Not Reported in F.Supp.2d, 2004 WL 2984355 (W.D.Pa.), 2004 A.M.C. 1553
(Cite as: 2004 WL 2984355 (W.D.Pa.))

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United States District Court,
W.D. Pennsylvania.
Stanley EDDY, Plaintiff,
v.
MON RIVER TOWING, INC. Defendant.

No. Civ.A. 02-1537.
June 7, 2004.

Dennis M. O'Bryan, O'Bryan Baun Cohen, Birmingham, MI, for Plaintiff.

Christy M. Holmes, William R. Ellis, Wood & Lamping, Cincinnati, OH, for Defendant.

MEMORANDUM OPINION AND ORDER
MCVERRY, J.

***1** Presently before the Court for consideration is DEFENDANT MON RIVER TOWING, INC.'S MOTION FOR SUMMARY JUDGMENT (*Document No. 15*), with memorandum in support, (*Document No. 15-1*), and PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*Document No. 21).* For the reasons that follow, the motion will be denied.

I. BACKGROUND

This case arises from an injury to Plaintiff Stanley Eddy during the course of his employment as a deck hand for Defendant Mon River Towing, Inc. (hereinafter Defendant or "Mon River"). Plaintiff brings this cause of action under the Jones Act, 46 U.S.C. § 688, as amended, for negligence, and under the General Admiralty and Maritime Law for unseaworthiness, maintenance and cure.

The facts relevant to this discussion, and viewed in the light most favorable to Plaintiff, are as follows. On August 13, 2002, Plaintiff was assigned to harbor boat M/V Explorer to perform harbor services at Cumberland Mine. That morning, the M/V Explorer was attempting to "tie up" a fleet of empty barges (Mon River fleet) to another fleet of empty barges (Ingram fleet) already anchored to a spud barge. Plaintiff was situated on the lead barge of the Mon River fleet approximately 600 feet from the pilot house of the M/V Explorer in order to direct the pilot to dock the fleets together. Defendant provided radios to facilitate communication between the deck hand and the pilot.

As the lead barge approached, Plaintiff positioned himself near the gunwale in order to reach a lantern from the corner barge of the Ingram fleet. At that same time, Plaintiff ascertained that the Mon River fleet was approaching the Ingram fleet too fast and radioed the pilot, Chuck Hugney, to stop forward throttle. The radio failed to work whereupon Plaintiff hand-signaled for Hugney to reverse throttle in order to check the fleet's forward momentum. This instruction apparently went unheeded by Hugney and the distance between the two fleets of barges continued to close. Plaintiff again attempted radio communication with Hugney with no success.

As a result, Plaintiff decided to manually "check down" the forward momentum of the fleet by tying off a line between the two fleets. While in the process of "walking the line" down the gunwale, he again attempted radio contact with Hugney. At that same moment the gunwale of the lead barge of the Mon River fleet passed beneath the rake of the forward barge of the Ingram fleet and Plaintiff's leg became caught between the timberhead and the rake which resulted in a comminuted fracture of his right tibial shaft.

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Plaintiff alleges that Defendant was negligent and/or created an unseaworthy condition in the following respects: (1) failing to provide a seaworthy and operational radio; (2) failing to select a competent pilot; and (3) failing to provide an adequate crew for the work performed. Defendant has moved for summary judgment, to which Plaintiff has responded, and the matter is ripe for disposition.

II. STANDARD OF REVIEW

***2** Rule 56(c) of the Federal Rules of Civil Procedure reads, in pertinent part:

[Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In interpreting Rule 56(c), the United States Supreme Court has stated:

The plain language ... mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must view the facts in a light most favorable to the non-moving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. *Id.* at 242. The "existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against the moving party." *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir.1978) (*quoting Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir.1972)). Final credibility determinations on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. *Josey v. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir.1993); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.1993).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'-that is, pointing out to the District Court-that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1230. When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is "merely colorable" or "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

III. DISCUSSION

A. *Jones Act*

***3** The elements of a Jones Act negligence claim are duty, breach of duty, notice and causation. A seaman is entitled to recover under the Jones Act if his

employer's negligence is the cause, in whole or in part, of his injury. *See* Barnes v. Andover Co. L.P., 900 F.2d 630, 634 (3d Cir.1990); *Ribitzki v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658, 662 (9th Cir.1997). An employer's duty is "measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.... The standard of proof for causation is relaxed in cases filed pursuant to the Jones Act. Causation is satisfied if 'the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury....' " *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 357 (3d Cir.1998) (*quoting* *Rogers v. Missouri R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (internal quotations omitted).

