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No. 65119-6-I

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

DANA CLAUSEN,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

BRIEF OF APPELLANT ICICLE SEAFOODS, INC.

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I. INTRODUCTION

Seaman Dana Clausen brought a lawsuit against Icicle Seafoods for a back injury he sustained while working on Icicle's seafood processing barge. Clausen brought claims for negligence, unseaworthiness and maintenance and cure, the trio of actions available to injured seamen. Clausen prevailed on his negligence claim and on his maintenance and cure claim. He recovered compensatory damages on the negligence claim, as well as unpaid maintenance and cure, attorney fees, and punitive damages.

Icicle seeks review of two aspects of Clausen's recovery. First, Icicle challenges the attorney fee award because under governing federal maritime law, and under Washington substantive and procedural law, attorney fees in a maintenance and cure action are an element of damages to be decided by the jury. Clausen presented no evidence to the jury regarding attorney fees, but instead recovered them from the court on a post-trial motion. This constitutes reversible error, and the attorney fee award should be vacated.

Secondly, Icicle appeals the trial court's failure to reduce the jury's punitive damage award in accordance with controlling federal maritime law. As a matter of substantive maritime law, punitive damages cannot

dwarf compensatory damages. Instead, there must be a 1:1 ratio between them. The trial court's failure to apply this ratio was a reversible error warranting reduction of the punitive damages award.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in denying Icicle's Motion for Judgment as a Matter of Law on Prejudgment Interest and Attorneys' Fees.
2. The trial court erred in its Findings and Conclusions Regarding the Award of Attorney's Fees.
3. The trial court erred in denying Icicle's Motion to Amend Judgment.

B. Issues Pertaining to Assignments of Error.

1. Where attorney fees and costs are available as an element of damages for a maritime employer's willful and wanton failure to pay maintenance and cure to an injured seaman, may the seaman recover such fees and costs despite having submitted no evidence to the jury as to the measure of this element of damages? (Assignments of Error 1 and 2).
2. Where a seaman is entitled to recover attorney fees and costs as a result of his employer's willful and wanton failure to pay maintenance and cure, and bears the burden of segregating the portion of such fees attributable to counsel's efforts devoted to the recovery of maintenance and cure and of proving the reasonableness of the fee sought, does the trial court abuse its discretion by not scrutinizing the fee application to ensure the seaman has satisfied those burdens? (Assignments of Error 2).

3. Is an award of punitive damages for the willful and wanton failure to provide maintenance and cure subject to the 1:1 ratio adopted by the United States Supreme Court as a matter of substantive maritime law? (Assignment of Error 3).

III. STATEMENT OF THE CASE

A. Overview of Federal Maritime Law Regarding Maintenance and Cure.

All of the issues presented in this appeal are related to maintenance and cure, maritime law remedies available to injured seamen for hundreds of years. Icicle presents the following brief overview of the doctrines of maintenance and cure to provide relevant background information and context for the Court's evaluation of the questions presented.

Maintenance and cure are traditional remedies under the general maritime law that are designed to provide a seaman with food, lodging and medical care when he becomes sick or injured in the ship's service. The OSCEOLA, 189 U.S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760 (1903); Vaughan v. Atkinson, 369 U.S. 527, 532, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962). Simply stated, "maintenance" is a daily payment to cover certain living expenses and "cure" is the payment of certain medical bills. To recover maintenance and cure, a seaman must prove that his injury or illness occurred while in the ship's service. West v. Midland Enters., 227 F.3d 613, 616 (6th Cir. 2000).

Maintenance and cure are no-fault remedies that the employer is obligated to pay from the time the seaman becomes incapacitated until he reaches maximum cure. Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 945-46 (9th Cir. 1986). Maximum medical cure is reached when it is probable that further treatment will not improve the seaman's condition. See Vella v. Ford Motor Co., 421 U.S. 1, 5, 95 S. Ct. 1381, 43 L. Ed. 2d 682 (1975).

If the employer fails to pay maintenance and cure and the seaman takes legal action to recover these benefits, there are several potential remedies, each dependent on the nature of the employer's conduct in failing to pay. First, where the employer's failure to pay was reasonable, the seaman may recover the unpaid maintenance and cure simply by proving his entitlement thereto. Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987). Secondly, where the seaman demonstrates that the failure to pay was "unreasonable," he may recover compensatory damages for any additional harm or injury resulting from the failure to pay. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371, 53 S. Ct. 173, 77 L. Ed. 368 (1932). This action for compensatory damages for the unreasonable failure to pay maintenance and cure is a separate negligence cause of

action under the Jones Act. Id. at 272-378.¹ The types of compensatory damages available in such an action may include additional medical care necessitated by the delay in paying maintenance and cure, additional pain and suffering, and additional economic losses caused by the delay. Gaspard v. Taylor Diving & Salvage Co., 649 F.2d 372, 375 (5th Cir. 1981) (stating compensatory damages include “full tort damages” that result from failure to pay maintenance and cure).

The third potential remedy for failure to pay maintenance and cure is attorney fees, which the seaman can only recover upon a showing that the failure to pay was “willful and wanton” or “arbitrary and capricious.” Vaughan, 369 U.S. at 530-31; Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1501 (9th Cir. 1995), abrogated on other grounds by Atlantic Sounding v. Townsend, ___ U.S. ___, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). Finally, under the Supreme Court’s recent decision in Townsend, a maritime employer’s “willful and wanton” disregard of its maintenance and cure obligation may also entitle a seaman to punitive damages. 129 S. Ct. at 2575.

¹ The Jones Act is a federal statute that grants seamen a negligence cause of action against their employer for personal injuries. 46 U.S.C. § 30104. To prevail on a Jones Act claim, a plaintiff must establish that he or she is a seaman, and prove the traditional elements of a negligence claim, namely duty, breach, causation and damages. See Ribitzki v. Canmar Reading & Bates, 111 F.3d 658, 662 (9th Cir. 1997).

B. Factual and Procedural History.

Dana Clausen filed a suit against Icicle Seafoods in King County Superior Court on January 18, 2008. CP 3-14. Clausen alleged that he suffered an injury on February 12, 2006, while working aboard Icicle's processing barge the BERING STAR, and brought claims for Jones Act negligence, unseaworthiness, and maintenance and cure. CP 5-13. Clausen also sought attorney fees in the amount incurred in "asserting his right to receive maintenance and cure" because of Icicle's allegedly arbitrary and capricious failure to pay him maintenance and cure. CP 13. Following the issuance of the Supreme Court's Townsend decision, Clausen also sought an award of punitive damages based on Icicle's allegedly wrongful failure to pay maintenance and cure.

A jury trial was held from October 26 through November 10, 2009, before the Honorable Hollis Hill. Clausen rested his case without providing any evidence regarding attorney fees. Icicle moved for Judgment as a Matter of Law on the attorney fees claim based upon Clausen's failure to submit such evidence. CP 97-101. The court orally denied the motion.

The jury returned its verdict on November 16, 2009. The jury found in favor of Clausen on his negligence claim, finding Icicle 56

percent at fault for his injury and Clausen himself 44 percent at fault, and awarded \$253,736 in damages on his negligence claim. CP 109-112. The jury found for Icicle on the unseaworthiness claim. CP 110.

With respect to Clausen's claims for maintenance and cure, the jury found that Clausen was entitled to additional maintenance and cure, and awarded him \$19,300 in unpaid maintenance and \$18,120 in unpaid cure. CP 108. The jury further found that Icicle was unreasonable in its failure to pay Clausen maintenance and cure, but that Icicle's failure did not cause **any** injury to Clausen, so it awarded \$0 compensatory damages for failure to pay maintenance and cure. CP 113-114. The jury received no instruction regarding attorney fees. Finally, the jury found that Icicle was "callous and indifferent" or "willful and wanton" in its failure to pay maintenance and cure, and awarded Clausen \$1,300,000 in punitive damages. CP 114.

On November 30, 2009, Clausen filed a Motion for Attorney's Fees and Litigation Costs, requesting a total of \$431,970 in attorney fees and \$42,129.23 in costs. CP 225-240. In its opposition, Icicle renewed its earlier motion for judgment as a matter of law on the issue of attorney fees, arguing that Clausen's failure to present evidence to the jury on this element of damages precluded a fee award. Icicle also challenged the

reasonableness of the fee request. CP 265. The trial court issued its Findings and Conclusions regarding attorney fees on January 28, 2010, rejecting Icicle's argument and awarding Clausen's counsel \$387,558 in attorney fees and \$40,547.57 in costs, after reducing the attorney fees amount sought by 10 percent. CP 420-433.

Judgment was entered on the verdict on January 28, 2010. CP 434-435. Icicle filed a Motion to Amend the Judgment on February 4, 2010, which the trial court denied on March 2, 2010. CP 439-456; 548-563. Icicle timely filed this appeal on March 26, 2010. CP 573.

IV. ARGUMENT

A. **The Superior Court Erred in Not Dismissing Clausen's Attorney Fees Claim as a Matter of Law Based on His Failure to Submit Any Evidence Regarding Fees to the Jury.**

1. **Standard of Review.**

Whether Clausen was required to submit evidence of attorney fees to the jury is a question of law that is reviewed de novo. Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 880, 224 P.3d 761 (2010).

2. **Statement of Facts.**

As noted, Clausen failed to submit any evidence on his attorney fee claim. Icicle moved for Judgment as a Matter of Law based on that failure. CP 97-101. The trial court denied the motion and awarded

attorney fees and costs on Clausen's post-trial motion. CP 420-433.

3. Legal Analysis and Argument.

a. Under Federal Maritime Law, Attorney Fees for Willful and Wanton Failure to Pay Maintenance and Cure Are an Element of Damages to Be Decided by the Jury.

Maritime actions brought in state court are governed by substantive federal maritime law. Endicott, 167 Wn.2d at 878 (citation omitted). Under federal maritime law, an award of attorney fees for failure to pay maintenance and cure is an element of damages, and is therefore a question of fact that must be decided by the jury.

In Vaughan, the very case in which this attorney fee remedy was established, the Supreme Court expressly stated that an award of attorney fees for failure to pay maintenance and cure is an element of damages. 369 U.S. at 531. ("It is difficult to imagine a clearer case of **damages** suffered for failure to pay maintenance and cure than this one." (emphasis added)). In its analysis, the Vaughan Court noted that attorney fees had been awarded as a form of equitable relief in certain circumstances, and that an admiralty court sitting in equity would have authority to award such relief. Id. at 530. However, the Court made clear that it was not relying upon its equitable powers in authorizing an attorney fees award, stating, "We do not have here that case. Nor do we have the usual problem

of what constitutes 'costs' in the conventional sense. Our question concerns **damages.**" Id. (citation omitted) (emphasis added).

While the Vaughan Court made clear that attorney fees were an element of damages, it did not expressly characterize them as compensatory or punitive.² However, in Townsend, the Supreme Court left no doubt that they are a form of punitive damages. 129 S. Ct. at 2571. Punitive damages, like all other forms of damages, are a question of fact to be decided by the jury. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15-16, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

Since Vaughan, the Fifth Circuit³ has addressed precisely this issue under the same circumstances presented in this case, and has confirmed that evidence regarding the quantum of attorney fees and costs must be presented during trial. In Holmes v. J. Ray McDermott & Co., 734 F.2d 1110 (5th Cir. 1984) ("Holmes II"),⁴ overruled on other grounds by

² See Part C.3.b.(i) for further analysis as to why attorney fees in the maintenance and cure context are punitive rather than compensatory.

³ The Fifth Circuit is widely recognized as a leading authority on issues of federal maritime law, as acknowledged at trial by counsel for Clausen. See, e.g., RP 19; 1030-1031. The Washington Supreme Court has similarly recognized the preeminence of the Fifth Circuit with respect to maritime law issues. See Endicott, 167 Wn. 2d at 881-82 (rejecting Ninth Circuit interpretation in favor of Fifth Circuit analysis regarding scope of Jones Act plaintiff's right to elect mode of trial).

⁴ Although Holmes II was overruled in part by Guevara with respect to the availability of punitive damages, its requirement that the plaintiff produce evidence to the jury regarding the appropriate amount of attorney's fees for failure to pay maintenance

Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995), the plaintiff seaman's claims for Jones Act negligence and maintenance and cure were tried to a jury. Id. at 1112. The seaman presented no evidence on the issue of attorney fees during his case in chief, and the employer moved for a directed verdict on the issue, which was denied. Id. at 1120. The judge instructed the jury that if it found the employer had willfully and arbitrarily failed to pay maintenance and cure, it should decide whether to award attorney fees, and if so, should leave the amount of fees blank for the judge to decide later. Id. at 1120. The jury so found, and awarded fees in an undetermined amount. Id.

The employer appealed, but the Fifth Circuit held that it did not have jurisdiction to hear the appeal because without a specified amount of attorney fees, there was no final appealable judgment. Id. (citing Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1147 (5th Cir. 1982) (“Holmes I”). On remand, the trial court heard testimony regarding the amount of time expended by plaintiff's counsel and his hourly rate, and awarded \$10,000 in attorney fees. Id. at 1113. The employer appealed again, and the Fifth Circuit reversed the attorney fee award because of the

and cure remains valid. See Spell v. American Oilfield Divers, Inc., 722 So.2d 399, 405 (La. App. 1998).

seaman's failure to present evidence regarding attorney fees to the jury.

The court stated:

We think it is clear that the district court erred in denying McDermott's motion for a directed verdict on this issue. While there was evidence before the jury as to McDermott's conduct on the maintenance and cure issue from which it could properly determine that McDermott acted arbitrarily and willfully . . . there had been absolutely no evidence presented with regard to the amount of an attorneys' fee award. In *Holmes I*, while expressly not reaching the issue presently before us, we made it quite clear that **an award of damages in the form of attorneys' fees for willful and arbitrary failure to pay maintenance and cure is a non-severable part of the plaintiff's cause of action, and an integral part of the merits of the case.** In the absence of a waiver by the parties of the right to have this issue decided by the jury, it was error for it to have been severed and reserved by the trial judge.

Id. at 1120-21 (emphasis added). State courts in Louisiana, the state where Clausen's attorney, Mr. Curtis, is from and has an active practice, have followed the Fifth Circuit's Holmes II decision and applied the same rule. See, e.g., Spell, 722 So.2d at 405 (holding trier of fact must hear evidence and determine appropriate amount of attorney fee award);⁵ Reed v. Seacoast Products, Inc., 458 So.2d 971, 980 (La. App. 1984) (reversing

⁵ The Spell case involved a bench trial, and in that circumstance, the appellate court found the appropriate remedy for the plaintiff's failure to present evidence regarding attorney's fees was to remand and reopen the evidence to allow for such evidence to be presented to the trial judge. 722 So. 2d at 405. However, no such remedy is available in a jury trial, such as this case, where the jury has been dismissed and there is no mechanism to reopen the evidence.

fee award because no evidence regarding appropriate amount of attorney fee was presented to jury).

Washington courts have similarly recognized as a matter of substantive law that where attorney fees are an element of damages, failure to present evidence to the jury for determination of a reasonable amount precludes recovery of fees. Jacob's Meadow Owner's Assn. v. Plateau 44 II, LLC, 139 Wn. App. 743, 762, 162 P.3d 1153 (Div. 1 2007).

b. Civil Rule 54(d)(2) Requires That Where Attorney Fees Are an Element of Damages, They Must Be Proved at Trial.

While maritime actions brought in state court are governed by substantive federal maritime law, state procedural rules nevertheless apply to such actions. See Endicott, 167 Wn.2d at 884. On the issue at hand, the maritime rule of law discussed in the previous section precisely parallels the Washington procedural rule. Civil Rule 54(d)(2) requires evidence of attorney fees to be presented to the jury where such fees are an element of damages:

Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion **unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial.**

CR 54(d)(2) (emphasis added). Civil Rule 54(d)(2) is substantially similar

to Federal Rule of Civil Procedure 54(d)(2).⁶ Under Washington law, federal decisions interpreting substantially similar court rules are instructive in construing the Washington Civil Rules. Smith v. Behr Process Corp., 113 Wn. App. 306, 319, 54 P.3d 665 (Div. 2 2002).

Thus, where attorney fees are awarded as a matter of course, such as where a statute provides for an award of fees to the prevailing party, the post-trial motion procedure described in CR 54(d)(2) applies. See, e.g., Port of Stockton v. Western Bulk Carrier KS, 371 F.3d 1119, 1122 (9th Cir. 2004) (reaching this conclusion with respect to identical provision set forth in Fed. R. Civ. P. 54(d)(2)(A)). In contrast, where attorney fees are an element of damages under the applicable substantive law, evidence must be produced at trial to support an award of such fees. See Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc., 446 F. Supp. 2d 551, 578 (E.D. Va. 2006); Pride Hyundai, Inc. v. Chrysler Fin. Co. LLC, 355 F. Supp. 2d 600, 603 (D.R.I. 2005).

Attorney fees are not awarded as a matter of course in maritime personal injury cases. Rather, only in limited instances where the seaman proves the shipowner has willfully and wantonly failed to pay

⁶ "A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A).

maintenance and cure will the seaman be allowed to recover the fees incurred in obtaining maintenance and cure. Glynn, 57 F.3d at 1501; Kopczynski v. The Jacqueline, 742 F.2d 555, 559 (9th Cir. 1984).

As outlined above, under federal maritime law, attorney fees for a shipowner's willful and wanton failure to pay maintenance and cure are an element of damages. Vaughan, 369 U.S. at 530-31; Holmes II, 724 F.2d 1120-21. The plain language of CR 54(d)(2), and the holdings of federal cases interpreting the virtually identical federal rule, leave no doubt that Clausen was required to put evidence of attorney fees before the jury.

Clausen's own counsel recognized and understood that it was the jury that was charged with determining the amount of attorney fees to award. First, as noted, Clausen's co-counsel Mr. Curtis hails from Louisiana, where both state and federal courts follow this rule. Secondly, Clausen's proposed Special Verdict Form submitted in advance of trial specifically provided for the jury to determine the amount of attorney fees to award in connection with the maintenance and cure claim. CP 62. Nevertheless, Clausen failed to put forth any evidence regarding attorney fees.

Where, as here, attorney fees are an element of damages and a party fails to present evidence regarding attorney fees at trial, fees must be

completely denied. Rockland Indus. v. E+E (US), Inc. Manley-Regan Chems. Div., 991 F. Supp. 468, 475 (D.Md. 1998); Kraft Foods, 446 F. Supp. 2d at 578 (“Kraft has lost its opportunity to prove its entitlement to attorney’s fees, and none will be awarded.”); Pride Hyundai, 355 F. Supp. 2d at 603; see also Jacob’s Meadow, 139 Wn. App. at 762.

As with any other claim for damages, the trier of fact – in this case the jury – is charged with weighing the evidence, determining whether or not to award damages, and if so, deciding how much to award, based upon the evidence presented. Bunch v. Dep’t of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645-46, 771 P.2d 711 (1989). Where no such evidence is presented, there is no basis for an award of damages. Thus, Clausen’s failure to present evidence of attorney fees incurred in the prosecution of his maintenance and cure claims precludes any award of such fees, and the trial court erred in denying Icicle’s Motion for Judgment as a Matter of Law on this issue.

c. The Trial Court Erred in Concluding Attorney Fees Could Be Awarded by the Court Rather Than the Jury.

Judge Hill repeated this error in her Findings of Fact and Conclusions of Law Regarding the Award of Attorney’s Fees when she concluded that the determination of attorney fees was not a question for

the jury. CP 421-22. In reaching that conclusion, Judge Hill relied largely on two cases in which courts, rather than juries, awarded attorney fees in maintenance and cure actions. See Incandela v. American Dredging Co., 659 F.2d 11 (2d Cir. 1981); Peake v. Chevron Shipping Co., Inc., 2004 AMC 2778 (N.D. Cal. 2004), rev'd on other grounds, 245 F. App'x 680 (9th Cir. 2007). The trial court also made reference to commentary to the Ninth Circuit Pattern Jury Instruction on attorney fees in maintenance and cure cases, and characterized the Vaughan Court's award of attorney fees as an equitable remedy made under the Court's equity jurisdiction rather than as an element of damages in support of her conclusion.⁷ However, none of these authorities are sound support for that conclusion.

