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No. 63969-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 FEB 12 PM 1:29

TUYEN THANH MAI,

Respondent,

vs.

AMERICAN SEAFOODS COMPANY LLC and
NORTHERN HAWK LLC

Appellants

APPELLANTS' AMENDED OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial erred in failing to apply the proper maritime legal standards concerning an injured seaman's right to maintenance and cure benefits, and concerning a shipowner's right and duty to investigate the seaman's claim to maintenance and cure benefits.

2. The trial court erred in its finding of fact that ASC wrongfully withheld payment of maintenance and cure to Mai and that such withholding of payment was "unreasonable, willful and persistent." FF & CL No. 1 re Attorneys' Fees, etc.¹ CP 223-24.

3. The trial court erred in its finding of fact that ASC "withheld" maintenance and cure during the period from July through December 2007. FF & CL No. 22. CP 234.

4. The trial court erred in its finding of fact that the frozen fish box striking Mai's left knee on March 29, 2005, "was the proximate cause of an injury that required replacement of the left knee." FF & CL No. 18. CP 233.

¹ On June 4, 2009, the trial court entered two separate findings of fact and conclusions of law: Findings of Fact and Conclusions of Law Regarding Award of Attorneys' Fees and Costs (CP 223-26) and Finding of Fact and Conclusions of Law (CP 227-41).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in finding that appellant ASC acted willfully, persistently, and unreasonably in withholding or delaying payment of maintenance & cure for Mai's total knee replacement ("TKR") surgery where such delay and non-payment resulted from ASC's attempt to exercise its legal right under maritime law to investigate her claimed entitlement to maintenance & cure by seeking an IME? (Assignment of Error Nos. 1, 2 & 3.)

2. Did the trial court err in finding that appellant ASC acted willfully, persistently, and unreasonably by filing a Declaratory Judgment action to determine its obligation to pay maintenance & cure to Mai for the TKR surgery? (Assignment of Error Nos. 1, 2 & 3.)

3. Did the trial court err in finding that appellant ASC acted willfully, persistently, and unreasonably by delaying payment for the TKR surgery until it could investigate her claimed entitlement to maintenance & cure for this procedure through an IME and the IME was delayed solely due to Mai's conduct in initially refusing to attend an IME and subsequently by unilaterally setting various conditions regarding the physician and the date she would appear? (Assignment of Error Nos. 1, 2 & 3.)

4. Did the trial court err in awarding compensatory damages to Mai where appellant ASC acted reasonably in exercising its right to investigate Mai's claimed entitlement to maintenance & cure by seeking an IME and filing a Declaratory Judgment action? (Assignment of Error Nos. 1, 2 & 3.)

5. Did the trial court err in awarding attorney fees and costs where appellant ASC acted reasonably in exercising its right to investigate Mai's claimed entitlement to maintenance & cure by seeking an IME and filing a Declaratory Judgment action? (Assignment of Error Nos 1, 2 & 3.)

6. Did the trial court err in finding that appellant ASC acted willfully, persistently, and unreasonably because its IME physician generally agreed that TKR surgery was a reasonable option for Mai? (Assignment of Error Nos. 1, 2 & 3.)

7. Did the trial court in finding that appellant ASC acted willfully, persistently, and unreasonably and otherwise waived its right to investigate Mai's claimed entitlement to reinstatement of maintenance & cure for TKR surgery where its lawyer issued a letter prior to such request stating that this procedure falls within maintenance & cure because curative, but later when the surgery was requested by Mai, clarified its view that a reasonable question existed regarding her entitlement, i.e,

whether TKR or a an alternative procedure was warranted given the condition of Mai's knee? (Assignment of Error Nos. 1, 2 & 3.)

8. Did the trial court err in finding that the alleged March 29, 2005, trauma to the left knee caused the injury ultimately requiring knee replacement surgery where the only medical testimony regarding causation was conjectural, conclusory and speculative? (Assignment of Error No. 4)

III. STATEMENT OF THE CASE

A. Mai's Pre-Accident History of Bilateral Knee Pain and Limitation.

Prior to the left knee injury that was the subject of this case, Mai had a long, documented history of bilateral knee pain, limitation, and problem. She had a congenital varus deformity (i.e., bow leggedness) in both knees that increased stress on the medial aspect of her knees and placed her at increased risk for developing medial compartment problems (e.g., torn meniscus). She previously had sustained a meniscus tear and early arthritis of her right knee in April 2001, for which she underwent surgery with the orthopedic surgeon Dr. Bert Tardieu. CP 114-15. This injury prevented her from working as a processor due to pain, swelling, and limitation. CP 117. Dr. Tardieu advised Mai in 2002 that she should no longer work as a processor due to her physical limitations and the risk

her left medial meniscus. Ex. 23-2. Ex. 22-3. CP 132-33. A degenerative meniscal tear develops over time due to normal wear and tear on the knee joint, i.e., it is not caused by trauma. Id. Dr. Tardieu testified that the degenerative tear of the medial meniscus in Mai's left knee arose prior to her joining the NORTHERN HAWK in January 2005 and had nothing to do with her the accident. CP 134. He further testified that the only factual issue regarding medical causation to be resolved was when Mai's pre-existing degenerative meniscal tear became symptomatic. CP 134-35.

C. Dr. Tardieu Could Only Speculate As To the Cause of Mai's Symptoms.

Dr. Tardieu testified that a degenerative meniscal tear can become symptomatic due to normal wear and tear and "very simple, normal everyday movements," such as stepping off a curb, squatting too many times, pivoting on one's knee, and moving in a confined space. CP 146-47 ("[a]lmost what we would consider inconsequential trauma, an inconsequential event."). This would include common movements and activities done literally thousands of times each day aboard a boat in the Bering Sea, such as shifting one's weight back and forth from one leg to the other to maintain balance in a rolling sea. CP 147-49.

There is no dispute that Mai's left knee was "symptomatic" i.e., painful, at the time of her February 4, 2005 accident and subsequently.

She obtained medical treatment for her left knee at the Iliukliuk Clinic in Dutch Harbor on February 16, 2005. Tom Kay testified that Mai complained of left knee pain from the time of her February 4th accident until she left the boat and propped her knee at times on a pan. CP 356-57. Mai testified that she worked a lighter duty job as an inspector for the remainder of the season and could not recall if her knee continued to hurt after the February accident. RP 124, 125. However, she told Dr. Peterson on April 6, 2005, at the first appointment with him after leaving the boat that she did continue to have pain in her left knee after her February 4th knee injury. Ex. 22-2.

Dr. Tardieu could not tell if there was any difference in the symptoms Mai experienced prior to her alleged accident and afterward. CP 143-44. He testified that although he did not know the specifics of her March 2005 accident, the alleged mechanism thereof, i.e., being struck in the knee with a 40 lb. box falling a short distance off a conveyor, would not necessarily render a degenerative meniscal tear symptomatic because this does not carry a lot of energy. CP 112-14. Based on the totality of the medical evidence Dr. Tardieu testified that it would be speculative to try to link her left knee symptoms to any particular event:

Q: So would you agree that there's really no specific factor about this accident or about her complaints that really allows you to determine when, in fact, her pre-existing degenerative medial meniscus tear became symptomatic?

A: Be very difficult.

Q: In fact, Doctor, would you agree that no one could say with any degree of medical certainty that – when, in fact, her medial meniscal tear, the pre-existing one that she had aboard the NORTHERN HAWK, became symptomatic? That you would basically need a crystal ball or some sort of power that no one has to be able to answer that question? Would you agree with that?

A: Very true, yeah.

CP 155-56.

D. Maintenance & Cure

ASC did not pay maintenance to Mai between July 1st and December 31, 2007, because she refused to attend an IME to allow ASC to investigate her entitlement to maintenance & cure for TKR. RP 287-88. RP 145-38 to 145-39. Mai requested to pursue TKR as a treatment option at an appointment with Dr. Tardieu on May 1, 2007. A request was first made to ASC to authorize the surgery. ASC agreed that such surgery would fall within cure, but questioned whether her condition warranted this surgery and requested an IME with an orthopedic surgeon to explore her entitlement. RP 145-56 to 145-57.

