all--such as when the injured processor keeps working until the end of the fishing trip during which the injury occurred.

The other big difference is the scope of medical conditions covered. Maintenance and cure covers any medical condition--even long-festering cancer--that occurs, recurs, first manifests, or is aggravated while the seaman is in the service of the vessel, as long as the seaman did not intentionally conceal the prior illness or injury when applying for the job. *See, Messier v. Bouchard Transportation*, 2012 A.M.C. 2370, 688 F.3d 78 (2d Cir. 2012), *cert. denied*, ___ U.S. ___ (2013). Alaska Comp., by contrast, requires that the medical condition be work related. Alaska Statutes (A.S.) 23.30.010:

> [For coverage, the] employee must establish a causal link between the employment and the . . . need for medical treatment. . . . (and) the employment is the substantial cause of the disability . . .

See also, A.S. 23.30.395(24): "injury" defined.

Some fishing companies took advantage of this 'twilight zone' coverage and started herding injured processors into the Alaska Comp. system without advising them that they might be better off choosing maritime remedies. This practice was challenged when a processor receiving Alaska Comp. first consulted a lawyer after the limitation period had expired for filing suit under the Jones Act and the doctrine of unseaworthiness. *Huseman v. Icicle Seafoods*, 2007 A.M.C. 46, 471 F.3d 1116 (9th Cir. 2006). The Ninth Circuit refused to extend the limitation period, ruling that Icicle had no duty to explain the Jones Act to its employees. 2007 A.M.C. at 47. "This is a case of a plaintiff waiting too long to file suit." Id. at 57. The court did allow the maintenance and cure claim to proceed, however, ruling that laches applied (requiring a showing of inexcusable delay by Huseman plus prejudice to Icicle) --rather than the three-year limitation period for liability claims. 2007 A.M.C. at 58. After the *Huseman* case, Icicle thought it had a ticket to ride and began to ignore its responsibilities under the maritime law to those employees whom it shuffles into Alaska Comp. Its employment contracts typically include the following language:

> Unless requested otherwise, we will process any claim through the Alaska Workers' Compensation system.

Huseman v. Icicle Seafoods is actually a very narrow decision, holding only that the doctrines of equitable tolling and equitable estoppel won't help a processor who missed the three-year time limit. Nowhere is it stated that Alaska Comp. is a substitute for benefits under the maritime law, and nowhere is it even suggested that vessel owners are excused from paying maintenance and cure. The majority opinion in this 2-1 case showed poor reasoning, in the author's opinion, by ignoring the wardship doctrine for a seaman who admittedly did not understand that Icicle was steering him away from "more costly federal benefits" (2007 A.M.C. at 68), until it was too late. In his excellent dissent, Judge Stephen Reinhart recognized that,

> Icicle Seafoods' whole pattern of behavior was designed to lull Huseman into a false sense of security, making him believe that, as his employer, it was looking out for him because it was taking care of all of his claims, a belief that Icicle hoped would last until the statute of limitations ran on the federal claims.

2007 A.M.C. at 60. The wardship doctrine--requiring that seamen be informed of their rights--is especially appropriate in this situation, where one almost needs a law degree to figure out which system of compensation is more favorable.

The 2-1 *Huseman* decision is not binding authority on state courts in Washington. Even though a federal appellate court decided an issue of federal maritime law, until the U.S. Supreme Court speaks state courts are free to interpret federal law more equitably than do their brethren on the Ninth Circuit. *Lundborg v. Keystone Shipping*, 138 Wn.2d 658 (1999).

