United States District Court,
W.D. Kentucky.

Chad THORNSBERRY, Plaintiff,
v.
NUGENT SAND COMPANY, Defendant.

No. Civ.A. 03-28-C.

July 25, 2003.

Dennis M. O'Bryan, Kirk E. Karamanian, O'Bryan Baun Cohen Kuebler, Birmingham, MI, for Plaintiff.

John R. Halpern, Goldstein & Price, St. Louis, MO, Stephanie R. Miller, W. Scott Miller, Jr., Miller & Miller, Louisville, KY, for Defendant.

ORDER

COFFMAN, J.

*1 This matter is before the court upon the plaintiff's motion for a preliminary injunction (Docket No. 5) pursuant to Federal Rule of Civil Procedure 65(a).

When a party makes a motion for a preliminary injunction, the court must analyze four factors: whether the plaintiff has a strong likelihood of success on the merits, whether the preliminary injunction will save the plaintiff from irreparable harm, whether the preliminary injunction would substantially harm others, and whether the preliminary injunction would serve the public interest. *National Hockey League Players' Association v. Plymouth Whalers Hockey Club,* 325 F.3d 712, 717 (6th Cir.2003); *Performance Unlimited v. Questar Publishers, Inc.,* 52 F.3d 1373, 1381 (6th Cir.1995). The four factors are not prerequisites to be met, but rather, the court must balance them when determining whether to grant or deny the injunctive relief. *Id.*

The present case arose because the plaintiff, one of the defendant's employees, fell from a ladder while on one of the defendant's ships. As a result, the plaintiff has filed a complaint under the Jones Act, 46 U.S.C. § 688, as well as general principles of admiralty and maritime law, and is attempting to secure awards of maintenance, medical expenses and other damages from his employer. The plaintiff alleges that he is currently receiving too little maintenance and as a result is being deprived of basic sustenance. He claims that a diminution in payments resulted after the institution of this lawsuit and that this injunction would preserve the status quo.

To begin the balancing analysis, the plaintiff has a strong likelihood of

success. To recover maintenance, a seaman needs to show only that he was working as a seaman, was injured while in the vessel's service, and incurred expenditures relating to the injury. *Felice v. Ingram Barge Co.*, 2001 A.M.C. 782, No. 5:00CV163, 2000 U.S. Dist. LEXIS 21507, at *4, 2000 WL 33389210, at *1 (W.D.Ky.2000)(citing *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616 (6th Cir.2000)). Ambiguities are resolved in the seaman's favor. *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). "The right to maintenance and cure must be construed liberally...." *Clifford v. Mt. Vernon Barge Service*, 127 F.Supp.2d 1055, 1058 (S.D.Ind.1999). A shipowner's liability for maintenance and cure is among the most pervasive of all and is not to be defeated by restrictive distinctions or to be narrowly defined. *Vaughan*, 369 U.S. at 532. Rather, maintenance should be inclusive and simple, with few exceptions. *Boyden v. American Seafood Co.*, 2000 AMC 1512, 1513 (W.D.Wash.2000). Based on the plaintiff's allegations and the case law, there is indeed a strong possibility that the plaintiff will prevail on the merits of his maintenance claim.

Additionally, the plaintiff has shown that he will suffer irreparable harm. He is facing financial ruin, and waiting for the final ruling in this lawsuit will not alleviate his current and pressing needs. *Performance Unlimited*, 52 F.3d at 1383 (citing *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 924 (6th Cir.1978)). An award at a later time will not assuage the hardship he will be facing until then. While the court recognizes that normally economic loss is not irreparable, this case is unique in that the plaintiff is alleging total financial ruin. *Id.* The case is also different from the usual economic loss claim because this case involves the admiralty claim of maintenance, for which there are especially generous standards. [FN1] The plaintiff's affidavit about his financial situation is unopposed, other than his actual monthly expenses, and the plaintiff has agreed to incorporate the defendant's estimates in place of his own for purposes of this motion alone.

> FN1. *See, e.g., Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Felice v. Ingram Barge Co.*, 2001 A.M.C. 782, No. 5:00CV163, 2000 U.S. Dist. LEXIS 21507, 2000 WL 33389210 (W.D.Ky.2000); *Clifford v. Mt. Vernon Barge Service*, 127 F.Supp.2d 1055 (S.D.Ind.1999).

*2 While denying the plaintiff's motion will cause him irreparable harm, granting the preliminary injunction will not substantially harm the defendant. The defendant had been paying a higher amount of maintenance prior to the commencement of this lawsuit. This modest request for maintenance will not be a hardship for the defendant.

