

FILED

MAY 25 2012

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

87407-7

Court of Appeals No. 66075-6

**SUPREME COURT
OF THE STATE OF WASHINGTON**

IAN DEAN
Petitioner / Appellant

v.

THE FISHING COMPANY OF ALASKA, INC.

and

ALASKA JURIS, INC.
Respondents / Appellees

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 MAY -7 PM 2:31

APPELLANT'S PETITION FOR REVIEW

**LAW OFFICE OF JOHN MERRIAM
JOHN MERRIAM, ESQ.
4005 - 20th Avenue West
Suite 110
Seattle, Washington 98199
Telephone: (206) 729-5252
Attorney for Petitioner/Appellant Ian Dean**

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER	1
II. CITATION TO COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	2
1. Who has the burden of proof for summary judgment motions involving the <u>reinstatement</u> of maintenance and cure?	
2. Who has the duty to initiate CR 42(b) expedited evidentiary hearings involving maintenance and cure?	
3. May state court judges apply equitable remedies to disputes involving maintenance and cure?	
4. Should this Court decide the surveillance issue even though the parties stipulated to a judgment below?	
IV. STATEMENT OF THE CASE.....	2
V. ARGUMENT.....	6
A. Division I never answered the question from which this appeal arose.....	6
B. Division I opinion contains internal contradictions of fact.....	7
C. Opinion from federal judges in the Western District of Washington may be reconciled.....	8

D. Expedited hearings per CR42(b) are not the solution for a seaman whose maintenance and cure is cut off	10
E. Equitable solutions are available to state courts deciding maintenance and cure issues	11
F. Surveillance	12
VI. CONCLUSION	14
VII. DECLARATION OF SERVICE ELECTRONICALLY AND BY U.S. MAIL	15
VIII. APPENDIX	A-1
1. Order Denying Motion for Reconsideration	A-1
2. Decision by Court of Appeals Division I	A-2

TABLE OF AUTHORITIES

Cases

<u>Buenbraso v. Ocean Alaska</u> No. C06-1347C, 2007 U.S. Dist. LEXIS 98731 (W.D. Wash. 2/28/07) (Judge Coughenour)	8, 9
<u>Clausen v. Icicle Seafoods</u> No. 85200-6 (Washington Supreme Court 3/15/12)	11, 12
<u>Gouma v. Trident Seafoods</u> No. C07-1309, 2008 A.M.C. 863, 2008 WL 2020442 (W.D. Wash. 5/13/08) (Judge Pechman)	7, 8, 9
<u>Mai v. American Seafoods</u> 160 Wn.App. 528 (2011)	1
<u>Vaughan v. Atkinson,</u> 369 U.S. 527, 82 S.Ct. 997, 8L.Ed.2d 88 (1962)	13
<u>Vella v. Ford Motor Co.</u> 421 U.S. 1, 1975 A.M.C. 563 (1975)	11

Statutes

Savings to Suitors Clause 28 U.S.C. §1333	12
--	----

Court Rules

CR 42(b)	10, 11
----------------	--------

Other Authorities

Force and Norris, <u>The Law of Seamen</u> §26:45 (5th ed. 2003)	10
---	----

SUPREME COURT
OF THE STATE OF WASHINGTON

IAN DEAN
Petitioner /Appellant

v.

THE FISHING COMPANY OF ALASKA, INC.
and
ALASKA JURIS, INC.
Respondents/Appellees

APPELLANT'S PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Plaintiff/Appellant below, Ian Dean, petitions this Court to review the opinion in this case by Division I of the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of Dean v. Fishing Company of Alaska, No. 66075-6-I in Division I of the Court of Appeals, decided March 5, 2012. Reconsideration was denied by the Court of Appeals on April 5, 2012.

III. ISSUES PRESENTED FOR REVIEW

1. Who has the burden of proof for summary judgment motions involving the reinstatement of maintenance and cure?
2. Who has the duty to initiate CR 42(b) expedited evidentiary hearings involving maintenance and cure?
3. May state court judges apply equitable remedies to disputes involving maintenance and cure?
4. Should this Court decide the surveillance issue even though the parties stipulated to a judgment below?

IV. STATEMENT OF THE CASE

In May and June 2006 petitioner Ian Dean worked as a fish processor aboard the factory trawler F/T ALASKA JURIS. Mr. Dean stands 6 feet, 3 inches in height. He was assigned to work long hours in a space with an overhead of six feet or less. Working with his head bent at an angle soon resulted in neck pain. By the time Mr. Dean left the vessel he had also developed bilateral carpal tunnel syndrome.