Icicle Seafoods is self-insured for Alaska Comp. claims and is aggressively pursuing ways to save money. When sending processors and deckhands--deckhands are indisputably entitled only to maritime remedies--to the Iliuliuk medical clinic in Dutch Harbor, Alaska, they are given a "Pre-Visit" form filled out by the "Safety Manager" on each vessel. The Pre-Visit form has three boxes under "Billing Information", one of which is to be checked by the Safety Manager. The first box is "Alaska Workers Compensation," likely the one marked for most processors. The second box is "P & I Injury" [Protection & Indemnity—insurance speak for liability coverage], probably marked for most deckhands and other non-processor crewmembers with Jones Act claims. The third box is "Personal Medical". Included in this box are instructions for processors (or deckhands?) to make payment out of their own pockets for medical treatment, including a "$50 Pre –Pay." Processors leaving the vessel for "Personal Medical" are routinely told that they will have to pay their own way home from Alaska. That is a false statement, given Icicle's duties under the maritime law, unless the 'personal medical bill' results from gross misconduct such as intoxication or venereal disease.

What follows are some examples of how Icicle is taking liberties with its duty to provide seamen with maintenance and cure, which includes unearned wages.

Mohammed Abdi was a 72-year-old Somali working 16-hour shifts on the 'slime line' aboard the fish factory ship *R.M. Thorstenson*. He had to stop working due to bronchitis and was taken to the Iliuliuk clinic at Dutch Harbor. From there he was flown to Seattle and sent for treatment at the Work Clinic in Tukwila. Icicle herded Abdi into the Alaska Comp system and then refused to pay his medical bills because bronchitis is "not work related." Because the bronchitis manifested while he was in the service of the ship, Abdi was clearly entitled to maintenance and cure. He, not Icicle, got a bill for $856 from the clinic in Dutch Harbor, and Icicle refused to pay the Work Clinic for his treatment. Abdi received no time loss payments. To add insult to injury, he was listed as ineligible for rehire.

With an interpreter, Abdi contacted Icicle's office near Fishermen's Terminal in Seattle and confronted its "Safety Director," Todd Zey, demanding injury benefits. Zey told Abdi that he was out of luck because Abdi's illness was "a personal medical issue". Through the interpreter, Abdi said he was going to get a lawyer. Zey told him to go for it, and to "make sure you get a good one because Icicle has good lawyers."

Abdi did get a lawyer, who demanded maritime remedies. As soon as he did, Icicle paid all the medical bills and $20/day maintenance retroactive to the day he left the ship. Icicle also paid unearned wages to the end of Abdi's contract--more than $4,000. Deducted from unearned wages for withholding taxes was a 19.5% "tax multiplier" in the amount of $942.78. Some time later, this practitioner learned that Icicle was pocketing the "tax multiplier" deducted from the unearned wages of Abdi and other processors, and not paying it to the IRS.

(Discussion of this withholding of taxes by Icicle is beyond the scope of this article.)

The case is *Abdi v. Icicle Seafoods*, King Co. No. 12-2-17104-1 SEA.

James Chacon is an immigrant from Costa Rica who suffered repetitive use injuries to his right wrist, arm, and shoulder while working 16-hour shifts on the slime line aboard the factory ship *Gordon Jensen*. By August 2012 he couldn't take it anymore and quit at the end of his contract. He went home to Sacramento, California to start a course of treatment at Kaiser Permanente. Icicle shuffled him into the Alaska Comp. system and started paying him time loss of $239/week, or $34.14/day. In December 2012, Icicle flew Chacon from Sacramento to Lake Oswego, Oregon to have him examined by orthopedic Dr. Steven Groman. Dr. Groman said what it took to get Icicle off the hook for Alaska Comp.: Chacon was "medically stable with regards to the work injury." He opined that adhesive capsulitis in Chacon's shoulder and cubital tunnel syndrome in his elbow were "non-work-related", and that his shoulder problems were likely related to cervical degeneration from aging. Nothing was said about medical stability--"maximum cure" is the maritime law term--for the 'non-work-related' injuries that manifested while Chacon was in the service of the ship. "Cervical spine disease (according to Dr. Groman) is preexisting and unrelated to his work activity." On the strength of Dr. Groman's report Icicle cut off Chacon's benefits because his need for treatment was "not related" to the job, notwithstanding the fact that he was clearly entitled to maintenance and cure, even under Dr. Groman's questionable conclusions.

