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United States District Court, E.D. Arkansas, Eastern Division.

Michael K. RAY, Sr. Plaintiff  
JANTRAN, INC. Defendant

No. 2:00-CV-00217GH.

Dec. 7, 2001.

Charles D. Harrison, McMath, Vehik, Drummond, Harrison & Ledbetter, P.A., Little Rock, Dennis Michael O'Bryan, Christopher D. Kuebler, Neil A. Davis, O'Bryan Baun Cohen, Birmingham, MI, for Michael K Ray, Sr, plaintiffs.

Thomas B. Janoush, Westerfield & Janoush, Cleveland, MS, for Jantran Inc, M/V Nebraska City, jointly and severally, M/V Miss Dixie, jointly and severally, defendants.

ORDER

HOWARD, District J.

\*1 Plaintiff brings this action under the Jones Act, 42 U.S.C. § 688, for negligence and under the General Admiralty and Maritime Law for unseaworthiness, maintenance, cure, wages and punitive damages.

Plaintiff was a pilot/captain aboard a vessel owned by defendant. In 1997, while captain on defendant's vessel, the M/V Nebraska City, he sustained an injury to his back while assisting the deck crew on the tow. He received very little treatment and returned to work shortly thereafter without restriction and without incident. Plaintiff continued working without any further back problems until June 11, 1999. At that time, he was employed by defendant as a captain on the M/V Nebraska City, at which time he reported an injury to his back while assisting the crew in tightening up the tow. He was diagnosed as having sustained a herniated disc at L4-5. Plaintiff was treated, missed work and defendant paid him maintenance and cure benefits.

Plaintiff returned to work. On June 22, 2000, he was employed by defendant as a captain on the M/V Miss Dixie. On that day, he asked to be relieved from his duties on the M/V Miss Dixie because of back pain. Plaintiff was ultimately seen by Dr. Wayne Bruffet on July 26, 2000. According to the history portion of the exam, DR. Bruffet notes that pain started after plaintiff bent over to pick up a heavy pipe at work. On September 28, 2000, plaintiff underwent surgical decompression and complete discectomy at L4-5, posterior spinal fusion and posterior interbody fusion at L4-5.

Defendant has not paid plaintiff maintenance and cure benefits since leaving M/V Miss Dixie on June 22, 2000.

Plaintiff has filed a motion for retroactive and future payment of maintenance and cure, attorney's fees and an expedited hearing. Seamen who become ill or injured in the service of a vessel are entitled to maintenance and cure. *Deisler*

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v. *McCormack Aggregates Co.*, 54 F.3d 1074, 1079 (3rd Cir.1995). Maintenance refers to the shipowner's obligation to provide a seaman with food and lodging, while cure is the duty to provide the seaman necessary medical care. See *Blainey v. American Steamship Co.*, 990 F.2d 885, 887 (6th Cir.1993).

It is well-settled that maintenance and cure is payable even though the shipowner is not at fault, and regardless of whether the seaman's employment caused the injury or illness. See *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527, (1938) (the duty, which arises from the contract of employment, does not rest upon negligence or culpability on the part of the owner or master and is not restricted to those cases where the seaman's employment is the cause of the injury or illness).

"To recover for maintenance and cure, a plaintiff need show only that (1) he was working as a seaman, (2) he became ill or injured while in the vessel's service, and (3) he lost wages or incurred expenditures relating to the treatment of the illness or injury." *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616 (6th Cir.2000). The "right to recover for maintenance and cure is broad and the burden of proof is ... relatively light since recovery is not dependent on the negligence or fault of the vessel or its owner." *Freeman v. Thunder Bay Transp. Co.*, 735 F.Supp. 680, 681 (M.D.La.1990). Any ambiguities concerning a seaman's entitlement to maintenance and cure must be resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962). Maintenance and cure benefits must be paid until a seaman's maximum possible recovery. See *Associated Elec Co-Op. v. Mid-America Transp. Co.*, 931 F.2d 1266, 1268 n. 2 (8th Cir.1991).