The Incandela Court's rationale for having the court, rather than a jury, determine the attorney fee award in a maintenance and cure case was that because determining an appropriate attorney fee involves consideration of "technical matters" such as the relative difficulty of a case and the quality of preparation and advocacy, "a trial judge is better equipped by training and experience to determine a reasonable amount

⁷ Inexplicably, the trial court made no mention of CR 54.

than is a jury inexperienced in such matters.” 659 F.2d at 15. Such reasoning ignores the fact that jurors are routinely asked to make attorney fee awards in all sorts of cases in both federal and state court, often in situations involving considerable complexity, and are considered competent to do so. See, e.g., Jacob’s Meadow, 139 Wn. App. at 761 (citations omitted) (“While it is true that a determination of a reasonable attorney fee is often a complex question, that consideration alone is not sufficient to remove the question from the jury’s purview.”)⁸ Moreover, the existence of both Fed. R. Civ. P. 54(d)(2)(A) and Washington’s CR 54(d)(2) demonstrates that jurors have been explicitly entrusted with making such determinations.

The Peake case relied upon by the trial judge is readily distinguishable, because there the parties stipulated to having the court, rather than the jury, determine the amount of the fee award in a maintenance and cure action. CP 392. As recognized in Holmes II, such a stipulation is a permissible waiver of the right to have the jury determine this element of damages, but absent such a waiver, the fee award remains within the province of the jury. 724 F.2d at 1120-21. Here there was no

⁸ The court in Jacob’s Meadow noted that juries may be aided in the determination of reasonable attorney fees by expert testimony. 139 Wn. App. at 761.

such waiver. Peake therefore provides no support for taking the issue of attorney fees from the jury in this case.

The non-binding Comment to Ninth Circuit Pattern Jury Instruction 7.12 states that “if the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys’ fees as determined by the court.” CP 309. The comment cites to Kopczynski as authority for this position, yet Kopczynski says nothing about whether it is the court or the jury that should determine the amount of attorney fees in such cases. In contrast, the Fifth Circuit Pattern Jury Instructions instruct the jury on how to determine the proper amount of attorney fees if it finds willful or arbitrary failure to pay maintenance and cure. Fifth Circuit Pattern Jury Instruction No. 4.11 (Appendix A.7).

Finally, the trial court’s characterization of the Vaughan Court’s attorney fee award as an “equitable remedy” made pursuant to the Court’s equity jurisdiction is directly contradicted by the Vaughan Court’s explicit language characterizing the attorney fee award as an element of damages. 369 U.S. at 530 (stating that question of attorney fees in maintenance and cure action was one of “damages.”).

Thus, in granting Clausen’s post-trial motion for attorney fees, the

trial court not only relied on unsound authority, but contradicted applicable federal maritime law and CR 54(d)(2). Clausen's failure to present evidence precludes recovery of attorney fees, and the trial court's award of attorney fees must be reversed.

B. The Trial Court Abused Its Discretion by Not Scrutinizing Clausen's Fee Application to Ensure That Clausen Met His Burden to Segregate the Portion of Fees Attributable to the Maintenance and Cure Claim and to Show the Fees Sought Were Reasonable.

1. Standard of Review.

The amount of attorney fees awarded by a trial court is reviewed for abuse of discretion. Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009).

2. Statement of Facts.

Clausen's post-trial Motion for Attorney's Fees and Costs sought \$431,970 in attorney fees and \$42,129.23 in costs. CP 239. Despite the fact that the basis for their requested recovery of attorney fees and costs was the jury's finding of wrongful denial of maintenance and cure, Clausen's counsel made no effort whatsoever to segregate the portion of their time allocated to the maintenance and cure issues from the other issues in this case, but instead asserted that because the claims all shared a common core of facts and legal theories, segregation was impossible. CP 226.

The trial court similarly concluded, without any findings or analysis, that segregation was “difficult,” and arbitrarily estimated that 90 percent of Clausen’s attorneys’ time was related to the maintenance and cure claim. CP 428. Based upon this arbitrary estimate, the trial court awarded Clausen’s counsel a total of \$387,558 in attorney fees and \$40,547.57 in costs, without providing any indicia of having applied the required scrutiny or of having made an independent analysis in order to reach its conclusion. CP 432.

3. Legal Analysis and Argument.

a. Clausen Failed to Meet His Burden to Segregate the Portion of Attorney Fees Attributable to His Maintenance and Cure Claim, and the Trial Court Abused Its Discretion by Not Independently Attempting to Make the Required Segregation.

Even if the trial court, rather than the jury, has the authority to award attorney fees for the wrongful failure to pay maintenance and cure, its award in this case is fatally flawed and must be stricken, or at the very least remanded for recalculation, based on the failure of both Clausen and the trial court to properly segregate the hours and costs incurred to secure maintenance and cure and to ensure the reasonableness of the award.

Both federal maritime and Washington state law require a demonstration by the fee applicant and an independent review by the court

to ensure that any fee award is reasonable. Williams v. Kingston Shipping Co., 925 F.2d 721, 723 (4th Cir. 1991); see also Jordan v. Multnomah County, 815 F.2d 1258, 1263, n.8 (9th Cir. 1987); Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (stating trial court must make independent decision as to reasonableness of attorney fees rather than merely relying on billing records of fee applicant).

One aspect of the reasonableness determination is the requirement that the fee applicant segregate the portion of fees attributable to the cause of action for which fees are available, and that the court independently scrutinize the application and, if necessary, make its own such segregation. See Kopczynski, 742 F.2d at 559 (noting that Vaughan authorized recovery of only those fees “incurred to secure a maintenance and cure award”); Williams, 925 F.2d at 724 (holding attorney fees are not recoverable for time devoted to matters other than maintenance and cure, such as Jones Act or unseaworthiness claims); Smith, 113 Wn. App. 306, 344-45 (2002) (holding trial court’s failure to segregate hours related to claims for which attorney fees are recoverable requires remand).

The primary reason both Clausen and the trial court found it “difficult” to segregate the hours incurred to secure maintenance and cure was the failure of Clausen’s attorneys to maintain contemporaneous time

records. Clausen filed his complaint on January 18, 2008, alleging entitlement to attorney fees based on Icicle's alleged failure to pay maintenance and cure. CP 13. In spite of the fact that this claim was part of the original complaint, his attorneys admittedly failed to document their time contemporaneously and instead "created" time records post-trial. See, e.g., CP 150 (Beard Declaration) ("I do not keep contemporaneous time records. My attorney time set forth herein is a reconstruction."); CP 245 (Jacobsen Declaration) ("[m]y paralegal and I reviewed the file **after** the trial to document the work I performed . . . I based my **estimate** of time upon my experience of keeping track of time in the past.") (emphasis added).

As declared by Mr. Jacobsen, this post hoc creation of time records is nothing better than an "estimate." Clausen's attorneys had the opportunity to segregate and document their time contemporaneously, knowing from the beginning of the lawsuit that they were seeking attorney fees for wrongful failure to pay maintenance and cure.⁹ In light of this, the

⁹ The authors of the treatise Attorney Fees In Washington advise that attorneys "must keep specific contemporaneous time records of fees incurred," noting that in particular, "it is advisable even for plaintiff's counsel working on a contingent basis" to keep such time records to document fee requests, as "courts are justifiably skeptical about fee declarations creating time records after the fact." Talmadge, Philip A. & Jordan, Mark V., Attorney Fees in Washington, at p. 132 (Lodestar Publishing 2007).

trial court had even greater reason to scrutinize the fee application and independently assess its reasonableness, yet failed to do so.

Both Clausen's counsel and the trial court abdicated their responsibility to segregate the maintenance and cure portion of the fees sought on the grounds that it was too difficult to do so. As outlined above, any such difficulty should be weighed against the party best situated to track the time related to the maintenance and cure claims, namely Clausen. As recognized by Clausen's appellate counsel, under Washington law, such "difficulty" is not an adequate basis for abdicating all attempts at segregation. Talmadge & Jordan, *supra*, at p. 144-45 (citing Smith, 113 Wn. App. at 344-45 ("Regardless of the difficulty involved in segregation, the Travis court made it clear that the trial court has to undertake the task.") (referring to Travis v. Wash. Horse Breeders Ass'n., 111 Wn.2d 396, 411, 759 P.2d 418 (1988))).

While there may be some overlap between time spent on maintenance and cure and on Clausen's other claims, even a cursory review of the declarations submitted by Clausen's counsel in support of their fee request shows that significant segregation is possible by merely reviewing the time entries on their face. Icicle made this point in its opposition to Clausen's Motion for Attorney's Fees, where it identified no

fewer than 27 time entries that were obviously unrelated in any way to the maintenance and cure claims. CP 274-278.

The table provided in the Appendix hereto further illustrates that while segregation of the time entries may have been time consuming, it was by no means so difficult as to excuse both Clausen and the trial court from their respective obligations to do so. The table displays certain cost and fee entries that are obviously unrelated to the maintenance and cure claims or that show Clausen's complete failure to segregate the entries where it would have been possible to do so. For example, Mr. Stacey sought fees for two hours spent at the deposition of plaintiff's liability expert, Mr. Jacobsen sought fees for four hours spent opposing Icicle's motion to compel a vocational evaluation of Clausen, and Mr. Rainey sought fees for a total of 80 hours for what he described only as "Trial," without further elaboration. Appendix A.10. In total, after a cursory facial review, the table shows \$356,714.84 in time and costs that are not visibly related to the maintenance and cure claims.

Clausen's failure to meet his burden to segregate warrants reversal of the attorney fee award. While it may be argued that a fee applicant's failure to make the required segregation in a maintenance and cure case is not fatal to the award, that is true only if the court takes it upon itself to

“carefully scrutinize” the fee application and “painstakingly” determine a reasonable fee. Williams, 925 F.2d at 725 (finding that where trial court “carefully scrutinized” fee application, attempted to identify specific hours unrelated to maintenance and cure claim, and ultimately reduced fees sought by 14 percent, plaintiff’s counsel’s failure to segregate such entries was not fatal to fee application).

Here, instead of “carefully scrutinizing” and “painstakingly” reviewing the fee application, the trial court arbitrarily concluded that “a fair estimate of counsel time expended solely on a claim other than ‘maintenance and cure’ to be 10%” and awarded plaintiff 90 percent of the fees sought. CP 428. This estimate stemmed from the court’s erroneous reliance on Peake and Deisler v. McCormack Aggregates, 54 F.3d 1074, 1087 (3rd Cir. 1995).

In Deisler, the trial court estimated the portion of time spent on the plaintiff’s Jones Act negligence claim was 10 percent. 54 F.3d at 35. But in Deisler, the shipowner refused to pay maintenance “on the contention that the accident never happened.” Deisler, 54 F.3d at 1081. Here, Icicle did not dispute that Clausen’s accident occurred, and it was undisputed that Icicle paid him maintenance and cure following the injury. The question at trial was whether Mr. Clausen was entitled to additional

maintenance and cure beyond what Icicle had already paid.

In Peake, the trial court awarded the plaintiff approximately 44 percent of the fees sought, not the 80 percent indicated by Judge Hill in her decision on attorney fees. Peake, 2004 A.M.C. at 2794; CP 427.

Furthermore, like the Williams case discussed above, the Peake court went beyond a simple estimation. In Peake, the plaintiff's attorney alleged 80 percent of the total time was directly attributable to, or inextricably intertwined with, the maintenance and cure issues in that case. Id. at 2790-91. The district court accepted the 80 percent estimate, but did not stop its analysis there. The trial court went on to perform an exhaustive review of the hours, costs, and hourly rates sought by that plaintiff. Id. at 2790-94. Based on this review, the Peake court reduced the number of hours by 191, and awarded only \$150,311 in attorney fees and \$82,724.53 in costs, as opposed to the \$338,927.50 in fees and \$114,496.53 in costs sought by the seaman's counsel.¹⁰ Id.; see also In re Robbins, 575 F. Supp. 584, 588-89 (W.D. Wash. 1983) (rejecting counsel's estimate that 244.18 hours of the 472.6 total hours spent on the

¹⁰ Thus, counsel in Peake recovered approximately 44 percent of the attorney's fees and 72 percent of the costs sought. In addition to the reduction of hours noted above, the Peake court also adjusted the fee award downward by applying a .70 multiplier. 2004 AMC at 2794. No such multiplier was applied in this case.

case were dedicated to maintenance and cure claims and reducing amount to 50 hours, noting that actions for maintenance and cure are “relatively easy to present.”).

This case involved the presentation of a Jones Act claim for negligence that resulted in an award totaling \$253,736. It involved the presentation of an unseaworthiness claim that the jury rejected. Neither of these claims concern maintenance and cure, for which the jury awarded \$37,420. The allocation of only 10 percent of the time to the Jones Act and unseaworthiness case is facially absurd.

b. Clausen Failed to Meet His Burden to Show the Hourly Rate Sought Was Reasonable, and the Trial Court Abused Its Discretion by Not Independently Evaluating the Reasonableness of the Hourly Rate.

As with an attorney fee award in general, the hourly rate sought by the applicant must be reasonable. See Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 48, 738 P.2d 665 (1987). The trial court has a duty to review the rates sought by counsel and determine a reasonable hourly rate. See Peake, 2004 AMC at 2790 (finding requested hourly rates of \$250 and \$300 “excessively high” in San Francisco and reducing rate to \$225 per hour). Here, the trial court adopted the requested hourly rate of \$450 for Mr. Jacobsen, Mr. Curtis, Mr. Stacey, and Mr. Beard without analysis of

the reasonableness of such a rate. CP 424.

Clausen's attorneys work on a contingent fee basis and do not charge an hourly rate. See CP 151 (Mr. Beard declaring, "I ... handle nearly 100% of my cases on a contingency fee basis"); CP 246 (Mr. Jacobsen declaring, "I always work on a contingent fee contract."). In the absence of regular hourly billing rates, a court may look to evidence of hourly rates in the relevant community to determine reasonableness. See Blum v. Stenson, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).

A review of attorney fee awards in maintenance and cure cases in the Western District of Washington demonstrates that \$250-\$275 per hour is reasonable. In 2005, Judge Lasnik found that \$250 per hour was a reasonable hourly rate for Kevin Sullivan, a well regarded Seattle maritime attorney. Hefta v. Cruise West, Inc., 2005 AMC 2942 (W.D. Wash. 2005). In 2000, Mr. Stacey, one of Clausen's attorneys, was awarded \$175 per hour in a maintenance and cure case. See DuBois v. NORTHERN HAWK PS, 2000 AMC 1510, 1511 (W.D. Wash. 2000).

Clausen's failure to submit evidence of attorney fees to the jury was a fatal error that precludes any award of fees in this case. However, if this Court finds that the trial court, rather than the jury, was the proper

factfinder on the attorney fees issue, it nevertheless must vacate the court's attorney fee award based on Clausen's failure to meet his burdens to show reasonableness and to segregate fees and costs related to his maintenance and cure claim. Alternatively, this Court must remand the attorney fees issue to the trial court for the determination of a proper fee after careful scrutiny to segregate the time entries related to maintenance and cure and to independently analyze the reasonableness of the award, particularly of the hourly rate. See Williams, 925 F.2d at 726; see also Smith, 113 Wn. App. at 344-45 (requiring the trial court to segregate hours on remand).

C. The Superior Court Erred in Not Reducing the Jury's Award of Punitive Damages in Accordance with the 1:1 Ratio Established by the United States Supreme Court as a Matter of Substantive Federal Maritime Law.

1. Standard of Review.

Whether the trial court properly applied controlling federal maritime law is a question of law that is reviewed de novo. Endicott, 167 Wn. 2d at 880.

2. Statement of Facts.

It was undisputed at trial that Clausen sustained an injury to his low back on February 12, 2006, while working aboard the BERING STAR. RP 567. It was also undisputed that Icicle paid him maintenance and cure from the date he left the vessel due to his injury through

August 31, 2006. RP 604.

The issue that was hotly disputed at trial was Icicle's subsequent handling of Clausen's maintenance and cure claim. At the close of trial, the jury was instructed that it should award punitive damages if it found Icicle's conduct in failing to pay additional maintenance and cure was "willful and wanton." RP 1685. Icicle's Proposed Jury Instruction No. 23 included a more detailed and explicit description of the types of behavior that would warrant a punitive damages award. CP 89. This description was taken directly from the Townsend case and included references to conduct of the "most atrocious and dishonourable nature," "tortious acts of a particularly egregious nature," and "monstrous wrong." Id.

Clausen objected to the inclusion of these phrases in the jury instruction, likely because he believed it placed a higher burden on him than the "willful and wanton" standard. As noted, the actual instruction given to the jury stated that the jury could award punitive damages "only if you find the defendant acted with willful and wanton disregard of its obligation to provide maintenance and cure." RP 1685. The Special Verdict Form similarly asked the jury whether Icicle's failure to pay maintenance and cure was "callous and indifferent or willful and wanton." CP 114.

As noted earlier, the jury awarded Clausen unpaid maintenance and cure totaling \$37,420, but did not award Clausen any compensatory damages for Icicle's unreasonable failure to pay maintenance and cure, despite his counsel's request in closing argument for \$300,000 in compensatory damages on the maintenance and cure claim. CP 108; RP 1739. The jury did award \$1.3 million in punitive damages based on its finding that Icicle was "willful and wanton" or "callous and indifferent" in its failure to pay Clausen additional maintenance and cure.

Icicle does not challenge the jury's findings with respect to its conduct in this appeal but does challenge the trial court's failure to adhere to governing federal maritime law regarding the upper limit of punitive damage awards. In its Motion to Amend Judgment, Icicle asked the trial court to reduce the punitive damage award in accordance with the U.S. Supreme Court's ruling in Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), which established a 1:1 ratio between punitive and compensatory damages as a matter of federal maritime common law.

The trial court denied Icicle's motion and upheld the punitive damages award based not on federal maritime law but on Supreme Court jurisprudence analyzing such awards as a matter of constitutional due

process. CP 550; 561-62. Specifically, the trial court incorrectly used the amount of attorney fees plus the amount of unpaid maintenance and cure as compensatory damages, and found that comparing the punitive damages award (\$1.3 million) to that number (\$465,525) resulted in a ratio of 2.79:1, which the court found to be within the outer limits imposed by due process concerns. The trial court relied exclusively upon the Supreme Court's due process cases, which allow for a much higher ratio than Exxon. CP 561 (citing to due process cases, including TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 453, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (sustaining 526:1 ratio)).

3. Legal Analysis and Argument.

a. The Punitive Damages Award Is Subject to the 1:1 Ratio Imposed by Exxon.

In Exxon, the United States Supreme Court established a maximum punitive-to-compensatory damages ratio of 1:1 as a matter of substantive maritime law. The Exxon Court made clear that it was acting as the nation's highest maritime common law court, rather than the court charged with evaluating state law punitive damages awards for compliance with the due process provisions of the U.S. Constitution. As a maritime case brought in state court, this action is governed by substantive federal maritime law, making the Exxon case controlling. Endicott, 167

Wn.2d at 878. Because the trial court erred in applying the constitutional due process analysis rather than governing federal maritime common law, and because the court upheld a punitive damages award that dwarfs compensatory damages, the punitive damages award must be reduced.

(i) **The Exxon Ratio Is a Matter of Federal Common Law, Not a Matter of Constitutional Due Process.**

The United States Supreme Court has two distinct roles in reviewing punitive damages awards. When reviewing punitive damages awards made pursuant to state law or federal statutory law, the Court's role is to evaluate such awards for compliance with the due process provisions of the U.S. Constitution. See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-17, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (stating that while states have discretion over imposition of punitive damages, punitive damages present danger of arbitrary deprivation of property and must therefore comply with constitutional due process and upholding ratio of 145:1); see also BMW of N. Am. v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (establishing guidelines for constitutional due process review of punitive damages awards and upholding ratio of 500:1).