ASC questioned Mai's entitlement because she had severe arthritis in only one compartment of her knee. RP 276. It is not usual for this procedure to be requested where a patient has only unicompartmental disease. RP 277. When apprised of plaintiff's request, ASC scheduled an appointment with orthopedic surgeon Dr. Jonathan Franklin to obtain a second opinion whether TKR was warranted.

After being advised of plaintiff's request for authorization of surgery, ASC promptly scheduled an appointment with Dr. Franklin for June 11, 2007. RP 251, 282. Mai was living in California at the time, and ASC arranged transportation and hotel for Mai to attend the appointment in Seattle. Ex 145-56 to 145-57. Plaintiff, however, refused to attend. RP 145-58 to 145-59. The appointment did not take place until December 2007 because (1) ASC was forced to file a Declaratory Judgment action in June 2007 to force the IME, (2) Mai agreed in September 2007 to attend an IME with Dr. Franklin in October, (3) Mai then rejected Dr. Franklin as the IME examiner after the appointment was set up and, (4) ASC found another examiner Dr. Mandt who could first schedule perform the IME in December. Ex 145-138 to 145-140. ASC did not obtain the IME report until December 28, 2007. Ex 145-133.

Dr. Tardieu has testified that it was reasonable for ASC to seek a second opinion in this circumstance. CP 108.

Although the IME physician Dr. Mandt recommended a different procedure for Mai, he opined that TKR was reasonable in her circumstances. Ex 145-135. If Mai had attended the appointment with Dr. Franklin on June 11, 2005, this opinion would have been known in June, and ASC would have approved the surgery. Dr. Tardieu could have scheduled the TKR within a week after ASC received an opinion that surgery was reasonable. CP 110-11. After receiving the IME opinion, ASC paid Mai maintenance between May 18, 2007, when she received the request to approve this treatment, and June 30, 2007, the period it would have taken to investigate Mai's request if she had not refused to cooperate. ASC did not pay maintenance between July 1st and December 31, 2007, which is the period the IME was delayed due to Mai's refusal to attend and her objections to the examiner.

ASC paid for the TKR surgery; it was performed on February 4, 2008.

E. ASC Filed a Timely Appeal of the Judgment.

On August 6, 2009, ASC filed a timely Notice of Appeal from the Judgment entered on July 8, 2009, and from the trial court's Findings of Fact and Conclusions of Law filed on June 4, 2007.

IV. ARGUMENT

A. **The Trial Court Erred In Its June 4, 2009, Decision Awarding Back Maintenance, Compensatory Damages, Attorney Fees, and Costs Based on a Finding That ASC Acted Unreasonably and Arbitrarily In Refusing To Reinstate Maintenance & Cure In Connection With Mai's Request To Undergo TKR In May 2007 Because She Wrongfully Refused To Attend an IME and To Cooperate With ASC's Attempt To Investigate Her Entitlement To Such Procedure.**

1. **Standard of Review**

ASC challenges the trial court's decision because it incorrectly applied the law applicable to a seaman's entitlement to maintenance & cure. On these issues this court reviews the trial court's legal conclusions on a *de novo* basis. ASC also challenges the trial court's application of law to the facts in determining whether it acted in an arbitrary, callous and capricious manner. On these issues this court review the trial court's factual findings on a substantial evidence basis.²

2. **The Trial Court's Award of Maintenance, Compensatory Damages, Attorney Fees, and Costs Is Not Supported Factually and Is Not Warranted Under the Controlling Case Law.**

²Some federal courts have applied an abuse of discretion standard in determining whether the award of attorney fees for delay in payment of maintenance & cure was improper. See Stevens v. McGinnis, Inc., 83 F.3d 1353, 1360 (6th Cir. 1996); Breese v. AWI, Inc., 823 F.2d 100, 103 (5th Cir. 1987). However, these courts apply this standard in the same manner, i.e., determining whether "the [trial] court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." Stevens, 83 F.3d at 1360, citing First Technology Safety Sys. v. Depinet, 11 F.3d 641, 647 (6th Cir. 1993)

(a) *The Trial Court's Decision*

The trial court awarded Mai \$4600 in back maintenance, \$11,542 in attorney fees, \$70.24 in costs, and \$10,000 in compensatory damages based on ASC's refusal to authorize TKR surgery until after it had the opportunity to investigate whether such procedure was warranted through an IME. CP 246, 259, 260.

The trial court made the following specific factual findings concerning Mai's entitlement to maintenance & cure for the TKR:

- (1) On May 1, 2007, Mai's treating physician Dr. Tardieu recommended that she undergo TKR (FF ¶ 19, CP 255);
- (2) On April 5, 2007, ASC's attorney issued a letter stating that TKR constituted curative treatment and it is covered by maintenance & cure (FF ¶ 19, CP 255);
- (3) TKR was scheduled for June 11, 2007 (FF ¶ 19, CP 255);
- (4) On May 18, 2007, ASC's claims administrator told Dr. Tardieu it would not pay for TKR (FF ¶ 19, CP 255);
- (5) On June 29, 2007, ASC filed a Declaratory Judgment action for a determination that ASC was not responsible for maintenance & cure for the TKR (FF ¶ 20, CP 256);
- (6) The Declaratory Judgment action was withdrawn by ASC when Mai filed this case (FF ¶ 20, CP 256);
- (7) Mai underwent an IME under Rule 35 with Dr. Mandt on December 13, 2007 (FF ¶ 21, CP 256);
- (8) Dr. Mandt recommended a different procedure, but agreed TKR was reasonable for Mai (FF ¶ 21, CP 256);

- (9) ASC subsequently agreed to pay for the TKR (FF ¶ 22, CP 256);
- (10) ASC did not pay maintenance between July and December 2007, until it received the IME opinion (FF ¶ 22, CP 256);
- (11) Mai waited additional seven months to undergo TKR due to ASC's refusal to pay maintenance & cure (FF ¶ 31, CP 260); and
- (12) ASC insisted on an IME with a physician, i.e., Dr. Franklin, who had a "colorable claim of patient privilege" (FF ¶ 31, CP 260);

Based on these findings, the trial court found ASC's withholding of maintenance & cure unreasonable and arbitrary, explaining its "insistence of a second opinion from a physician with a colorable claim of patient privilege, dragged the time out for no discernable reason, which combined with the filing of the federal declaratory judgment action seemed for no other purpose than delay." (FF ¶ 31, CP 260).

Although the trial court cited a couple of relevant cases addressing the award of attorney fees for nonpayment of maintenance & cure, its statement that it could find "no discernable reason" why ASC delayed payment for the surgery while it attempted to investigate Mai's entitlement or ASC's refusal to pay maintenance to Mai during the period that her willful misconduct precluded an IME, demonstrates the trial court's failure to understand the full range of rights and responsibilities attendant to payment of maintenance & cure. When considered in light of all the

applicable law, ASC's actions were neither arbitrary or capricious or even unreasonable.

(b) *ASC Had a Legal Right to Investigate Mai's Entitlement to Reinstatement of Maintenance & Cure Before An Obligation Arose to Pay Such Benefits, Which Included Its Right to Have Mai Submit to an IME.*

The trial court's findings that Mai was entitled to maintenance & cure when Dr. Tardieu recommended TKR and that ASC acted unreasonably by failing to approve the surgery upon being apprised of such recommendation are erroneous.