Defendant contends that the sole cause of Plaintiff's injuries was his failure to use reasonable care to protect himself. Specifically, Defendant contends that Plaintiff was injured because of his own inattentiveness and failure to follow established safety precautions when he placed his foot on the outside of the timberhead as the two barge fleets closed. In opposition, Plaintiff contends that his injuries were caused by the malfunction of the radio which required him to attempt to manually check the forward momentum of the Mon River fleet which action(s) resulted in injury to Plaintiff. Plaintiff further contends, without evidentiary support, that Defendant was negligent in its failure to provide a competent pilot or an adequate crew.

The Court finds that making every inference in favor of the non-moving party a reasonable jury could find that Mon River was negligent in its failure to provide Plaintiff with an operational radio and that this negligence was a cause, even if slight, of Plaintiff's injuries. Plaintiff has provided unrebutted evidence that Mon River had notice that the radio(s) were not working properly. For the purpose of the motion for summary judgment, Mon River conceded that Plaintiff's radio malfunctioned. A jury could find that because Plaintiff was unable to communicate with the pilot by radio and where his hand signal(s) went unheeded by the pilot that he was forced to attempt to slow the barge fleet manually which action presented an unreasonable risk of injury. Undoubtedly, whether and to the extent which Plaintiff's own negligent conduct was a factor which caused or contributed to his injuries will be a consideration for a jury in this case. However, based on the facts of record, the Court cannot conclude as a matter of law that Plaintiff's conduct was the sole cause of his injuries.

Accordingly, the motion for summary judgment as to Plaintiff's Jones Act claim will be denied.

B. *Unseaworthiness claim*

Under the doctrine of unseaworthiness, the shipowner's liability is not based on any theory of negligence, but is a form of absolute duty designed to protect seaman from dangerous conditions by shifting the risk to the shipowner. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 728, 87 S.Ct. 1410, 18 L.Ed.2d 482 (1967). To be seaworthy, the "things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." *Gutierrez v. Waterman Steamship Corporation*, 373 U.S. 206, 213, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963), *rehearing denied*, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082 (1963). As with negligence under the Jones Act, the plaintiff has the burden of proving that the vessel was unseaworthy. *Loehr v. Offshore Logistics, Inc.*, 691 F.2d 758 (5th Cir.1982). In addition, the mere fact that an injury occurs does not establish that the vessel was unseaworthy. *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223 (2d Cir.), *cert. denied*, 375 U.S. 835, 84 S.Ct. 52, 11 L.Ed.2d 65 (1963).

***4** Defendant argues that the malfunction of the radio is a red-herring because whether the radio worked or not Plaintiff's injuries were caused solely by his own negligent conduct in placing his foot outside of the timberhead. Defendant further contends

that Plaintiff admitted in his deposition that was he was not distracted by the malfunction of the radio. In opposition, Plaintiff contends that Defendant's failure to provide an operational radio is tantamount to an unseaworthy condition as a matter of law. Also, Plaintiff contends that Defendant's failure to provide a competent pilot and an adequate crew for harbor boats such as the M/V Explorer also contributed to the communications breakdown and constituted unseaworthy condition(s).

Upon review, the Court does not agree with Defendant's characterization of Plaintiff's deposition testimony that he was not distracted by the malfunction of the radio. Rather, the testimony implies the contrary. Furthermore, it is undisputed at this stage of the proceeding that the radio failed to operate at the time in question and that Plaintiff's hand-signals to the pilot were not acted upon. A reasonable jury could find that the malfunctioning radio was not fit for its intended purpose and that, coupled with an inattentive pilot and inadequate crew, created unseaworthy condition(s) which resulted in injury to Plaintiff. These matters raise genuine issues of material fact which must be submitted to and determined by a jury.

Therefore, Defendant's motion for summary judgment as to Plaintiff's unseaworthiness claim(s) will be denied.

IV. CONCLUSION

Accordingly, the motion for summary judgment of Mon River Towing, Inc. will be denied. An appropriate Order follows.

ORDER OF COURT

AND NOW, this 7th day of June, 2004, upon consideration of Defendant's MOTION FOR SUMMARY JUDGMENT (Document No. 15) and after oral argument in open court, it is hereby ORDERED, ADJUDGED, AND DECREED that said Motion for Summary Judgment is DENIED.

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