In contrast, when reviewing punitive damages awards grounded in

substantive maritime law, the Court acts in its role as the ultimate arbiter of matters of federal maritime common law. The Exxon Court took pains to explain this distinction and to leave no doubt as to which role it was filling, saying:

Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard.

[...]

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.

128 S. Ct. at 2626-27 (emphasis added).

The Exxon Court therefore rejected as inapplicable its earlier punitive damages cases based on constitutional due process analysis, and specifically rejected the Ninth Circuit's exhaustive application of Gore and State Farm, in reviewing a maritime punitive damages award. 128 S. Ct. 2605. Instead, the Supreme Court recognized that it was acting "in the position of a common law court of last review, faced with a perceived defect in a common law remedy" and concluded that under substantive

maritime law, punitive damages standards “more rigorous than the constitutional limit” were necessary. Id. at 2629.

Since this case is governed by substantive maritime law, the Exxon standard for punitive damages is controlling and the Supreme Court’s line of cases addressing due process concerns is, in the Court’s own words, preceded and obviated by federal maritime law. The trial court therefore erred in applying the constitutional due process analysis and upholding the punitive damages award because it was within the outer limits of due process, when, in fact, it exceeded the limit imposed as a matter of federal maritime common law.

(ii) Under Exxon, Punitive Damages Must Not “Dwarf” Compensatory Damages, But Should Instead Be “Pegged” at a Ratio of 1:1.

The Exxon case, as is widely known, involved a vessel that ran aground in Alaska when the vessel’s captain left the bridge, leaving two lesser-experienced and unlicensed crewmembers to perform a complicated maneuver. 128 S. Ct. at 2612. The crewmembers failed to accomplish the maneuver, and the vessel ran aground on a reef, resulting in the spill of millions of gallons of crude oil into Prince William Sound. Id. The vessel’s captain had a history of alcohol abuse of which the company was

aware, and there was evidence that the company knew the captain continued to drink. Id. While Exxon's conduct was denominated as "reckless" under the particular legal standard applicable to that case, the Supreme Court made clear that it did "**not** mean to suggest that Exxon's and [the captain's] failings were **less than reprehensible.**" Id. at 2632 n. 23 (emphasis added).

Following the spill, the jury awarded \$507.5 million in compensatory damages and \$5 billion in punitive damages, nearly ten times the compensatory damages amount. Id. at 2614 and 2634. Exxon appealed, and the Ninth Circuit remanded the case twice to modify punitive damages, then ultimately reduced the punitive damage award to \$2.5 billion, which Exxon appealed to the Supreme Court. Id. at 2614.

As outlined above, the Exxon Court acted in its role as the ultimate arbiter of maritime common law in evaluating the propriety of the punitive damages award. The Court recognized the importance of predictability in punitive damage awards, and emphasized concerns of fairness and consistency. Id. at 2625-2627 ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with the ability to know what the stakes are in choosing one course of action or another.").

It was in the context of this concern for predictability and fairness that the Court noted the problem of “outlier” cases that subject defendants to punitive damages “that dwarf the corresponding compensatories.”¹¹ *Id.* at 2625. In this case, the jury’s punitive damages award certainly dwarfed its compensatory damages award. The jury awarded Clausen only \$37,420 in unpaid maintenance and cure, but \$1.3 million in punitive damages, resulting in a ratio of 34.7:1.

The Exxon court considered several different approaches to remedy the problem of excessive punitive damages in maritime cases. The Court considered and rejected both verbal formulations and hard dollar caps, and instead determined that the amount of punitive damages should be related to the amount of compensatory damages using a ratio or multiple. *Id.* at 2627-29.

Next the Court considered the appropriate ratio to apply. It

¹¹ One reason that punitive damages awards are particularly likely to have a catastrophic impact is that insurance coverage for punitive damages is generally unavailable and, in some states, prohibited by law. See, e.g., Ford Motor Co. v. Home Ins. Co., 116 Cal. App. 3d 374, 379, 172 Ca. Rptr. 59 (Cal. App. 1981) (punitive damages are uninsurable as matter of public policy); Providence Wash. Ins. Co. v. Valdez, 684 P.2d 861, 863 (Alaska 1984) (assuming without deciding that Alaska public policy would prohibit liability insurance coverage for punitive damages). Given that reality, a single “outlier” award of punitive damages on a maintenance and cure claim could put many maritime employers out of business, which would run contrary to the purpose of punitive damages. See Exxon, 128 S. Ct. at 2627 (citing Maryland jury instruction that includes statement that punitive damages are not designed to “bankrupt or financially destroy a defendant”).

evaluated and rejected both a 3:1 ratio and a 2:1 ratio. The Court found that the 3:1 ratio was unworkable because it was directed at cases involving “some of the most egregious conduct” and was therefore inappropriate for cases where the tortious action was “worse than negligent but less than malicious.” Id. at 2631. In other words, an across the board application of a 3:1 ratio could be expected to result in punitive damages awards that were disproportionate to the actual harm sustained and to the level of reprehensibility of the conduct. Id.

The Court likewise rejected a 2:1 ratio, which is the proportion reflected in many statutory provisions allowing for “treble damages.” Id. at 2632. This rejection was based in part on the fact that the federal statutes allowing treble damages governed areas “far afield from maritime concerns” and on the fact that the justifications underlying such treble damages provisions were unrelated to the purpose of punitive damage awards in maritime cases. Id.

Thus, the Court concluded that the appropriate and reasonable ratio to apply in maritime cases is 1:1. In doing so, the Court looked to empirical evidence of jury verdicts which covered cases spanning the spectrum of reprehensibility, from “the most as well as the least blameworthy conduct triggering punitive liability,” which put the median

ratio for the “entire gamut” of circumstances at less than 1:1. Id. at 2633. The Court noted that the median ratio for all cases was 0.65:1, and therefore recognized that in most cases, compensatory damages exceeded punitive damages. Id. The Court therefore concluded, “[G]iven the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is the fair upper limit in such maritime cases.” Id.

(iii) The Exxon 1:1 Ratio Applies in Cases Involving Punitive Damages for Failure to Pay Maintenance and Cure.

This case is believed to be the first in the country since the Supreme Court’s Townsend decision in which an appellate court has had the opportunity to review an award of punitive damages for failure to pay maintenance and cure. As such, there has been no explicit articulation from other courts as to the proper measure of punitive damages in maintenance and cure cases. Nevertheless, it follows from the Supreme Court’s analysis of the proper measure of punitive damages in Exxon that the 1:1 ratio should apply in maintenance and cure cases.

While the Townsend Court authorized recovery of punitive

damages in maintenance and cure cases, it was silent regarding the measure of punitive damages in such cases because that issue was not before it. 129 S. Ct. at 2575, n. 11 (noting that petitioners had not argued for cap on punitive damages, citing Exxon, and stating that with respect to size of punitive damage awards in maintenance and cure cases, “We do not decide these issues.”).

Although the Townsend Court did not decide this issue, its explicit citation to Exxon and the reasoning of Exxon imply that the question of the proper size of such awards is, in fact, governed by Exxon, not by non-maritime cases addressing punitive damages awards in the constitutional due process context.

Given that Exxon was decided as a matter of federal maritime common law, Exxon controls the measure of damages in maintenance and cure cases, which are a subset of maritime law cases. There is nothing in Townsend or elsewhere to suggest that maintenance and cure cases should be somehow carved out from the body of maritime cases subject to the Exxon ratio. Exxon therefore provides the substantive limitation on punitive damages awards in maintenance and cure cases.

**(iv) The “Reprehensibility” of Icicle’s
Conduct Does Not Justify a Departure
from the 1:1 Ratio Established by Exxon.**

Exxon arguably leaves open the possibility of a higher ratio for punitive damages in cases involving particularly egregious conduct. The jury here did not award punitive damages for particularly egregious conduct, it awarded punitive damages for “willful and wanton” conduct. Icicle’s proposed jury instruction on punitive damages would have given the jury the opportunity to award punitive damages based on “particularly egregious,” “atrocious and dishonourable,” or “monstrous” conduct, but because Clausen objected to such an instruction, there was no basis for the jury to find conduct rising to the level of reprehensibility that would justify a departure from the 1:1 ratio. What the jury actually found in this case was a “willful and wanton” or “callous and indifferent” failure to maintenance and cure, and that is therefore the level of reprehensibility to be considered in evaluating the propriety of the punitive damages award.

As noted above, the jury in Exxon had found the company’s conduct to be “reckless,” a term that might be considered to be a step above negligent and below “willful and wanton” or “callous and indifferent” on the reprehensibility scale. 554 U.S. at 578. However, because of the way recklessness was described in the Exxon jury

instructions, the jury found Exxon's conduct to be essentially equal in reprehensibility to the conduct at issue here.

The punitive damages instruction given to the jury in Exxon provided as follows:

The purposes for which punitive damages are awarded are: (1) to punish the wrongdoer for **extraordinary** misconduct; and (2) to warn defendants and others and deter them from doing the same.

Id. at 2633 n. 27 (emphasis added). The corresponding jury instruction in the case at bar stated, “[t]he purpose of punitive damages is to punish a defendant and to deter similar acts in the future.” RP 1686.

The use of the term “extraordinary misconduct” in the Exxon instruction suggests a more exacting standard for awarding punitive damages than the term recklessness, something more akin to a willful and wanton standard. In contrast, the jury instruction given here made no mention of “extraordinary misconduct” and what the jury found was willful and wanton conduct. Thus, despite the different labels, when viewed with regard to the underlying meanings assigned to those terms by the respective courts, it is clear that the level of reprehensibility is actually the same. Therefore, no departure from the Exxon 1:1 ratio is warranted.

Even if such a distinction arguably remains, there is no need to

raise the 1:1 ratio. The Supreme Court stated that where the level of reprehensibility was “recklessness,” it expected the punitive-to-compensatory ratio to be about 0.65:1, the median ratio for cases involving all levels of reprehensibility. 128 S. Ct. at 2633 & n. 23. The 1:1 ratio adopted by the Court in Exxon for maritime cases actually exceeds the 0.65:1 median ratio and the expected “recklessness” ratio, and provides room for an increase in the level of reprehensibility without an increase in the ratio. Thus, even if there were any significant difference in reprehensibility between the “reckless” conduct in Exxon and the “willful and wanton” conduct here, it is already provided for and no further adjustment to the ratio is necessary.

Finally, it is important to note that “recklessness” was the highest level of reprehensibility the jury was asked to consider in the Exxon case. 554 U.S. at 578. In other words, the jury was not given the opportunity to label Exxon’s conduct as “willful and wanton” behavior. Id. While it is impossible to know a juror’s thought process, had the jury been given the opportunity, it may have determined that Exxon’s actions, which resulted in widespread environmental destruction and economic damage, fell much higher on the blameworthiness continuum than Icicle’s failure to pay \$37,420 in maintenance and cure, especially where Clausen was found to

have suffered no compensable injury as a result of the failure.

b. Applying Exxon's 1:1 Ratio to the Proper Measure of Compensatory Damages in This Case Results in a Maximum Punitive Damages Award of \$37,420.

Having established that Exxon's 1:1 ratio between punitive and compensatory damages governs this case as a matter of federal maritime common law, the next issue is determining the proper measure of compensatory damages to use in applying the ratio. The trial court erred in including the amount of attorney fees in the measure of compensatory damages because attorney fees awarded for wrongful failure to pay maintenance and cure are punitive in nature, not compensatory. Using the attorney fee amount essentially doubles the amount of punitive damages, and such double recovery is prohibited under maritime law.

The proper measure of compensatory damages is the amount of unpaid maintenance and cure actually recovered. Applying the Exxon ratio to the amount of unpaid maintenance and cure the jury awarded Clausen results in a maximum punitive damages award of \$37,420. The trial court erred in refusing to reduce the award.

(i) The Trial Court Erred in Including the Amount of Attorney Fees in the Measure of Punitive Damages.

The trial court characterized both the jury's award of unpaid

maintenance and cure and the court's own award of attorney fees as compensatory damages and evaluated the punitive damages award in comparison to these two amounts taken together. CP 552 ("Adding together the unpaid maintenance and cure and attorney's fee award, the amount of **compensatory** damages is \$465,525." (emphasis added)). While the trial court was correct to consider the unpaid maintenance and cure as compensatory damages, it erred in including the attorney fee award as compensatory damages because attorney fees are punitive, not compensatory.

The Townsend Court recognized that attorney fees awarded in the maintenance and cure context are punitive in nature, citing Vaughan:

[O]ur case law also supports the view that punitive damages awards, in particular, remain available in maintenance and cure actions after the [Jones] Act's passage. In Vaughan v. Atkinson, for example, the Court permitted the recovery of attorney's fees for the 'callous' and 'willful and persistent' refusal to pay maintenance and cure.

129 S. Ct. at 2571 (internal citations omitted); see also Breese v. AWL, Inc., 823 F.2d 100, 102-03 (5th Cir. 1987) (referring to both attorney fees and punitive damages as available "sanctions" in maintenance and cure cases, and noting the required showing of "bad faith" by shipowner to support award of either); Hines v. J.A. LaPorte, Inc., 820 F.2d 1187, 1189-

90 (11th Cir. 1987); Gilmore, Grant & Black, Charles L., Jr., The Law of Admiralty (2d ed. 1975), at page 13 (finding that Supreme Court in Vaughan “awarded what were essentially punitive damages under the name of counsel fees.”).

If attorney fees and costs were compensatory, they would be available and awarded in every case where maintenance and cure was denied and later awarded, regardless of wrongdoing on the part of the vessel owner. This is not the case. Rather, the purpose of awarding attorney fees is to punish the vessel owner for wrongfully denying maintenance and cure and to deter vessel owners from doing so, just as it is with punitive damages. Compare Glynn, 57 F.3d at 1505 (finding attorney fees for maintenance and cure serve as deterrent) with Exxon, 128 S. Ct. at 2621 (finding purpose of punitive damages is principally retribution and deterrence).

Because an attorney fee award in the maintenance and cure context is punitive rather than compensatory, it cannot be used in determining the measure of punitive damages without violating the maritime law prohibition against double recovery. See Crooks v. United States, 459 F.2d 631, 633 (9th Cir. 1972) (prohibiting double recovery to seaman) (citing to Gilmore and Black, The Law of Admiralty, Ch. VI, § 6-9); see

also Townsend, 129 S. Ct. at 2561 (acknowledging rule against double recovery). The Exxon Court made clear that maritime punitive damages are to be “pegged” to compensatory damages; they cannot be pegged to another form of punitive damages, as this would, in effect, allow an impermissible doubling of the punitive damages.

Finally, even if it were somehow permissible to use the amount of attorney fees awarded as compensatory damages by which to measure punitive damages, here Clausen failed to provide the jury with any evidence of attorney fees and costs, a fatal error which precludes an award of attorney fees in this case. Because of Clausen’s failure to present evidence of the reasonable amount of attorney fees incurred in pursuing his maintenance and cure claim, the trial court erred in awarding him attorney fees, and the proper amount of his attorney fees is \$0. Using this number as the basis for a punitive damages award results in a punitive damages award of \$0, under the Exxon 1:1 ratio or any other.

Here, the jury was not even informed that Clausen could recover his attorney fees and costs as an element of damages. While Clausen’s own proposed Special Verdict Form would have allowed the jury to make an award of both attorney fees and punitive damages, neither the actual jury instructions nor the Special Verdict Form put both issues before the

jury. Had the jury been asked, as required under CR 54(d)(2) and controlling federal maritime law, and as contemplated by Clausen's proposed Special Verdict Form, to determine the amounts for both attorney fees and punitive damages, their determination of the former may have significantly influenced their determination of the latter.

As it is, the trial court's own award of attorney fees in this case is flawed for the reasons outlined in Parts A and B, and even if the amount had been properly determined by the jury, it would not be the correct measure of punitive damages because attorney fees themselves are punitive in this context.

(ii) The Proper Measure of Compensatory Damages Is the Amount of Unpaid Maintenance and Cure.

The amount of unpaid maintenance and cure is the proper measure of compensatory damages for purposes of determining the upper limit of punitive damages for failure to pay maintenance and cure. That amount represents the seaman's recovery on his maintenance and cure claim, and punitive damages can only be awarded on a maintenance and cure claim. The trial court recognized this, and correctly included the amount of unpaid maintenance and cure as an element of compensatory damages to which punitive damages should be compared. CP 552.

Moreover, using the amount of unpaid maintenance and cure satisfies the Exxon Court's concern that punitive damages be predictable. The amount of maintenance and cure due in any given case is readily calculable, and would allow the proverbial "bad man" to predict the maximum penalty he might incur.

For the foregoing reasons, the jury's award of punitive damages should be reduced to \$37,420 in accordance with the Exxon 1:1 ratio. Even if the Court determines that a departure from Exxon is warranted, \$37,420 is the amount of compensatory damages to which punitive damages should be compared.

V. CONCLUSION

Clausen's failure to submit evidence to the jury regarding attorney fees precludes an award of fees as a matter of law. Alternatively, the fee award must be reversed or remanded for review of its reasonableness, including segregation of the time spent on the maintenance and cure claims and evaluation of the proper hourly rate. In addition, the trial court's failure to apply the Exxon 1:1 ratio and its erroneous characterization of attorney fees as compensatory damages warrant reduction of the punitive damages award to \$37,420.

RESPECTFULLY SUBMITTED this 20th day of September,
2010.

HOLMES WEDDLE & BARCOTT, P.C.

A handwritten signature in black ink, appearing to read "Michael A. Barcott", is written over a horizontal line.

Michael A. Barcott, WSBA #13317
Megan E. Blomquist, WSBA #32934
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APPENDIX

1. Complaint..... A1.1-1.12

2. Special Verdict Form A2.13-2.19

3. Supplemental Verdict Form..... A3.20-3.21

4. Findings and Conclusions Regarding The
Award of Attorney’s Fees A4.22-4.35

5. Order Denying Defendant’s Motion to
Amend Judgment A5.36-5.51

6. Plaintiff’s Proposed Special Verdict Form A6.52-6.658

7. Fifth Circuit Pattern Jury Instruction 4.11 A7.59-7.60

8. Defendant’s Proposed Jury Instruction Regarding
Punitive DamagesA8.61

9. Trial Court’s Instruction to Jury Regarding
Punitive Damages A9.62-9.63

10. Table of Selected Attorney Fees and Costs Entries A10.64-10.106

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

v.

ICICLE SEAFOODS, INC.,

Defendant.

Case No.

08-2-03333-3SEA

SEAMAN'S COMPLAINT FOR
PERSONAL INJURY UNDER THE
JONES ACT, 46 USC § 30104, AND THE
GENERAL MARITIME LAW AND FOR
MAINTENANCE AND CURE

~~DOUGLAS D. McBROOM~~

COMES NOW the Plaintiff and for a claim against the defendant states:

1. JURISDICTION

1.1 This is a claim for personal injuries sustained by a seaman in the course and scope of his employment on board a merchant vessel against the owner and operator of the vessel *in personam*. Jurisdiction is vested in this Honorable Court pursuant to the Jones Act, 46 U.S.C. §30401, 45 U.S.C. § 56, and by the Savings to Suitors Clause, 28 U.S.C. § 1333.

SEAMAN'S COMPLAINT

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BEARD STACEY
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2. VENUE

2.1 Icicle Seafoods, Inc., plaintiff's employer, regularly conducts business in King County, Washington. Venue for this action is proper in the King County Superior Court pursuant to RCW 4.12.025(a).

3. PARTIES

3.1 Plaintiff, Dana Clausen ("Clausen"), age 54, is a resident of Gonzales, Ascension Parish, Louisiana, domiciled at 14321 Whispering Oaks, Gonzales, Louisiana. The Defendant, Icicle Seafoods, Inc. ("Icicle"), is a corporation and is the owner of the *BERING STAR*. Icicle Seafoods, Inc. conducts business in King County, Washington.