Complaint, CP (Clerk's Papers) 1-5. An unusual neurological condition, myotonia congenita, also manifested while Mr. Dean was in the service of respondent Fishing Company of Alaska's (FCA) vessel. 5/19/08 chartnote by Dr. Jane Distad, attached at Ex. A to FCA's Declaration of Theresa Fus, CP 60.

FCA initially paid for Mr. Dean's medical treatment. It also paid maintenance: \$20 per day through July 2007, and \$30 per day thereafter.

Mr. Dean saw numerous medical providers. He had bilateral carpal tunnel surgery: to the right wrist in May 2008, and to the left in January 2009. His neck problems were virtually ignored while doctors concentrated on the myotonia congenita. CP 60.

FCA cut off care (medical bills) in June 2009, refusing to pay for a consultation requested by Dr. Elizabeth Joneschild. CP 69.

Instead of authorizing the consultation requested by Dr. Joneschild, FCA apparently decided it was time to stop this business once and for all, demanding examination of Mr. Dean by the notorious Dr. Williamson-Kirkland. Dr.

Williamson-Kirkland said the magic words “maximum cure” and the \$30 per day maintenance was cut-off on September 9, 2009. CP 40-42.

Mr. Dean had earlier filed suit, when realizing that cure had been cut off. Complaint, CP 1-5. Later, after Mr. Dean’s maintenance was cut off, appellant filed a motion to reinstate maintenance and cure. CP 9-23. Mr. Dean’s neck complaints had been treated by a Dr. Aflatooni since before the time FCA sent Mr. Dean to see Dr. Williamson-Kirkland. See Dr. Aflatooni’s letter of 6/10/09 at CP 67-68. Dr. Aflatooni stated that Mr. Dean had not reached maximum cure for his neck problems. CP 16-17. The trial judge treated the motion as one for summary judgment under CR 56 and ruled that: “Plaintiff has failed to show that no genuine issue of material fact exists as to his entitlement to maintenance and cure such that he is entitled to judgment is a matter of law.” Order denying plaintiff’s motion to reinstate maintenance by Judge Laura Inveen, CP 76-77.

The parties went through arbitration and Mr. Dean requested trial de novo. See Agreed Order of Entry of Judgment, CP 121-122.

Mr. Dean filed a motion to compel discovery from FCA in regard to whether or not he had been placed under surveillance, as opposed to requesting production of any surveillance films themselves. CP 78. That motion was denied by the trial judge. CP 113-114.

Rather than undertaking the time and expense of trial de novo, the parties filed a joint motion for entry of judgment in favor of the defendants. CP 118-120. In support of that motion, the parties entered into a Stipulation to the effect that the “prevailing party” would be determined by the outcome of the instant appeal, and that the parties would jointly request that the Court of Appeals review the trial judge’s ruling on the discoverability of surveillance films, notwithstanding the fact that trial de novo in this matter has been foregone by stipulation. CP 118-120. The trial judge granted that motion and entered judgment. CP 121-122. Plaintiff appealed. CP 123-130. Division I affirmed the trial court’s decision and refused to review the surveillance issue. Dean v. Fishing Company of Alaska, et al., No. 66075-6-I. Appellant petitions this Court to review the Opinion from Division I.

V. ARGUMENT

A. Division I Never Answered the Question from which this Appeal Arose

The evil at which this appeal was first directed is the practice by shipowners of simply hiring a doctor to give a conflicting medical opinion about a seaman's ongoing entitlement to maintenance and cure, thereby justifying a suspension of the seaman's benefits until trial. Division I never answered the basic question that triggered the appeal: It is a given that the shipowner/employer bears the burden at proof at trial in regard to whether or not an injured seaman has achieved maximum cure. Mai v. American Seafoods, 160 Wn.App. 528 (2011). Should the shipowner/employer have the same burden of proof at the pre-trial stage, in summary judgment motions to reinstate maintenance and cure, after the shipowner hires a doctor to pronounce "maximum cure" and then cuts off the seaman's benefits? Division I ruled that a summary judgment standard applies to motions to reinstate maintenance and cure. Opinion at p. 1. Appellant has no quarrel with that

holding. But who has the burden of proof on summary judgment?

