CHRISTOPHER EVERAGE	*	**NO. 2001-CA-1104**
VERSUS	*	**COURT OF APPEAL**
ABC INSURANCE COMPANY AND RENE CROSS CONSTRUCTION, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 43-934, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.)

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AFFIRMED

On November 3, 1997, the plaintiff, Christopher Everage, was injured while in the scope and course of his employment with the defendant, Rene Cross Construction, Inc. (Cross). Mr. Everage was employed by Cross as a "rigger" and since the date of his initial employment in July of 1996, he had been assigned to the J.R. 122, a spud barge used by Cross on various jobs over the water.

The J.R. 122 is 120 foot long craft equipped with a permanent crane, an office trailer, a tool shed, a welding machine, water and fuel tanks, and living quarters which included a kitchen and bunk beds for eight men. The J.R. 122's crew of five consisted of a supervisor, a crane operator, an oiler and two riggers. The craft is moved to work sites by a tug boat which remains attached to the spud barge during the work operation, so that the barge can be moved around stationary platforms to complete repairs or other construction projects. At times, the J.R. 122 is "spudded down" so that the

crane can be used to lift various construction materials.

On the day of Mr. Everage's accident, the J.R. 122 was on a job repairing a boat slip and dock on a Total Minatone platform located in Eloi Bay. On this particular job, in addition to the tug boat and the J.R. 122, there was also a materials barge attached to the side of the J.R. 122 and a pontoon barge which was used to work between the larger barges and the platform. During the course of the repair work, the crew loaded boards from the materials barge onto the pontoon barge and guided the much smaller pontoon barge into position so that the boards could be retrieved and put into position with the crane on the spud barge. At one point, a twelve to fifteen foot long, ten inch by ten inch timber, which was to serve as the "sill" on the top of the boat dock, became entangled with the grating and pipes attached to the boat dock.

After the timber became stuck, the crane operator slackened the crane's cable and the rest of the crew began hitting the sill with a hammer attempting to dislodge it. Mr. Everage was then instructed to get up onto the dock and jump up and down on the sill to attempt to dislodge it. Mr. Everage jumped up and down on the sill twice. The second time it came

loose and Mr. Everage fell feet first about five or six feet down into the water, striking his knee on the way down.

On November 2, 1998, Mr. Everage brought this maritime personal injury action against Cross under the Jones Act, the general maritime law, and the "savings to suitors" provision of federal law. The matter designated as being under the maritime law was tried without a jury and before the court on September 20 and September 29, 1999. On August 11, 2000, the trial court awarded Mr. Everage $150,000.00 in general damages, $150,000.00 for lost past and future earnings and earning capacity, and $57,431.09 for past and future medical expenses. However, these amounts were reduced by thirty percent (30%), the percentage of fault that the trial court attributed to Mr. Everage. Both the defendant and the plaintiff appealed from the trial court's judgment. Mr. Everage has since withdrawn his appeal.

On appeal, the defendant raises the following issues: 1) whether the trial court erred in finding that Mr. Everage was a Jones Act seaman who was assigned to and injured aboard a Jones Act vessel; 2) whether the trial court erred in apportioning liability; 3) whether the trial court abused its discretion in determining that Mr. Everage was entitled to future lost

earnings; and 4) whether the trial court abused its discretion in awarding future special and general damages for medical treatments.

STANDARD OF REVIEW

As a general proposition, maritime law in the United States is federal law. But because the Louisiana Supreme Court has declared that appellate standards of review are procedural in nature, Louisiana courts of appeal should apply the state manifest error standard of review in general maritime and Jones Act cases. Milstead v. Diamond M Offshore, Inc., 95-2446 (La. 7/2/96), 676 So.2d 89, 93. Before a factfinder's determinations may be reversed, (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding below and (2) the appellate court must further determine that the record establishes the finding is clearly wrong or manifestly erroneous. Zanca v. Life Ins. Co. of North America, 99-2253 (La.App 4 Cir. 6/28/00), 770 So.2d 1, 3, writ denied, 2000-2859 (La. 12/8/00), 776 So.2d 467.