Finally, a strong public policy exists in favor of establishing generous and immediate maintenance payments for seamen. [FN2] As this type of relief is relied upon as an alternative to worker's compensation for seamen, [FN3] it is necessary to provide for these workers in their time of need. "Maintenance and cure must be so inclusive as to be relatively simple, and it can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays and invite litigation." *Farrell v. United States*, 336 U.S. 511, 516, 69 S.Ct. 707, 93 L.Ed. 850 (1949). There is every indication that public policy favors an immediate remedy for the plaintiff.

FN2. *See, e.g., Boyden v. American Seafood Co.,* 2000 AMC 1512 (2000).

FN3. *Blainey v. American Steamship Co.,* 990 F.2d 885, 886 (6th Cir.1993).

It should be noted, however, that the plaintiff's initial allegations calculated the amount of his monthly expenses at $1,144.46. There were no receipts attached to the plaintiff's affidavit. [FN4] The defendant states that it does not believe the amount of daily living expenses claimed by the plaintiff, and the plaintiff has agreed to substitute the defendant's proposed figures as to the amounts of the telephone, electric, water and city taxes bills for purposes of this motion only. In addition, the court will use the defendant's figure for the plaintiff's gas bill, for purposes of this motion alone. [FN5] The defendant further states that as it believes that there are inconsistencies in the plaintiff's affidavit regarding his expenses, it does not believe the other expense amounts as plaintiff has claimed them. However, these bare allegations that the plaintiff is lying are unpersuasive, and the plaintiff's figures regarding the remainder of his expenses will be incorporated into the calculation for purposes of this order. Further, the defendant claims that the plaintiff's utility expenses should be prorated to account for the three other family members residing with the plaintiff. However, there is no need to discount the utilities, phone or electricity due to the fact that there are others in the house. *Clifford,* 127 F.Supp. at 1058. The amount would likely be the same even if the plaintiff were living alone. *Id.* at 1059. That being said, the amount of the plaintiff's monthly expenses as amended for purposes of this order comes to $894 .28.

FN4. There is a split of authority as to whether an affidavit without receipts attached is sufficient to make out a *prima facie* case for maintenance. For purposes of this motion, the court will accept the statement in *Miller v. Canal Barge Co.,* 2001 A.M .C. 528 (E.D.La.2000):" Typically, the injured seaman's own testimony as to the reasonable cost of living expenses ... is sufficient to establish the appropriate rate." *Cf. Clifford,* 127 F.Supp.2d at 1057-1058. ("Because maintenance is intended to substitute for the food and lodging that a seaman enjoyed at sea, it is established that the seaman is entitled only to expenses 'actually incurred.' ... [A] very general figure ... not supported by any receipts ... [will] not carr[y] his *prima facie* burden of showing the amount of money he has *actually incurred.*")

FN5. The plaintiff did not specifically agree to accept the defendant's proposed figure for gas ($0.00), but in the interest of granting the plaintiff's relief in a timely manner, the court will assume plaintiff has no objection to the substitution of this figure as well, for purposes of this motion alone.

In addition, the defendant asks that any amount awarded to the plaintiff under this order should be subject to a credit balance of $1,768.28. However, the court deciding *Clifford* rejected such a credit, stating: "Keeping in mind that the right

to maintenance and cure should be construed liberally, we conclude that the defendant should not be entitled to credit those payments. The gratuitous payments will be an offset with respect to any other damages the plaintiff is entitled to recover under the Jones Act." *Clifford,* 127 F.Supp. at 1059. As in *Clifford,* there seems to be a dispute regarding whether or not the payments to the plaintiff by the defendant which the defendant now wishes to credit were gratuitous or were amounts entitled to be credited against plaintiff's Jones Act recovery. And as in *Clifford,* the court will refrain from deciding the issue until the resolution of this case.

*3 As the rule for maintenance awards is that they should be granted liberally, and as the only real issue is to amount and the plaintiff has agreed to the defendant's corrections, the court being duly informed,

IT IS ORDERED that the plaintiff's motion for a preliminary injunction is GRANTED and pursuant to this injunction, the defendant is directed to pay the plaintiff maintenance in the amount of $31.94 per day, effective as of the date of entry of this order, retroactive to the first day that the defendant paid only $18.00 per day, that is, March 25, 2003, according to plaintiff's affidavit, and to continue until the trial of the present lawsuit has come to a conclusion.

IT IS FURTHER ORDERED that the plaintiff's request for an expedited hearing is DENIED AS MOOT.

2003 WL 23164408 (W.D.Ky.), 2003 A.M.C. 2447

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