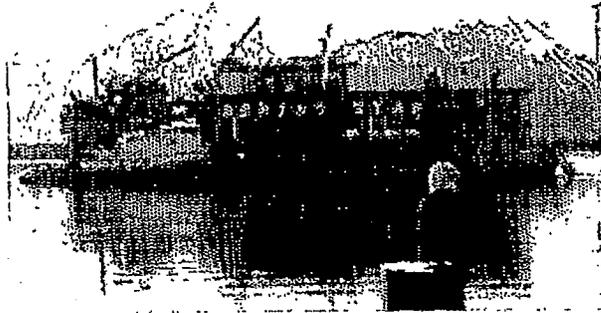
4. SEAMAN STATUS

4.1 That at all times hereinafter mentioned, Clausen was employed by Icicle for approximately three (3) years. Clausen was first employed by Icicle as a seaman in January of 2003. Clausen worked for Icicle as a second engineer and, most recently, earned \$3,950.00/month.

4.2 That at all times hereinafter mentioned, Clausen was assigned to, and performed virtually all of his work for Icicle, on, with, and aboard its fleet of vessels.

4.3 Clausen was last employed by Icicle working aboard the *BERING STAR* in Dutch Harbor, Alaska. The *BERING STAR* is shown in Exhibit "A" below.

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Exhibit "A"

4.4 That at all times hereinafter mentioned, Clausen contributed to the mission and purpose of the Icicle vessels he was assigned to work aboard including, but not limited to, the *BERING STAR*.

5. TRAUMATIC INJURY.

5.1 That Clausen re-alleges and re-avers Paragraphs 1 through 4 above as if copied at this point *in extenso*.

5.2 That on or about February 16, 2006, Clausen, while in the course of his employment, and pursuant to orders, was caused to suffer an accident and injuries due to Icicle's negligence and the unseaworthiness of the *BERING STAR*, when he was obliged to lift and position a very heavy sheet of carbon steel plate on a fabrication table.

5.3 That the said injuries and damage were caused solely by reason of Icicle's negligence, and by reason of the unseaworthiness of the *BERING STAR*, without any negligence on Clausen's part.

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2 5.4 By way of example and not of limitation, that Icicle's negligence and the
3 unseaworthiness of the *BERING STAR* consisted of the following:

4 5.4.1 in failing to provide this Plaintiff with a safe place to work as required
5 by the Jones Act;

6 5.4.2 in failing to provide this Plaintiff with adequate, proper and sufficient
7 training;

8 5.4.3 in failing to instruct and/or in failing to adequately instruct this
9 Plaintiff concerning the safe conduct of the work then and there in
10 progress on February 12, 2006;

11 5.4.4 in failing to provide this Plaintiff with adequate, proper and sufficient
12 supervision when and where the work was being performed;

13 5.4.5 in failing to warn and/or failing to adequately warn this Plaintiff
14 concerning conditions in the work place which caused it to be unfit,
15 unsafe, and unsuitable;

16 5.4.6 in failing to take precautions to prevent, or for that matter, in failing
17 to take any precautions to prevent the unfit, unsafe and unsuitable
18 work conditions which then and there existed;

19 5.4.7 in failing to adopt practices, policies, and procedures designed
20 specifically to prevent the injuries and damage suffered by this
21 Plaintiff;

22 5.4.8 in failing to provide this Plaintiff with adequate, proper and safe tools,
23 machinery and equipment at the time of, and at the place where, the
24 work was to be performed on February 12, 2006;

25 5.4.9 in failing to provide this Plaintiff with an adequate number of
26 competent co-employees;

5.4.10 in failing to provide this Plaintiff with adequate, sufficient and proper
job site analysis, at the time of, and at the place where, the work was
being performed on February 12, 2006;

5.4.11 in failing to provide adequate, proper and sufficient hazard prevention
controls at the time of, and at the place where, the work was being
performed on February 12, 2006;

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2 5.4.12 in failing to provide this Plaintiff with adequate, proper and sufficient
3 medical management;

4 5.4.13 in failing to eliminate the risk associated with manual material
5 handling required at the time of, and at the place where the work was
6 being performed on February 12, 2006;

7 5.4.14 in failing to provide this Plaintiff with adequate and sufficient medical
8 care and attention.

9 5.5 That, by reason of Icicle's negligence and the unseaworthiness of the
10 *BERING STAR*, Clausen sustained serious injury to his body and limbs, including but
11 not limited to, injury to the left and right forearms consisting of aggravation,
12 acceleration or accentuation of non-symptomatic bilateral carpal tunnel syndrome,
13 injury to the cervical spine at C6-7, as well as injury to the lumbar spine consisting of
14 herniated nucleus pulposus at L3-4 on the right and a broad base disc bulge to the left
15 at L4-5, as well as mental suffering, the full extent of which has not yet been
16 determined; he has been caused to sustain severe shock and injuries to his nerves and
17 nervous system, all of which in the past required, and may in the future continue to
18 require, medicines, medical care and treatment; he has in the past suffered and may
19 in the future continue to suffer agonizing aches, pain and mental anguish; he has in
20 the past and may in the future continue to be disabled from performing his usual
21 duties, occupation and avocations.

22 5.6 That, as a consequence of the foregoing, Clausen has suffered, is
23 suffering and will continue to suffer damages including, without limitation, past and
24 future physical and mental pain and suffering, past disability and permanent future
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2 disability, loss of wages, loss of earning capacity, loss of enjoyment of life and past
3 and future medical expenses.

4 5.7 That Clausen, by virtue of the disability incurred while in the service of
5 the *BERING STAR*, claims that he is also entitled to maintenance and cure for the
6 period of his disability in a sum which is reasonable in the premises.

7 5.8 That Icicle has acted arbitrarily and capriciously in its failure to provide
8 Clausen with prompt and proper maintenance and cure and, therefore, Clausen is
9 entitled to have compensatory damages assessed against Icicle. Clausen is also
10 entitled to an award of attorney's fees, which he has incurred and will incur in
11 asserting his right to receive maintenance and cure in a sum which is reasonable in
12 the premises.
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14 5.9 Clausen also claims damages, as a result of this incident, due to the
15 failure and/or refusal of Icicle to pay to him, or to pay on his behalf, prompt and
16 adequate maintenance and cure. Furthermore, Clausen's medical condition has been
17 made worse as a result of the failure of Icicle to provide prompt cure. In
18 consequence, Clausen is entitled to damages, under the Jones Act in a sum which is
19 reasonable in the premises.
20

21 6. CUMULATIVE TRAUMA INJURY

22 6.1 That Clausen re-alleges and re-avers Paragraphs 1 through 5 above as if
23 copied at this point *in extenso*.

24 6.2 That in addition, and/or in the alternative, during Clausen's
25 employment with Icicle, he was required to engage in heavy physical work which
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2 exposed him to the hazards and risks associated with cumulative trauma to the spine
3 and, in particular, exposed him to cumulative trauma of the anatomical structures of
4 the neck and low back, including but not limited to, the motion segments at C6-7, L3-
5 4 and L4-5, as well as to the adjacent anatomical structures, which ultimately resulted
6 in Clausen suffering permanent and disabling injuries to his neck and low back

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8 6.3 That Icicle knew, or should have known, that these hazards and risks
9 caused the work place to be unsafe, but they failed to eliminate or mitigate these
10 hazards and risks by introducing techniques such as, basic bio-mechanical analysis,
11 job analysis, job design analysis, etc.

12 6.4 That, on the other hand, Icicle did not inform Clausen, and Clausen did
13 not know, that these unsafe work conditions were known to cause total and
14 permanent disability, due to cumulative trauma of the neck and low back.

15 6.5 That Icicle did not inform Clausen, and Clausen was unaware of the
16 latent, insidious and harmful effects that this cumulative heavy physical work was
17 having on his body, in general, and, on his neck and lower back, in particular.

18 6.6 That, as part of its obligation under the Jones Act, Icicle was required to
19 inform itself of the nature and character of the conditions which existed in the work
20 place and it had a duty to warn all of its employees of hazards which it knew, or in the
21 exercise of due and reasonable care should have known, were present in the work
22 place.
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2 6.7 That the said injuries and damage were caused solely by reason of
3 Icicle's negligence, and by reason of the unseaworthiness of the Icicle vessels aboard
4 which Clausen served, without any negligence on Clausen's part.

5 6.8 That, by way of example and not of limitation, Icicle's negligence and
6 the unseaworthiness of the Icicle's vessels aboard which Clausen worked consisted of
7 the following:

8 6.8.1 in failing to provide this Plaintiff with a safe place to work as required
9 by the Jones Act;

10 6.8.2 in failing to provide this Plaintiff with adequate, proper and sufficient
11 training;

12 6.8.3 in failing to instruct and/or in failing to adequately instruct this
13 Plaintiff concerning the safe conduct of the work which he was obliged
14 to perform while in Icicle's employ;

15 6.8.4 in failing to provide this Plaintiff with adequate, proper and sufficient
16 supervision when and where the work was being performed;

17 6.8.5 in failing to warn and/or failing to adequately warn this Plaintiff
18 concerning conditions in the work place which caused it to be unfit,
19 unsafe, and unsuitable;

20 6.8.6 in failing to take precautions to prevent, or for that matter, in failing
21 to take any precautions to prevent the unfit, unsafe and unsuitable
22 work conditions which existed in the work place;

23 6.8.7 in failing to adopt practices, policies, and procedures designed
24 specifically to prevent the injuries and damage suffered by this
25 Plaintiff;

26 6.8.8 in failing to provide this Plaintiff with adequate, proper and safe tools,
machinery and equipment at the time of, and at the place where, the
work was to be performed;

 6.8.9 in failing to provide this Plaintiff with an adequate number of
competent co-employees;

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- 6.8.10 in failing to provide this Plaintiff with an ergonomics program designed to prevent repetitive trauma to his neck and low back;
- 6.8.11 in failing to provide this Plaintiff with adequate, sufficient and proper job site analysis, at the time of, and at the place where, the work was being performed;
- 6.8.12 in failing to provide adequate, proper and sufficient hazard prevention controls at the time of, and at the place where, the work was being performed;
- 6.8.13 in failing to provide this Plaintiff with sufficient, or for that matter, any medical management program;
- 6.8.14 in failing to periodically test its employees such as this Plaintiff for the physical effects of cumulative trauma to the low back and in failing to take appropriate action, including advising this Plaintiff as to the test results;
- 6.8.15 in failing to eliminate the risk associated with manual material handling required in the work place;
- 6.8.16 in failing to mitigate the risk associated with manual material handling required in the work place;
- 6.8.17 in failing to recognize that exposing this Plaintiff to prolonged and repeated improper and unsafe heavy physical work involving, manual material handling, among other things, would cause this Plaintiff to suffer "wear and tear" injuries to his neck and low back that could, and, in this instance, did cause this Plaintiff to become injured and disabled;
- 6.8.18 in failing to monitor the work activities and work practices present in the work place to determine whether or not its employees, in general, and this Plaintiff, in particular, was at risk of suffering a repetitive trauma injury;
- 6.8.19 in failing to provide this Plaintiff with adequate and sufficient medical care and attention.

6.9 That, by reason of Icicle's negligence and the unseaworthiness of the Icicle vessels aboard which Clausen worked, Clausen sustained serious injury to his

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2 body and limbs which happened as a result of the repeated exposure to harmful
3 conditions in the work place, which became apparent to him on or about February 12,
4 2006, including but not limited to, injury to the left and right forearms, consisting of
5 aggravation, acceleration or accentuation of non-symptomatic bilateral carpal tunnel
6 syndrome, injury to the cervical spine at C6-7, as well as injury to the lumbar spine
7 consisting of herniated nucleus pulposus at L3-4 on the right and a broad base disc
8 bulge to the left at L4-5, as well as mental suffering, the full extent of which has not
9 yet been determined; he has been caused to sustain severe shock and injuries to his
10 nerves and nervous system, all of which in the past required, and may in the future
11 continue to require, medicines, medical care and treatment; he has in the past
12 suffered and may in the future continue to suffer agonizing aches, pain and mental
13 anguish; he has in the past and may in the future continue to be disabled from
14 performing his usual duties, occupation and avocations.
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17 6.10 That, as a consequence of the foregoing, Clausen has suffered, is
18 suffering and will continue to suffer damages including, without limitation, past and
19 future physical and mental pain and suffering, past disability and permanent future
20 disability, loss of wages, loss of earning capacity, loss of enjoyment of life and past
21 and future medical expenses in a sum which is reasonable in the premises.

22
23 6.11 That Clausen, by virtue of the disability incurred while in the service of
24 the *BERING STAR*, claims that he is also entitled to maintenance and cure for the
25 period of his disability in a sum which is reasonable in the premises.
26

1
2 6.12 That Icicle has acted arbitrarily and capriciously in its failure to provide
3 Clausen with prompt and proper maintenance and cure and therefore, Clausen is
4 entitled to have compensatory damages assessed against Icicle. Clausen is also
5 entitled to an award of attorney's fees, which he has incurred and will incur in
6 asserting his right to receive maintenance and cure in a sum which is reasonable in
7 the premises.

8
9 6.13 Clausen also claims damages, as a result of this incident, due to the
10 failure and/or refusal of Icicle to pay to him, or to pay on his behalf, prompt and
11 adequate maintenance and cure. Furthermore, Clausen's medical condition has been
12 made worse as a result of the failure of Icicle to provide prompt cure. In
13 consequence, Clausen is entitled to damages, under the Jones Act in a sum which is
14 reasonable in the premises.

15 6.14 Clausen is entitled to and does hereby request trial by jury.

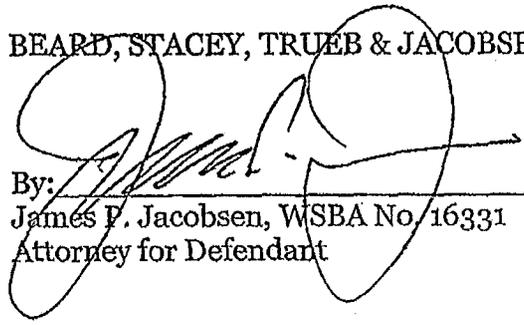
16 WHEREFORE, plaintiff prays:

17 That this Honorable Court enter judgment in plaintiff's favor in an amount to
18 be determined at trial, with interest, costs, and prejudgment interest, and attorney's
19 fees as provided by the general maritime law, and for other and further relief as this
20 Honorable Court finds just and proper.

21 DATED this 18th day of January 2008.

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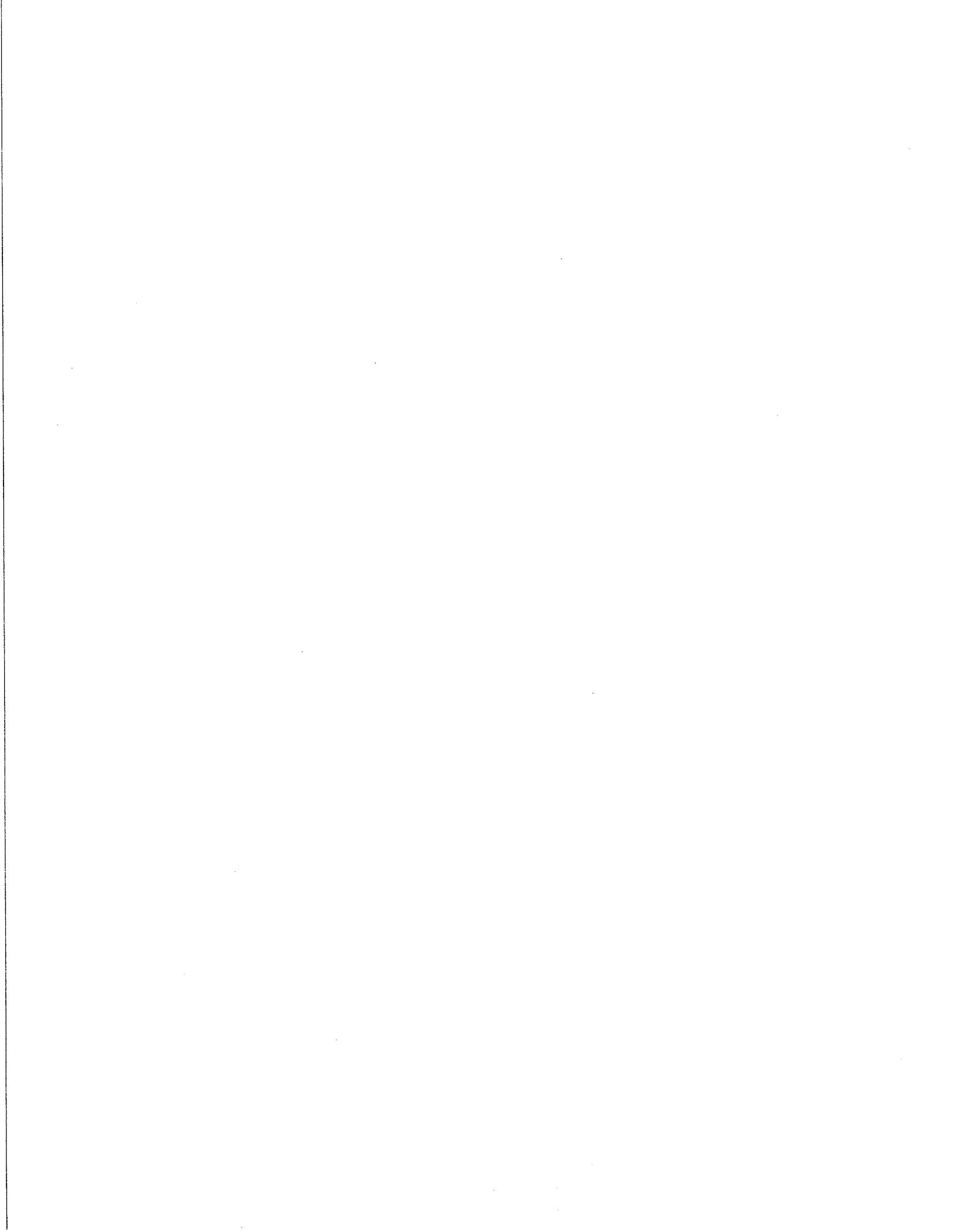
BEARD, STACEY, TRUEB & JACOBSEN, LLP


By: _____
James P. Jacobsen, WSBA No. 16331
Attorney for Defendant

Of Counsel:

Lawrence N. Curtis, LA Bar No. 4678
LAWRENCE N. CURTIS, LTD.

A 1.12



THE HONORABLE HOLLIS HILL, TRIAL JUDGE

FILED
KING COUNTY, WASHINGTON

NOV 16 2009

SUPERIOR COURT CLERK
BY JILLIE WARFIELD
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

v.

ICICLE SEAFOODS, INC.,

Defendant.

Case No. 08-2-03333-3 SEA

SPECIAL VERDICT FORM

SPECIAL VERDICT FORM

1. Do you find, from a preponderance of the evidence, that Icicle was negligent in the manner claimed by Dana Clausen and that such negligence played any part, no matter how small, in causing or contributing to the injuries suffered by him?

Answer Yes or No: YES

(Note: Go to Question No. 2)

SPECIAL VERDICT FORM (PLAINTIFF) - 1
Case No. 08-2-03333-3 SEA

A 2.13

2. Was the *BERING STAR* unseaworthy in the manner claimed by Dana Clausen and was such unseaworthiness a legal cause of the injuries suffered by Dana Clausen under the standards given to you in regard to the unseaworthiness claim?

Answer Yes or No: NO

(Note: If you answered "Yes" to Question No. 1 or Question No. 2, proceed to Question No. 3. If you answered "No" to Question No. 1 and No. 2, proceed to Question No. 9.)

3. Do you find from a preponderance of the evidence that Dana Clausen was himself negligent in the manner claimed by Icicle and that such negligence was a legal cause of his own damages under the standards given to you in regard to the Jones Act or unseaworthiness claims?

Answer Yes or No: YES

(Note: If you answered "Yes" to Question Nos. 1 or 2 and "Yes" to Question No. 3, proceed to Question No. 4. If you answered "Yes" to Question Nos. 1 or 2 and "No" to Question No. 3, proceed to Question No. 5.)

