

No. 66075-6

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**IAN DEAN
Plaintiff / Appellant
v.
THE FISHING COMPANY OF ALASKA, INC.
and
ALASKA JURIS, INC.
Defendants / Respondents**

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

1. Standard for Deciding Maintenance and Cure
Motions

Respondent, Fishing Company of Alaska (FCA), never challenged Ian Dean's initial entitlement to maintenance and cure. Indeed, FCA paid him maintenance for over three years. FCA paid for bilateral carpal tunnel surgeries, the last one being performed some two and a half years after Mr.

Dean started receiving maintenance and cure. His hand surgeon recommended a follow-up with a neurologist for Mr. Dean's continued complaints. Note by Dr. Elizabeth Joneschild, CP 69. FCA refused to pay for that consultation and instead sent Mr. Dean to Dr. Williamson-Kirkland, who said what he was paid to say: 'maximum cure'.

Appellant made a tactical decision (perhaps an erroneous tactical decision, given the trial judge's order, CP 76-77) to emphasize the neck problems, rather than carpal tunnel syndrome, when bringing a motion to reinstate maintenance. That made no difference to the proceedings below. Although not in the record, Dr. Williamson-Kirkland was ready to testify, and later did testify, that Mr. Dean had not needed the carpal tunnel surgeries performed by Dr. Joneschild. With a strict summary judgment standard regarding conflicting medical opinions, Mr. Dean still would have lost the motion. The neck problem versus carpal tunnel syndrome also makes no difference in this appeal. The issue is what standard of proof the judge should have required of the parties when deciding the motion.

Cervical radiculopathy was raised as a possible

diagnosis shortly after Mr. Dean got off the FCA vessel in June 2006. Dr. Joneschild's chartnote of June 26, 2006, CP 46. Dr. Jane Distad later noted "some narrowing in the right C5-6 which could potentially affect the C6 root" (a nerve root in the neck). CP 60. That Mr. Dean's neck pain manifested in the service of the ship was never challenged until FCA decided to cut off his maintenance and cure. Dr. Timothy Daly diagnosed "cervical strain and intermittent paracervical spasm". CP 62. "I am not certain that there are any curable recommendations for the neck." Id. (emphasis added). That is hardly the "unequivocal" determination of maximum cure required before a seaman's benefits are cut off. Johnson v. Marlin, 893 F.2d 77 (5th Cir. 1990). To the contrary, Dr. Aflatooni concurred with Dr. Joneschild's earlier tentative diagnosis of "cervical radiculopathy" and Dr. Daly's diagnosis of muscle spasm in the neck, but concluded that curative treatment was indicated. CP 68.

Then along comes Dr. Williamson-Kirkland, hired by FCA to disagree with all four of these doctors.

There was no dispute that Mr. Dean established an initial entitlement to maintenance and cure. The issue is when he became dis-entitled to maintenance and cure once it started. Mr. Dean urges this Court to follow the ruling in Gouma v. Trident Seafoods, attached to appellant's brief at the appendix. FCA disagrees and states: "With all due respect to the trial judge in Gouma, she (Judge Marsha Pechman) had the standard backwards." Brief of Respondent at p. 14. With all due respect to FCA, it doesn't understand the standard Judge Pechman used. The federal Eastern District of New York recently applied the same standards of proof as did Judge Pechman. Haney v. Miller's Launch, Inc., 2010 WL 4716625 (E.D.N.Y. 2010) ("Once a seaman establishes his rights to payments, the burden shifts to the shipowner to prove that the injured employee has reached the point of maximum medical cure.").

FCA then goes on to argue that the trial judge did not have the power to order continued maintenance and cure. This is an incredible assertion. FCA is arguing basically that, although Superior Courts have authority to decide

cases for injury to seamen, those courts do not have authority to order reinstatement of maintenance and cure when it has been wrongly cut off. Accepting such an argument would render the Savings to Suitors Clause meaningless. 28 U.S.C. § 1333.

The basic issue in this appeal is whether or not shipowners can simply purchase a medical opinion and thereby escape their maintenance and cure obligations until trial.

2. Surveillance

“In the present case, given that FCA unequivocally stated that it would not introduce surveillance materials (if any exist) at trial, there is no need or reason to determine whether the contents of the surveillance (again if any exists) are privileged.” Brief of Respondent at p. 24. Does any surveillance material exist or not? FCA should just answer the question. Then it can be determined whether or not this is even an issue. In Howard Johnson’s Motor Lodges, Inc., v. Baranov, 379 So.2d 114 (Fla.App. 1979), it was held that an

interrogatory about the existence of surveillance films must be answered. The court did not reach the issue of producing the film itself. This is a necessary prerequisite to a decision regarding discovery of the film's content. Such discovery in turn is "reasonably calculated to lead to the discovery of admissible evidence. FRCP 26(b)(1)." Id. See, CR 26(b)(1).

In this appeal and in the court below, FCA relies on federal Judge Zilly's opinion in Goma v. American Seafoods (W.D. Wash. 2008). Brief of Respondent at p. 22. FCA is justified in relying upon that decision. The fact is, however, that Judge Zilly has flipped on this issue. He ruled in exactly the opposite manner nine years previously. Gray v. Norquest Seafoods, C98-596Z (W.D. Wash. 1999). A copy of Gray v. Norquest Seafoods was supplied to the trial judge in Ex. 4 to the surveillance motion below. CP 100. The Gray v. Norquest Seafoods case involved an identical interrogatory to that at issue here. Declaration of John Merriam, attached as Ex. 5 to the surveillance motion below, CP 101. In Gray v. Norquest Seafoods, the shipowner was ordered to answer interrogatory number 5, about whether or not surveillance had been undertaken. Id.