B. The Division I Opinion Contains Internal Contradictions of Fact

Division I initially appeared to recognize Mr. Dean's contention that FCA never challenged his entitlement to maintenance and cure for the neck injury, as opposed to carpal tunnel syndrome and myotonia congenita. In other words, the summary judgment at issue in the trial court was one to reinstate maintenance and cure for Mr. Dean's neck injury, rather than a motion to commence maintenance and cure for that injury. The motion is initially recognized as one to "reinstate maintenance and cure". Opinion at p. 1. "Dean consistently complained of neck pain . . ." Id. at p. 2. It was further recognized by Division I that there was a factual dispute from conflicting medical opinions about the neck injury. Id. at p. 6. Then, in a complete turn-around, Division I states: "Additionally, unlike Gouma, at issue here is Dean's initial entitlement to maintenance and cure arising from a neck injury." Id. at p. 11 (emphasis added). Which is

it? If the latter--if Dean's initial entitlement to maintenance and cure is truly the issue--appellant again has no quarrel with the ruling of Division I. Mr. Dean agrees that seamen should have the burden of proof when initially claiming entitlement to maintenance and cure.

C. Opinions from Federal Judges in the Western District of Washington Can be Reconciled

Federal court trial judges in the Western District of Washington are seemingly divided on the procedures and standards of proof that should be utilized for deciding pre-trial motions for maintenance and cure. A close examination of the various rulings suggest that the opinions are not as divergent as first appears. Division I focuses primarily on two cases from the local federal court, Buenbraso v. Ocean Alaska, No. C06-1347C, 2007 U.S. Dist. LEXIS 98731 (W.D. Wash. 2/28/07) (Judge Coughenour), and Gouma v. Trident Seafoods, No. C07-1309, 2008 A.M.C. 863, 2008 WL 2020442 (W.D. Wash. 5/13/08) (Judge Pechman). See, Opinion at pp. 7-11. Division I seemed to prefer Judge Coughenour's approach to maintenance and cure motions as

discussed in Buenbraso. Opinion at p. 8. However, the Buenbraso case involved the seaman's motion to compel the initiation of maintenance and cure. Id. As touched upon in the previous section in this Petition, Appellant has no argument with that approach. Gouma, on the other hand, involved a motion to reinstate maintenance and cure, after the seaman had satisfied whatever initial burden he had in the first instance. Division I dismissed the following language from Gouma as dicta: "Even if a summary judgment standard of review were to be applied . . . , disputed questions of material fact . . . would simply mean that Plaintiff would be entitled to continue receiving maintenance and cure until the matter was ultimately resolved at trial." Opinion at p. 10. Division I gave no weight to Judge Pechman's holding in Gouma and adopted Judge Coughenour's approach in Buenbraso instead, stating: "Additionally, unlike Gouma, at issue here is Dean's initial entitlement to maintenance and cure arising from a neck injury." Opinion at p. 11. Exactly! Judge Coughenour's decision involved the seaman's initial entitlement to maintenance and cure. Judge Pechman was dealing with a

motion to reinstate maintenance and cure. The two opinions are not at odds.

D. Expedited Hearings per CR 42(b) are Not the Solution for Seamen when Maintenance and Cure Benefits are Cut Off

Division I suggests an expedited hearing under CR 42(b) as the solution to the dilemma that triggered this appeal. Opinion at p. 11. Expedited evidentiary hearings would be unduly burdensome to seamen who have already established an entitlement to maintenance and cure. The time and expense involved would be prohibitive, given that the amount of maintenance at issue is typically \$20-\$30 per day. Maintenance and cure are supposed to give the seaman, “a sure remedy devoid of most of the exceptions and delays which ordinarily hamper and defeat illness and injury claims.” Force and Norris, The Law of Seamen, §26:45 (5th ed. 2003). As Justice Brennan observed:

Moreover, easy and ready administration of the shipowner’s duty would seriously suffer from the introduction of complexities and uncertainty that could stir contentions, cause delays and invite litigations.

Vella v. Ford Motor Co., 421 U.S. 1, 1975 A.M.C. 563 (1975).

CR 42(b) expedited evidentiary hearings would be an appropriate remedy for a shipowner who wishes to end the maintenance and cure obligation, as long as it is understood that the burden of proof has shifted to the party who wishes to change the status quo. This could apply equally to a seaman who wishes to initiate maintenance and cure benefits. Again, appellant has no quarrel with Division I's ruling if expedited CR 42(b) hearings or trials have to be initiated by the party trying to change the status quo by either starting or terminating the maintenance and cure entitlement.

