

United States District Court
for the
Southern District of Florida

Saul Alberto Acosta Varela, Plaintiff,)
)
v.) Civil Action No. 17-23127-Civ-Scola
) **In Admiralty**
Dantor Cargo Shipping, Inc., and)
others, Defendants.)

Verdict and Order Following Non-jury Trial

The Plaintiff, Saul Alberto Acosta Varela (Acosta), was a crewman aboard the Defendant vessel, M/V GLORY SKY I, which is owned by Defendant Fofu Transport, Inc. and was operated by Defendant Dantor Cargo Shipping, Inc. While in service on the vessel, Acosta injured his left foot and, as a result of not receiving adequate medical attention on board the vessel, developed a severe ulcer on his foot which became necrotic and led to a permanent disability. Acosta brought this action, pursuant to the Court's admiralty jurisdiction, alleging counts for Jones Act negligence (Count 1), unseaworthiness (Count 2), failure to provide maintenance and cure (Count 3), failure to treat (Count 4), general negligence (Count 5), and an *in rem* action against the vessel (Count 6). The Plaintiff seeks compensatory and punitive damages.

Each of the Defendants failed to respond to the complaint and a Clerk's default was entered against each on September 26, 2017 (ECF No. 11). On November 3, 2017, a final default judgment (ECF No. 20) was entered as to liability but, since some of the damages the Plaintiff is seeking are non-liquidated, and the Plaintiff had demanded a jury trial, the Court set this matter for a jury trial on damages only for November 13, 2017, with a calendar call set for November 8, 2017.

Prior to the calendar call, the Plaintiff filed a Motion to Strike Demand for Jury Trial (ECF No. 21) in which he alleged that he was only invoking the Court's admiralty jurisdiction and was not entitled to, and was not seeking, a jury trial. Based upon this motion, the entered an order (ECF No. 22) striking the demand for jury trial and setting this matter for a non-jury trial. But, since the Plaintiff's Count 5 for general negligence would not fall within the Court's admiralty jurisdiction, the Court finds that the Plaintiff has abandoned that count and the Court, therefore, dismisses Count 5 of the Complaint without prejudice.

At the calendar call, no appearance was made by the Defendants and the Court inquired of the Plaintiff's counsel if he had been in communication with any of the Defendants. The Plaintiff's counsel indicated that he had spoken to an attorney for the Defendants, who indicated that the Defendants were aware of the lawsuit, but did not intend to defend against it since the Defendants had no assets.

A defendant, by his default, admits the plaintiff's well-pleaded allegations of fact as set forth in the operative complaint. *See Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009). Therefore, by their default, Defendants admit the allegations in the complaint. The Court entered judgment in the Plaintiff's favor as to liability on November 3, 2017, (ECF No. 20), entitling the Plaintiff to recover compensatory and punitive damages from the Defendants.

The sole issue before the Court during this non-jury trial is the quantum of damages.

The Plaintiff presented the testimony of both Acosta and a treating physician, Dr. Marcel Garci, by deposition transcript. The Plaintiff also introduced photographs, medical records and employment records during the trial. The Court has read the deposition testimony and reviewed the photographs and other documentary evidence.

Facts

Acosta was aboard the M/V GLORY SKY I (the "Vessel") for four months. (Pl.'s Dep. 8:19-21.) Prior to signing on the Vessel, he had to undergo a pre-employment physical on October 13, 2014. (Pl.'s Dep. 9:8-10:1.) Acosta did not have diabetes at this time. (Pl.'s Dep. Ex. 1; Pl.'s Dep. 20:11-23.)

While in the service of the Vessel, Acosta injured his left foot. (Pl.'s Dep. 12:22-13:2 Pl.'s Dep. 14:4-8.) Acosta did not receive any type of adequate medical attention on board the Vessel. (Pl.'s Dep. 33:25-34:2.) As a result, Acosta developed a severe ulcer on his foot, which became necrotic, and ultimately required hospitalization. (Dr. Garci's Dep. 5:11-17, 8:19-9:9.) Acosta was ultimately denied his wages aboard the vessel and given a plane ticket to return home to Honduras, completely abandoned by the Defendants. (Pl.'s Dep. 14:9-16:9.) Having been abandoned by the Defendants, he became completely reliant on his sister in Honduras. (Pl.'s Dep. 22:20-23:2.)