If FCA were to state there was no surveillance, this motion and appeal would not have been filed. If FCA had in fact undertaken surveillance and chose not to introduce it at trial, that fact should be discoverable. Like in the spoliation of evidence line of cases, see, e.g., Henderson v. Tyrrell, 80 Wn.App. 592 (1996), a party should be allowed to argue to the finder of fact that the opposing party is withholding potentially relevant evidence.

Where surveillance is concerned, maintenance and cure cases present a unique situation. The shipowner has a duty to investigate before cutting off benefits. Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

FCA claims that being required to answer interrogatory number 5, “was also unwarranted because discovery of that information was not likely to lead to the discovery of admissible evidence.” Brief of Respondent at p. 24. False. If Mr. Dean was in fact under surveillance, the decision to not introduce the surveillance films is relevant, in that FCA could not find Mr. Dean faking his ailments. The rationale for non-disclosure of surveillance films, at least prior to deposition, is that surveillance is the ultimate truth serum

about what a claimant can and cannot do. But the converse is also true. It can be the ultimate shield for a claimant in defeating assertions that the claimant is not injured, can or cannot do something. It may show the claimant limping; it may show the claimant unable to lift a heavy object; it may show the claimant asking for help doing something; it may show the claimant in pain. It would be entirely unfair for a shipowner, who has surveillance films showing the seaman not able to do something, to then take a contrary position at trial through the testimony of one of their doctors or other experts. For example, in this case, it is conceivable that FCA has surveillance films showing Mr. Dean holding his neck in pain.

In a situation like this, involving a motion for reinstatement of maintenance and cure, one of the issues is the shipowner's actual knowledge of Mr. Dean's condition. Given the shipowner's duty to investigate maintenance and cure claims, surveillance arguably could have been part of fulfilling that duty. The seaman should be entitled to learn the results of that investigation, just as he is entitled to the reports of the insurance company's doctors. If there was

surveillance, which the fishing company is hiding, the surveillance could show actual knowledge of Mr. Dean's neck ailment. In a maintenance and cure case, the seaman is entitled to see all the evidence that the shipowner relies on, good, bad or neutral. The shipowner has the duty to consider all evidence in making decisions whether to grant or withhold benefits. And the seaman has the right to see if that duty has been fulfilled.

Whether or not a statement has been taken from a witness is not, of itself, work product--the only work product is the statement itself. The same should hold true for whether or not surveillance has been undertaken. If there has been no surveillance, FCA should just say so and be done with it. If there is surveillance but it will not be used at trial, FCA should say so and only then assert the work product privilege. Whether or not the film itself is work product is a separate issue. We can cross that bridge when we come to it.

II. CONCLUSION

FCA states: "Summary judgment is the appropriate

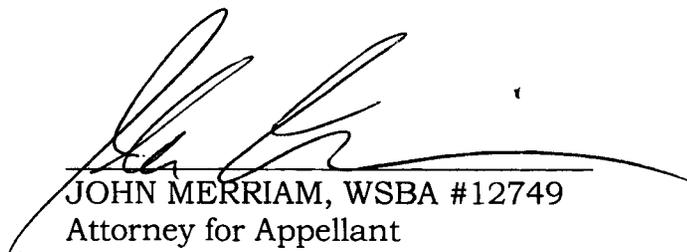
standard for determining factual issues surrounding a seaman's entitlement to maintenance and cure prior to trial on the merits." Respondent's brief at p. 25 (emphasis added). That is correct. That standard is also appropriate for determining factual issues surrounding a seaman's dis-entitlement, for which the shipowner should have the burden on proof. In this case, Mr. Dean's initial entitlement to maintenance and cure was never in dispute. The issue is: Who has the burden of proving whether or not maximum cure has been reached, once the seaman has established his entitlement to maintenance and cure in the first instance?

For surveillance, the issue is also simple.

Regarding whether or not FCA engaged in surveillance: Just answer the question, yes or no!

Respectfully submitted this 16th day of March 2011.

LAW OFFICE OF JOHN MERRIAM



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III. DECLARATION OF SERVICE ELECTRONICALLY
AND BY US MAIL

Pursuant to 28 USC § 1746 (1976), John Merriam
declares as follows:

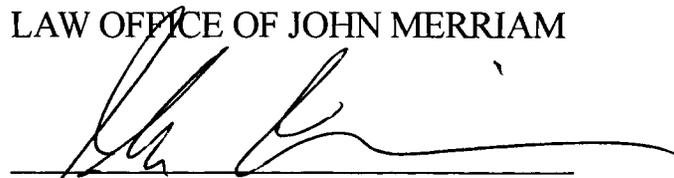
On March 16, 2011, I caused to be filed and served true
and correct originals and/or copies of Appellant's Reply Brief
submitted herein, by electronic service and by depositing the
same in the United States mail, first class, postage prepaid, to:

Michael A. Barcott, Esq.
Megan E. Blomquist, Esq.
Holmes Weddle & Barcott
999 Third Avenue, Suite 2600
Seattle, WA 98104-4001

I declare under penalty of perjury that the foregoing is
true and correct.

Dated this 16th day of March 2011, at Seattle,
Washington.

LAW OFFICE OF JOHN MERRIAM



John W. Merriam
Attorney for Appellant/Plaintiff Ian Dean