\*2 Here, plaintiff has not worked for defendant since June 22, 2000. He requests maintenance for food, board and utilities. "A seaman makes out a prima facie case on the maintenance rate question when he proves the actual living expenditures which he found it necessary to incur during his convalescence. Once he has done so, the burden shifts to the defendant to produce some evidence in rebuttal." *Clifford v. Mt Vernon Barge Serv., Inc.*, 127 F.Supp.2d 1055, 1057 (S.D.Ind.1999) (citation and internal quotations omitted). See *Miller v. Canal Barge Co., Inc.*, 2000 WL 33389203 (E.D.La.2000) (plaintiff's affidavit and receipts of actual living expenses sufficient to establish prima facie showing as to appropriate maintenance).

Plaintiff is married and has two children, ages 10 and 13. According to his affidavit, he has monthly food expenses of \$573.52, which falls within a moderate cost plan for a family of four under the USDA policy. This equates to \$19.12 per day.

With respect to board, plaintiff claims a monthly mortgage of \$285.00, and homeowner's insurance of \$44.76 per month, which equates to \$10.91 per day for board. With respect to utility expenses, plaintiff's monthly cost of his utilities equals \$352.72, which equates to \$11.76 per day. In sum, plaintiff seeks maintenance payments in the amount of \$41.96 per day retroactive to June 22, 2000. In response, defendant merely alleges that plaintiff's claim is premature and that the issues should be resolved at the trial currently set for May 20, 2002. However, a reading of the cases cited by plaintiff reveals that defendant's argument is without merit and that plaintiff has established his entitlement to maintenance and cure. Furthermore, defendant has not presented any evidence, medical or otherwise, to refute the information submitted by plaintiff. Thus, the

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Court finds that plaintiff is entitled to maintenance payments in the amount of \$41.96 per day retroactive to June 22, 2000, until he reaches his maximum possible recovery. Furthermore, defendant is directed to pay plaintiff's medical expenses until he meets his maximum medical recovery.

Plaintiff also seeks attorney's fees. "Attorney's fees can be awarded if the shipowner was callous and recalcitrant in its willful and persistent refusal to pay maintenance and cure which was plainly owed." *Stevens v. McGinnis, Inc.*, 82 F.3d 1353, 1360 (6th Cir.1996) (citation and internal quotations omitted). See also *Rodriguez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 316 (2d Cir.1990) ("When a ship operator fails to make a prompt, good faith investigation of a seaman's claim for maintenance and cure, or otherwise takes a 'callous' or 'recalcitrant' view of its obligations, the seaman may recover legal expenses on top of maintenance and cure.")

Plaintiff left the vessel on June 22, 2000, and has not worked since then. On October 20, 2000, his counsel sent a letter to defendant requesting maintenance and cure. Defendant performed no investigation after receiving notice from plaintiff of his request for maintenance and cure. The personnel director was aware that plaintiff left defendant's vessel complaining of back pain and was aware that plaintiff had back surgery after getting off defendant's vessel in June, 2000. Defendant's personnel director said that she did not investigate the claim because she did not have an accident report.

\*3 Here, defendant did not make any "prompt, good faith investigation" of plaintiff's claim for maintenance and cure, which would only have required it to investigate whether plaintiff was in the service of the ship at the time his injury occurred. See *Sullivan v. Tropical Tuna, Inc.*, 963 F.Supp. 42, 45 (D.Mass.1997) (defendant's one month delay in authorizing payment for plaintiff's surgery constituted willful failure to provide cure warranting award of attorney's fees).

Plaintiff filed his lawsuit in November of 2000. Over one year after plaintiff made his claim for maintenance and cure, defendant still has not fulfilled its obligation to pay plaintiff and authorize necessary medical treatment. Indeed, plaintiff was forced to withdraw his 401K benefits to pay off his outstanding mortgage. It is clear that defendant engaged in the type of "egregious" conduct for which an award of attorney's fees is warranted. Thus, the Court finds that plaintiff is entitled to reasonable attorney's fees and costs in connection with bringing his claim for maintenance and cure. Plaintiff's counsel should submit within twenty days appropriate documentation in support of his claim for a reasonable attorney's fee.

Accordingly, the motion for retroactive and future payment of maintenance and cure and attorney's fees is granted. Defendant shall pay to plaintiff within twenty days of the file-stamped date of this Order maintenance at the rate of \$41.97 per day retroactive to June 22, 2000 until defendant proves plaintiff has reached his maximum possible recovery. Defendant is also ordered to pay plaintiff's medical bills and a reasonable attorney's fee and costs in an amount to be determined. The motion for expedited hearing is denied as moot.

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