4. What proportion or percentage of Dana Clausen's damage was legally caused by the following entities or persons?

Answer in terms of percentage:

Icicle	<u>56</u>	%
Dana Clausen	<u>44</u>	%

(Note: The total of the percentages given in your answer to Question No. 4 should equal 100%. Go to Question 5.)

5. Without regard to any percentage that you may have given in answer to Question No. 4, please state the entire amount of damages suffered by Dana Clausen from the date of the accident to the date of the trial.

- a. Loss of past wages, including loss of earning capacity \$ 114,000
- b. Physical pain and suffering, past and present \$ 59,000
- c. Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, past and present \$ 2,100
 $13,000$
~~2,100~~
- d. Past disability \$ 21,000
- e. Loss of enjoyment of life, that is the normal ability to enjoy the pleasures and pursuits of life, past \$ 21,000

(Note: Go to Question No. 6.)

6. Without regard to any percentage that you may have given in answer to Question No. 4, please state the entire amount of damages suffered by Dana Clausen from the date of the trial into the future.

- a. Hospital, medical, nursing, pharmaceutical and other related expenses, future (excluding cure under No. 12) \$ 35,000
- b. Loss of future wages, including loss of earning capacity \$ 145,000
- c. Physical pain and suffering, future \$ 10,000
- d. Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, future \$ 4,000

- e. Permanent future disability \$ 20,000
- f. Loss of enjoyment of life,
that is the normal ability
to enjoy the pleasures and
pursuits of life, future \$ 30,000

(Note: Go to Question No. 7.)

7. Do you find, from a preponderance of the evidence that Dana Clausen has failed to use reasonable efforts to mitigate his damages?

Answer Yes or No: NO

(Note: If you answered "Yes" to Question No. 7, please proceed to Question No. 8. If you answered "No" to Question No. 7, please proceed to Question No. 9.)

8. What sum of damages do you find, from a preponderance of the evidence, could have been avoided, had Dana Clausen used reasonable efforts to mitigate his damages?

Answer in Dollars: \$ _____

(Note: Go to Question No. 9.)

9. Do you find, from a preponderance of the evidence, that Dana Clausen has reached maximum medical cure.

Answer Yes or No YES

(Note: If you answered "Yes", go to Question No. 10. If you answered "No", go to Question No. 11.)

10. On what date did Dana Clausen reach maximum medical cure?

Answer: (Insert Date) 4-23-2009

(Note: Go to Question No. 11.)

11. If you find that Mr. Clausen is not at maximum medical cure, what amount do you find, from a preponderance of the evidence, is owed to Dana Clausen for maintenance from February 12, 2006 through May 10, 2010?

Answer in Dollars: \$ _____

(Note: Go to Question No. 12.)

12. If you find that Mr. Clausen is not at maximum medical cure, what amount do you find, from a preponderance of the evidence is owed to Dana Clausen for cure from February 12, 2006 through May 10, 2010?

Answer in Dollars: \$ _____

(Note: Go to Question No. 13.)

13. Do you find, from a preponderance of the evidence, that Icicle was unreasonable in its failure to pay maintenance to Dana Clausen?

Answer Yes or No: YES

(Note: Go to Question No. 14.)

14. Do you find, from a preponderance of the evidence, that Icicle was unreasonable in its failure to pay cure to Dana Clausen?

Answer Yes or No: YES

(Note: If you answered "Yes" to Question No. 13 or 14 proceed to answer Question No. 15. If you answered "No" to Question No. 13 and Question No. 14 you need not consider or answer any of the remaining questions. Simply sign and date the verdict form and return it to the Bailiff.)

15. Do you find, from a preponderance of the evidence, that Icicle's unreasonable failure to pay maintenance or cure to Dana Clausen was a legal cause of some injury to him?

Answer Yes or No: NO

(Note: If you answered "Yes" to Question No. 15, proceed to Question No. 16. If you answered "No" to Question No. 15, go to Question No. 17.)

16. Please state the entire amount of damages sustained by Dana Clausen as a result of the Icicle's unreasonable failure to pay prompt and proper maintenance and cure?

Answer in Dollars: \$ _____

(Note: Go to Question No. 17.)

17. Do you find, from a preponderance of the evidence, that Icicle was callous and indifferent or willful and wanton in its failure to pay maintenance to Dana Clausen?

Answer Yes or No: YES

(Note: Go to Question No. 18.)

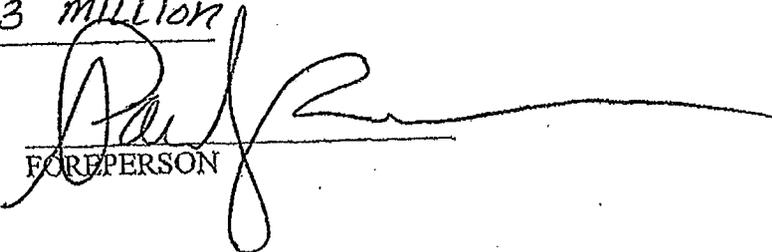
18. Do you find, from a preponderance of the evidence, that Icicle was callous and indifferent, or willful and wanton in its failure to pay cure?

Answer Yes or No: YES

(Note: If you answered "Yes" to Question No. 17 or No. 18 proceed to answer Question No. 19. If you answered "No" to Question No. 17 and No. 18 you need not consider or answer Question No. 19. Simply sign and date the verdict form and return it to the Bailiff.)

19. Please state the entire amount of punitive damages to be awarded to Dana Clausen:

Answer in Dollars: \$ 1.3 MILLION



FOREPERSON

Seattle, Washington
_____, 2009

SPECIAL VERDICT FORM (PLAINTIFF) - 6
Case No. 08-2-03333-3 SEA

BEARD, STACEY, TRUEB & JACOBSEN, LLP
4039 21st Avenue West, Ste. 401
Seattle, Washington 98199
Telephone: (206) 282-3100
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BY: _____
James P. Jacobsen, WSBA #16331

and

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FILED
KING COUNTY, WASHINGTON

NOV 16 2009

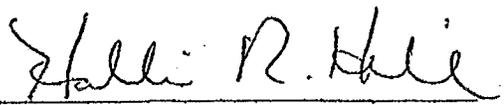
SUPERIOR COURT CLERK
BY JULIE WARFIELD
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING
COUNTY

Dana Clausen)
)
) Plaintiff,) 08-2-03333-3 KNT
)
) vs.)
)
) Icicle Seafoods, INC.,)
)
) Defendant.)
 _____)

COURT'S INSTRUCTIONS TO THE JURY:
SUPPLEMENTAL VERDICT FORM

November 16, 2009



Judge Hollis R. Hill

Supplemental Verdict Form

1. What amount, if any, do you find, from a preponderance of the evidence, is owed to Dana Clausen for maintenance from February 12, 2006 until the date he reached maximum medical improvement?

Answer in Dollars: \$ 19,300

(Note: Go to Question No. 12.)

2. What amount, if any, do you find, from a preponderance of the evidence, is owed to Dana Clausen for cure from February 12, 2006 until the date he reached maximum medical improvement?

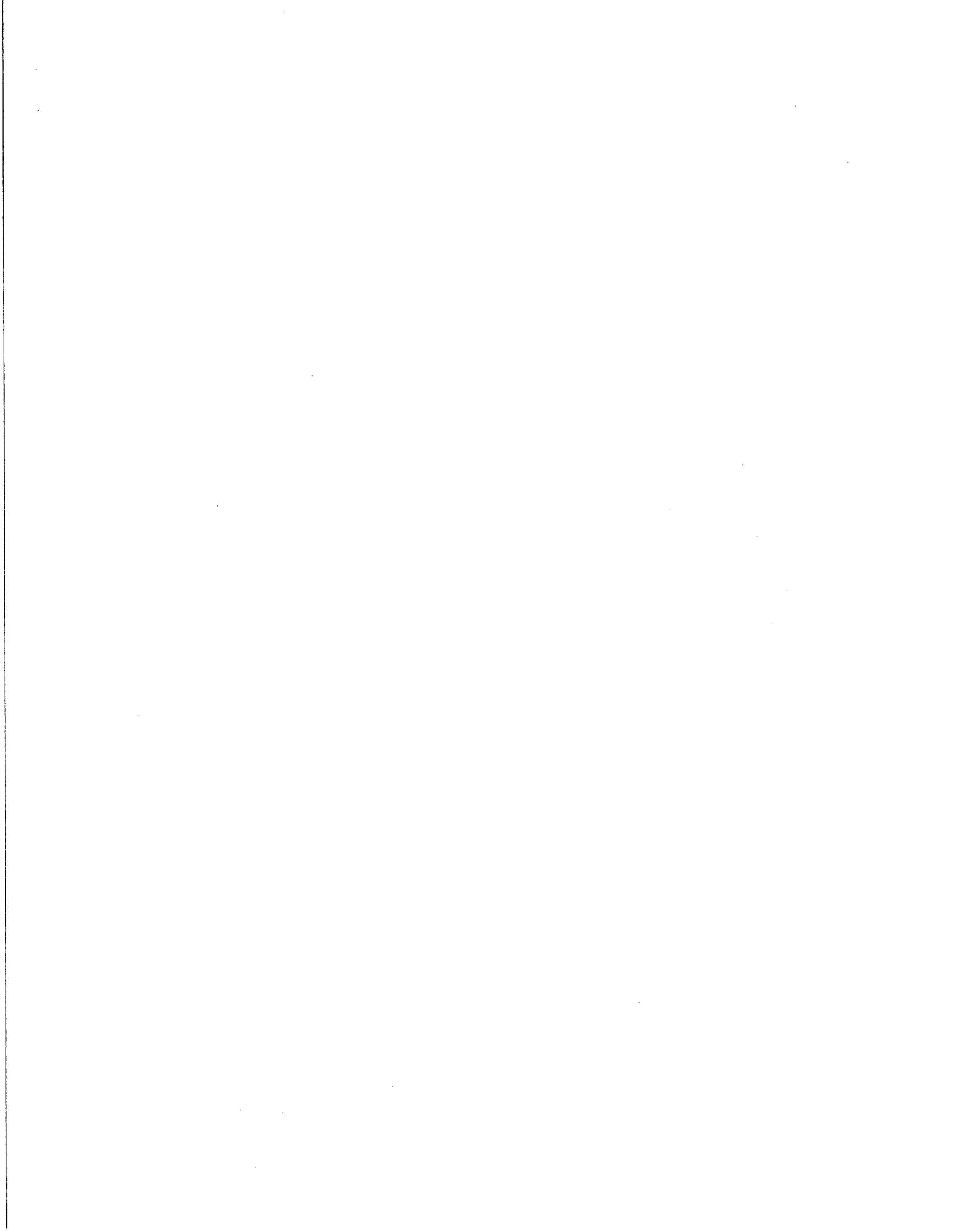
Answer in Dollars: \$ 18,120

(Note: Go to Question No. 13.)



FOREPERSON

November 16, 2009



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JUDGE HOLLIS R. HILL

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3 KING COUNTY
4 SUPERIOR COURT CLERK
5 KENT, WA

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9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
10 FOR KING COUNTY

11
12 DANA CLAUSEN,
13 Plaintiff,
14 v.
15 ICICLE SEAFOODS, INC.,
16 Defendant.

Case No. 08-2-03333-3 SEA
Findings and Conclusions Regarding The
Award Of Attorney's Fees

17 The following constitutes the Court's findings and conclusions regarding Mr. Dana
18 Clausen's request for attorney's fees:

19 I. Introduction

20 On November 16, 2009, the jury returned a verdict against the defendant Icicle Seafoods,
21 Inc. In their answers to Special Interrogatories Nos. 13 and 14, the jury found that the defendant
22 unreasonably refused to pay Mr. Clausen's maintenance and cure. In their answers to Special
23 Interrogatories Nos. 17 and 18, the jury found that the defendant "was callous and indifferent or
24 willful and wanton" in its failure to pay maintenance and cure. The jury's findings entitle Mr.
25

JUDGE HOLLIS R. HILL
King County Superior Court
Courtroom 3J
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429
(206) 296-9285

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1 Clausen to an award of attorney's fees. *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.
2 2d 88 (1962).

3 In seeking his attorneys' fees, Mr. Clausen relies upon the Declarations and Supplemental
4 Declarations of James P. Jacobsen, Lawrence N. Curtis, and Joseph S. Stacey. He also relies
5 upon the Declarations of Scott C.G. Blankenship and Kevin Coluccio.
6

7 The defendant filed its opposition to the motion for attorney's fees, supported by the
8 Declaration of Michael A. Barcott.

9 The defendant takes no issue with the amount of time that was spent on the various tasks
10 as outlined in the fee declarations. As such, there is no claim that plaintiff's lawyers wasted time
11 or duplicated efforts.

12 II. Discussion

13 A. The Attorney's Fee Issue Is For The Court Not The Jury

14 Defendant argues that the award of attorney's fees for wrongful denial of maintenance
15 and cure is an issue for the jury not the Court. Once the jury finds the defendant's acted willfully
16 or wantonly, it is up to the Court to set the attorney's fees via a post-trial motion. *Incandela v.*
17 *American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981). The court followed the same procedure
18 in *Peake v. Chevron Shipping Co., Inc.*, 2004 AMC 2778 (N.D. Cal 2004), *rev'd on other*
19 *grounds*, 245 Fed. Appx. 680 (9th Cir. 2007). This is the proper way to handle attorneys' fees
20 and it is the way the Ninth Circuit Court of Appeals handles attorneys' fees in maintenance and
21 cure cases. (Ninth Circuit Pattern Jury Instruction No. 7.12).
22
23
24
25

1 The U.S. Supreme Court in *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d
2 88 (1962), held that the attorneys' fee award is made pursuant to the Court's equity jurisdiction.
3 Courts, not juries, award equitable remedies. *Maher & Co. v. Farnadis*, 70 Wash. 250, 255-56
4 (1912)(no right to a jury trial on equitable issue); *State v. Evergreen Freedom Forum*, 111 Wash.
5 App. 586, 609-612, 49 P.3d 894 (2002)(same). The award is made under the court's equity
6 jurisdiction in order compensate the seaman for the economic harm he suffered by incurring
7 attorney's fees to obtain his due. Under federal law, a trial court's equity power allows it to
8 award attorney's fees in a maintenance and cure case, *Vaughn v. Atkinson*, or as damages. *U.S.*
9 *v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987) ("Where a court of equity assumes jurisdiction
10 because the complaint requires equitable relief, the court has power to award damages incident to
11 the complaint.").

12
13
14 **B. Methodology for Determining Reasonable Attorneys' Fees and Related Litigation
Expense**

15 Under federal law and the case of *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
16 Cir. 1975), the Court considers certain factors in awarding attorney's fees and costs. These
17 factors are: (1) the time and labor required; (2) the novelty and the difficulty of the questions
18 involved; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other
19 employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the
20 fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the
21 amount involved and the results obtained; (9) the experience, reputation, and ability of the
22 attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional
23 relationship with the client; and (12) awards in similar cases.
24
25

1 The trial court determines a reasonable fee by calculating a “lodestar” figure, which is the
2 market value of the attorney’s services determined by multiplying the hours reasonably expended
3 in the litigation by the reasonable rate of compensation. *Bowers v. Transamerica Title Ins. Co.*,
4 100 Wn.2d 581, 675 P.2d 193 (1983); *Perry v. Costco Wholesale Co.*, 98 P.3d 1264 (2004). The
5 award of fees is left to the sound discretion of the trial court. *Id.* The calculation in this case has
6 two important steps: (a) determining the number of hours reasonably expended by each attorney;
7 and (b) establishing the rate of compensation for each attorney. These considerations will each
8 be addressed below.

10 **1. Number of Hours.** The trial court must determine the number of hours reasonably
11 expended in the litigation based upon reasonable documentation of the work performed. *Bowers*,
12 100 Wn.2d. at 597. This documentation need not be exhaustive or in minute detail, but must
13 inform the court, in addition to the number of hours worked, the type of work performed, and the
14 category of attorney who performed the work. *Id.* The novelty and complexity of the issues are
15 factors to consider in determining the reasonableness of the hours expended in the litigation.
16 *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993).

18 Recovery is also allowed for reasonable fees incurred in preparing the application for an
19 award of costs and fees. *Steele v. Lundgren*, 96 Wn. App. 773, 781-82, 982 P.2d 619 (1999).

21 **2. Hourly Rate.** The total number of hours reasonably expended must next be multiplied
22 by the reasonable hourly rate of compensation. *Bowers*, 100 Wn.2d. at 597. Where the attorneys
23 in question have an established rate for billing clients, that rate will likely be the reasonable rate.
24 *Id.* The attorney’s usual fee is not, however, conclusively a reasonable fee and other factors may

1 | necessitate an adjustment. *Id.* In addition to the usual billing rate, the court may consider the
2 | level of skill required by the litigation, time limitations imposed on the litigation, the amount of
3 | the potential recovery, the attorney's reputation, and the undesirability of the case. *Id.* The
4 | reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate
5 | may well vary with each type of work involved in the litigation. *Id.*
6 |

7 | The Court has carefully considered the declarations and finds that the hours requested by
8 | Mr. Clausen should all be included in the loadstar.¹ The Court has carefully considered the
9 | evidence on the hourly rate and finds that \$450.00 an hour for Mr. Jacobsen, Mr. Curtis, Mr.
10 | Stacey, and Mr. Beard is a reasonable rate in King County for trial lawyers of similar, skill,
11 | reputation and experience. The Court also finds that \$150.00 an hour is a reasonable rate for Mr.
12 | Rainey, Mr. Curtis' associate attorney.
13 |

14 | **B. The Time That Plaintiff Requested Is Supported By The Case Law**

15 | Travel time and travel costs are included in an award of attorney's fees. *Stark v. PPM*
16 | *America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) (travel time for out-of-town counsel
17 | compensable); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395-96 (5th Cir. 2003) (travel,
18 | hotel, and meals compensable).
19 |

20 | Plaintiffs' work on post trial motions for sanctions and fees is related to the maintenance
21 | and cure issues. The sanctions motion and the attorney fees motion are directly related to the
22 | maintenance and cure claim. The evidence withheld was directly relevant to the maintenance
23 | and cure claim, and the fees are awarded based upon the defendant's willful and wanton conduct.
24 |
25 |

1 Moreover, fees for post trial work are properly recovered. *Weyant v. Okst*, 198 F.3d 311, 316-
2 317 (2d Cir. 1999).

3 Mr. Clausen's counsel presented detailed summaries of their time which included the
4 date the work was performed, a description of the work, and the time required. Reconstructed
5 time, especially when it is in exacting detail as counsel presented here, fully supports an
6 attorney's fee award. *E.E.O.C. v. Harris Farms, Inc.*, 2006 WL 1028755, 5 (E.D. Cal. 2006);
7 *Frank Music Corp. v. Metro-Goldwin-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989); *Freiler v.*
8 *Tangipuhua Bd. Of Educ.*, 185 F.3d 337, 349 (5th Cir. 1999).

10 **D. The Defendant Chose Not To Offer Counter-Evidence To The Number Of Hours**
11 **Requested.**

12 The defendant takes issue with a few hours of the overall attorney's time. Mr. Clausen's
13 counsel filed Supplemental Declarations addressing all of this "questioned" time or expenses.
14 From these declarations the Court finds that the "questioned" time is properly included in the
15 loadstar.

16 Beyond these specific objections the defendant uses non-specific arguments against Mr.
17 Clausen's fee request. When it comes to opposing attorney's fees, the opponent must provide
18 the Court with specific, detailed evidence to rebut the fee request.

19 The fee applicant bears the burden of documenting the appropriate hours
20 expended in the litigation and must submit evidence in support of those hours
21 worked. The party opposing the fee application has a burden of rebuttal that
22 requires submission of evidence to the district court challenging the accuracy and
23 reasonableness of the hours charged or the facts asserted by the prevailing party in
its submitted affidavits.

