

No. 63969-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TUYEN THANH MAI,

Respondent,

vs.

AMERICAN SEAFOODS COMPANY LLC and
NORTHERN HAWK LLC

Appellants

APPELLANTS' REPLY BRIEF

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 FEB 16 PM 4:31

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A. ARGUMENT IN REPLY

1. The Trial Court's Finding That ASC's Temporary Withholding of TKR Surgery While Investigating Mai's Entitlement Was Improper, Unreasonable, and Willful Ignores the Applicable Law and is Not Supported by Substantial Evidence.
 - a. Issues For Decision on Appeal Regarding Mai's Maintenance & Cure Claim.

In resolving this appeal, the Court must determine whether the following are correct statements of the general maritime law concerning maintenance and cure ("M&C"):

- When a seaman requests reinstatement of M&C based on her physician's recommendation that she undergo TKR, a shipowner is entitled to investigate (by means of an IME) the reasonableness of the physician's opinion that this procedure is warranted.
- Assuming an investigation is reasonable, the shipowner may withhold payment of M&C during any period a seaman fails to cooperate in the shipowner's reasonable efforts to investigate the claim for reinstatement of M&C.

Because the foregoing are correct statements of the law, and because the trial court ignored their application to the facts of this case, the trial court's findings of fact that ASC withheld payment of M&C and that such withholding was "unreasonable, willful and persistent" are legally incorrect and factually unsupported and the judgment based on these erroneous findings must be reversed.

- Before the time to respond, Mai filed her own lawsuit against ASC seeking M&C for the TKR surgery (Id. at 13),
- ASC dismissed the declaratory judgment action (Id. at 13),
- ASC's declaratory judgment action could not stand in view of Mai's right to chose her own forum for pursuing this claim (not disputed),
- Mai originally agreed to attend an IME appointment with Dr. Franklin (not disputed),
- Mai requested to reschedule the IME with Dr. Franklin from October to November 2007 for her convenience (not disputed),
- Mai thereafter refused to attend an IME with Dr. Franklin (not disputed),
- ASC made an appointment with a different IME physician Dr. Mandt (Id. at 14),
- Dr. Mandt recommended a different surgical procedure, i.e., tibial osteotomy, as treatment for Mai, although agreeing TKR was not unreasonable (not disputed),
- ASC approved surgery, but inquired with Dr. Tardieu whether the procedure recommended by Dr. Mandt was appropriate (not disputed),
- Upon receipt of Dr. Tardieu's view that TKR should be performed instead of tibial osteotomy, ASC approved TKR and paid Mai maintenance (Id. at 14), and
- Mere delay in approving M&C does not establish an entitlement to back maintenance, compensatory damages, or attorney fees and costs, i.e., such delay must be "undue," (Id. at 25).

ASC acted reasonably by requesting an IME. It had a reasonable basis for inquiring whether Mai's knee required TKR at that time and acted diligently to schedule an appointment with a competent doctor, agreeing to arrange and to pay for all expenses for Mai to attend. Mai does not point to any legal authority that shows ASC's request and efforts to obtain an IME to investigate her request for TKR were improper. The delay in approving payment arose solely due to Mai's refusal to submit to an IME prior to the start of litigation, and after the start of litigation, due to her agreeing, delaying, and then refusing to submit to an IME with Dr. Franklin. The trial court's findings that maintenance was owed during this period and that Mai is entitled to compensatory damages and attorney fees because ASC allegedly acted improperly, unreasonably, and "willfully" are not supported by substantial evidence and should be overturned.

- c. Mai's Assertion That a Vessel Owner Automatically Owes Maintenance & Cure Upon Presentation of Medical Records from a Treating Physician and Thereupon Can No Longer Challenge the Seaman's Alleged Entitlement is Legally Incorrect.

Mai's sole legal argument on appeal is that M&C is automatically due once a seaman presents medical records recommending a particular treatment. Brief at 21, 26-27. This is incorrect.

Mai cites the Holmes case for the proposition that production of a medical record from a doctor prescribing medical treatment establishes the

seaman's entitlement to M&C. 734 F.2d 1110 (5th Cir. 1984). Holmes does not stand for this proposition; if anything, it stands for the opposite, i.e., a medical record, standing alone, neither establishes nor fails to establish entitlement to M&C:

Holmes, however, characterizes Vella as standing for the proposition that the operative date is not necessarily the date that actual maximum medical recovery was diagnosed, but rather contends that maintenance and cure must continue until the date that the diagnosis has been memorialized in the form of "a medical report, medical trial testimony, [or] a medical opinion letter." We do not accept Holmes' assertion. ... We are not persuaded that continuing maintenance & cure until the date of memorialization of this diagnosis would further this policy.

734 F.2d at 1117.

Moreover, this proposition is illogical. If a seaman is entitled to M&C whenever she presents a medical chart note, then a vessel owner would never be allowed to challenge or to investigate her entitlement, even if wrong, without incurring liability for delaying payment. As the cases cited by ASC in its opening brief show, a vessel owner does not bear liability for investigating a seaman's entitlement where such investigation is reasonably warranted to determine whether the seaman requires the requested treatment. *See* Appellant's Opening Brief at 15.

A recent case, on similar facts to this case, shows that a vessel owner does not act unreasonably by refusing to accept the seaman's

medical chart notes supporting TKR surgery and instead challenges the request for treatment based on a differing medical opinion. Kuithe v. Gulf Caribe Maritime, Inc., 2009 U.S. Dist. LEXIS 2869 (S.D. Ala. 2009).

Kuithe injured his knee aboard defendant's vessel in 2006 and underwent surgery. He was subsequently found at maximum medical cure ("MMI") in 2007, and M&C was terminated. In 2008, physicians recommended that Kuithe undergo TKR. The defendant vessel owner refused to pay for the surgery, relying on a doctor's prior statement that Kuithe had reached MMI.

The district court denied the parties' cross motions for summary judgment on M&C. Kuithe claimed entitlement to M&C based on a treating doctor's opinion that he needed TKR. Id. at 6-7. The court found the seaman's treating doctor's opinion did not automatically establish his entitlement to M&C in view of contrary medical evidence that the procedure was not warranted. Id. Moreover, the court wrote that despite the treating doctor's TKR recommendation, "defendant might have obtained summary judgment had it shown that maximum cure is reached when current curative measures have been exhausted and future curative measures, though likely, are not yet appropriate." Id. n. 4.

If Mai's position is correct, then a vessel owner could never avoid summary judgment, much less obtain judgment in its favor, in these circumstances.

A vessel owner's ability to challenge a doctor's recommendation for TKR is supported by the fact that a vessel owner generally cannot recover M&C payments from a seaman that have been made in error. Dise v. Express Marine, Inc., 651 F.Supp.2d 457, 470-71 (D. Md. 2009); Kirk v. Allegheny Towing, Inc. 620 F.Supp. 458, 460-61 (W.D. Pa. 1985); Cotton v. Delta Queen Steamboat Co., Inc., 2010 La. App. LEXIS 9, 14-19 (La.App.Ct. 1/6/10). The Dise case pointed out in rejecting the vessel owner's the attempt to recover M&C wrongly paid, that if it "had serious doubts about its duty to provide maintenance & cure, it could have sought a declaratory judgment after the accident" 651 F.Supp.2d at 471.² As indicated the only time a vessel owner may contest a seaman's M&C entitlement is prior to payment, i.e., when a treating physician recommends treatment.

The Guevera, Kopacz, and Folse cases cited by Mai do not hold that a M&C investigation is limited to perusing the treating doctor's

² Mai incorrectly cites to the Supreme Court's decision held in Atlantic Sounding to support its assertion that filing a declaratory judgment action to determine a vessel owner's M&C responsibility is improper. That only issue addressed was the recovery of punitive damages. Subsequently, cases have found declaratory judgment actions to determine M&C responsibility proper. See, e.g., Royal Caribbean Cruise, Ltd. V. Whitefield, 2009 U.S. Dist. LEXIS 84252 (S.D. Fla. 10/9/09).

records. Guevera held that the vessel owner's payment of M&C months after medical records were first provided without any investigation during the interim period was arbitrary and capricious. 34 F.3d at 1282-83 ("even if the delay between Guevera's first demand and Maritime's first payment could be explained as a reasonable investigatory period, the jury was entitled to conclude that the six-month delay between Maritime's first payment and its second payment, received by Guevera practically on the eve of trial, could not."). Kopacz is inapposite because it addresses a situation where the vessel owner utterly refused to pay M&C **upon completion of its investigation**; it does not involve a delay in payment while it attempted to investigate the seaman's claimed entitlement.

Folse similarly involved a failure to pay M&C, after the vessel owner completed its investigation. The case also turned on whether Folse had forfeited his entitlement for intentionally misrepresenting a prior diabetic condition, an issue not involved in Mai's case. 873 So. 2d at 722. Contrary to Mai's position the court indicated that it is neither unreasonable nor arbitrary to stop paying M&C if an issue exists regarding the seaman's entitlement. Id. at 725.

- d. Mai's Assertion That ASC Had No Reasonable Basis Upon Which to Investigate Her Claimed Entitlement to M&C for TKR Is Incorrect.

Mai sought reinstatement of M&C benefits in May 2007 to cover TKR. Mai did not challenge below and the trial court accepted, as it must, the conclusion that she was at the point of maximum medical cure as of November 2007 when ASC terminated maintenance. Her reliance on cases discussing whether M&C was properly **terminated** is inapposite.

All relevant evidence supports the conclusion that it was reasonable for ASC to investigate whether Mai was, in fact, a proper candidate for TKR as of May 2007. Dr. Tardieu testified that despite his recommendation, it was reasonable for ASC to evaluate this request through an IME. CP 108. Defendant's medical expert Dr. Zietak testified that TKR was not appropriate given Mai's functionality and lack of objective symptoms. RP 192-95. Dr. Mandt, ASC's IME physician, although not ruling out TKR as unreasonable, recommended a different type of surgery. Ex. 39-1 to 39-3. ASC's in house claims adjuster Robert Lang understood based on his experience in prior cases involving TKR and specifically from having worked with a national expert on the subject that such procedure was generally not warranted given that Mai had severe degenerative changes in only one of the three compartments of the knee and adequate function. RP 276-78.

Mai contends the trial court was correct in concluding ASC's request for an IME was mere "pretext," citing following evidence as

point of requiring it” Ex. 145-56.³ This conclusion is supported by the remainder of this letter:

As mentioned, if Dr. Franklin concurs with the surgery, approval will be provided. If he feels a different course should be considered, we anticipate Dr. Tardieu will evaluate his opinion and determine what, if anything different from surgery, should be done. The purpose of this request is not to avoid American Seafoods’ maintenance & cure obligation to Ms. Tuyen or to delay treatment she is rightfully entitled to. American Seafoods has a right to investigate requests for maintenance & cure, and it is undertaking to do so quickly and in good faith.

Ex. 145-57.

Mai cites not one case showing that it is improper to seek an IME to examine her knee before undergoing TKR. It is not unusual for a party to seek a pre-litigation evaluation of evidence where the opposing party seeks to a course of action that will destroy or alter evidence. See, e.g., Adams v. Canal Indemnity Co., 760 So. 2d 1197, 1202 (La. App. Ct. 2000) (request for pre-litigation IME where plaintiff sought to have back surgery after car accident).

ASC did not state that a disagreement among doctors about the need for TKR would require it to pay M&C. The referenced letter only states that ASC was aware of the law pertaining to when there is

³ ASC’s 12/6/07, letter to IME examiner Dr. Mandt confirms: “We would like to obtain your opinion ... **whether she requires knee replacement surgery.**” Ex. 145-27.

conflicting medical evidence, not that it entitles her to have the procedure with no questions asked.

ASC agrees Mai could not be compelled to attend an IME pre-litigation, but would have to file a lawsuit to do so. This highlights that her refusal to cooperate resulted in the delay in completing ASC's investigation. ASC said up front that it would pay for the surgery if the evidence elicited through the IME demonstrated that it was medically necessary. Ex. 145-57. If Mai agreed to attend the IME when originally scheduled, her surgery would have been delayed only by a few weeks, which is not unreasonable. The trial court's finding about other possible motives is unsupported by any evidence and therefore speculative.

e. Mai Incorrectly Asserts That ASC's Attempt to Schedule an IME with Dr. Franklin Was Improper.

Mai argues and the trial court apparently agreed that after requesting the IME, ASC engaged in numerous actions to delay payment of M&C including an alleged improper "ex parte contact" with Dr. Franklin to schedule an IME, which she contends was barred by the physician-patient privilege. This finding of the trial court is both legally and factually wrong.

Dr. Franklin was not a treating physician; ASC initially referred Mai to him for a second opinion in October 2006 because she did not agree with the opinion of her then treating physician Dr. Peterson that she

could return to work. RP 283. Exs. 22-26, 26-2. ASC located Dr. Franklin, and set up and paid for this appointment in the same manner that it set up such appointments for other injured crewmembers. RP 251-252, 283-84. Dr. Franklin sent his report to ASC, not to Mai. RP 284. Mai did not treat with Dr. Franklin, who directed her back to her then treating physician Dr. Peterson. Ex. 26-4. ASC's belief that Dr. Franklin was its, not Mai's, doctor is shown by its declaratory judgment Complaint filed on June 29, 2007: "Defendant [Mai] underwent an independent medical evaluation with orthopedic surgeon Dr. Jonathan Franklin in October 2005," Ex. 145-63, ¶ 11. ASC reasonably believed it could schedule the IME with Dr. Franklin.