E. Equitable Solutions are Indeed Available in State Courts when Deciding Maintenance and Cure Issues

A fatal mistake in the Opinion from Division I is the assumption that state courts have no equitable powers in maintenance and cure cases. Opinion at p. 12. This Court came to the opposite conclusion shortly afterwards in Clausen v. Icicle Seafoods, No. 85200-6 (Washington Supreme Court 3/15/12).

Because maintenance and cure is a right created under common law, courts have fashioned equitable remedies to further the underlying policies At common law, an award for attorney fees is created in equity . . .

Id. at pp. 8-10. Fees were so awarded in equity in Clausen. Id. at p. 14. “(T)his award (of attorney fees) is primarily based in equity . . .” Id. at p. 26.

Maintenance and cure is by its very nature an equitable remedy. State courts have power from the Savings to Suitors Clause in 28 U.S.C. §1333, if from nowhere else, to apply equitable remedies.

F. Surveillance

Division I declined to consider the surveillance issue because “we generally do not issue advisory opinions.” Opinion at p. 12. This Court is urged to decide the surveillance question. Not only will this issue arise again and again in personal injury cases, but more pressing is the fact that maintenance and cure cases involve special features that implicate surveillance or the lack thereof.

A shipowner has a duty to investigate before cutting off maintenance and cure benefits. Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). The issue below involved a 'yes or no' question about whether Mr. Dean had been under surveillance. There was no discovery request, at that point in the proceedings, for discovery films themselves, if they existed. But an answer to the 'yes or no' interrogatory could lead to discoverable evidence. It would be entirely unfair for a shipowner, who has surveillance films showing the seaman not able to do something, to then take a contrary position at trial through the testimony of one of the shipowner's doctors or other experts. For example, in this case, it is conceivable that FCA has surveillance films showing Mr. Dean holding his neck in pain. In a situation like this, involving a motion for reinstatement of maintenance and cure, one of the issues is the shipowner's actual knowledge of Mr. Dean's condition. Given the shipowner's duty to investigate maintenance and cure claims, surveillance arguably could have been part of fulfilling that duty.

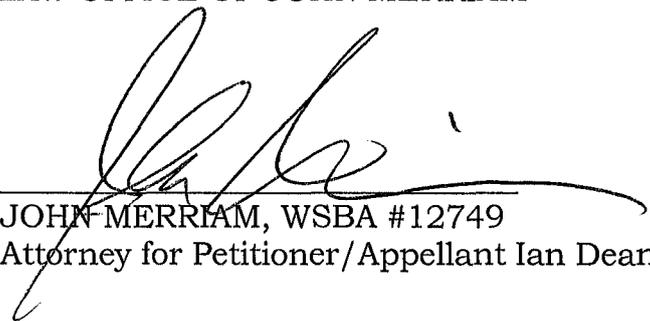
Maintenance and cure claims present a unique situation when the question of surveillance is involved. Appellant prays that the Court decide this issue.

VI. CONCLUSION

Petitioner prays that this Court review the Opinion of Division I to clearly state what burdens of proof apply in summary judgment proceedings for the reinstatement of maintenance and cure. Petitioner further prays that this Court decide the issue of surveillance presented herein.

Respectfully submitted this 7th day of May 2012.

LAW OFFICE OF JOHN MERRIAM



JOHN MERRIAM, WSBA #12749
Attorney for Petitioner/Appellant Ian Dean

VII. DECLARATION OF SERVICE ELECTRONICALLY AND BY U.S. MAIL

Pursuant to the laws of the state of Washinton, John Merriam declares as follows:

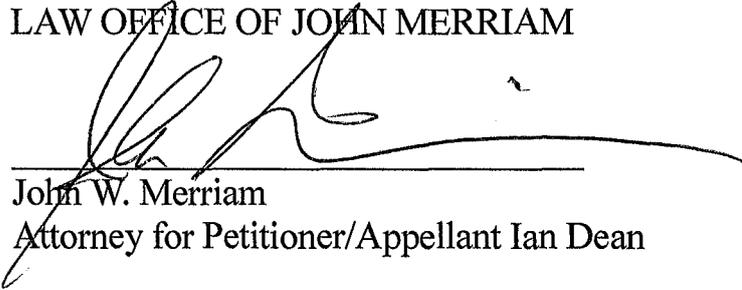
On May 7, 2012, I caused to be filed and served true and correct originals and/or copies of Appellant's Petition for Review submitted herein, by electronic service and by depositing the same in the United States mail, first class, postage prepaid, to:

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

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

Dated this 7th day of May 2012, at Seattle, Washington.

LAW OFFICE OF JOHN MERRIAM



John W. Merriam
Attorney for Petitioner/Appellant Ian Dean

VIII. APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IAN DEAN,)	NO. 66075-6-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	ORDER DENYING MOTION
THE FISHING COMPANY OF)	FOR RECONSIDERATION
ALASKA, INC.; and ALASKA)	
JURIS, INC.,)	
)	
Respondents.)	

The appellant, Ian Dean, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 5th day of April, 2012.

FOR THE COURT:

Leach C. J.
Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 APR -5 AM 10:05

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IAN DEAN,)	NO. 66075-6-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	PUBLISHED OPINION
THE FISHING COMPANY OF)	
ALASKA, INC., and ALASKA)	
JURIS, INC.,)	
)	
Respondents.)	FILED: March 5, 2012

LEACH, A.C.J. — In this case of first impression, we must decide whether the usual summary judgment standard applies to a seaman’s pretrial motion to reinstate maintenance and cure. Ian Dean appeals a trial court decision denying his pretrial motion. He contends that a more lenient standard should apply given the solicitude courts have traditionally afforded seamen seeking compensation for maritime injuries. While we are sensitive to this special solicitude, we hold the trial court correctly applied the summary judgment standard to deny Dean’s motion.

Dean also claims the trial court erred by denying his motion to compel discovery asking if his former employer, the Fishing Company of Alaska (FCA), conducted surveillance of him. We do not reach this issue as the parties

stipulated to a final judgment in favor of FCA. Because the trial court properly denied Dean's summary judgment motion, we affirm.

FACTS

Dean worked aboard the FCA vessel F/T Alaska Juris as a fish processor in May and June 2006. According to Dean, who is six feet three inches tall, he worked 16 to 18 hours per day in a confined space with a ceiling height of six feet, requiring him to keep his neck constantly bent. Once on land, Dean sought medical treatment at the Seattle Hand Surgery Group for "numbness and tingling" in his hands and neck pain. The doctor there concluded that Dean had "possible bilateral carpal tunnel syndrome" or cervical radiculopathy. Between 2006 and 2009, Dean saw several doctors, including a hand specialist, a neurologist, and an orthopedist. Dean received carpal tunnel release surgery in 2008 and 2009. Dean was also diagnosed with myotonia congenita, a neurological condition unrelated to his time aboard the vessel. FCA initially paid maintenance and cure to compensate Dean for his medical and daily living expenses.

The record demonstrates that during the time frame at issue, Dean consistently complained of neck pain to his doctors. In May 2008, Dean's neurologist recommended physical therapy for his neck. In August 2008, Dean's orthopedist examined him and opined, "I am not certain that there are any

curable recommendations for the neck. I have recommended light massage, soaks, and gentle range of motion.” Dean, however, did not undergo treatment to alleviate the symptoms in his neck.

In June 2009, Dean saw Dr. Alfred Aflatooni, who diagnosed him with “cervical radiculopathy, bilateral, with weakness of the neck and arms.” In Aflatooni’s opinion, Dean’s neck injury required “further neurological consultation[,] . . . including MRI [magnetic resonance imaging] of his cervical and thoracic region with . . . EMG [electromyography] and nerve conduction studies.” In July 2009, an EMG was performed and analyzed. No treatment recommendations were made for Dean’s neck at that time.

In August 2009, Dean underwent an independent medical examination by Dr. Thomas Williamson-Kirkland at FCA’s request to determine whether Dean had a neck injury subject to FCA’s maintenance and cure obligation. Dr. Williamson-Kirkland could find “no evidence in the medical records or my examination that any of the symptoms Mr. Dean is currently experiencing in his neck are related to his work aboard the vessel.” Because his examination yielded normal results, Dr. Williamson-Kirkland had no recommendations for treatment.

In September 2009, FCA discontinued payments to Dean for maintenance and cure. It based its decision on Dr. Williamson-Kirkland’s findings, the lack of

evidence connecting Dean's neck symptoms to his work for FCA, and the absence of curative treatment recommendations. Dean sued FCA in King County Superior Court, seeking compensation under the Jones Act¹ and general maritime law.

Dean moved for a pretrial reinstatement of maintenance and cure. Applying the usual CR 56 summary judgment standard, the trial court denied Dean's motion because "[p]laintiff has failed to show that no genuine issue of material fact exists as to his entitlement to maintenance and cure such that he is entitled to judgment as a matter of law."

Dean then filed a motion to compel a discovery response to the interrogatory: "Has defendant or anyone acting on its behalf conducted a surveillance of the plaintiff or engaged any person or firm to conduct a surveillance of the plaintiff or his/her activities?" FCA objected, asserting that the work product doctrine protected the information from discovery. The trial court denied Dean's motion.

The parties engaged in arbitration. Following arbitration, they filed a joint motion for entry of judgment in FCA's favor, stipulating that the outcome of this appeal would determine the prevailing party. The parties also "agreed . . . that [they] will jointly request that appellate courts review the trial judge's ruling on the

¹ 46 U.S.C. § 30104.

discoverability of surveillance films, notwithstanding the fact that trial de novo in this matter has been forgone by this stipulation.” The trial court entered judgment for FCA, and Dean appeals.

ANALYSIS

“The United States Constitution extends the judicial power of the federal courts ‘to all cases of admiralty and maritime jurisdiction,’ preserving the general maritime law as a species of federal common law.”² Congress has given federal courts exclusive jurisdiction over all admiralty or maritime cases “saving to suitors in all cases all other remedies to which they are otherwise entitled.”³ State courts therefore have jurisdiction to consider maritime actions under the “saving to suitors” clause, “provided that the state court proceeds in personam (here, ‘at law’) and not in rem (here ‘in admiralty’).”⁴ Once a plaintiff elects to proceed in state court under the “saving to suitors” clause, federal substantive law and state procedural law apply.⁵

Regardless of fault, maritime common law requires a shipowner to pay a seaman a daily subsistence allowance (maintenance) and costs associated with medical treatment (cure) when the seaman becomes ill or injured in the service

² Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878, 224 P.3d 761 (2010) (quoting U.S. CONST. art. III, § 2), cert. denied, 130 S. Ct. 3482 (2010).

³ 28 U.S.C. § 1333(1).

⁴ Endicott, 167 Wn.2d at 878-79 (citing Madruaga v. Superior Court, 346 U.S. 556, 560-61, 74 S. Ct. 298, 98 L. Ed. 290 (1954)).

⁵ Endicott, 167 Wn.2d at 879, 881.

of a vessel.⁶ A seaman must establish his or her right to maintenance and cure by a preponderance of the evidence.⁷ Once proven, the entitlement to maintenance and cure continues until a seaman reaches "maximum cure," the point at which the condition becomes "fixed and stable."⁸ "The employer bears the burden of proving that maximum cure has occurred."⁹ In Vaughan v. Atkinson,¹⁰ the United States Supreme Court decreed that any ambiguities or doubts regarding payment of a seaman's entitlements must be resolved in favor of the seaman.

Here, the parties agree that the medical opinions of Dr. Aflatooni and Dr. Williamson-Kirkland create a factual dispute concerning Dean's entitlement to maintenance and cure for his neck complaints. However, Dean argues that this dispute should not preclude pretrial reinstatement of maintenance and cure because all ambiguities regarding his entitlement to maintenance and cure should be resolved in his favor. He therefore contends that the trial court erred

⁶ Tuyen Thanh Mai v. Am. Seafoods Co., 160 Wn. App. 528, 538-39, 249 P.3d 1030 (2011).

⁷ Mai, 160 Wn. App. at 538-39. The seaman must prove: (1) his or her engagement as a seaman; (2) his or her illness or injury occurred, manifested, or was aggravated while in the ship's service; (3) the wages to which he or she is entitled; and (4) the expenditures for medicines, medical treatment, board, and lodging.

⁸ Miller v. Arctic Alaska Fisheries Corp., 133 Wn.2d 250, 268, 944 P.2d 1005 (1997).

⁹ Mai, 160 Wn. App. at 539.

¹⁰ 369 U.S. 527, 532, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962).

by applying the usual summary judgment standard to resolve his motion. This involves a question of law, which we review de novo.¹¹

In Buenbrazo v. Ocean Alaska, LLC,¹² Judge Coughenour noted that “obvious tension exists between the summary judgment standard, which requires that all doubts be resolved in favor of the non-moving party, and the canon of admiralty law, which provides that all doubts be resolved in favor of the seaman.” This tension has led to inconsistencies in the way that federal courts have resolved pretrial motions for maintenance and cure.¹³ To date, neither the Ninth Circuit nor the United States Supreme Court has announced a standard under which courts should review pretrial motions seeking maintenance and cure.¹⁴ Therefore, we find instructive several unpublished decisions from the United States District Court for the Western District of Washington.¹⁵

¹¹ Endicott, 167 Wn.2d at 880.