A seaman bears the burden of establishing her entitlement to reinstatement of maintenance & cure. Ward v. Inland Marine Services, Inc., 1987 AMC 1282, 1286 (N.D. Fla. 1987) ("Thus, once a seaman's maintenance is legally terminated, as in this case, the plaintiff bears the burden of proving that he is entitled to re-instatement."). Mai presented evidence by way of Dr. Tardieu's TKR recommendation that created an issue as to whether maintenance should be reinstated.³

However, the mere fact that Mai presented evidence from her treating physician concerning the TKR recommendation did not automatically entitle her to payment for this procedure or reinstatement of

³ ASC properly terminated payment of maintenance to Mai in 2006 because her condition plateaued after her second surgery and the only treatment she was undergoing was palliative (maintenance & cure is not owed for purely palliative treatment). Mai did not challenge this position in the trial court, and it must be accepted on appeal.

maintenance. ASC had the right to conduct a prompt and reasonable investigation into plaintiff's request before making any payment. Vaughn v. Atkinson, 369 U.S. 527, 530-32 (1962).⁴ Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 170 (5th Cir. 2005). Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1044-47 (9th Cir. 1999). Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir.1987). Edmond v. Offshore Specialty Fabricators, Inc., 2009 U.S. Dist. LEXIS 44117 (E.D. La. 2009). Nunez v. Weeks Marine, Inc., 2009 U.S. Dist. LEXIS 35078, at 9 (E.D. La. 2009). Lodrigue v. Delta Towing, L.L.C., 2003 U.S. Dist. LEXIS 22933, at pp. 35-39 (E.D. La. 2003). Bloom v. Weeks Marine, Inc., 2002 U.S. Dist. LEXIS 21356 (M.D. Fla. 2002). Proshee v. Tidewater Marine, Inc., 927 F.Supp. 959, 960-61 (E.D. La. 1996).

The nature of this obligation is demonstrated by the Ninth Circuit's opinion in Sana. Sana developed brain inflammation and went into a coma, and the vessel owner refused to pay maintenance & cure on the ground that his affliction arose when he was off the vessel. To prove that his symptoms arose aboard the boat, Sana sought to introduce a report from an insurance investigator containing summaries of interviews with fellow crewmembers discussing Sana's symptoms aboard the vessel. The

⁴ Washington courts are bound to follow U.S. Supreme Court decisions on maritime law, including maintenance & cure. Lundborg v. Keystone Shipping Co., 138 Wn.2d 658, 670, 981 P.2d 854 (1999).

trial court refused to admit this evidence on the ground of hearsay. However, the Ninth Circuit reversed, finding the report a “business record,” as it was prepared pursuant to the vessel owner’s duty to investigate Sana’s entitlement to maintenance & cure.

The Ninth Circuit stated, “Vaughn and its progeny **require** shipowners to investigate a seaman’s claims for maintenance & cure.” 181 F.3d 1045-46 (emphasis added). The court said this created a duty by the vessel owner to gather information, e.g. interview crewmembers, to evaluate Sana’s contention that his brain became inflamed while in the service of the vessel. The duty to investigate is so deeply rooted within the obligations a vessel owner owes to an injured seaman that documents created in connection with such investigation rise to the level of business records for purposes of the hearsay exception. Id.

A vessel owner’s duty to investigate a seaman’s entitlement has also been interpreted by courts as a right that a vessel owner may exercise before it becomes obligated to pay maintenance & cure. Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir.1987) (“Upon receiving a claim for maintenance & cure, the shipowner need not immediately commence payments; he is entitled to investigate and require corroboration of the claim.”). Nunez v. Weeks Marine, Inc., 2009 U.S. Dist. LEXIS 35078, at 9 (E.D. La. 2009) (shipowner may undertake a reasonable investigation of

the seaman's claim for maintenance & cure before paying). Fifth Circuit Pattern Jury Instruction 4.11 ("A shipowner who has received a claim for maintenance and cure is entitled to investigate the claim."). The only two limitations on this right are that the investigation must be diligent and it must be reasonable.

An IME is an accepted tool through which a vessel owner may carry out its duty to investigate claims for maintenance & cure. Estelle v. Berry Bros. General Contractors, Inc., 2008 U.S. Dist. LEXIS 19979, at 5 (E.D. La. 2008) ("the vessel owner is entitled to investigate and require corroboration of the claim" for maintenance & cure and "has the right to seek this independent medical evaluation" to determine whether the treatment plaintiff seeks are "necessary"). Lodrigue v. Delta Towing, LLC, 2003 U.S. Dist. LEXIS 22933 (E.D. La. 2003) (when seaman requested reinstatement of maintenance & cure, shipowner "reasonably exercised its right to investigate [seaman's] claim and requested that [seaman] submit to an independent medical examination" before payment). Bloom v. Weeks Marine, Inc., 227 F.Supp.2d 1273 (M.D. Fla. 2002). Schoenbaum at § 6-29, 381.

The trial court's inability to discern a reason why ASC sought an IME before agreeing to pay for Mai's TKR surgery demonstrates a fundamental misunderstanding of this right. It held ASC liable for

attempting to undertake the very thing the law requires it to do, i.e., investigate Mai's maintenance & cure claim. The cases that have found vessel owners liable for unreasonable conduct in not paying or delaying payment of maintenance & cure turn on the vessel owners failure to investigate such requests and not, as here, where it tries to do so. See Vaughn, 369 U.S. at 530.

Accordingly, the trial court erred in awarding compensatory damages, attorney fees, and costs for the delay in payment of maintenance & cure for the TKR to the extent such delay arose from ASC's attempt to investigate Mai's claim before paying.

(c) *The Trial Court Erred in Finding that ASC Acted Unreasonably by Filing a Declaratory Judgment Action to Determine Its Obligation to Reinstate Maintenance & Cure.*

The trial court erred because it concluded that ASC acted unreasonably in delaying payment for the TKR surgery by filing a declaratory judgment action to determine Mai's entitlement. It is well settled that a declaratory judgment action is a reasonable and acceptable means for a vessel owner to determine its obligation to pay maintenance & cure: "The employer can file an action under the Declaratory Judgment Act [28 U.S.C. § 2201] to determine its duty to pay maintenance & cure" Schoenbaum, Admiralty and Maritime Law, § 6-28, 380 (4th Ed.

2007). Rowan Companies v. Griffin, 876 F.2d 26 (5th Cir. 1989). Lady Deborah, Inc. v. Ware, 855 F.Supp. 871 (E.D. Va. 1994). Belle Pass Towing Corp. v. Cheramie, 763 F.Supp. 1348 (E.D. La. 1991). Torch, Inc. v. Theriot, 727 F.Supp. 1048 (E.D. La. 1990); Lancaster Towing, Inc. v. Davis, 681 F.Supp. 387 (E.D. La. 1990).

The purpose of the filing a declaratory judgment action is both to seek a judicial determination of an uncertain obligation and to obtain discovery into the issue that is not otherwise available. When no suit is pending, a vessel owner cannot force a seaman like Mai to undergo an IME. If a seaman refuses to attend, a vessel owner can only exercise its right of investigation by filing suit and seeking a Rule 35 exam. Bloom v. Weeks Marine, Inc., 227 F.Supp.2d 1273 (M.D. Fla. 2002). Schoenbaum at § 6-29, 381. Where, as here, the seaman refuses to attend an IME and no lawsuit is pending, a vessel owner such as ASC can only obtain an IME to evaluate its obligation by filing a declaratory judgment action.

On May 18, 2007, Mai first made a demand for payment for TKR. ASC responded on June 6, 2007, by requesting that she attend an IME with an orthopedic surgeon to evaluate her entitlement. When Mai refused to attend, ASC used the only method available to it to obtain the IME - filing a declaratory judgment action. This action was reasonable and does not support a finding that ASC acted unreasonably, arbitrarily or

capriciously. U.S. v. Martin, 2001 U.S. Dist. LEXIS 1223 (E.D. Pa. 2001) (held that declaratory judgment action is reasonable and appropriate means for vessel owner to investigate seaman's claimed entitlement to maintenance & cure where she refuses to attend pre-litigation IME).