24 ¹ In its reply brief, plaintiff's counsel reduced their calculations by three hours.
25

1 The plaintiffs' counsel submitted documentation of the hours expended and
2 evidence in support of those hours. The district court's order reflects that the court
3 carefully considered the plaintiffs' declarations and billing statements. The
4 defendants failed to meet their burden of rebuttal by submitting evidence to
5 challenge the assertions of the plaintiffs' counsel.

6 *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (citations omitted). Thus, other than on the
7 hourly rate, the defendant has failed to offer any countervailing evidence, such as evidence of its
8 own time spent on the case. Thus, the Court focuses on plaintiff's declarations to determine
9 whether or not the hours are reasonable. The Court finds that, with the exception of 3 hours
10 (which plaintiff in its reply brief acknowledges should be excluded), it should all be included in
11 the loadstar.

12 **E. Plaintiffs are at a Reasonable Market Rate for Lawyers of their Calibur in King**
13 **County**

14 The supplemental declarations of James P. Jacobsen, Scott C.G. Blankenship, and Kevin
15 Coluccio provide additional evidence that the requested rate of \$450 an hour is reasonable for
16 high level trial work in the King County market.² In determining Mr. Clausen's counsels' rate,
17 the Court will take into consideration that they have not requested any paralegal time as they
18 could have done. *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S.Ct. 2463 (1989). The Court
19 accepts Mr. Clausen's counsel's representation that hundreds of hours of paralegal time were
20 necessary to prosecute the maintenance and cure issues. Thus, Mr. Clausen's lawyers' hourly
21 rate necessarily includes the paralegal time which was not separately billed.
22

23 _____
24 ² The Court is entitled to rely upon the National Law Journal's billable hour survey attached to the
25 Supplemental Declaration of James P. Jacobsen. *Smith v. Norwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1418
(10th Cir. 1997) (trial judge entitled to rely upon published survey of hourly rates).

1 **F. In This Particular Case the Court can Estimate a Reasonable Segregation of Hours**

2 The defendant claims that plaintiff should have done more to segregate hours between the
3 bad faith maintenance and cure case and the Jones Act and unseaworthiness liability case.
4 However, the facts of all causes of action arose from a common nucleus of operative facts. For
5 example, the plaintiff's *voir dire* and opening statement were largely devoted to the maintenance
6 and cure case and plaintiff's medical condition. There is no way to divide up the minutes
7 between the Jones Act and unseaworthiness liability and the maintenance and cure claims. Other
8 trial judges have recognized that when a trial involves both Jones Act and maintenance and cure
9 issues, it is practically impossible to divide the time with exactitude. For example, in *Deisler v.*
10 *McCormack Aggregates, Co.*, 54 F.3d 1074, 1087 (3rd Cir. 1995), the trial judge found that it was
11 practically impossible to segregate between the Jones Act and the maintenance and cure claims.
12 Thus, the trial judge apportioned the time 90 percent to maintenance and cure and 10 percent to
13 the Jones Act case, then awarded 90 percent of the attorney's fees. The Court of Appeals
14 affirmed.
15

16 Likewise, Judge Patel in *Peake v. Chevron Shipping Co., Inc.*, 2004 AMC 2778 (N.D.
17 Cal. 2004), was faced with a Jones Act and maintenance and cure case. Judge Patel held:
18 "these 'maintenance and cure' issues did overlap (significantly) with nearly all of the other
19 liability issues in this action, and the 80% figure proposed by plaintiff is appropriate here." *Id.*
20 Thus, Judge Patel attributed 80 percent of the attorney's fees to the maintenance and cure issues.
21

22 Here, the maintenance and cure issues were from the beginning (when the defendant first
23 sued Mr. Clausen in federal court) central to this case. There were fourteen witnesses who
24 testified at trial. Twelve of these witnesses testified either on direct or cross examination
25

1 concerning the maintenance and cure issues. Given the overlapping evidence of the Jones Act
2 and unseaworthiness claims, it is difficult to segregate services on each. Based on a review of
3 the record, a fair estimate of counsel time expended solely on a claim other than "maintenance
4 and cure" to be 10%.

5 Based upon the facts of this case, the Court will award 90% of the claimed hours.

6
7 **G. The Kerr Factors**

8 The Court will address the *Kerr* factors. The *Kerr* factors are in harmony with
9 Washington law.

10 **1. The Time and Labor Required**

11 The time required in this matter is set forth in the Declarations of James P. Jacobsen,
12 Lawrence N. Curtis and Michael Rainey, James M. Beard, and Joseph S. Stacey.

13 For a jury trial of this complexity this is a reasonable number of hours to be expended in
14 this matter. In this case, the defendant takes no issue with the number of hours expended on each
15 particular task. Thus, there is no evidence that the amount of time was unreasonable, or that any
16 of the work was duplicative.

17
18 **2. The Novelty and the Difficulty of the Issues Involved**

19 Mr. Clausen's counsels have substantial experience handling Jones Act and maintenance
20 and cure claims in state and federal court. However, this was their first case tried concerning
21 punitive damages.

22
23 **3. The Skill Requisite to Perform the Legal Services Properly**

1 A high skill level is required to properly try a Jones Act, maintenance and cure, and
2 punitive damage case in the Superior Court. The proper presentation of the case required
3 thorough knowledge of the Rules of Civil Procedure, the Rules of Evidence, the King County
4 Local Rules, the substantive maritime law, substantive punitive damage law, and substantial
5 amount of medical knowledge, and extensive prior experience trying these types of cases.
6

7 The lead trial counsel have a combined 54 years of maritime law experience developed in
8 state and federal trial and appellate courts. Lead trial counsel possess a lengthy record of success
9 in maritime trials. From the Court's observation, Mr. Jacobsen and Mr. Curtis are well seasoned,
10 well prepared and highly competent trial lawyers.

11 **4. The Preclusion of Other Employment by the Attorney Due To Acceptance of**
12 **the Case**

13 In this case Mr. Clausen's counsel did not turn down any cases because they had accepted
14 this case.

15 **5. The Customary Fee**

16 In Jones Act and maintenance and cure cases the fee is almost always contingent.
17 Seamen like Mr. Clausen simply cannot advance costs and pay lawyers an hourly fee.
18

19 **6. Whether the Fee Is Fixed or Contingent**

20 The fee in this matter is contingent. If there is no recovery in this matter no fee was due.
21 While this fee arrangement is customary, it limits the number of attorneys willing to undertake
22 such a case. It is a specialized area of practice and involves significant risks to the attorneys and
23 their firms. It takes skilled attorneys with significant financial backing to undertake a case like
24 this.
25

1 Among other factors to be considered in a contingency case is the delay in the payment of
2 fees. The delay in attorney's fees payment results in a very real loss in the time value of money.

3 Here, Mr. Clausen's lawyers were required to advance the costs of the case, pay interest
4 on them, and run the risk of non-reimbursement if the case is lost. While the ultimate
5 responsibility for costs rests with the client, as a practical matter, Mr. Clausen had no ability to
6 pay the costs if he did not prevail.
7

8 Public policy greatly supports the contingency fee. However, the Court did not apply a
9 contingent multiplier in this case finding that \$450.00 an hour in a reasonable rate.

10 **7. Time Limitations Imposed By the Client or the Circumstances**

11 The client imposed no time limitations.

12 **8. The Amount or Money at Stake and the Results Obtained**

13 The amount of money at stake was substantial. The defendant's willful and wanton
14 conduct supported a verdict of \$1.3 million in punitive damages and an award of attorney fees
15 and costs. The jury found that Mr. Clausen's rights to maintenance and cure were violated.
16

17 In setting attorney's fee awards, the U. S. Supreme Court places substantial emphasis on
18 the results obtained.

19 Where a plaintiff has obtained excellent results, his attorney should recover a
20 fully compensatory fee. Normally this will encompass all hours reasonably
21 expended on the litigation . . . For example, a plaintiff who failed to recover
22 damages, but obtained injunctive relief or vice versa, may recover a fee award
23 based upon all hours reasonably expended if the relief obtained justified that
24 expenditure of attorney time. . . in these circumstances the fee award should not
25 be reduced simply because the plaintiff failed to prevail on every contention
raised in the lawsuit.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

1 The results achieved fully support the amount of effort expended and justify the Court's
2 attorney's fees award. *Id.*

3
4 **9. The Experience, Reputation and Ability of Plaintiff's Counsel**

5 The Declaration of James P. Jacobsen and Lawrence N. Curtis list the lead plaintiff's
6 counsels' academic backgrounds, and professional experience. The attorney affidavits support a
7 finding that the lead trial lawyers are experienced and well regarded members of the maritime
8 bar.

9
10 **10. The "Undesirability" Of The Case**

11 This case may have been "undesirable" from a business perspective, but there was no
12 community resentment to a seaman client or a claim of this nature.

13 **11. The Nature and the Length of the Professional Relationship with the Client**

14 There was no previous relationship between the plaintiff's counsel and Mr. Clausen.

15 **12. Awards in Similar Cases**

16 The attorney's fees awards in other bad faith, employment, and civil rights cases
17 demonstrate the reasonableness of the request for an hourly rate of \$450.00. The trial court in
18 *Cornhusker Casualty Insurance v. Chris Kachman et al.*, Civil No. 3:05-cv-05026, Order
19 Granting Plaintiff's Motion to Set Amount of Attorney Fee Award (W.D. Wash. September 1,
20 2009), awarded \$450.00 an hour for the lead trial counsel. The evidence submitted by Mr.
21 Clausen's lawyers shows that for trial lawyers of this experience, reputation, and specialty
22 \$450.00 is a reasonable market rate in King County, Washington.
23

24 **H. The Court Awards Attorney Fees and Litigation Costs as Follows.**
25

Attorney	Hours	Rate	Total
James P. Jacobsen	399.1	\$450	\$179,595.00
Joseph S. Stacey	41.5	\$450	\$18,675.00
James M. Beard	10	\$450	\$4,500.00
Lawrence N. Curtis	469	\$450	\$211,050.00
Michael Rainey	112	\$150	\$16,800.00
Total			\$430, 620.00
<u>-10%</u>			<u>-\$43, 062.00</u>
Grand Total			\$387,558.00

The Court awards litigation costs in the amount of 90% of \$10,237.18³ to Beard Stacey Trueb & Jacobsen, LLP + \$2,916.92 (for Westlaw legal research October and November, 2009) or \$11, 838.69 to Beard Stacey Trueb & Jacobsen, LLP + \$28,735.88 to Lawrence C. Curtis, for a total costs award of \$40,547.57⁴

The Court will award supplemental fees and costs for the work on the post trial motions. Mr. Clausen's counsels are directed to submit any supplemental claims for attorney's fees after the deadline for filing and consideration of Rule 59 motions has expired.

It Is So Ordered.

³ The dinner cost of \$239.25 on 11/10/09 has been deducted as unreasonable. Other costs of meals during case-related travel are reasonable expenses.

⁴ 10% of costs billed by Beard, et. al. are deducted for the reason stated above for segregation of fees. All costs billed by Curtis are awarded because they pertain to expenses attributed to the maintenance and cure claims or to travel, which is all payable on the maintenance and cure claim.

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Dated this 28th day of January, 2010.

Hollis R. Hill

HONORABLE HOLLIS HILL
King County Superior Court Judge



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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,)
)
Plaintiff,)
)
vs.)
)
ICICLE SEAFOODS, INC.,)
)
)
Defendant.)

Case No. 08-2-03333-3 SEA

ORDER DENYING
DEFENDANT'S MOTION TO
AMEND JUDGMENT

I. Introduction

The defendant has filed a Rule 59(h) motion asking the Court to eliminate or reduce the punitive damage award for its willful and wanton actions in denying Mr. Clausen the maintenance and cure to which the jury found he was entitled. The Court has carefully considered the briefs, affidavits, and arguments of the parties. For the following reasons the Court denies the defendant's motion.

II. Applicable Law

As Mr. Clausen's claims arise under the maritime law, federal law controls the outcome of this motion.

Under maritime law, the defendant has an affirmative duty to provide its employee with medical care. *The IROQUOIS*, 194 US 240 (1903). "The duty to provide proper medical treatment and

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1 attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the
2 shipowners by all maritime nations.” *Id.* at 241-242. The employer is the “legal guardian in the sense
3 that it is a part of his duty to look out for the safety and care of his seamen, whether they make a
4 distinct request for it or not.” *Id.* at 247.

5 Admiralty courts have been liberal in interpreting this duty. ‘for the benefit and
6 protection of seamen who are its wards.’ We noted in *Aguilar v. Standard Oil Co.*, that
7 the shipowner’s liability for maintenance and cure was among ‘the most pervasive’ of all
8 and that it was not to be defeated by restrictive distinctions nor ‘narrowly confined.’
9 When there are ambiguities or doubts, they are resolved in favor of the seaman.
10 [citations omitted].

11 *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

12 The defendant was under the most stringent legal obligation to take detailed and
13 affirmative action to *ensure* that Mr. Clausen received his maintenance and cure. Willful and
14 wanton violation of this stringent legal duty is uniquely culpable conduct.

15 The defendant claims that the *Exxon* case provided a universal cap of a 1:1 ratio between
16 punitive damages and compensatory damages in all maritime cases. The Court disagrees. In *Atlantic*
17 *Soundings v. Townsend*, 129 S.Ct. 2561, 2574 n.11 (2009), the Supreme Court stated that it was not
18 applying recovery cap as it did in the *Exxon Valdez* case. Specifically, the Court stated:

19 Nor have petitioners argued that the size of punitive damages awards in maintenance
20 and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. See
21 *Exxon Shipping Co. v. Baker*, 554 U.S. ____, 128 S.Ct. 2605, 171 L. Ed. 2d 570, [slip op]
22 at 42 (2008)(imposing a punitive-to-compensatory ratio of 1:1). We do not decide these
23 issues.

24 Thus, *Atlantic Soundings* specifically did not impose a 1:1 limit as implied by the defendant.

25 Moreover, a careful examination of the *Exxon* case also teaches that the Supreme Court did not
26 establish a bright line rule for all maritime cases. In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605,
27 2008 AMC 1521 (2008), the Supreme Court stated that it imposed a cap of 1:1 in “such maritime
28 cases” which did not involve “exceptional blameworthiness” or “behavior driven primarily by desire

1 for gain” and that was “profitless for the tortfeasor” and that was the result of “reckless” rather than
2 “intentional” behavior. *Id. at 2633-2634*. Moreover, the Court stated that in cases with substantial
3 damages, \$507,000,000 in the *Exxon* case, a 1:1 ratio can reach the outer limit of due process. *Id. At*
4 *2634*. Thus, *Exxon* imposed a 1:1 ratio under those particular facts, and it did not establish a 1:1 limit
5 for all maritime cases.

6 The 1:1 cap applied in the *Exxon* case has also been projected as the appropriate cap in non-
7 maritime cases where the compensatory award, like it was in *Exxon*, is particularly large. *State Farm*
8 *Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (“When compensatory damages are
9 substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost
10 limit of the due process guarantee.”).

11 In assessing the punitive damage award in this particular case, “the most important indicium of
12 the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s
13 conduct.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court’s
14 jurisprudence provides a detailed list of the markers employed for judging the reprehensibility of the
15 defendant’s conduct. By these standards, the instant defendant’s conduct reaches the zenith of
16 reprehensibility, thus supporting a substantial punitive damage award. The Court will consider all of
17 the relevant markers below.

18 The defendant argues that neither the award of unpaid maintenance and cure nor the award of
19 attorney’s fees are compensatory damages and therefore cannot be compared to the punitive award.¹
20 The defendant fails to cite any case on point to support its argument. To the contrary, the Court
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24 ¹ In its award of sanctions for defendant’s failure to disclose its misdeeds, this Court was extremely lenient, both in terms of
25 the sum awarded and it directing payment to the Clerk of the Court, rather than as compensation to Plaintiff. This was based
on a finding that the jury’s award of punitive damages was an indication that Plaintiff was not harmed in the verdict by the
withholding. Should the punitive damages award be reduced, this Court’s assessment of appropriate sanctions should be
revisited.

1 concludes that the attorney's fees are compensatory damages, as are the awards for maintenance and
2 cure. In discussing attorney's fees in *Vaughn v. Atkinson*, 369 U.S. 527, 531 (1962), the Supreme
3 Court stated that the seaman "was forced to hire a lawyer to get what was plainly owed to him," and
4 that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than
5 this one." Thus, the Supreme Court stated that the attorney's fees were awarded as damages for failure
6 to pay maintenance. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967),
7 the Supreme Court stated even more explicitly that *Vaughn v. Atkinson* attorney fees are awarded as
8 compensatory damages.

9 Limited exceptions to the American rule have, of course, developed. They have been
10 sanctioned by this Court when overriding considerations of justice seemed to compel
11 such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be
12 awarded counsel fees *as an item of compensatory damages* (not as a separate cost to be
taxed). *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).
[Emphasis supplied].

13 Thus, the Supreme Court itself holds that *Vaughn v. Atkinson* attorney's fees are "compensatory
14 damages".

15 Specifically addressing a maintenance and cure case, the Fifth Circuit Court of Appeals also
16 held that *Vaughn v. Atkinson* attorney's fees are compensatory damages, not punitive damages.
17 *Guevara v. Maritime Overseas Corporation*, 59 F.3d 1496, 1501-03 (5th Cir. 1995), *rev'd on other*
18 *grounds, Atlantic Soundings v. Townsend*, 129 S.Ct. 2561 (2009).

19 In other "bad faith" cases, akin to this case, courts have characterized awards of attorney's fees
20 as compensatory damages and include the fees as compensatory damages to be compared against the
21 punitive award. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir.
22 2007)(applying Georgia law, holding that \$1.3 million in attorney's fees is a compensatory award and
23 should be compared against the punitive damage award); *Leeper-Johnson v. Prudential Ins. Co. of*
24 *America*, 2009 WL 1318692, 23 (Cal. Ct. App. 2009)(court awarded attorney's fees included in
25

1 compensatory damages which are compared against the punitive award). Applying these cases, the
2 attorney's fees will be characterized as compensatory damages.

3 Adding together the unpaid maintenance and cure and attorney's fees award, the amount of
4 compensatory damages is \$465,525. The punitive damages are \$1.3 million. The resulting ratio is
5 1:2.79. The question before the Court is whether this ratio passes legal muster.

6 **III. Facts Relating To The Defendant's Conduct**

7 The Supreme Court has provided clear instructions for trial courts to determine whether a
8 particular punitive damage award is appropriate. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538
9 U.S. 408, 419-421 (2003), the Court identified markers of reprehensibility as follows: (1) Indifference
10 to or reckless disregard for the health of others; (2) the target of the conduct was financially vulnerable;
11 (3) the conduct involved repeated actions and was not isolated; (4) the harm was a result of intentional
12 malice, trickery, or deceit, and was not an accident. *Id.* Furthermore, deliberate false statements, acts of
13 affirmative misconduct, and concealment of evidence of improper motive demonstrates the most
14 reprehensible conduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-580 (1996).
15 "[M]alicious behavior" "carried on for the purpose of increasing the tortfeasor's financial gain" is
16 "some of the most egregious conduct". *Exxon*, 128 S.Ct. at 2631-32. The reviewing court must also
17 consider the potential damage if the defendant had succeeded in its scheme, as well as the size of the
18 award that is required to deter the defendant from similar conduct in the future. *TXO Production Corp.*
19 *v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

20 Each issue will be addressed below.

21 **(1) Indifference to or Reckless Disregard For the Health of Others.**

22 The defendant demonstrated intentional indifference to Mr. Clausen's health. The defendant
23 paid the Seattle Panel of Consultants' Dr. Richard Meeks to review Mr. Clausen's medical records. Its
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1 hand-picked doctor advised the defendant that Mr. Clausen needed epidural spinal injections and was a
2 back surgery candidate. Upon review of the report, Chris Kline, a corporate officer, considered the
3 report "not good for Icicle." (Trial Exhibits 198 & 199 & Trial Testimony of Mr. Gremmert).
4 Although advised by its doctor that the injections were medically necessary and related to Mr.
5 Clausen's work injury, the defendant refused to pay for the injections as well as the surgery. The
6 defendant persisted in this behavior despite repeated requests to authorize and pay for Mr. Clausen's
7 necessary medical care. These actions demonstrate an intentional disregard for Mr. Clausen's health.