¹² No. C06-1347C, 2007 U.S. Dist. LEXIS 98731, at *8 (W.D. Wash. Feb. 28, 2007).

¹³ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *8-9 (“Some judges have concluded that the imposition of the summary judgment standard to a pre-trial motion seeking maintenance and cure is inappropriate. Other judges, taking their cue from the parties’ motions for summary judgment, have applied the summary judgment standard without any discussion of whether its imposition is appropriate. A final approach is to apply the summary judgment standard because ‘we are aware of no [other] procedure of obtaining pre-trial judgment on the merits of a claim.’”) (citations omitted) (quoting Guerra v. Arctic Storm, Inc., No. C04-1010L, 2004 WL 3007097, at *1 (W.D. Wash. Aug. 4, 2004)).

¹⁴ Mabrey v. Wizard Fisheries, Inc., No. C05-1499L, 2007 WL 1556529, at *2 (W.D. Wash. May 24, 2007).

¹⁵ The parties also rely on unpublished district court decisions. Under Fed. R. App. P. 32.1, a party may cite unpublished district court orders that were

In Buenbrazo, the plaintiff moved to compel maintenance and cure.¹⁶ As here, the plaintiff there argued that his entitlement should be resolved using a more lenient standard than that used for summary judgment. The court disagreed, noting its skepticism that Vaughan “was designed to torpedo the well-established summary judgment procedure.”¹⁷ Further, the court stated, “Disregarding genuine issues of material facts . . . prior to trial before each party has had an opportunity to make their case places too heavy a thumb on the scale in favor of the seaman.”¹⁸ The court concluded that “in spite of the canon of admiralty law that all doubts and ambiguities should be resolved in favor of the seaman, the summary judgment standard should be applied to a pre-trial motion to compel maintenance and cure.”¹⁹ Because a genuine issue of material fact existed as to whether the plaintiff suffered injury while in the service of the vessel, the court denied the motion to compel maintenance and cure.²⁰

issued on or after January 1, 2007. We do not consider decisions cited by the parties issued before that date.

¹⁶ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *1.

¹⁷ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *10.

¹⁸ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *10.

¹⁹ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *10.

²⁰ Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *14. However, citing the fact that “admiralty courts are ‘flexible’ in operation,” the court granted the plaintiff equitable relief in the form of a temporary daily stipend. Buenbrazo, 2007 U.S. Dist. LEXIS 98731, at *14-15 (quoting Putnam v. Lower, 236 F.2d 561, 568 (9th Cir. 1956)).

Similarly, in Mabrey v. Wizard Fisheries, Inc.,²¹ the plaintiff moved pretrial to compel the defendant to pay cure to treat carpal tunnel syndrome (CTS). Again, the parties disputed what standard the court should apply. The court concluded that the summary judgment standard should apply because (1) neither the Supreme Court nor the Ninth Circuit have provided guidance; (2) the local rules and the supplemental admiralty rules do not provide an alternative procedure; (3) the Ninth Circuit has affirmed a district court's refusal to compel maintenance and cure due to the existence of genuine issues of material fact; and (4) "whether plaintiff suffers from CTS and, if he does, whether it was caused while he was working in service of the vessel are threshold issues on which plaintiff will bear the burden of proof at trial."²²

Dean relies on Gouma v. Trident Seafoods, Inc.²³ There, the federal district court refused to apply the summary judgment standard to a seaman's pretrial motion for maintenance and cure. The court recognized the holdings in Buenbrazo and Mabrey but distinguished them. The court noted that in those cases, "the purely factual question of whether the seaman had been in the service of the vessel when injured was before the court, and the fact of the unresolved 'service' question was central to the findings that a summary

²¹ No. C05-1499L, 2007 WL 1556529, at *1 (W.D. Wash. May 24, 2007).

²² Mabrey, 2007 WL 1556529, at *2.