Similarly, ASC's decision to dismiss its federal court declaratory judgment action once Mai filed her state court lawsuit was neither unreasonable nor arbitrary. In response to ASC's filing, Mai filed suit in King County Superior Court on August 27, 2007, alleging claims for Jones Act negligence, unseaworthiness, and maintenance & cure. CP 3-5. Once Mai filed a lawsuit asserting an identical claim for maintenance & cure, ASC was precluded from litigating this claim in its federal court action:

We believe that absent bad faith on the part of the defendant-employee in the federal court, a properly filed Jones Act suit requires dismissal of a declaratory judgment action which arises out of the same set of facts.

Belle Pass Towing Corp v. Cheramie, 763 F.Supp. 1348, 1355 (E.D. La. 1991); Flowers Transp. Inc. v. Fox, 606 F.Supp. 263 (E.D. Mo. 1985). Schoenbaum at § 6-29, 381.

(d) *ASC Had a Reasonable Basis for Seeking to Investigate Mai's Claimed Entitlement to Maintenance & Cure for TKR and Carried Out Such Duty In a Diligent Manner.*

The trial court erred in awarding damages for delay because substantial evidence did not exist to support a finding that ASC acted unreasonably, arbitrarily, or capriciously in the manner in which it attempted to carry out such investigation. The evidence at trial shows that ASC had a reasonable basis for questioning Dr. Tardieu's TKR recommendation and that it proceeded in a reasonable and diligent manner to investigate Mai's claim.

The sole grounds upon which Dr. Tardieu recommended TKR were Mai's complaints of knee pain and severe arthritis in only one compartment of her knee. (CP 108). He acknowledged that it was not "unreasonable" for ASC to seek a second opinion as to whether TKR is warranted in this circumstance. Id.

Dr. Aleksandra Zietak, a Board certified physiatrist who refers patients for TKR as a regular part of her practice, testified it was reasonable for ASC to seek an IME in Mai's case. RP 168. Dr. Zietak testified that Mai's primary complaint was knee pain and she did not have "much in the way of objective findings," i.e., loss of range of motion, loss of strength, or gait deviation. RP 194. Although stating that the advanced degenerative changes in the medial compartment of her knee could be an indication for TKR, this procedure was not warranted in the absence of other objective limitations. RP 196. Dr. Zietak testified that she "would

be hesitant to recommend a knee replacement” in a case like Mai’s where the primary complaint is pain and there are little in the way of objective findings regarding loss of function. RP 194. Dr. Zietak opined that as of May 2007 when Dr. Tardieu sought authorization for TKR, this procedure was not a reasonable treatment option for Mai. RP 210.

The decision to seek an IME to investigate Mai’s request for TKR was made by ASC’s in house claims adjuster Robert Lang. RP 242. Mr. Lang, handled Mai’s claim since 2005, had been receiving her medical records from Dr. Tardieu and was familiar with her course of treatment. He testified that ASC only first became aware of the TKR request in a telephone call from Dr. Tardieu’s office on May 18, 2007. RP 239. Ex. 132. ASC informed Dr. Tardieu’s office that it would not authorize surgery at that time, but would first have to investigate the request by seeking a second opinion. RP 237. ASC wanted to determine whether Mai was a valid candidate for TKR and, if so, whether there was a causal connection to the alleged injury on the boat. RP 247, 276.

Mr. Lang had a reasonable basis for seeking to investigate Mai’s TKR request. He knew from the records that she had severe arthritis in only one compartment of her knee. RP 241-42. He had handled other cases involving TKR and understood that this was not warranted unless a patient had severe, i.e., Grade 4, degenerative changes in at least two

compartments of the knee. RP 277. For example, he had retained as an expert in a TKR case Dr. Ahmed Saleh, an orthopedic surgeon who wrote a paper for the National Institute of Health regarding the indications for performing TKR, and Dr. Saleh's opinions confirmed this understanding. Id.

Mr. Lang testified that ASC would make a decision regarding Mai's entitlement to reinstatement of maintenance & cure for TKR only after an IME to see the medical evidence confirmed that TKR was appropriate for Mai. RP 280.

On June 6, 2007, ASC sent a letter to Mai's counsel requesting an IME with Dr. Jonathan Franklin, a Seattle orthopedic surgeon who specializes in TKR, to investigate Mai's entitlement to reinstatement of maintenance & cure. Ex. 145-56. The letter advised that the purpose of the IME request was to determine if Mai had reached the point of requiring TKR or whether alternative treatment was a reasonable option. Id. RP 240, 248. ASC advised that it would pay Mai's expenses in coming to Seattle to attend the IME and had obtained multiple dates for the IME within the next two weeks, i.e., June 11th and 18th. Ex. 145-57. The letter emphasized that the IME request was not made to delay or avoid any obligation ASC had, but merely to investigate her request for reinstatement of maintenance & cure:

The purpose of this request is not to avoid American Seafoods maintenance & cure obligation to Ms. Tuyen or to delay treatment she is rightfully entitled to. American Seafoods has a right to investigate requests for maintenance & cure, and it is undertaking to do so quickly and in good faith.

. . . .

American Seafoods has not yet authorized the surgery and will not do so until it has the chance to exercise its right to investigate the request. It will do so promptly and the requested evaluation will not delay matters more than a few weeks. As Ms. Tuyen's knee condition has existed for more than two years, this seems a not unreasonable request.

Id.

Mai's attorney responded on June 7, 2007, stating she would not attend the IME. Ex. 145-58. Her counsel took the erroneous position that "there is no provision in the law to require Ms. Tuyen to undergo a second opinion" Id. He said that if ASC did not pay, Mai would file suit to compel such payment. Ex. 145-59.

Mai's refusal to attend an IME and to allow ASC to investigate her claimed entitlement placed ASC in a difficult position – it needed medical information in order to evaluate the necessity of Dr. Tardieu's surgical recommendation, but could not get it because of Mai's refusal to cooperate in allowing the exam. ASC could not compel Mai to attend because no lawsuit was pending. It could not call Dr. Tardieu to discuss his opinion because Mai was represented by counsel. RP 283. Similarly, ASC could

not depose Dr. Tardieu because no lawsuit was pending. Instead of simply refusing to pay, ASC filed a declaratory judgment action to obtain discovery into her claim for maintenance & cure. RP 282.

ASC filed the declaratory judgment action to determine its maintenance & cure obligation to Mai in federal district court in Seattle on June 29, 2007. Ex. 145-60. Because the parties had been corresponding through counsel for a considerable time, ASC opted to the waiver of service provision, i.e., by mail under Fed.R.Civ.P. 4(d). Ex 145-65 to 145-69. A copy was mailed to her counsel. Ex. 145-67. Because she resided in Florida, she had 60 days in which to answer. RCW 4.28.180.

Neither Mai nor her counsel responded. However, before the 60 day service period expired, Mai filed her own Complaint in King County Superior Court asserting claims for Jones Act negligence, unseaworthiness, and maintenance & cure. Given the two pending lawsuits involving the same maintenance & cure issue and the case law indicating ASC would have to dismiss its suit, *infra*, ASC agreed to dismiss its lawsuit in exchange for plaintiff's agreement to attend an IME to determine her entitlement to maintenance & cure. Ex. 145-78 to 145 - 82.

ASC then proceeded to schedule the IME with Dr. Franklin. It obtained dates four different dates for the IME in October, and provided

them to Mai and agreed to pay for her travel and accommodations. Ex. 145-84. However, Mai did not want to travel to Seattle in October, and it was agreed by October 12th to schedule the IME with Dr. Franklin on November 14, 2007. Ex. 145-93. RP 279.

After agreeing to see Dr. Franklin, however on October 18th, Mai objected to seeing Dr. Franklin as the IME doctor.⁵ Ex. 145-102. After substantial discussion between the parties' counsel, ASC decided that instead of pursuing a motion to compel, it would look for another orthopedic surgeon who specialized in TKR that would be willing to perform a Rule 35 exam. RP 279. ASC located Dr. Peter Mandt. Ex. 145-112. The IME was scheduled on December 13, 2007, Dr. Mandt's first available appointment. Ex. 145-117.

