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National Sea Grant Law Center
Kinard Hall, Wing E - Room 262
Post Office Box 1848
University, MS 38677-1848
Office Phone: (662) 915-7775
Fax: (662) 915-5267
E-mail: sealaw@olemiss.edu

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Thomas J. Murray, Associate Director
VIMS Marine Advisory Services
Program Leader, Virginia Sea Grant Extension Program
Virginia Institute of Marine Science
College of William & Mary
P.O. Box 1346
Gloucester Point, Virginia 23062

Re: Injury compensation for aquaculture employees (NSGLC-12-04-06)

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Dear Tom,

Please find below the NSGLC's response to your advisory request dated June 13, 2012 regarding the application of federal admiralty law to aquaculture operations. The information below is intended for informational purposes only and does not constitute legal representation of the

Virginia Institute of Marine Science or its constituents. It represents our interpretation of the relevant laws and regulations.

From my understanding of your request, VIMS was contacted by the owner of a Virginia oyster aquaculture farm after an insurance claim for an employee's injuries was denied. The owner's insurance policy acknowledged that employees would work on "barges, docks, vessels or bridges," and the employee's insurance classification was "oyster man." The insurance company rejected the claim declaring that the incident in question was not covered by the policy, since the worker was a maritime employee under the Jones Act. Below is a look at whether the Jones Act is in fact applicable and which laws would apply to injured aquaculture workers.

The law regarding compensation for injured aquaculture workers is not clear—several compensation schemes could potentially apply to injured commercial aquaculture workers, including personal insurance through state workers' compensation regimes, the Longshore and Harbor Workers' Compensation Act (LHWCA), the Jones Act or other maritime remedies. Determining which laws apply to a particular incident requires a fact specific inquiry, including an examination of where the incident occurred and the employee's status. For example, if the incident occurred in navigable waters in interstate or international commerce,[1] federal maritime laws may apply. For incidents that occur on inshore waters,[2] such as bays and rivers, or on land adjacent to bodies of water, the law is less clear, as there are overlapping federal and state laws that could apply. Below is a brief explanation of these laws and an examination of how they might apply in the aquaculture context.

Jones Act

The Jones Act provides a federal remedy for injured seaman. For a worker to bring a claim against his or her employer under the Jones Act, he or she must be a "seaman." Seaman has been defined as a "master or member of a crew of any vessel."[3] To be considered a seaman, an employee must be doing "ship's work"[4] and must have a connection to a vessel in navigation that is substantial in duration and nature.[5]

The first inquiry as to whether the Jones Act would apply to offshore aquaculture operations is whether the aquaculture employee has a connection to a "vessel." Vessel is defined as "every description of water craft or other artificial contrivance used or capable of being used, as a means of transportation on water."[6] The determination of what is a "vessel" is a matter of law for certain vessels; however, in some instances a trial court may look at factual circumstances of each particular case to decide whether something is a "vessel" for the purposes of federal

[1] Generally, offshore waters are from 3 to 200 nautical miles from the shore.
[2] In Virginia, the state has authority over submerged lands and waters up to three nautical miles from shore.
[3] 33 U.S.C. § 902 (3)(G).
[4] McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991).
[5] Chandris, Inc. v. Latsis, 515 U.S. 347 (1995).
[6] 1 U.S.C. §3.

maritime jurisdiction.[7] A 2005 U.S. Supreme Court ruling found a water craft that is "practically capable" of transport on the water is likely a vessel.[8] The Court ruled that the "Super Scoop" dredge, which relied on tugs for movement, was in fact a vessel. The Court noted that the "Super Scoop" was only temporarily stationary for repairs and "had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport…"[9] A Fifth Circuit opinion interpreting the "Super Scoop" case found that a barge towed to job sites and used as a floating dormitory by workers was in fact a vessel.[10] The court found that the barge was "practically capable" of transport, noting that the barge was towed with relative frequency.

Whether an aquaculture facility would also be considered a vessel would depend on a fact-specific look at the facility. Traditional stationary fish farms in shallow, near-shore waters, may not meet the definition of vessel. For example, shellfish aquaculture operations using racks or stable platforms are stationary and likely would not be a vessel. However, boats used to travel to and from the site or to support the shellfish aquaculture operation would meet the definition of vessel. In addition to going to and from work on a vessel, some aquaculture facilities might even be classified as a vessel.
Deepwater aquaculture facilities, such as net pens or cages attached to decking on which employees work, may be considered a vessel. If the entire facility floats over water and is towed frequently to provide more freely circulating ocean water and natural food, then it would be "practically capable" of transport, just as the "Super Scoop" dredge and the "floating dorm." If an aquaculture employee were injured while working on the decking or from a vessel, one could make the argument that he is a seaman with a Jones Act claim.

Assuming an aquaculture facility is a vessel or that an employee is working from a vessel, one would look to see whether the aquaculture employee met the definition of seaman, "master or member of a crew of any vessel." Again, this would be a fact specific inquiry. The U.S. Supreme Court has ruled that to attain the status of seaman, "[t]he employee's duties must contribute to "the function of a vessel or the accomplishment of its mission" and the seaman must have a connection to a vessel in navigation that is "substantial in terms of both its duration and nature."[11] For the duration requirement, "[a]n appropriate rule of thumb is that a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman."[12]

An offshore aquaculture worker spending his workday performing tasks on a floating net pen structure or working from other qualifying "vessels" for that length of time would likely meet this requirement. A shellfish aquaculture employee who only used a boat to travel to and from nearshore sites probably would not meet this requirement. In this instance, the employee

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[7] 70 Am. Jur. 2d Shipping § 8 (2008).
[8] Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005).
[9] *Id*.
[10] Holmes v. Atlantic Sounding Co., Inc., 437 F.3d 441 (5th Cir. 2006).
[11] Chandris, *supra* note 5.
[12] *Id*.

would not contribute to "the function of a vessel or the accomplishment of its mission." Nor would the employee have a substantial connection to the vessel. However, if the shellfish aquaculture employee worked from the vessel for more than thirty percent of his time performing tasks contributing to the vessel's mission, an argument could be made that he is a Jones Act seaman.

Longshore and Harbor Workers' Compensation Act (LHWCA)

Essentially, the LHWCA provides federal workers compensation for "any person engaged in maritime employment," who is injured "in the course of employment."[13] Under the LHWCA, "employee" is defined as: "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include ... a master or member of a crew of any vessel; or any person engaged by a master to load or unload or repair any small vessel under eighteen tons net."[14] The Act excludes masters and crew members eligible for Jones Act and general maritime law remedies. An injured employee may file claims under either the Jones Act or the LHWCA.[15]

A U.S. Supreme Court case, *Southern Pacific Co. v. Jensen*, held that state workers' compensation could not apply to a longshoreman when the incident occurred over navigable waters.[16] The LHWCA was passed after *Jensen* to protect longshoremen who crossed from state coverage into federal coverage during the work day. The LHWCA was expanded landward in 1972 and created concurrent jurisdiction between state and federal law.[17] However, in 1984, Congress redefined "employee" under the LHWCA to exclude workers "who, although by circumstance happened to work on or adjacent to waters, lacked a sufficient nexus to maritime navigation and commerce."[18] Aquaculture workers are expressly excluded from coverage.[19] Therefore, the LHWCA does not apply to an aquaculture employee.[20]

Virginia Workers' compensation

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[13] 33 U.S.C. § 902 (3).

[14] *Id*.

[15] "If a worker is denied Longshore Act benefits because he is a seaman, he will be able to file a claim under the Jones Act and vice versa." However "… a settlement agreement and compensation order or other formal award [under the LHWCA] will preclude a Jones Act suit for the same remedies." Thomas Shoenbaum, Admiralty and Maritime Law 381 (5th ed. 2012).

[16] 244 U.S. 205 (1917).

[17] The Virginia Workers Compensation Act allows concurrent jurisdiction between LHWCA and state workers compensation.

[18] S.Rep. No. 98-81, at 24-25 (1983).

[19] 33 U.S.C. § 902 (3)(E).

[20] Aquaculture workers are defined by federal regulations as "those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species." 20 C.F.R. 701.302.

An in-shore or near shore employee of aquaculture operations may have a claim under the Virginia Workers Compensation Act.[21] State workers' compensation establishes a system of comprehensive medical coverage and income benefits for employees who suffer work-related injuries. However, as noted in the original request, classification as a Jones Act seaman may preclude an aquaculture employee from recovering under the state workers' compensation law.

The U.S. Supreme Court has held that there is concurrent federal and state jurisdiction for maritime employees covered by both the LHWCA and state workers' compensation.[22] Whether a Jones Act seaman may recover under state workers' compensation is unclear. In one California case involving a claim by a Jones Act seaman who suffered injuries aboard a ferry in state waters, the court held that there was concurrent jurisdiction between state workers' compensation statutes and federal maritime law.[23] On the other hand, an Alaska court ruled that state workers compensation could not apply to a Jones Act seaman when the injury occurred within the workers scope of employment as a seaman.[24]

If neither the Jones Act nor the LHWCA applies, an aquaculture employee could still recover under state workers' compensation or general maritime law. The U.S. Supreme Court noted that *"*[a]s the Court has stated on several occasions, the Jones Act and the LHWCA are mutually exclusive compensation regimes … Injured workers who fall under neither category may still recover under an applicable state workers' compensation scheme or, in admiralty, under general maritime tort principles (which are admittedly less generous than the Jones Act's protections)."[25]

An aquaculture employee may have a general maritime negligence claim if admiralty jurisdiction is established. For a tort in admiralty, the maritime law would apply to an incident occurring on or over navigable waters in interstate or international commerce that bears a significant relationship to traditional maritime activity. Although an aquaculture employee may have no trouble establishing that an incident occurred over navigable waters, he would still have to demonstrate a sufficient relationship to maritime activity. Other potential causes of action are "unseaworthiness" and "maintenance and cure." An unseaworthiness claim is a strict-liability claim against the vessel owner. The right to maintenance and cure is a no-fault remedy designed to provide for the seaman during illness or injury. Both of these claims require the existence of a "vessel." Further these claims are only available to members of the crew.

In *Green v. Vermilion*, an employee was injured while unloading a vessel at a duck camp in Louisiana.[26] The plaintiff, Green, brought a claim seeking compensation under the LHWCA as well as general maritime law. The LHWCA specifically excludes "individuals employed by a club,

[21] Va. Code Ann. § 65.2-100.
[22] Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 722 (1980).
[23] CAN Ins. Co. v. Workers' Comp. Appeals Board, 58 Ca. App. 4th 211 (1997).
[24] Trident Seafoods Corp. v. Murray, 2000 AMC 288 (Alaska Super. Ct. 1999)
[25] Chandris, Inc., *supra* note 5.
[26] Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998).

camp, recreational operation, restaurant museum, or retail outlet."[27] While the court agreed that Green was excluded from the Act, it ruled that Green was not limited to state workers' compensation but could proceed with his general maritime claims for negligence and unseaworthiness.

Conclusion

In summary, employees classified as seamen recover under the Jones Act and the general maritime law, while non-seaman maritime workers recover under the LHWCA. State or non-maritime workers recover under state law, including state workers' compensation laws. Which law applies to an aquaculture employees is unclear and requires a fact specific inquiry. From my research, it seems as though a shellfish aquaculture employee would not be covered either by the LHWCA or the Jones Act and should be eligible for state workers' compensation benefits.

I hope you find this information helpful. If you would like additional information, please let us know.

Sincerely,

/s/ Terra Bowling
Research Counsel, National Sea Grant Law Center

[27] 33 U.S.C. § 902 (3)(C).