8 When the defendant obtained Dr. Meeks' opinion that Mr. Clausen was not at maximum
9 medical cure, could benefit from epidural steroid injections, and was a surgical candidate, it did not
10 provide a copy of the report to Mr. Clausen, the nurse case manager, or any of Mr. Clausen's treating
11 physicians, leaving Plaintiff misled as to his medical condition. Instead, the defendant kept the report
12 secret because it was "not good for Icicle". The implication is that Mr. Clausen's necessary medical
13 care was going to cost the defendant money. These actions amount to intentional disregard for Mr.
14 Clausen's health, and evidence a plan to trade Mr. Clausen's health for corporate profits.

15 Significant to this conclusion is that the defendant was under a legal obligation to *ensure* that
16 Mr. Clausen received proper medical care for his shipboard injury. Thus, the defendant was under a
17 strict and heightened duty to be concerned with Mr. Clausen's care which it intentionally and
18 repeatedly repudiated.
19

20 **(2) Mr. Clausen Was Financially Vulnerable.**

21 Mr. Clausen's back injury rendered him unable to do any of the work for which he was
22 qualified. Mr. Gremmert admitted that he knew this during the spring of 2006. (See also Exhibit 11,
23 Dec. of Jacobsen). Also, the defendant paid only \$20.00 a day in maintenance---clearly not enough
24 money for safe and secure lodging with heat, cooling, shower, toilet and electricity, plus three meals a
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1 day. Mr. Clausen was reduced to living in a broken down recreational vehicle with no heat, air
2 conditioning, toilet, or running water. Eventually, the roof leaked and could not be repaired. Mr.
3 Clausen was practically homeless, and therefore quintessentially financially vulnerable.

4 Ms. Moore testified at trial that during this time she knew or suspected that Mr. Clausen had
5 only an old RV for shelter. Mr. Gremmert testified that it is possible to live on \$20.00 in a safe and
6 clean environment and still eat three meals a day. The defendant knew that Mr. Clausen was
7 financially vulnerable and that is why it wanted him to take the "bait" so that he could get "\$\$" by
8 backing off of his medical care.

9 The manner in which the defendant sought to use Mr. Clausen's financial vulnerability against
10 him is particularly reprehensible in light of the legal duty the defendant owed Mr. Clausen to ensure he
11 received the medical care he needed.

12
13 **(3) The Defendant Repeatedly Violated Mr. Clausen's Right To Maintenance And Cure.**

14 Defendant repeatedly violated Mr. Clausen's right to maintenance and cure. Based upon the
15 jury's award of unpaid maintenance and cure, Mr. Clausen's right to these benefits extended for a
16 considerable time past the date when the defendant quit paying. Plaintiff's Trial Exhibits 59 to 123 are
17 the 64 letters that Mr. Curtis sent to the defendant enclosing medical records and bills and asking for
18 payment of cure.

19 **(4) The Failure To Pay Maintenance and Cure Was the Result of Intentional Malice,
20 Trickery and Deceit, And It Was Not A Mistake.**

21 The decision to deny Mr. Clausen maintenance and cure was made by Ms. Laurenda Moore and
22 it was an intentional decision, not a mistake. The claims adjuster's file demonstrates that the decision
23 was carried out with both trickery and deceit.

24 In a letter dated June 20, 2006, Dr. Richard E. Marks told the defendant that Mr. Clausen had
25 not reached maximum medical care, that he needed epidural steroid injections, and that he was a

1 surgical candidate. (Panel of Consultants Report, Exhibit 1 to the Declaration of James P. Jacobsen).

2 The defendant refused to pay for this treatment. Instead, defendant sued Mr. Clausen in federal court.

3 The adjuster's file demonstrates a conspiracy within the defendant's corporate management to
4 deny Mr. Clausen his medical care.

- 5 • On May 25, 2006, the defendant reported to the insurance company: "We feel that settlement in
6 this range would be preferable to taking any chances with the outcome of a functional capacity
7 exam and future medical treatment."
- 8 • On June 5, 2006, in telephone notes that the insurance company had authorized a settlement
9 offer and that, "We should move on this before guy gets away from us—He agreed will talk to
10 Leauri—Good."
- 11 • On June 9, 2006, in telephone notes the adjuster says: "----We Hv Reviewed the email from the
12 nurse case mgr. Review earlier med recs ---Looks like medical situation is wide open again
13 after we thought it was almost finished ---He agrees ---Maybe he will take bait & my to back
14 down his medical treatment in order to get \$\$ by "closing" file."
- 15 • On June 28, 2006, in the telephone notes it states: "----Read med recs review Rpt ---Not good
16 for Icicle ---We should really try and corral this guy ---May end up with a back surgery"
- 17

18 (Exhibits 4 and 2, Dec. of Jacobsen in support of Opposition to Motion to Amend Judgment).

19 Mr. Gremmert testified that the back surgery was expected to cost between forty and seventy
20 five thousand dollars. Thus, beginning in the summer of 2006 the defendant engaged in an elaborate
21 scheme to force Mr. Clausen to settle his claim in order to avoid paying for an expensive back
22 surgery—a surgery which its own doctor concluded would be therapeutic.

23 The evidence at trial also established that Lori Gregoire, the nurse assigned by the defendant to
24 monitor Mr. Clausen's medical care, believed that Dr. Brennan, Mr. Clausen's treating physician was
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1 incorrect when he said Mr. Clausen had reached maximum medical cure. This was the same
2 conclusion reached by Dr. Richard Meeks, defendant's hand-picked doctor. And Mr. Gremmert
3 testified at trial that he accepted the fact that Mr. Clausen had not reached maximum medical cure as
4 stated by Dr. Brennan.

5 Nevertheless, concealing Dr. Richard Meeks' opinion and that of Nurse Lori Gregoire, Mr.
6 Gremmert was still relying upon Dr. Brennan's statement that Mr. Clausen had reached maximum
7 medical cure to support the defendant's denial of maintenance and cure. (Exhibit 13, December 5,
8 2006 Facsimile from Kurt Gremmert to Larry Curtis, and Exhibit 14, letter dated December 12, 2006,
9 Dec. of Jacobsen). These facts demonstrate the use of deceit, false statement and trickery, because the
10 opinions of Dr. Meeks and Nurse Gregoire were withheld from Mr. Clausen, but the discredited
11 opinion of Dr. Brennan was still being used to deny him maintenance and cure.

12 **(5) The Defendant Employed Deliberate False Statements.**

13 One example of the many false statements defendant made in denying Mr. Clausen maintenance
14 and cure is contained in its federal court Complaint. On or about September 18, 2007, the defendant
15 sued Mr. Clausen in the United States District Court in order to terminate his rights to maintenance and
16 cure. The defendant's Complaint made deliberate false statements. Under the facts section, the
17 defendant's Complaint stated:
18

19 Throughout this matter Mr. Clausen has impeded his employer's right and obligation to
20 investigate Mr. Clausen's ongoing entitlement to maintenance and cure by way of
21 example and without limitation, failing to keep Icicle Seafoods, Inc. apprised of his
22 medical status, failing to provide Icicle Seafoods, Inc. with copies of medical records,
23 failing to adequately allow Icicle Seafoods, Inc. access to the treating physicians, failing
24 to seek authorization for medical treatment, [and] failing to apprise Icicle Seafoods, Inc.
25 of medical bills[.]

(Complaint ¶ 4.2, Exhibit 15, Dec. of Jacobsen). The adjuster's file demonstrates that each one
of these allegations was false.

1 The progress reports and billing records from Nurse Lori Gregoire, show that for every
2 step of the way, she talked with Mr. Clausen and his doctors, reviewed his medical records, and
3 reported all of this information in detail to the claims adjuster. (Nurse Lori Gregoire's records,
4 Exhibits 6 to 10, Dec. of Jacobsen). When the defendant filed its federal lawsuit, these records
5 were still a secret in the claims adjuster's file. Trial Exhibit 202 was a letter dated June 29,
6 2006 from Mr. Curtis to Mr. Gremmert which contained numerous medical records, medical
7 bills, a summary of medical bills that remained unpaid, and fifteen releases signed by Mr.
8 Clausen so that the defendant could obtain his medical records directly from the providers. Mr.
9 Gremmert admitted on cross examination that none of these releases for medical records were
10 ever used. The law suit was filed two and one-half months after receipt of the releases.

11 Thus, the Complaint that the defendant filed in the U.S. District Court contained patently
12 false and misleading statements.

13 These false statements were particularly egregious because the defendant owed Mr.
14 Clausen a fiduciary duty to ensure that he received the medical care to which he was due.
15

16 **(6) Defendant's Misconduct Was Motivated By Profit.**

17 Mr. Gremmert's telephone notes of the conversations with Mr. Chris Kline, the
18 defendant's corporate officer, demonstrate that the defendant was trying to "corral" Mr. Clausen
19 and get him to take the "bait" of some small settlement "to back down his medical treatment in
20 order to get \$\$". The motive was to enhance the defendant's profit margin. According to
21 *Exxon*, willful and wanton conduct in the pursuit of profit is "the most egregious conduct".

22 **(7) The Potential Harm If The Defendant Had Fully Succeeded In Its Plan**
23 **Is Severe.**

24 On June 9, 2006, Nurse Lori Gregoire reported to the defendant that, "Mr. Clausen
25 reports increased pain to his hips and flare up on Saturday, described as a "lightning bolt" that

1 lasted about ten minutes to his left hip. Dr. Brennan deferred any work release and
2 recommended referral to a neurosurgeon, Dr. Isaza." (Exhibit 5, Dec. of Jacobsen). Mr.
3 Gremmert's notes from that same day state, "---We Hv Reviewed the email from the nurse case
4 mgr. Review earlier med recs[.] ----Looks like medical situation is wide open again after we
5 thought it was almost finished[.] ---He agrees[.] ---Maybe he will take bait & my to back down
6 his medical treatment in order to get \$\$ by "closing" file." (Exhibit 2, Dec. of Jacobsen). As of
7 June 9, 2006 it is therefore undisputed that the defendant knew that Mr. Clausen was suffering
8 from "lightning bolt" pain and that his treating physician wanted Mr. Clausen to see a
9 neurosurgeon for further treatment. Despite this knowledge, the defendant planned to offer Mr.
10 Clausen "bait" of a small settlement to forego his medical treatment.

11 Later that summer, Mr. Clausen continued to suffer from excruciating pain. In Dr.
12 Isaza's record from the Baton Rouge Orthopedic Clinic, dated August 17, 2006, is the following
13 chart note.

14 Patient advised to go to er if medicine is not helping his pain. His friend "franny" is
15 aware of this—she states patient has threatened to kill himself and we advised her to go
16 to ER—

17 (Exhibit 16). Nurse Gregoire reported this emergency room visit to the defendant. (Progress Report
18 No. 6, page 2, Exhibit 6).

19 The defendant knew that Mr. Clausen was suffering from excruciating pain so intense that it
20 was reported to his doctor that he contemplated suicide. Nevertheless, shortly after this chart note and
21 the report from Nurse Gregoire, the defendant refused to pay any further maintenance and cure.

22 After the defendant refused to pay for his medical care, Mr. Clausen was able to borrow money
23 to obtain some of the care which was required. If the defendant had fully succeeded in its plan, and Mr.
24 Clausen had been unable to borrow money for his medical treatment and prescription medications, Mr.
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1 Clausen would have been left suffering excruciating unremitting pain—pain so bad that he
2 contemplated death as an alternative.

3 Moreover, the defendant quit paying maintenance in September, 2006, and only gave him a
4 token amount in 2007. Mr. Clausen was living in his broken down RV in squalid conditions. Only
5 because he borrowed money was he was able to put a modest roof over his head.

6 The potential harm, if the defendant's decision to deny Mr. Clausen his maintenance and cure
7 had been fully successful, was hardship, pain, and devastation of his life.

8 **(8) The Size of the Award That is Required to Deter the Defendant From Similar Conduct**
9 **in the Future.**

10 The jury in this case made a finding that the defendant's conduct was willful and
11 wanton. Nevertheless, the defendant argues here that it should be subject to no punitive
12 damages. The defendant needs substantial deterrence not to repeat what it did to Mr. Clausen.

13 First, that the defendant has opportunity to treat other workers in the same way it treated
14 Mr. Clausen. The defendant admitted that it employs hundreds of seamen.

15 The defendant's opening statement claimed that the defendant had done nothing wrong.
16 The defendant tried to blame its actions on Mr. Clausen. The defendant's closing statement
17 made the same arguments. Mr. Gremmert and Ms. Moore claimed that they did nothing wrong.
18 Both were unrepentant.

19 When this case came to trial the defendant knew that if it lost the case, it faced the
20 prospect of an award of attorney's fees, costs, and punitive damages. During the entire time
21 that it was willfully and wantonly denying Mr. Clausen maintenance and cure, and intentionally
22 betraying its stringent duty to provide him proper cure, defendant's managers knew that it was
23 exposed to damages and attorney's fees. Nevertheless, the defendant denied Mr. Clausen his
24 due. The punitive damages must be too painful to make such conduct profitable.
25

1 The jury's modest award to Mr. Clausen for general damages under the Jones Act and
2 the substantial comparative fault finding demonstrates that this jury in this case was careful and
3 thoughtful. The jury did not go "wild" assessing Jones Act damages against the defendant. The
4 jury's considered judgment was that it would require \$1.3 million to adequately punish and
5 deter the defendant. Considering, the stringent legal duty the defendant breached, the
6 intentional and cynical manner in which Mr. Clausen was treated, and what the defendant put
7 Mr. Clausen through--\$1.3 million is an appropriate award.

8 **(9) Punitive Damages Are Properly Awarded In Cases Involving Economic Harm.**

9 The defendant claims that Mr. Clausen, because he cannot recover punitive damages,
10 was not awarded physical damages for wrongful denial of maintenance and cure under the
11 general maritime law. This argument is foreclosed by Supreme Court precedent.

12 To be sure, infliction of economic injury, especially when done intentionally through
13 affirmative acts of misconduct, or when the target is financially vulnerable, can warrant
14 a substantial penalty. [citation omitted].

15 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576 (1996). Here the defendant's repeated
16 acts were intentional and Mr. Clausen was a quintessentially financially vulnerable victim.

17 Thus, this case warrants a "substantial penalty." *Id.*

18 The jury was entitled to take into consideration the conditions under which the
19 defendant caused Mr. Clausen to live. The jury did not have to award him separate damages
20 under the general maritime law in order for it to abhor what the defendant did to him. The Jury
21 found the defendant's conduct abhorrent, which is why it awarded \$1.3 million in punitive
22 damages. Moreover, under the Special Verdict Form, the jury was required to award
23 compensatory damages under the Jones Act before it reached the general maritime law. The
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1 jury may have thought that the general maritime law compensatory damages duplicated the
2 Jones Act damages and therefore declined to award any more.

3 The Supreme Court's markers of reprehensibility apply whether or not there is physical
4 injury. And that analysis, applied to this case, fully supports the \$1.3 million punitive award.

5 **(10) The Ratio Of Compensatory Damages To Punitive Damages Is Well Within**
6 **Federal Limits.**

7 The nub of defendant's argument is that the punitive damage award is too high based upon the
8 compensatory damages awarded in this case. "The precise award in any case, of course, must be based
9 upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*
10 *Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

11 The application of the Supreme Court's punitive damage jurisprudence to this case establishes
12 that under the "facts and circumstances" of this case the award is fully justified. Objective application
13 of the Supreme Court's markers places the defendant's conduct at the zenith of reprehensibility. The
14 defendant preyed upon a man incapable of work living in a broken down old RV. The defendant did it
15 intentionally, repeatedly, over a period of years, and the purpose of its malicious actions was corporate
16 profit. Moreover, while doing this, the defendant was subject to a stringent legal duty to do just the
17 opposite—to carefully care for Mr. Clausen. Thus, a large punitive damage award is fully supported by
18 the law.

19 The question then becomes what is a large award? That is determined by the reprehensibility of
20 the conduct and the size of the compensatory award. The Supreme Court has many cases which discuss
21 the ratio of punitive to compensatory damages.

22 In *TXO Production Corp.*, 509 U.S. at 453, 113 S.Ct. 2711, the Supreme Court affirmed a
23 punitive damage award that was 526 times as great as the compensatory damages in action for slander
24 of title. In affirming the award, the Supreme Court observed that it "is appropriate to consider the
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1 magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim
2 if the wrongful plan had succeeded, as well as the possible harm to other victims that might have
3 resulted if similar future behavior were not deterred." *Id.* at 460. The Court then held that it did not
4 consider the dramatic disparity between the actual damages and the punitive award controlling in a case
5 of this character. Here, there is no drastic disparity between the harm and the potential harm and the
6 punitive award. The ratio is less than three and fully supported by the case law and defendant's
7 reprehensible conduct.

8 Many courts have upheld damage ratios higher than the one in this case. E.g. *Action Marine,*
9 *Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007)(ratio of 1:9 appropriate where
10 the defendant's actions particularly reprehensible); *Southern Union Co. v. Irvin*, 563 F.3d 788, 790 -
11 794 (9th Cir. 2009)(1:3.1 upheld); *Jones v. United Parcel Service, Inc.*, 658 F.Supp.2d 1308 (D.Kan.,
12 2009)(1:3.1 ratio in wrongful discharge case upheld); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728,
13 741 (N.C. Ct. App. 2009)(1:25 ratio upheld where compensatory low and defendant's conduct
14 reprehensible); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 385-86 (N.M. App. 2008)(1:6.76
15 ratio is upheld when the conduct was particularly reprehensible).
16

17 This award is not out of line, does not unfairly punish the defendant, and is fully supported by
18 the evidence before the jury and the controlling case law.

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IV. Conclusion

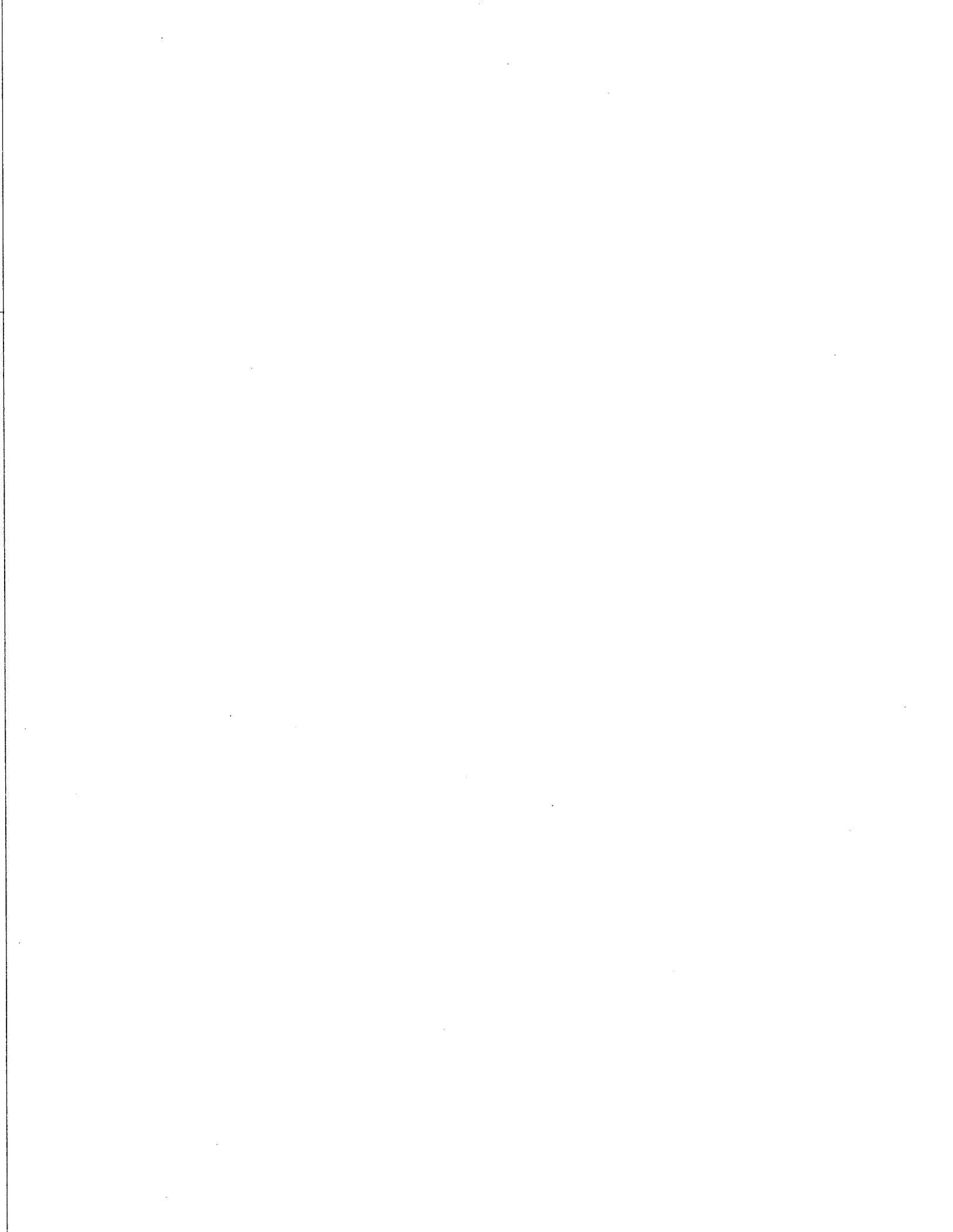
The defendant's Rule 59(h) motion is hereby denied.