ASC asked Dr. Mandt to provide his opinion on the following:

We request your opinion whether Ms. Tuyen requires knee replacement surgery for her left knee. If not, is there any other treatment Tuyen does require for her knee.

Ex. 145-129.

⁵ Mai's first objection to using Dr. Franklin as the IME doctor was raised on October 18, 2007, more than four months after ASC first requested the IME. Mai objected because Dr. Franklin had seen her in October 2006 at the request of ASC for a second opinion. ASC did not consider Dr. Franklin a "treating" physician because it had arranged the appointment for its purposes, the report was sent to ASC (not Mai), and Mai specifically told Dr. Franklin that she did not want to establish a relationship with him as a treater, instead wanted to seek treatment with Dr. Tardieu in California. RP 283-84.

Dr. Mandt's opinion was received on December 28, 2007, and immediately provided to Mai's counsel. Ex. 145-33. Dr. Mandt recommended a different surgery, but said TKR would also be a reasonable option. After an inquiry to Dr. Tardieu about the alternative procedure recommended by Dr. Mandt, ASC authorized payment for the surgery.

ASC paid back maintenance for the period between May 18, 2007, when authorization for TKR surgery was first requested, until June 30, 2007, when the IME would have taken place and approval of payment for the procedure would have been given had Mai not wrongfully refused to cooperate in allowing ASC to investigate her request. Exs. 145-138 to 145-140, 145-153.

ASC did not pay maintenance between July 1st and December 31, 2007, which is the period the IME was delayed due to: (1) Mai's refusal initially to attend an IME, (2) Mai's agreement to attend and request to delay the IME until October 2007 to accommodate her personal schedule, (3) Mai's subsequent agreement and then refusal to see the IME physician nominated by ASC, i.e., Dr. Franklin and, (4) the time required to identify another competent orthopedic surgeon who specializes in the need for TKR. Id.

ASC had a reasonable basis for questioning Dr. Tardieu's TKR recommendation. It diligently pursued an IME. The IME did not take place until six months after the request to pay for the surgery because plaintiff initially refused to attend and then later created other obstacles that delayed the IME. Any and all delays in obtaining the IME arose solely due to Mai's actions and not due to any action or inaction on the part of ASC. Accordingly, substantial evidence does not support the finding that ASC acted unreasonably or arbitrarily in the manner in which it conducted and pursued its investigation of Mai's payment request.

(e) Mai Waived Her Entitlement to Maintenance During the Period She Refused to Cooperate With ASC's Investigation.

Mai acted unreasonably and waived any right she may have had to reinstatement of maintenance during the period that she failed to cooperate with ASC's attempt to investigate her request for TKR. Vaughn, 369 U.S. at 530-32. Sana, 181 F.3d 1041, 1044-47 (9th Cir. 1999). A seaman has a duty to cooperate with a vessel owner's investigation. Id. Such investigation, as well as the obligation of the seaman to cooperate therewith is an "ordinary" fact of life in maritime industry. Sana, 181 F.3d at 1044.

Mai's refusal to attend the IME amounts to a failure to treat, i.e., willful misconduct, which negates any right she had to maintenance.

Lipari v. Maritime Overseas Corp., 493 F.2d 207, 214 (3rd Cir. 1974).⁶

Accordingly, Mai was not entitled to payment of maintenance during the period she refused to attend the IME. *cf.* “Note: Punitive Damages for Maintenance and Cure: Is It How Much You Pay or How You Pay It – Harper v. Zapata Off-shore Co.,” 10 Tul. Mar. L.J. 103, 110 (1985) (“Hence, an employer has a right to withhold payment of maintenance and cure if he has a good faith reason for doing so.”)

Mai’s misconduct involved refusing to attend the IME between June and September, then asking but putting it off from October to November for her personal convenience, and finally forcing ASC to find a new IME doctor whose first appointment was in December. The delay in authorization was entirely due to her actions. Accordingly, the trial court erred in awarding \$4600 in back maintenance during the July through December 2007 period, the duration of which resulted solely from Mai’s failure to cooperate in ASC’s investigation.

⁶ A seaman forfeits his right to maintenance & cure if he engages in willful misconduct. Warren v. U.S., 340 U.S. 523, 528, 71 S.Ct. 432, 435 (1951) (“willful disobedience of orders” or “willful misbehavior” will forfeit the right to maintenance & cure); Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724, 731, 63 S.Ct. 930, 934 (1943) (“Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection.”). Courts have interpreted willful misconduct to include a seaman’s rejection of treatment or refusal to participate in prescribed treatment. U.S. v. Johnson, 160 F.2d 789, 790 (9th Cir. 1947), *aff’d in part, rev’d in part*, 333 U.S. 46 (1948); Oswalt v. Williamson Towing Co., Inc., 488 F.2d 51 (5th Cir. 1974); Sanders v. U.S., 2006 U.S. Dist. LEXIS 67585 (S.D. Ala. 2006) (seaman waives entitlement to maintenance & cure where his doctor recommends surgery, and he fails to get it).

(f) *The Trial Court Erred in Awarding Compensatory Damages for ASC's Delay and/or Refusal to Pay Maintenance & Cure During the Period Mai Refused to Attend an IME Because Such Request Was Reasonable.*

A seaman may recover compensatory damages only for a vessel owner's "unreasonable" failure to pay maintenance & cure benefits. Compensatory damages are owed as a result of tortious, hence unreasonable, conduct. The delay in payment for the TKR surgery resulted solely from Mai's initial refusal to attend the IME and her subsequent quibbling over the physician who would perform it. If not for Mai's conduct, there would have been no delay (ASC paid maintenance to Mai during the time it should have taken to obtain the IME). As discussed above, investigating such entitlement was ASC's right before agreeing to pay such benefits where there appeared a valid question whether the procedure was warranted. Therefore, the delay in payment was not unreasonable.

Compensatory damages are owed only if a vessel owner is refuses to pay maintenance & cure without a *reasonable* defense:

[T]here is an escalating scale of liability: a shipowner who is in fact liable for maintenance & cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance & cure. If the shipowner has refused to pay without a reasonable defense, he becomes

liable in addition for compensatory damages. If the owner not only lacks a reasonable defense, but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney fees as well.

Brown v. Parker Drilling Offshore Corp., 410 F.3d 166 (5th Cir. 2005), citing Morales v. Garijak, Inc., 820 F.2d 1355, 1358 (5th Cir. 1987). Fifth Circuit Pattern Jury Instruction 4.11 (2006) (<http://www.lb5.uscourts.gov/juryinstructions/2006CIVIL.pdf>).

If a vessel owner carries out its right to investigate the seaman's claim for maintenance & cure in a reasonable manner, then compensatory damages are not owed. The evidence before the trial court did not show otherwise. ASC obtained all of Dr. Tardieu's medical records, but could not interview him because Mai was represented by counsel.⁷ It then proceeded to obtain an opinion whether the condition of her knee warranted TKR, and whether it was causally related to any condition that arose aboard the vessel. The IME was delayed for months due to Mai's refusal to attend and then to schedule the appointment. ASC did all that was in its control to obtain the IME. It acted reasonably in seeking to determine Mai's entitlement. In these circumstances substantial evidence does not exist to support the trial court's compensatory damages award.