As a result of this injury, which first manifested itself while in the service of the Defendants vessel, Acosta was diagnosed with having diabetes mellitus 2 and an out of control clinical presentation of the disease. (Dr. Garci's Dep. 5:18-21.) Because of the severe nature of the ulcer to his foot, Acosta was taken by his family to a hospital where it was recommended that he undergo

an amputation of his left lower extremity. (Pl.'s Dep. 20:11-23; Dr. Garci's Dep. 6:12-15.) Acosta's family then brought him to Dr. Garci to transfer Acosta to a private facility to best treat his condition. (Dr. Garci's Dep. 6:16-24.) Dr. Garci had Acosta transferred to Hospital Caribe in Puerto Cortes, Honduras, where he was seen by a vascular surgeon and treated with IV antibiotic for 21 days. (Dr. Garci's Dep. 6:25-7:5.) Although the ulcer partially healed, his foot became completely deformed and, as a result, Acosta is totally disabled and is unable to work. (Dr. Garci's Dep. 8:4-9:13.)

The progression of Acosta's injury, treatment, resulting deformity and disability is visually documented in photographs, Plaintiff's Composite Exhibit 1. (Pl.'s Dep., Ex. 6.)

Applicable Law

The Court has jurisdiction over this matter pursuant to its admiralty and general maritime jurisdiction, 28 U.S.C. § 1333, and the Jones Act, 46 U.S.C. § 30104. Therefore substantive maritime law principles apply.

The general maritime law has long recognized the concept of joint liability. *See The Sterling*, 106 U.S. 647, 1 S.Ct. 89, 90, 27 L.Ed. 98 (1882) (describing the joint liability rule in admiralty as "well-established").

Maintenance and cure is an ancient legal duty that obligates a vessel owner to provide for a seaman who becomes ill or injured in the service of the ship. *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962). "Admiralty courts have been liberal in interpreting this duty for the benefit and protection of seamen who are its wards." *Id.* at 531-532. "Maintenance" includes a living allowance for food and lodging while "cure" refers to medical treatment. *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 413 (2009).

"A seaman's burden of production in establishing the value of maintenance is feather light: his own testimony as to reasonable cost of room and board in the community where he is living is sufficient to support an award." *Yelverton v. Mobile Labs., Inc.*, 782 F.2d 555, 558 (5th Cir. 1986).

Punitive damages have long been an accepted remedy under general maritime law and are available to seamen like Acosta "for the willful and wanton disregard of the maintenance and cure obligation." *Atl. Sounding Co.*, 557 U.S. at 424. Reasonable attorney fees may also be awarded when a shipowner acts "in bad faith, callously, or unreasonably" in the withholding of maintenance and cure benefits. *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995). The Defendants have admitted, through default, that their failure to provide the Plaintiff with maintenance and cure was, and continues to be willful, arbitrary, capricious, and in callous disregard for the Plaintiff's rights as a seaman. (See Complaint; ECF No. 1, ¶ 44.)

Damages

Counts 1, 2 & 4: Jones Act Negligence; Unseaworthiness; Failure to Treat

Damages for Jones Act negligence and unseaworthiness and failure to treat include:

Lost Wages in the Past

Before Acosta became ill while in the service of the Defendants vessel, his wages were \$3,500 per month in the capacity of chief engineer. (Pl.'s Dep. 10:19-11:2.) However, the Defendants still owe him \$10,500 of unpaid wages for the time Acosta was on board the Vessel. (Pl.'s Dep. 16:18-17:9.)

During each 12 month period, Acosta typically worked aboard ships an average of 8 to 9 months and took 3 to 4 months off for vacation. (Pl.'s Dep. 20:25-21:13.) Thus, his annual wages were \$3,500 per month x 8.5 months = \$29,750 per year.

The Defendants bought Acosta a plane ticket to return home to Honduras on November 7, 2015. (Pl.'s Dep. 14:24-15:3.) The spreading infection on his foot and the risk of amputation have required him to keep his weight off of his foot. As a result, he was bedridden and is still unable to look for work. Plaintiff's lost wages, to the date of trial are conservatively: \$3,500 per month x 8.5 months per year x 2 years = \$59,500; plus the \$10,500 in unpaid wages = **\$70,000.00** in total lost wages in the past.