JONES ACT STATUS

To recover as a seaman under the Jones Act, a plaintiff must demonstrate an "employment related connection to a vessel in navigation."

Chandris, Inc. v. Latsis, 515 U.S. 347, 368-72, 115 S.Ct. 2172, 2189-91, 132 L.Ed.2d 314 (1995). The "employment related connection" has two basic elements. First, the employee's duties must contribute to the function of the vessel or accomplishment of its mission. Second, the connection to the vessel in navigation must be substantial in terms of its duration and nature. Id. at 515 U.S. 368-9. Accordingly, we must answer whether the J.R. 122 was a "vessel in navigation" and, if so, whether Mr. Everage had the requisite "employment related connection" to the J.R. 122.

The evaluation of whether a structure is a vessel for purposes of the Jones Act begins by examining the purposes for which the craft was constructed and the business in which it is engaged. Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998). In looking at cases involving unconventional crafts such as spud barges, drilling barges and floating dredges, the courts have overlooked the outward appearance of the structure, and instead ask whether the primary purpose of the craft is to transport passengers, cargo or equipment from place to place across navigable waters. Id. at 348; Gumpert v. Pittman Const. Co., Inc., 98-2269, 99-0709 (La.App. 4 Cir. 6/9/99), 736 So.2d 1026. In addition, courts have

looked to several objective factors in determining whether a structure is a vessel: 1) navigational aids; 2) raked bow; 3) lifeboats and other lifesaving equipment; 4) bilge pumps; 5) crew quarters; and 6) registration as a vessel with the Coast Guard. Bernard v. Binnings Const. Co., Inc., 741 F.2d 824, 832, (5th Cir. 1984), Fn 25, *citing* Smith v. Massman Constr., 607 F.2d 87, 88 (5th Cir. 1979); Blanchard v. Engine & Gas Compressor Services, Inc., 575 F.2d 1140, 1143 (5th Cir. 1978). Other factors that have been suggested are: 7) the intention of the owner to move the structure regularly; 8) ability of the structure, if submerged, to be refloated; and 9) the length of the time the structure has remained stationary. Hemba v. Freeport McMoran Energy Partners, Ltd., 811 F.2d 276, 278 (5th Cir. 1987). *See* Gumpert at 1030.

In the instant case, the J.R. 122 had a dual purpose of transporting the crew and equipment and acting as a work platform for the crew. The fact that the structure was in part used as a work platform does not preclude a finding that the structure was also a vessel for purposes of the Jones Act. The J.R. 122 was engaged in the business of repairing and building work platforms in the navigable waters off the coast of Louisiana. The J.R. 122 was continually attached to a tug and a materials barge, because mobility

was essential to the work it was designed to do. On this particular job, the J.R. 122 was moved at least twenty times during the repair work to the Total Minatone platform. The J.R. 122 also contained living quarters for the crew, a kitchen with a stove and a refrigerator, a shower and other amenities. It is clear that the J.R. 122 has crew quarters and that it moves regularly. Considering that the J.R. 122 moved at least twenty times on the Total Minatone job, it is also apparent that the structure does not remain stationary for long periods of time. Furthermore, as stated above, the J.R. 122 was used to transport the crew and equipment to various work sites. These are all positive factors for determining whether the J.R. 122 is a vessel for purposes of the Jones Act. The crew of the J.R. 122 was also exposed to the perils of the sea normally associated with traditional seaman. Accordingly, we agree with the trial court and find that the J.R. 122 is a vessel for purposes of the Jones Act.

Seaman status is conferred upon those employees whose "duties contribute to the function of the vessel or accomplishment of its mission" and whose connection to a vessel in navigation is substantial in time and nature. Chandris, Inc. v. Latsis, *supra*; McDermott Intern., Inc. v. Wilander,

498 U.S. 337, 355, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). The question of who is a "seaman" is a mixed question of law and fact. Chandris, 515 U.S. at 369, 115 S.Ct. at 2190. The interpretation is a statutory inquiry, and thus legal; however, it is the factfinder's determination whether an injured employee is a seaman under the particular circumstances. Id.