This is shown by the case, Gorum v. Ensco Offshore Co., 2002 U.S. Dist. LEXIS 21992 (E.D. La. 2002). After maintenance & cure was

⁷ ASC asked to interview Dr. Tardieu previously and such permission was not granted. Ex 145-52.

terminated, the plaintiff-seaman notified the shipowner a year later in July 2002 that he had been treating with other doctors in the interim. Ensco's attorney made repeated requests for access to plaintiff's medical records, but did not obtain a response until September. Ensco then proceeded to depose plaintiff's doctors on October 17th and the issue of entitlement to maintenance and attorney fees and compensatory damages were tried to the bench on November 6, 2002. The trial court found that the medical evidence showed plaintiff had not reached maximum medical cure and was entitled to maintenance through the date of trial. However, the court held,

There is simply no evidence that defendant acted in an arbitrary and capricious, or willful, callous, and persistent manner, which would give rise to punitive damages and attorney fees. **Nor is there even evidence that defendant acted unreasonably, which would give rise to compensatory damages.**

2002 U.S. Dist. LEXIS 21992, at 27 (emphasis added).

(g) *The Trial Court Erred in Awarding Attorney Fees and Costs for ASC's Delay and/or Refusal to Pay Maintenance & Cure During the Period Mai Refused to Attend an IME Because Such Delay and/or Denial Does Not Constitute Willful, Arbitrary, or Recalcitrant Conduct..*

The seminal case authorizing an award of attorney fees for a vessel owner's failure to pay maintenance & cure is Vaughn v. Atkinson, 369

U.S. 527, 82 S.Ct. 997 (1962). Therein, a seaman was given a Master's Certificate to attend a Public Health Service Hospital upon finishing his employment and was diagnosed there with active tuberculosis in March 2007. The seaman claimed maintenance & cure benefits and provided medical records concerning his diagnosis to the vessel's owner. The vessel owner's only inquiry was made to the Master and Chief Engineer of the ship, who reported that Vaughn had not complained of any illness during his four months work aboard the ship. No further investigation was made. Two years, and Vaughn hired an attorney to sue. The Supreme Court held that attorney fees were warranted due to the shipowner's failure to investigate the seaman's claim:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance & cure than this one.

369 U.S. at 530-31.

Case law subsequent to Vaughn has held that an award of attorney fees for the failure to pay maintenance & cure due to an inadequate investigation must rise above mere negligence, i.e., unreasonable conduct,

but must be willful, callous, and recalcitrant or similar conduct equating to bad faith. Breese v. AWI, Inc., 823 F.2d 100, 103 (5th Cir. 1987), citing Yverton v. Mobile Laboratories, Inc., 782 F.2d 555, 558 (5th Cir. 1986) (“It is well settled that ‘[a] shipowner who arbitrarily and capriciously denies maintenance and cure to an injured seaman is liable to him for punitive damages and attorney fees.’”). Harper v. Zapata Off-Shore Co., 741 F.2d 87, 88, 90 (5th Cir. 1984) (an award of attorney fees “must be grounded on the same type of egregious shipowner conduct exhibiting wanton and intentional disregard of a seaman’s rights.” “The willful, wanton and callous conduct required to ground an award of punitive damages requires an element of bad faith.”). Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118 (5th Cir. 1984) (conduct must be “callous and recalcitrant,” “arbitrary and capricious,” and “willful, callous, and persistent”). Kopczynski v. The JACQUELINE, 742 F.2d 555, 559 (9th Cir. 1984) (construing Vaughn to allow attorney fees when failure to provide maintenance & cure is “arbitrary, recalcitrant or unreasonable”). Incandela v. American Dredging Co., 659 F.2d 11, 15 (2d Cir. 1981) (“... we have interpreted Vaughn v. Atkinson as entitling a seaman to counsel fees in a maintenance case where the employer was ‘callous’ or ‘recalcitrant.’”). Robinson v. Pocohontas, Inc., 477 F.2d 1048, 1051 (1st Cir. 1973) (requires callous, willful, or recalcitrant conduct to assess

attorney fees). Conduct qualifying for an award of attorney fees must go beyond unreasonableness; it must involve bad faith. Id.

“[I]t is clear that laxness in investigating a claim that would have been found to be meritorious will subject a shipowner to liability for attorney’s fees” Breese, 823 F.2d at 104; Tullos v. Resource Drilling, Inc., 750 F.2d 380, 388 (5th Cir. 1985); Holmes, 734 F.2d at 1118.

However, there is no evidence in the record to show or that would suggest ASC acted in a lax fashion.

For instance, in Breese, attorney fees were awarded where the shipowner did not review the seaman’s medical records or inquire with any physician to determine whether maintenance and cure was owed to a seaman who suffered a heart attack aboard ship. In Tullos, a jury question regarding the shipowner’s arbitrary conduct was found where it terminated benefits based on the opinion of its own IME doctor that Tullos could return to work and ignored the opinion of three treating doctors who said Tullos could not (of note, the court said that a jury could conclude this did not equate to arbitrary conduct).

An example of laxness in investigation giving rise to an award of attorney fees is Etheridge v. Rainier Investments, Inc., 1998 A.M.C. 2978 (D. Alaska 1998), wherein a seaman injured his groin while working aboard a crab boat and reported his injury to the vessel’s Master. He was

subsequently diagnosed with a hernia and recommended to have surgery. It took nine months before Etheridge provided authorization for the surgery. This delay was found to constitute laxness in investigating the claim sufficient to give rise to a claim for attorney fees. Id. at 2983-84.

However, where a reasonable basis exists for questioning the seaman's entitlement and the vessel owner diligently attempts to investigate, there is no liability for fees, costs, or damages arising from such delay. See, e.g., Gorum v. Ensco Offshore Co., 2002 U.S. Dist. LEXIS 21992 (E.D. La. 2002) (delay caused by seaman failing to cooperate with vessel owner's attempts to get records and depose doctors held not willful, callous, arbitrary or capricious) Ward v. Inland Marine Services, Inc., 1987 A.M.C. 1282, (N.D. Fla 1987) (three month delay due to investigation into request for surgery held reasonable).⁸

The trial court found ASC to have engaged in bad faith because it delayed payment while attempting to investigate Mai's entitlement. It concluded that such conduct was "unreasonable." However, unreasonable conduct does not qualify as a basis for assessing attorney fees and costs. Based on the applicable legal authorities, this finding was erroneous.

⁸ Even if investigation uncovers a fact issue regarding entitlement that is later resolved against the vessel owner, denial of payment does not automatically give rise to an award of attorney fees. See Nunez v. Weeks Marine, Inc., 2008 U.S. Dist. LEXIS 35078.

Moreover, the facts simply do not support the conclusion that ASC acted arbitrarily or capriciously. ASC had a reasonable basis for investigating Mai's entitlement, it diligently pursued an IME to evaluate Dr. Tardieu's recommendation, even going so far as to file a declaratory judgment action to force an IME when Mai refused to attend. When Mai eventually filed her own lawsuit, ASC did not seek to delay its evaluation by trying to keep its declaratory judgment action alive, but agreed to dismiss the case. It immediately obtained dates in October. When Mai did not want to attend the IME in October, it was moved to November at Mai's request to accommodate her schedule. When Mai later objected to the doctor chosen, ASC again chose to avoid delay and sought another doctor and scheduled the first available appointment. Although it could have forced Mai to pay for her own costs to attend, ASC agreed to pay these costs so as to expedite the appointment. The delay in approval arose solely due to Mai's refusal to cooperate with such investigation.

For these reasons the trial court's award of attorney fees and costs was not supported by substantial evidence and was thus in error.

(h) The Fact That Defendants' IME Physician Ultimately Agreed that TKR Surgery Was Reasonable, Such Determination Does Not Entitle Mai to Recover Maintenance During the Period She Refused to Cooperate with ASC's Attempt to Investigate Her Request.

Even though ASC's IME physician Dr. Mandt ultimately agreed that TKR was a reasonable treatment for her knee, Mai is not entitled to payment of maintenance during the time she refused to cooperate with and delayed ASC's investigation into her alleged entitlement to re-instatement of maintenance and cure. A seaman has a duty to cooperate with a shipowner's investigation into her claimed entitlement to maintenance & cure; this "is a 'usual' or 'ordinary' fact of life for the maritime industry" Sana, 181 F.3d at 1047. Mai's refused to do so. If she had agreed to the IME, the confirmation of its reasonableness and that it had a causal connection to her injury aboard the vessel would have been known by July 1, 2007. It was solely the result of Mai's actions that cure was delayed and maintenance was withheld.