Lost Future Earning Capacity

Acosta's left foot is completely deformed and atrophied. See photographs, Plaintiff's Composite Exhibit 1. He has been physically and medically unable to look for work, and he is still under the care of a doctor. (Pl.'s Dep. 28:11-17.) He will never work as a chief engineer on ships again. (Pl.'s Dep. 34:17-22.) Even though he would love to return to work, it is impossible. (Pl.'s Dep. 41:5-8.) The partial loss of his heel poses special problems due to the loss of the weight-bearing surface. This leads to an abnormal gait and further changes in plantar pressures. (Pl.'s Dep. 35:21-24; Pl.'s Dep. 36:2-7.)

Acosta is currently 56 years old and had planned to continue working as a chief engineer until age 64 — 8 years from now. (Pl.'s Dep. 40:11-21.) The typical retirement age for chief engineers in the maritime industry is between 64 and 68 years old. (Pl.'s Dep. 40:16-21.) Therefore, his economic damages for lost future earning capacity are conservatively: \$3,500 per month x 8.5 months per year x 8 years = **\$238,000.00** for lost future earning capacity.

Past Medical Expenses

Acosta has spent between \$15,000 and \$17,000 in medical treatment from Dr. Garci alone. (Dr. Garci's Dep. 10:9-22.) That figure does not include transportation to and from medical appointments, and treatment with other medical providers. (Dr. Garci's Dep. 10:24-11:6.) The Court finds that Plaintiff has incurred **\$15,000.00** in past medical expenses.

Future Medical Expenses

Acosta will require lifetime medical attention and care to avoid recurring infections and amputation of his deformed foot. (Dr. Garci's Dep. 12:4-21.) His future life expectancy is about 20 years. (Dr. Garci's Dep. 12:22-13:18.) The cost of specialized treatment for his foot is approximately \$6,000 to \$8,000 per year, not including the cost of necessary medical equipment. (Dr. Garci's Dep. 16:9-20.) And, the cost of treatment for his underlying diabetes (which was first manifested while in the service of the vessel) is \$3,000 to \$4,000 per year. (Dr. Garci's Dep. 16:1-4.) Therefore, his economic damages for reasonably expected future medical care is conservatively: \$12,000 per year x 20 years = **\$240,000.00** for future medical expenses.

Disfigurement and Pain and Suffering

The ordeal that Acosta has endured started with the inhumane denial of his most basic medical needs, and escalated to watching the skin and bone on the heel of his left foot physically rot away before his very eyes. (See Photographs, Plaintiff's Composite Exhibit 1.) When he finally was able to obtain medical treatment, slimy chunks of infectious tissue were removed from his foot. (Pl.'s Dep. 37:21-38:12.) Acosta lived in pain, shock, constant horror and "prayed a lot" that his left foot would not be amputated. (Pl.'s Dep. 38:13-20.) In addition to the obvious pain, he had fever and sweats from the infection. (Pl.'s Dep. 39:8-22.) He was unable to walk for nine months. (Pl.'s Dep. 39:2-7.) Now, his foot is severely deformed. (See Photographs, Plaintiff's Composite Exhibit 1 and Dr. Garci's Dep. 9:5-9.) He is only able to walk with a cane. (Pl.'s Dep. 39:2-7.) He is not able to get any kind of job given his education and training and his physical condition even once he reaches a 100 percent recovery. (Dr. Garci's Dep. 15:15-20.) He wants to work and misses it dearly. (Pl.'s Dep. 41:5-8.) He now must rely on his sister to support both himself and his daughter. (Pl.'s Dep. 41:21-23.)

There is no exact method to determine the value of physical and emotional pain and suffering. Guidance may be derived from the verdicts of other juries in similar cases. To that end, the Court has considered the jury verdict in the case of *Parsons v. Norfolk S. Ry. Co.*, No. 1-16-1384, 2017 WL

3707183, at *12 (Ill. App. Ct. Aug. 25, 2017). In *Parsons*, a railroad worker who sued his employer under the Federal Employer's Liability Act ("FELA")¹ suffered a severe injury to the heel of his foot. Parson's heel bone was shattered and much of the flesh on the bottom of his foot was torn off. To avoid amputation, flesh from plaintiff's thigh was harvested and attached to his foot. The plaintiff underwent 12 surgeries over the next few years to reconstruct the heel. The plaintiff's recovery had several setbacks, including infections. The plaintiff and other witnesses described a recurring cycle in which the wound would reopen, followed by long periods in which he could not put weight on his left foot until the wound closed. The jury in the *Parsons* case awarded the plaintiff \$19,000,000.00 for pain and suffering and disability. Acosta seeks and award of \$10,000,000.00.