In the instant case, Mr. Everage was assigned to the J.R. 122 since July of 1996. While Mr. Everage sometimes worked in Cross' yard, he spent at least 90% of his time working on "wet" jobs with the J.R. 122. The J.R. 122 was used by Cross for construction projects and repair work on stationary platforms located offshore. Mr. Everage slept, ate, cooked and operated tools on the barge, and part of his duties included maintaining the barge itself. The crew worked twelve hour shifts and would typically spend several days living aboard the J.R. 122, before going on shore for one night at their homes. Clearly, Mr. Everage's connection to the J.R. 122 was substantial in both its duration and nature. Mr. Everage also contributed to the accomplishment of the vessel's mission. Accordingly, we agree with the trial court's finding that Mr. Everage was a seaman.

APPORTIONMENT OF FAULT

The defendant contends that the trial court erred in finding it 70% at fault for the plaintiff's injury and finding that the plaintiff was only 30% at fault. In a Jones Act case, the court should determine the negligence of the employer according to the standard of a reasonable employer under like circumstances, and should determine the contributory negligence of the seaman according to the standard of a reasonable seaman under like circumstances. Vendetto v. Sonat Offshore Drilling Co., 97-3103 (La. 1/20/99), 725 So.2d 474. The duty on the employer to make the work place safe may, in a sense, impose a greater duty on the employer than the duty on the seaman to use reasonable care for his own safety. Id. These findings are treated as questions of fact and should not be disturbed on appeal unless they are clearly erroneous. Creppel v. American Tugs, Inc., 95-696 (La.App. 5 Cir. 1/17/96), 668 So.2d 374. Based on the testimony in the instant case, the trial court chose to believe the plaintiff's version of events and discount that offered by the defendant. Our review of the record reveals nothing clearly wrong nor manifestly erroneous with the trial court's findings regarding liability.

FUTURE LOST EARNINGS

The defendant contends that the trial court abused its discretion in awarding Mr. Everage $100,000 for loss of future earnings. The plaintiff has the burden of proving that his injuries resulted from the accident, and that he has sustained an incapacity to do work of a reasonable character for which he was fit by his training and education. Whigham v. Boyd, 97-0693 (La.App. 4 Cir. 10/1/97), 700 So.2d 1163. The factors to be considered in calculating the award for loss of future wages are: (1) the plaintiff's physical condition before and after the accident; (2) the plaintiff's past work record and consistency; (3) the amount the plaintiff probably would have earned but for the injury; and (4) the probability that he would have continued to earn such wages over his work life. Id. In the instant case, the trial court was presented with medical testimony that Mr. Everage was at least temporarily disabled, until such time as he had back and knee surgery. The trial court was also presented with testimony and income tax returns which indicated that Mr. Everage had been consistently working for several years prior to the accident and that his salary was steadily increasing. Accordingly, there is no indication that the trial court abused its discretion in awarding Mr. Everage $100,000 for future lost earnings.

FUTURE GENERAL AND SPECIAL DAMAGES

The defendant contends that the trial court erred in awarding general and special damages for the future surgeries which Mr. Everage will have to undergo. At trial, the court was presented with two separate and conflicting expert opinions from two medical doctors. The defendant's expert believed that no future surgeries would be necessary, while the plaintiff's expert believed that Mr. Everage would have to undergo an arthroscopic evaluation of his knee and an anterior lumbar fusion and discectomy.

Credibility determinations, including the evaluation of expert testimony, together with the ultimate issue of whether a plaintiff has satisfied his burden of proof are factual issues to be resolved by the trier of fact and will not be disturbed on appeal in the absence of manifest error. Simmons v. West, 29,633 (La.App. 2 Cir. 6/18/97), 697 So.2d 688. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So.2d 840 (La. 1989). In the instant case the trial court

evaluated the evidence before it and reached its conclusions. There is nothing in the record to indicate that the trial court's finding was manifestly erroneous or clearly wrong.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED