

**FILED**

AUG 21 2009

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

TRUNG LE,

Plaintiff - Appellant,

v.

AMERICAN SEAFOODS COMPANY  
LLC, a Delaware corporation, et al.,

Defendants - Appellees.

No. 08-35178

D.C. No. 2:06-cv-00130-JLR

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
James L. Robart, District Judge, Presiding

Submitted July 7, 2009\*\*  
Seattle, Washington

Before: O'SCANNLAIN, KLEINFELD and BERZON, Circuit Judges.

Trung Le appeals the trial court's decision, after a bench trial, that he failed to carry his burden of proof in his claim under the Jones Act, 46 U.S.C. § 30104, and in his general maritime law claim in which he alleged that the F/T Northern

---

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Jaeger was unseaworthy. Reviewing the trial court's findings of fact for clear error, Fed. R. Civ. P. 52(a)(6), we may disturb the trial court's factual findings only if our review of the evidence produces a "definite and firm conviction that a mistake has been committed." *Sauers v. Alaska Barge*, 600 F.2d 238, 244 (9th Cir. 1979). Having no such conviction, we affirm.

Le testified that he fell while attempting to dislodge a box that had jammed in the "boxilator," a machine that elevates boxes from the hold of the ship. He attributed his fall to the listing of the ship, an icy floor at his work station, and the flawed design of the boxilator.

Le's story was contradicted by Danny Mills, the only witness with the opportunity to directly observe how Le was injured. Mills was standing across the conveyer belt from Le at the time of the incident. Mills testified that he glanced up when he noticed the boxilator had stopped and saw that Le was hunched over, holding his arm and saying that his arm hurt. He further testified that when he asked Le if he had fallen, Le told him he had not. Mills did not see Le reach into the boxilator to extract a box and did not see Le fall.

The trial court believed Mills and not Le, calling Le's testimony "inconsistent and unreliable," and stating that he was "less than forthright" about his prior injuries, which the trial court ultimately concluded were the primary cause

of the injury at issue in this case. Mills, whom the judge found credible, also testified there was no ice where he was working.

We pay special deference to the trial judge's credibility determinations. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985); *Husain v. Olympic Airways*, 316 F.3d 829, 849 (9th Cir. 2002). We therefore cannot say it was clear error for the trial court to conclude that Le "failed to show how the vessel's list and alleged ice in his workspace played a role in causing or aggravating his injuries." Le therefore did not establish at trial that his injury resulted from American Seafoods Co.'s breach of its duty to provide a vessel and equipment that are "reasonably fit for their intended use." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960); *see also Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993). Nor did Le prove that his injury resulted from a breach of the duty of care under the Jones Act.

Le's attempt to characterize the trial court's decision as creating a "novel holding" with respect to the general maritime law of unseaworthiness also fails. Although the trial court observed in passing that ice is among the "conditions with which seamen must cope when they make their livelihoods in the fishing industry," that observation was not the basis for its holding that Le had not made out his case. Rather, the court concluded that "[t]he accident was not caused by ice that created unsafe, slippery conditions." Given its finding that unsafe ice did not cause the

accident, the trial court's observations about the prevalence of icy conditions are irrelevant. Even if there was ice, the trial court found that Le did not prove how its presence caused or aggravated his injury. The vessel and its equipment were "reasonably fit for their intended use." *Mitchell*, 362 U.S. at 550.

AFFIRMED.

**United States Court of Appeals for the Ninth Circuit**  
**Office of the Clerk**  
95 Seventh Street; San Francisco, California 94103

**General Information**  
**Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue seven calendar days after the expiration of the time for filing a petition for rehearing or seven calendar days from the denial of a petition for rehearing, unless the court directs otherwise. To file a motion for stay of mandate, file it electronically via the appellate ECF system or by paper with an original and four copies of the motion.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -4)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - ▶ Consideration by the full court is necessary to secure or maintain uniformity of the court's decisions; or
  - ▶ The proceeding involves a question of exceptional importance; or
  - ▶ The opinion directly conflicts with an existing opinion by another

court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- ▶ A petition for rehearing may be filed within fourteen (14) days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11.

- If a petition is filed electronically via the appellate ECF system, no paper copies are required.
- If filing a petition for panel rehearing by paper, submit an original and 3 copies.
- If filing a petition for rehearing en banc by paper, submit an original and 50 copies.

**Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information.

**Attorney's Fees**

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- All relevant forms are available on our website [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) or by telephoning (415) 355-7806.

**Petition for Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourtus.gov](http://www.supremecourtus.gov)

**Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court."

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

\_\_\_\_\_ v. \_\_\_\_\_ 9th Cir. No. \_\_\_\_\_

The Clerk is requested to tax the following costs against: \_\_\_\_\_

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	
Excerpt of Record			\$	\$			\$	\$	
Opening Brief			\$	\$			\$	\$	
Answering Brief			\$	\$			\$	\$	
Reply Brief			\$	\$			\$	\$	
Other			\$	\$			\$	\$	
<b>TOTAL:</b>				\$	<b>TOTAL:</b>				\$

**Other:** Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

\* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

\*\* Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

---

I, \_\_\_\_\_, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature \_\_\_\_\_

Date \_\_\_\_\_

Name of Counsel: \_\_\_\_\_

Attorney for: \_\_\_\_\_

---

(To Be Completed by the Clerk)

Date \_\_\_\_\_

Costs are taxed in the amount of \$ \_\_\_\_\_

Clerk of Court

By: \_\_\_\_\_

, Deputy Clerk