To allow a seaman to refuse to cooperate and then later to recover maintenance during the period when, if she did cooperate by attending an IME, the vessel owner could have determined that maintenance was owed, defeats such duty. This only provides an incentive for seamen to refuse to cooperate with a vessel owner's reasonable investigation efforts. Plaintiff's conduct is akin to a seaman who, though offered curative treatment, fails to follow up and to obtain such treatment and thereafter is properly denied maintenance during the period that she failed to treat. In this circumstance, courts deny the seaman recovery for maintenance &

cure. Lipari v. Maritime Overseas Corp., 493 F.2d 207, 214 (3rd Cir.

1974) (suspension of maintenance and cure obligation appropriate where seaman failed to obtain treatment).

- (i) *The April 5, 2007 Letter from ASC's Lawyer Does Not Render ASC's Subsequent Attempt to Investigate Mai's Entitlement to Maintenance & Cure, When a Request for Reinstatement was First Subsequently Made, Either Invalid or Unreasonable.*

The trial court relied on an April 5, 2007, letter sent by ASC's counsel to Mai's counsel in support of its determination that ASC acted unreasonably in delaying payment of maintenance & cure for TKR surgery. Although perhaps it certainly could have been written more clearly because the letter failed to address ASC's right to investigate Mai's entitlement, this omission did not prejudice Mai's position, and did not change subsequent events regarding the delay in approval. Although admittedly constituting some evidence of ASC's intent regarding the delay, it does not, standing alone, support a finding of unreasonable or arbitrary conduct because a good faith basis existed for questioning and therefore investigating the TKR request.

At the time the letter was written, no request had been made by Mai to undergo TKR. The letter was written in response to a telephone call with Mai's counsel regarding maintenance & cure, which had

previously been terminated. Ex. 145-54. The primary thrust of the letter was to explain the reasons why Mai was not entitled to maintenance & cure. In a concluding paragraph, it was acknowledged that Dr. Tardieu thought Mai may at some point require TKR and that this procedure is inherently curative in nature. In perhaps an inadequately worded concluding sentence, counsel wrote that “[s]hould Ms. Tuyen decide to have the surgery, it would be covered by maintenance and cure.” Id. The trial court concluded that ASC acted unreasonably by subsequently delaying approval of the surgery through the exercise of its right to investigate whether Mai truly was a candidate for TKR because apparently it felt that ASC had already conceded the point.

The April 5th letter from counsel did not address a pending request to authorize surgery. It did not promise payment to Dr. Tardieu should he schedule surgery nor did it state that ASC intended to waive its right to investigate Mai’s entitlement to maintenance & cure for the procedure. ASC did not have all of the facts relating to the issue of entitlement, and at best the letter addressed a hypothetical question about possible future entitlement to maintenance & cure. Although admittedly, the sentence could have been better worded, implicit in the response is the assumption that Mai did, in fact, qualify for the procedure. This is demonstrated by the reference to Dr. Tardieu’s “belief” that Mai is a “candidate” for the

procedure. It was not intended, nor did it acknowledge, that Mai did, in fact, qualify.

ASC did not authorize this wording of the letter. RP 238.

Although it did not issue a retraction upon later reading the letter, it did so as soon as Mai's request to perform TKR was brought to its attention. RP 240. When first apprised of the request ASC immediately informed Dr. Tardieu that it would not authorize the procedure pending an investigation into Mai's entitlement, i.e., whether it was warranted in light of Mai's limited degree of arthritic changes in her knee. This was confirmed in a subsequent letter by its counsel who was involved in trial and had to set up an IME to investigate.

Mai suffered no prejudice as a result of the letter. The condition of her knee was stable and did not worsen as a result of ASC's subsequent attempt to investigate her entitlement. If the letter had been worded differently, e.g. to read as the subsequent June 6th letter did, the same delay in treatment would have occurred, and such delay would have been just as reasonable.

For these reasons the April 5th letter does not constitute substantial evidence supporting the trial court's conclusion that ASC acted unreasonably or arbitrarily because it did not alter ASC's right to

investigate Mai's entitlement through an IME or the fact that the delay in doing so resulted solely as a result of Mai's actions.

B. Plaintiff Failed to Submit Competent Medical Evidence that the Shipboard Injury Caused Symptoms that Required TKR Surgery and Thus the Trial Court's Ruling Holding Defendant Liable for the Symptoms and Subsequent Surgery Must Be Reversed.

1. Standard of Review

The court reviews the trial court's factual findings on a "substantial evidence" basis. Pardee v. Jolly, 163 Wn.2d 558, 566 (2008) ("[f]indings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true.").

2. The Unsupported Finding of Fact

The trial court made a finding that the "...box which fell from the conveyor and struck Mai's knee on March 29, 2005 was the proximate cause of an injury that required replacement of the left knee." FF & CL, ¶ 18 (CP 233). As demonstrated below, this finding is not supported by substantial evidence, i.e., competent expert medical testimony that rises above speculation and guesswork, and the ruling based on thereon must be reversed.

3. Even Under the Jones Act's Relaxed Causation Standard, Plaintiff Must Still Present Evidence of

Medical Causation that Rises Above the Level of Speculation and Guesswork.

To prove the causation element of her Jones Act claim, plaintiff must show that the employer's alleged negligence played "any part, even the slightest, in producing [her] injury." Ribitzki v. Canmar Reading & Bates, Ltd., 111 F.3d 658, 664 (9th Cir. 1997) (quoting Lies v. Farrell Lines, Inc., 641 F.2d 765, 771 (9th Cir. 1981)). This relaxed causation standard nonetheless does not allow plaintiff to recover where her evidence of medical causation does not rise above mere speculation and possibility. See, e.g., Mayhew v. Bell S.S. Co., 917 F. 2d 961, 963-64 (6th Cir. 1990). There, the Sixth Circuit., in determining the standard of evidence admissible to prove medical causation in a Jones Act case, held that

[a]lthough a Jones Act plaintiff need not present medical evidence that the defendant 's negligence was *the* proximate cause of the injury, we believe that a medical expert must be able to articulate that there is more than a mere possibility that a causal relationship exists between the defendant's negligence and the injury for which the plaintiff seeks damages.

Mayhew, 917 F. 2d at 963 (emphasis in original); see also Hancock v. Diamond Offshore Drilling, Inc., 2008 U.S. Dist. LEXIS 60934 (E.D. La. 2008) (court granting summary judgment on Jones Act claim and noting that a "medical expert must be able to articulate that more than a mere

possibility of a causal relationship exists between the defendant's negligence and the injury for which the plaintiff seeks damages...); Swords v. Norfolk & W. Rwy. Co., 1996 Ohio App. LEXIS 2020 (1996) (medical testimony must show "likely" or "more than possible" connection).

4. Dr. Tardieu's Testimony Purporting to Link the Shipboard Injury and Plaintiff's Symptoms Which Later Necessitated Knee Replacement Surgery is Conclusory and Does Not Rise Above the Level of Speculation and Guesswork.

The only medical evidence submitted by plaintiff concerning the medical causation issue is the deposition testimony of Dr. Bert Tardieu, plaintiff's treating orthopedist. Dr. Tardieu's testimony on medical causation was conclusory, speculative, inconsistent and insufficiently reliable to permit the trial court to find that the box striking plaintiff's knee on March 29, 2005, was the proximate cause of the injury that required replacement of the left knee. For example, Dr. Tardieu gave the following testimony:

- In response to a question about what role the March 29th accident played any role in causing plaintiff's symptoms, Dr. Tardieu said "*I think the best I could say is she was by all reports asymptomatic prior to the injury and then became symptomatic after the injury.*" CP 49 (emphasis added).
- In response to a question whether the March 29, 2005, accident played any role, even the slightest, in causing symptoms that required surgery, Dr. Tardieu said, "*I think it's a very good possibility that injury started the process of pain symptoms... .*" CP 49 (emphasis added).