²³ No. C07-1309, 2008 WL 2020442 (W.D. Wash. May 13, 2008).

judgment standard was an appropriate basis on which to resolve the issue.”²⁴ In Gouma, however, the parties did not dispute that the plaintiff was injured while in service of the defendants’ vessel. Rather, they disputed the necessity of a medical procedure and if the plaintiff had reached maximum cure.²⁵ “With that understanding,” the court found the plaintiff entitled to a presumptive continuance of maintenance and cure payments.²⁶

The court then went on to state in dicta, “Even if a summary judgment standard of review were to be applied . . . , disputed questions of material fact . . . would simply mean that Plaintiff would be entitled to continue to receive maintenance and cure until the matter was ultimately resolved at trial.”²⁷ Otherwise, “a vessel owner could escape maintenance and cure obligations at any time prior to trial simply by finding a physician who would pronounce the seaman at maximum medical cure.”²⁸

Dean contends that Gouma “incorporate[d] the strictures of Rule 56 with the requirement that seamen receive the benefit of all doubts.” He urges us to adopt this approach here by applying “a summary judgment standard for issues surrounding the seaman’s initial entitlement . . . and then give the seaman the

²⁴ Gouma, 2008 WL 2020442, at *2.

²⁵ Gouma, 2008 WL 2020442, at *2.

²⁶ Gouma, 2008 WL 2020442, at *2.

²⁷ Gouma, 2008 WL 2020442, at *2.

²⁸ Gouma, 2008 WL 2020442, at *2.

benefit of 'all doubts and ambiguities' when deciding whether or not maintenance should be terminated." We decline to do so. Gouma is persuasive authority only, and the passage Dean relies upon is dicta. Additionally, unlike Gouma, at issue here is Dean's initial entitlement to maintenance and cure arising from a neck injury. FCA contends that Dean's neck problems did not occur during Dean's service to the vessel. Therefore, this case presents a factual dispute more similar to that in Buenbrazo.

Ultimately, this case must be resolved according to state procedure. Dean elected to pursue his claim in state court and therefore under state procedural law. In a Washington state court, a seaman seeking pretrial reinstatement of maintenance and cure has a limited number of procedural mechanisms at his disposal.²⁹ Here, the trial court resolved Dean's motion under the summary judgment standard, which required the court to deny his motion because a genuine issue of material fact existed regarding Dean's entitlement to

²⁹ In addition to moving for summary judgment under CR 56, a seaman may move for a temporary preliminary injunction under CR 65(a). See, e.g., Collick v. Weeks Marine, Inc., 397 Fed. App'x 762, 763 (3d Cir. 2010). We note that a CR 65(a) motion would require a seaman to give security. CR 65(c). Alternatively, a seaman could move for an expedited evidentiary hearing under CR 42(b). See, e.g., Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys., 44 Wn. App. 237, 241-42, 721 P.2d 996 (1986) (holding that under CR 42(b), a trial court may bifurcate a case to hold a separate evidentiary hearing on an evidentiary issue when there is a disputed issue of material fact on summary judgment); Johnson v. Marlin Drilling Co., 893 F.2d 77, 80 (5th Cir. 1990).

maintenance and cure. On appeal, Dean has not suggested a more appropriate procedure under the civil rules, nor did he suggest an alternative procedure below. While this court is sensitive to the special solicitude traditionally paid to seamen,³⁰ we, like Judge Coughenour, do not think that the Supreme Court's general admonition in Vaughan was meant to "torpedo the well-established summary judgment procedure." This is especially so here, where this court cannot exercise the equitable powers available to federal courts sitting in admiralty.³¹ Therefore, we hold that the trial court did not err by applying the summary judgment standard to Dean's motion.

Dean also assigns error to the trial court's order denying his motion to compel discovery on the existence of surveillance materials. The question whether the work product doctrine protects this information also presents an issue of first impression in Washington. However, the parties stipulated to a final judgment, making this issue moot. Because we generally do not issue advisory opinions,³² we decline to consider this issue.

³⁰ See Mai, 160 Wn. App. at 544.

³¹ See Vaughan, 369 U.S. at 530 ("Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief."); see Key Bank of Wash. v. S. Comfort, 106 F.3d 1441, 1444 (9th Cir. 1997) ("A district court sitting in admiralty has equitable powers to do 'substantial justice.'" (quoting Mosher v. Tate, 182 F.2d 475, 479 (9th Cir. 1950))).

³² State ex rel. O'Connell v. Kramer, 73 Wn.2d 85, 86-87, 436 P.2d 786 (1968).

CONCLUSION

The trial court did not err by applying the summary judgment standard to Dean's pretrial motion to reinstate maintenance and cure. We also decline to decide the discovery issue as it will have no effect on the proceedings. We affirm.

WE CONCUR:

Frach, A.C.J.

Appelwick, J.

Green