It Is So Ordered.

Dated this 2nd day of March, 2010



HONORABLE HOLLIS HILL
Superior Court Judge



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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

v.

ICICLE SEAFOODS, INC.,

Defendant.

Case No. 08-2-03333-3 SEA

SPECIAL VERDICT FORM
(Plaintiff)

PLAINTIFF'S SPECIAL VERDICT FORM

1. Do you find, from a preponderance of the evidence, that Icicle was negligent in the manner claimed by Dana Clausen and that such negligence played any part, no matter how small, in causing or contributing to the injuries suffered by him?

Answer Yes or No: _____

(Note: Go to Question No. 2)

2. Was the *BERING STAR* unseaworthy in the manner claimed by Dana Clausen and was such unseaworthiness a legal cause of the injuries suffered by Dana Clausen under the standards given to you in regard to the unseaworthiness claim?

SPECIAL VERDICT FORM (PLAINTIFF) - 1
Case No. 08-2-03333-3 SEA

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Answer Yes or No: _____

(Note: Go to Question No. 3)

3. If you answered "Yes" to Question Nos. 1 or 2, do you find from a preponderance of the evidence that Dana Clausen was himself negligent in the manner claimed by Icicle and that such negligence was a legal cause of his own damages under the standards given to you in regard to the unseaworthiness or Jones Act claims?

Answer Yes or No: _____

(Note: If you answered "Yes" to Questions No. 1 or 2 and yes to No. 3, proceed to Question No. 4. If you answered "Yes" to Questions No. 1 or 3 and "No" to No. 3, proceed to No. 4. If you answered "No" to Question 1, simply sign and date the verdict form and return it to the Bailiff.)

4. What proportion or percentage of Dana Clausen's damage was legally caused by Mr. Clausen's own negligence?

Answer in terms of percentage:

Icicle %

Dana Clausen: %

(Note: The total of the percentages given in your answer to Question 4 should equal 100%. Go to Question 5.)

5. Without regard to any percentage that you may have given in answer to Question No. 4 please state the entire amount of damages suffered by Dana Clausen from the date of the accident to the date of the trial.

a. Hospital, medical, nursing, pharmaceutical and other related expenses, past \$ _____

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- b. Loss of past wages, including loss of earning capacity \$ _____
- c. Physical pain and suffering, past and present \$ _____
- d. Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, past and present \$ _____
- e. Past disability..... \$ _____
- f. Loss of enjoyment of life, that is the normal ability to enjoy the pleasures and pursuits of life, past \$ _____

(Note: Go to Question No. 6.)

6. Without regard to any percentage that you may have given in answer to Question No. 4, please state the entire amount of damages suffered by Dana Clausen from the date of the trial into the future.

- a. Hospital, medical, nursing, pharmaceutical and other related expenses, future \$ _____
- b. Loss of future wages, including loss of earning capacity \$ _____
- c. Physical pain and suffering, future \$ _____
- d. Mental pain and suffering, including such items as fear, anxiety, humiliation, embarrassment and nervousness, future \$ _____

SPECIAL VERDICT FORM (PLAINTIFF) - 3
Case No. 08-2-03333-3 SEA

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- e. Permanent future disability\$ _____
- f. Loss of enjoyment of life,
that is the normal ability
to enjoy the pleasures and
pursuits of life, future\$ _____

(Note: Go to Question No. 7.)

7. Do you find, from a preponderance of the evidence, that Dana Clausen has reached maximum medical cure?

Answer Yes or No: _____

(Note: If you answered "Yes" to Question No. 7 proceed to answer Question No. 8. If you answered "No" to Question No. 7, simply sign and date the verdict form and return it to the Bailiff.)

8. What amount do you find, from a preponderance of the evidence, is owed to Dana Clausen for maintenance?

Answer in Dollars: \$ _____

(Note: Go to Question No. 9)

9. What amount of cure do you find, from a preponderance of the evidence, is owed to Dana Clausen for cure?

Answer in Dollars: \$ _____

(Note: Go to Question No. 10)

10. Do you find, from a preponderance of the evidence, that Icele was unreasonable in its failure to pay maintenance to Dana Clausen?

SPECIAL VERDICT FORM (PLAINTIFF) - 4
Case No. 08-2-03933-3 SEA

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1 Answer Yes or No: _____

2 (Note: Go to Question No. 11.)

3
4 11. Do you find, from a preponderance of the evidence, that Icele was unreasonable in
5 its failure to pay cure to Dana Clausen?

6 Answer Yes or No: _____

7
8 (Note: If you answered "No" to Question No. 10 and Question No. 11 you need not
9 consider or answer any of the remaining questions. Simply sign and date the verdict
10 form and return it to the Bailiff. If you answered "Yes" to Question No. 10 or 11
11 proceed to answer Question 12.)

12 12. Do you find, from a preponderance of the evidence, that Icele's failure to pay
13 maintenance or cure to Dana Clausen was a legal cause of damage to him?

14 Answer Yes or No: _____

15 (Note: Go to Question No. 13.)

16 13. State the entire amount of damages sustained by Dana Clausen as a result of the
17 Icele's failure to pay maintenance and cure?

18 Answer in Dollars: _____

19 (Note: Go to Question No. 14.)

20
21 14. Do you find, from a preponderance of the evidence, that Icele was callous or
22 indifferent or willful or wanton in failing to pay maintenance to Dana Clausen?

23 Answer Yes or No: _____

24 (Note: Go to Question No. 15)

25
26
SPECIAL VERDICT FORM (PLAINTIFF) - 5
Case No. 08-2-03333-3 SEA

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1 15. Do you find, from a preponderance of the evidence, that Ircle was callous or
2 indifferent or willful or wanton in failing to pay cure?
3

4 Answer, Yes or No: _____

5 *(Note: If you answered "No" to Question 14 and 15 you need not*
6 *consider or answer any of the remaining questions. Simply sign and*
7 *date the verdict form and return it to the Bailiff. If you answered*
8 *"Yes" to Question 14 or 15 proceed to answer Question 16.)*

9 16. If you answered "Yes" to either Question No. 14 or Question No. 15 state the
10 amount to be awarded to Dana Clausen, for the following items -- answer in dollars:

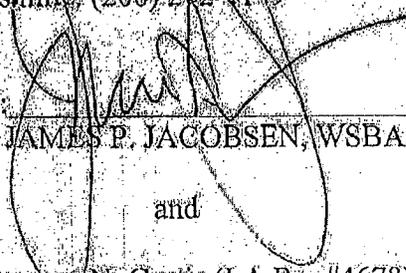
- 11 a. attorneys fees in connection with
12 the claim for maintenance and cure \$ _____
- 13 b. punitive damages \$ _____

14 _____
15 FOREPERSON

16 Seattle, Washington
17 _____, 2009

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SPECIAL VERDICT FORM (PLAINTIFF) - 7
Case No. 08-2-03333-3 SEA

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Court's Instruction No. ____
4.11

4.11 MAINTENANCE AND CURE (APPENDED TO JONES ACT—UNSEAWORTHINESS CLAIMS)

The plaintiff's third claim is that, as a seaman, he is entitled to recover Maintenance and Cure. This claim is separate and independent from both the Jones Act and the unseaworthiness claims of the plaintiff. You must decide this claim separately from your determination of his Jones Act and unseaworthiness claims.

Maintenance and Cure is a seaman's remedy. [If you determine that plaintiff was a seaman, you then must determine if he is entitled to maintenance and cure.] [Plaintiff is a seaman; thus you must determine whether he is entitled to maintenance and cure.]

Maintenance and cure provides a seaman, who is disabled by injury or illness while in the service of the ship, medical care and treatment, and the means of maintaining himself, while recuperating.

A seaman is entitled to maintenance and cure even though he was not injured as a result of any negligence on the part of his employer or any unseaworthy condition of the vessel. To recover maintenance and cure, the plaintiff need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part. The injury or illness need not be work related, it need only occur while the seaman is in the service of the ship. And maintenance and cure may not be reduced because of any negligence on the part of the seaman.

The "cure" to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus. However, the employer does not have a duty to provide cure for any period of time during which a seaman is hospitalized at the employer's expense.

Maintenance is the cost of food and lodging, and transportation to and from a medical facility. A seaman is not entitled to maintenance for that period of time that he is an inpatient in any hospital, because the cure provided by the employer through hospitalization includes the food and lodging of the seaman.

A seaman is entitled to receive maintenance and cure from the date he leaves the vessel until he reaches the point of what is called "maximum cure." Maximum cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. Thus, if it appears that a seaman's condition is incurable, or that the treatment will only relieve pain but will not improve a seaman's physical condition, he has reached maximum cure. The obligation to provide maintenance and cure usually ends when qualified medical opinion is to the effect that maximum possible cure has been accomplished.

If you decide that the plaintiff is entitled to maintenance and cure, you must determine when the employer's obligation to pay maintenance began, and when it ends. One factor you may consider in determining when the period ends is the date when the seaman resumed his employment, if he did so. However, if the evidence supports a finding that economic necessity forced the seaman to return to work prior to reaching maximum cure, you may take that finding into consideration in determining when the period for maintenance and cure ends.

If you find that the plaintiff is entitled to an award of damages under either the Jones Act or unseaworthiness claims, and if you award him either lost wages or medical expenses, then you may not award him maintenance and cure for the same period of time. That is because the plaintiff may not recover twice for the same loss of wages or medical expenses. However, the plaintiff may also be entitled to an award of damages for failure to pay maintenance and cure when it was due.

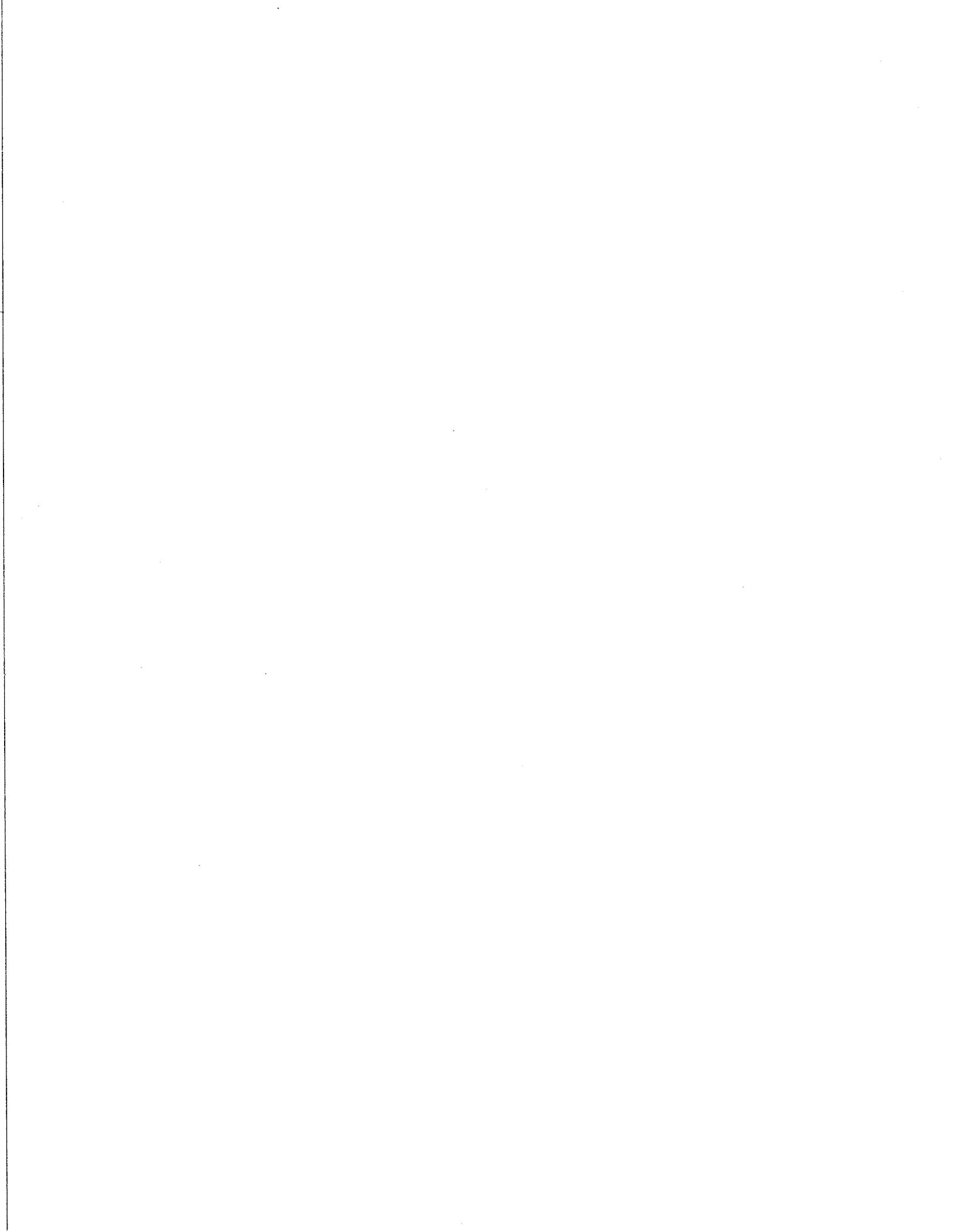
A shipowner who has received a claim for maintenance and cure is entitled to investigate the claim. However, if after investigating the claim, the shipowner unreasonably rejects the claim for maintenance and cure, he is liable for both the maintenance and cure payments he should have made, and any compensatory damages caused by his unreasonable failure to pay. Compensatory damages may include any aggravation of the plaintiff's condition because of the failure to provide maintenance and cure.

Thus, you may award compensatory damages because the shipowner failed to provide maintenance and cure if you find by a preponderance of the evidence that:

1. The plaintiff was entitled to maintenance and cure;
2. It was not provided;
3. The defendant acted unreasonably in failing to provide maintenance and cure; and
4. The failure to provide the maintenance and cure resulted in some injury to the plaintiff.

If you also find that the shipowner's failure to pay maintenance and cure was not only unreasonable, but was willful, that is, with the deliberate intent to do so, you may also award the plaintiff attorney's fees. However, you should not award attorney's fees unless the shipowner acted willfully in disregard of the seaman's claim for maintenance and cure. The plaintiff may not recover attorney's fees for the prosecution of the Jones Act or unseaworthiness claims. Thus, you may award only those attorney's fees plaintiff incurred in pursuing the maintenance and cure claim and only if you find that the shipowner acted willfully in failing to pay maintenance and cure.

The plaintiff may not recover attorney's fees for the prosecution of the Jones Act or unseaworthiness claims. You may award attorney's fees only if you find that the shipowner acted arbitrarily or with callous disregard, in failing to pay maintenance and cure.



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INSTRUCTION NO. 23.

PUNITIVE DAMAGES

The plaintiff claims that the defendant willfully and wantonly failed to pay maintenance and cure. If you find that the plaintiff is entitled to additional maintenance and/or cure and the defendant willfully or wantonly failed to pay maintenance and cure then you may but are not required to award punitive damages against a defendant. The purpose of an award of punitive damages is to punish the defendant and to deter him and others from acting as he did.

In addressing punitive damages for failure to pay maintenance and cure, the United States Supreme Court has used the following words to describe the types of behavior that amounts to "wanton, willful, or outrageous conduct" and justify a punitive damages award: "most atrocious and dishonourable nature," "maliciously or wantonly," "tortious acts of a particularly egregious nature," and "monstrous wrong."

A person acts willfully or wantonly if he acts in reckless or callous disregard of, or with indifference to, the rights of the plaintiff. An actor is indifferent to the rights of another, regardless of the actor's state of mind, when he proceeds in disregard of a high and excessive degree of danger that is known to him or was apparent to a reasonable person in his position.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct, including whether the conduct that harmed the plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish the defendant for harm to anyone other than the plaintiff in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

Fifth Circuit Pattern Jury Instruction 4.10 (modified)
Ninth Circuit Pattern Jury Instruction 5.5 (modified)

Atlantic Sounding v. Townsend, 129 S. Ct. 2561, 2566-69 (2009).



1 after investigating the claim the ship owner unreasonably
2 rejects the claim for maintenance and cure, he is liable for
3 both the maintenance and cure payments he should have made,
4 and for compensatory damages caused by his unreasonable
5 failure to pay.

6 Compensatory damages may include any aggravation of the
7 plaintiff's condition because of the failure to provide
8 maintenance and cure.

9 Thus you may award compensatory damages because the
10 ship owner failed to provide maintenance and cure if you
11 find by a preponderance of the evidence that, one, the
12 plaintiff was entitled to maintenance and cure; two, it was
13 not provided; three, the plaintiff acted -- the defendant
14 acted unreasonably in failing to provide maintenance and
15 cure; and four, the failure to provide maintenance and cure
16 resulted in some injury to the plaintiff.

17 You may award punitive damages only if you find that
18 the defendant acted with willful wanton disregard to its
19 obligation to provide maintenance and cure.

20 However, you should not award punitive damages unless
21 the ship owner acted willfully in disregard of the seaman's
22 claim for maintenance and cure.

23 The plaintiff may not recover punitive damages for the
24 prosecution of the Jones Act or unseaworthiness claims.
25 Thus you may award only those punitive damages plaintiff

1 incurred in pursuing the maintenance and cure claim, and
2 only if you find that the ship owner acted willfully in
3 failing to pay maintenance and cure.

4 The purpose of punitive damages is to punish a
5 defendant and to deter similar acts in the future. Punitive
6 damages may not be awarded to compensate a plaintiff. The
7 plaintiff has the burden of proving, by a preponderance of
8 the evidence, that punitive damages should be awarded.

9 If you find that punitive damages are appropriate, you
10 must use reason in setting the amount. Punitive damages, if
11 any, should be in an amount sufficient to fulfill their
12 purposes but should not reflect bias, prejudice or sympathy
13 toward any party in considering the amount of any punitive
14 damages, considering the degree of reprehensibility of the
15 defendant's conduct.

16 Maintenance and cure, doubts regarding entitlement.

17 All ambiguities and doubts as to entitlement to
18 maintenance and cure are resolved in favor of the injured
19 seaman.

20 At trial the injured seaman is still required to show,
21 by a preponderance of the evidence, that he was, one,
22 injured or became ill while in service of the vessel; two,
23 that he is entitled to additional maintenance and cure; and
24 three, the amount of maintenance and cure to which he is
25 entitled.

Appendix pages A 10.64

Through A 10.106 are
stricken per Commissioner's
12-27-10 Notation Ruling.