- In response to a question whether the 3/29 accident played a substantial factor in causing her symptoms and after saying he did not understand what “substantial” meant, Dr. Tardieu said, “On my lack of legal expertise, I would say yes. By the sound of what substantial is and what substantial means in English, *it was a substantial factor.*” CP 50-51 (emphasis added).
- In response to a question whether the 3/29 accident played any role in causing Mai’s arthritis in her knee to become symptomatic, Dr. Tardieu said, “*I think it’s quite possible that that started the symptomology.*” CP 59 (emphasis added).
- In response to a question whether the 3/29 accident was a trigger in causing her arthritis to become symptomatic, Dr. Tardieu said, “*I believe that’s safe.*” CP 98 (emphasis added).
- “So I’m kind of still believing the event *may well have been* a significant trigger ...” CP 136 (emphasis added).
- Q: So it [the pain] certainly doesn’t – it doesn’t allow you to pick one event versus another event as being the cause of her accident?
A: I think it would be difficult. Yes.
Q: And the same thing with the swelling. The fact that she had swelling in February and has swelling later on in April, that doesn’t allow you to really put your finger on and say this is the event that caused her to have that problem?
A: Not because of the swelling. CP 154-55.
- Q: So would you agree that there’s really no specific factor about this accident or about her complaints that really allows you to determine when, in fact, her preexisting degenerative medial meniscus tear became symptomatic?
A: *Be very difficult.* CP 155 (emphasis added).
- Q: In fact, doctor, would you agree that no one could say with any degree of medical certainty that – when, in fact,

her medial meniscal tear, the pre-existing one that she had aboard the Northern Hawk, became symptomatic? That you would need a crystal ball or some sort of power that no one has to be able to answer that question? Would you agree with that?

A: *Very true, yeah.* CP 155-56 (emphasis added).

- Q: Now, assuming that Ms. Mai reports a significant increase in pain following the March 29, 2005, incident, do you have an opinion on a more likely than not basis whether that incident was a cause, however slight, of the current disability in her left knee?

A: For me *it still remains the best data that I have*, and that's based on what little information we have and the patient's report.

Q: And so what conclusion do you draw?

A: *That the event with the box striking the knee set off the knee's ultimate demise.* CP 163-64 (emphasis added).

- *"I suspect* what has happened is that the tear reached a level of threshold that now became symptomatic. It's like the straw that hit, you know, the camel's back. That's what I look at it as." CP 164 (emphasis added).
- *"If it was significantly more painful the next day, I think it would be a reasonable thing to state that was the event*, but I don't know that either because I don't have that question asked, how did it feel the next day or the next week after the event. So I just – it's – *it's thin at best to say anything with this.* CP 170 (emphasis added).

Dr. Tardieu states in several instances and in a conclusory fashion his belief that the March 29, 2005, incident caused the knee to become symptomatic. However, when pressed to substantiate his belief on cross-examination, the unmistakable tenor of his testimony is that he cannot, beyond guessing as to the possibilities, say what caused plaintiff's knee to

become symptomatic. When the “clear thrust” of a medical expert’s testimony is that he does not know what caused the injury, there is no triable issue of fact on medical causation. Swords v. Norfolk & W. Rwy. Co., supra, at *21.

In *Swords* (a case involving FELA – upon which the reduced causation standard in Jones Act cases is based), plaintiff’s treating physician testified much as Dr. Tardieu did in the instant case: he gave a conclusory opinion that one of two incidents was the cause of plaintiff’s injury but on cross-examination acknowledged that the incident in question could only have “possibly” caused the injury:

We acknowledge that Dr. Schoedinger ... testified that based on the fact that appellant reported that his back began hurting after the September 3, 1991, incident, Dr. Schoedinger would have to conclude that appellant’s problems began on that date. However, the clear thrust of Dr. Schroedinger’s testimony is that he does not know whether the September 3, 1991, incident was a cause in whole or in part of appellant’s injury.

Swords, at *21. Because the overall tenor of the medical expert’s testimony was that he could not really say more than that it was a possibility that the incident in question caused plaintiff’s injuries, the appellate affirmed the trial court’s decision to dismiss the case because plaintiff had failed to raise a triable issue of fact on the medical causation issue.

Here, Dr. Tardieu similarly acknowledges that he does not really know which incident caused the symptoms requiring the knee replacement. He says, for example, that it is “quite possible” that the March 29, 2005, incident started the symptomology. CP 59. He admits that it would be “very difficult” to ascertain which incident caused her knee to become symptomatic. CP 155. He admits that to determine which incident made her knee symptomatic he would need “a crystal ball or some sort of power that no one has...” CP 155-56. In short, Dr. Tardieu’s medical causation testimony is speculative and mere guesswork and thus does not constitute “substantial evidence” to support the trial court’s finding that the March 29, 2005, incident caused the injury that required the knee replacement surgery. Clements v. Blue Cross of Wash. & Alaska, Inc., 37 Wn.App. 544, 549-50 (1984) (expert testimony based on speculation and conjecture does not constitute substantial evidence and therefore cannot be used to support a claim or defense).

5. The Integrity of the Judicial System Requires that Speculative, Conjectural and Conclusory Expert Opinions Be Excluded from Consideration by the Trier of Fact.

The integrity of the judicial process requires that speculative, conjectural and conclusory expert opinions be precluded from consideration by the trier of fact. Safeco Ins. Co. of Am. v. McGrath, 63

Wn.App. 170, 177 & n.18 (1991) (citing Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago, 877 F.2d 1333, 1339 (7th Cir. 1989). In Mid-State Fertilizer, the Seventh Circuit upheld the trial court's preclusion of expert testimony that was conclusory and speculative. The appellate court noted that an "expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." Id. As the court further noted

'The importance of safeguarding the integrity of the [judicial] process requires the trial [or appellate] judge, when he believes that an expert's testimony has fallen below professional standards, to say so, as many judges have done.'

Id. (citing Deltak, Inc. v. Advanced Systems, Inc., 574 F. Supp. 400, 406 (N.D. Ill. 1983).

Here, Dr. Tardieu admits that he would need a "crystal ball" or some power no one has to determine which injury to plaintiff's knee ultimately required the knee replacement surgery. CP 155-56. Thus, it is only by speculation and conjecture that Dr. Tardieu can conclude that it was the March 29th trauma that made the knee symptomatic. The integrity of the judicial process requires that triers of fact base their decisions on fact, and not on speculation, and therefore Dr. Tardieu's unsupported opinions on medical causation must be ignored.

VI. CONCLUSION

American Seafoods LLC and Northern Hawk LLC respectfully request that this Court reverse the trial court judgment and order that judgment be entered in favor of American Seafoods Company LLC and Northern Hawk LLC on the issue of liability pursuant to the Jones Act and General Maritime Law because plaintiff failed to adduce sufficient evidence to prove medical causation between her alleged accident and her subsequent surgery. American Seafoods Company LLC and Northern Hawk also respectfully request this Court to reverse the trial court judgment relating to Respondent Mai's entitlement to additional maintenance and to its award for attorney fees, costs, and compensatory damages for the delay in payment of cure and the failure to pay maintenance in connection with her knee replacement surgery.

Respectfully submitted this 13th day of November, 2009

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CERTIFICATE OF SERVICE

I, Sibel Yasarturk, under penalty of perjury of the laws of the State of Washington and the United States, hereby certify as follows:

1. I am an employee of the law firm of Gaspich & Williams PLLC, 1809 Seventh Ave., Suite 609, Seattle, WA 98101, counsel for Appellants American Seafoods Company LLC and Northern Hawk LLC herein.

2. On February 12, 2010, I caused a true and correct copy of this Appellant's Opening Brief to be served on the following in the manner indicated below:

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DATED this 12th day of February, 2010


Sibel Yasarturk