The Court believes that an appropriate award for pain and suffering and disfigurement is **\$250,000.00** for the past and **\$2,000,000.00** for the future.

Count 3 – Refusal To Provide Maintenance And Cure

At home in Honduras, Acosta has depended on the charity and good will of his sister to support him while he is injured, ill and unable to work. (Pl.'s Dep. 22:20-23:2.) But, he needs to pay her back. (Pl.'s Dep. 23:3-8.) Acosta's actual reasonable expenses of obtaining room and board are \$40 per day, including rent, utilities, and groceries. (Pl.'s Dep. 21:14-22:13.) He has not yet reached maximum medical improvement. (Dr. Garci's Dep. 15:15-20.) He should have been provided this maintenance from November 8, 2015, the date he was abandoned by Defendants in Honduras, through at least the present date. Therefore, past due maintenance may be calculated as \$40 per day x 736 days (through November 13, 2017) = **\$29,440.00** for past due maintenance.

Punitive damages for disregarding maintenance and cure

Under the general maritime law, punitive damages are available for the "willful and wanton disregard of the maintenance and cure obligation." *Atl. Sounding*, 557 U.S. at 424. Reasonable attorney fees may also be awarded when a shipowner acts "in bad faith, callously, or unreasonably" in the withholding of maintenance and cure benefits. *Flores*, 47 F.3d at 1127. The Defendants have admitted, through default, that their failure to provide the

¹ The Jones Act, 46 U.S.C.A. § 688, *et seq*, affords maritime employees' rights parallel to those of railroad employees under the Federal Employers Liability Act ("FELA"), 45 U.S.C.A. § 51, *et seq*. Thus, by its incorporation of the FELA statutory language, opinions related to FELA cases are directly applicable to Jones Act cases.

Plaintiff with maintenance and cure was, and continues to be willful, arbitrary, capricious, and in callous disregard for Plaintiff's rights as a seaman. (See Complaint; ECF No. 1, ¶44.) Acosta suggests that an amount equal to the total compensatory damages would be an appropriate punitive damage award. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) ("a punitive-to-compensatory ratio of 1:1"). However, under the circumstances of this case, the Court believes that an award of punitive damages in the amount of **\$500,000.00** is appropriate.

Conclusion

Count V of the Complaint has been abandoned by the Plaintiff and is dismissed without prejudice.

The Plaintiff is entitled to recover the following damages for Counts 1, 2, and 4:

Past medical expenses:	\$ 15,000.00
Future medical expenses:	\$ 240,000.00
Past lost wages:	\$ 70,000.00
Future loss of earning capacity:	\$ 238,000.00
Pain and suffering in the past:	\$ 250,000.00
Pain and suffering in the future:	\$2,000,000.00
Total damages for Counts 1, 2, and 4:	\$2,813,000.00

The Plaintiff is entitled to recover the following damages for Count 3:

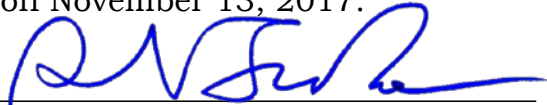
Failure to provide maintenance:	\$ 29,440.00
Punitive damages:	\$500,000.00
Total damages for Count 3:	\$529,440.00

Total monetary damages: \$3,342,440.00

The Plaintiff is entitled to recover his reasonable attorneys' fees and costs and shall submit a motion and accompanying affidavit setting forth the reasonable attorneys' fees and costs along with the proposed final judgment.

Within 5 days, the Plaintiff shall submit a proposed Final Judgment which incorporates the findings in this verdict as well as language relating to the *in rem* count against the vessel.

Done and ordered in Miami, Florida on November 13, 2017.

A handwritten signature in blue ink, appearing to read 'RNS', written over a horizontal line.

Robert N. Scola, Jr.
United States District Judge