Chacon's treating doctor in Sacramento disagreed that adhesive capsulitis and cubital tunnel syndrome were not work related, and recommended surgery. When Icicle wouldn't pay for the surgery, he suggested that Chacon get a lawyer.

Chacon did get a lawyer, who demanded maritime remedies. Icicle then fell all over itself to authorize surgery, and started paying maintenance and cure--at a rate of maintenance lower than Chacon's time loss under Alaska Comp., but higher than the $20/day set forth in the contract of employment.

The case is *Chacon v. Icicle Seafoods*, King Co. No. 13-2-18455-9 SEA.

Chris Mock is an ex-Marine living in Tucson, Arizona who aggravated a prior knee injury while working as a processor on the fish factory barge *Bering Star*. Before he got a lawyer, Icicle paid him Alaska Comp. time loss at the rate of $15.71/ day, less than the $20/day rate of maintenance in the contract of employment. After he got a lawyer, who demanded maritime remedies, Icicle paid him roughly half of $20/day, the contractual maintenance rate. The other half went to Arizona Child Support. That deduction was the subject of motion practice, but outside the scope of this article. (See, *Trial News*, "The Status of Maintenance (for seamen) and Child Support . . . " (Oct. 2009).)

Unearned wages weren't paid until after the undersigned filed a motion to compel payment. Icicle finally revealed that Mock was entitled to $6,500 in gross unearned wages, enough to completely satisfy the lien for past-due child support. This came <u>after</u> a fight with an Arizona Ass't Attorney General and on the King County Superior Court motion calendar over who got $9 out of Mock's $20/day maintenance payment. In other words, Icicle watched while Mock argued with Arizona Child Support that he needed more than $11/day to live on, knowing that he had enough coming in unearned wages to pay off the support lien. When unearned wages were finally paid, $1,000 was withheld as a

"19.5% tax multiplier" but not sent to the IRS. See, supra.

The case is *Mock v. Icicle Seafoods*, King Co. No. 12-2-12434-5 SEA.

Tara Halvorson is a Seattle native in her mid-20s who was pulled off two Icicle vessels three different times in 2011 and 2012 for recurrent left hand and arm pain, swelling and numbness. Her exact diagnosis is still uncertain but involves acute cold sensitivity. Icicle paid her Alaska Comp. time loss of $132.58/week, or $18.94/day, as opposed to a $20/day rate of maintenance in her contract of employment. After she got a lawyer, maintenance was paid at $25/day. For her three uncompleted contracts, Ms. Halvorson was paid about $20,000 in unearned wages. $4,327.90 was deducted as the "19.5% wage multiplier" and not paid to the IRS. See, supra.

The case is *Halvorson v. Icicle Seafoods*, King Co. No. 13-2-03820-0 SEA.

Why should processors have to get a lawyer to get the no-fault benefits of maintenance and cure and unearned wages? Lawyers expect to be paid, even when they accept maintenance and cure cases. The undersigned takes a contingent fee of 1/4 or 1/3 from unearned wages and lump sum payments of retroactive--but not contemporaneous--maintenance. That means the seaman gets less than full no-fault compensation because part of it goes to a lawyer. In the situations described above, the seamen needed a lawyer to help them choose a better system of compensation. Icicle should be required to reimburse the seaman for the contingent fee paid, because attorney fees in this situation are an item of compensatory, not punitive, damages. *See, Clausen v. Icicle Seafoods, infra* ($400,000-plus awarded in attorney fees).

In *Clausen v. Icicle Seafoods*, 174 Wn.2d 70, *cert. denied*, ___ U.S. ___ (2012), the state Supreme Court upheld a $1.3 million jury award for punitive damages, following a finding that Icicle withheld evidence showing that a seaman was entitled to maintenance and cure. As the above cases demonstrate, this fishing company is still cheating seamen out of maintenance and cure benefits, this time by hiding behind the cloak of Alaska Workers' Compensation. Icicle didn't learn a thing from the *Clausen* case and needs another lesson about how to treat seamen, including processors in the territorial waters of Alaska, who qualify for Alaska Comp. as well as maritime remedies.

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