There is no evidence in the record to support any improper, *ex parte* contact between ASC and Dr. Franklin (e.g. discussing Mai's condition or treatment). Even if one assumes *arguendo* that Dr. Franklin was a treating doctor, an employer is not prohibited from seeking a medical evaluation from its employee's treating physician. The Louden v. Myhre case referenced by Mai's counsel at trial only prohibits interviews with a treating doctor by a lawyer. RP 253-256. 110 Wn.2d 675, 678 (1988). It does not prohibit contact with a doctor's office staff *or all* contacts by a lawyer with a treating doctor. See, e.g., Smith v. Orthopedics International, Ltd., PS, 149 Wn. App. 337 (Div. 1 2009).

There is no risk that an improper *ex parte* contact could have taken place because in order for the IME to have occurred, Mai would first have to agree to it with Dr. Franklin, which consent negates any impropriety. *See* Washington State Bar Assn. Formal Ethics Op. 180 (a lawyer may interview a physician with the consent of the patient).

Moreover, ASC's choice of Dr. Franklin to conduct the IME did not unreasonably delay the TKR. Mai's initial response to the IME request in June 2007 was to refuse to attend; she did not object to using Dr. Franklin. Ex. 145-58. In September 2007 when finally agreeing to attend a Rule 35 exam, she again did not object to an IME with Dr. Franklin, but in fact, cooperated in scheduling the appointment. Ex. 145-79 to 145-95. It was only in October 2007 after five weeks of discussion and **confirming with Mai's counsel an exam date with Dr. Franklin** that she first raised an objection to Dr. Franklin conducting the exam because he allegedly was Mai's treating doctor. Ex. 145-96. ASC's attempt to address Mai's refusal was unsuccessful, and it opted to find another IME doctor. Exs. 145-110 to 145-111.

- f. **Mai Incorrectly Asserts a Vessel Owner's Sole Area of Investigation in Determining a Seaman's Entitlement to Maintenance & Cure is Whether She Was In the Service of the Vessel at the Time of the Injury.**
-

Mai asserts incorrectly that the sole area of inquiry for a vessel owner when exercising its right to investigate a seaman's entitlement to M&C is whether the seaman was injured in the service of the vessel. The sole authority cited for this assertion is inapposite. Sullivan v. Tropical Tuna, 963 F.Supp. 42 (D. Mass. 1997).

The plaintiff Sullivan injured his finger aboard the F/V MARY T. Although initially paying maintenance, payment for surgery was held up for a month because defendant said it needed to investigate whether the injury occurred aboard the boat. The court observed that "the only question for the insurer was whether Sullivan was in the service of the ship at the time his injury occurred." Id. at 45. Because this issue was never in doubt, the court found the one month delay in approving treatment unreasonable. Id.

Sullivan does not address whether it is reasonable for a vessel owner to withhold payment of M&C pending an investigation into whether a recommended treatment is medically necessary. The cited was not intended as a general statement of the law, but to address the specific facts and issue involved in that case. The cases cited by ASC demonstrate that a vessel owner may investigate more than whether an injury occurred while a seaman was in the service of the vessel, but also whether particular

treatment is warranted. See, e.g., Kuithe v. Gulf Caribe Maritime, Inc.,
2009 U.S. Dist. LEXIS 2869 (S.D. Ala. 2009).

g. Mai's Assertion That a Differing Medical Opinion
Does Not Allow a Vessel Owner to Refuse Payment
of Maintenance & Cure is Incorrect.

Mai cites the Tullos case for the proposition that ASC's desire to obtain a medical opinion from an IME examiner would not affect her entitlement to M&C even if that examiner reached a different conclusion whether TKR was medically necessary. Tullos v. Resource Drilling, 750 F.2d 380 (5th Cir. 1985). Tullos does not support this proposition. The case involves the issue whether a vessel owner terminating M&C based on the opinion of one doctor that Tullos had reached MMI and disregarding the opinion of other doctors saying he had not, could be viewed as arbitrary and capricious. The Fifth Circuit found:

This may *not* be arbitrary and capricious, but it is sufficient evidence entitling Tullos to have the jury resolve his arbitrary and capricious claim.

750 F.2d at 388 (emphasis in original). Tullos does not hold that a failure to follow a treating doctor's recommendation is *per se* unreasonable or in bad faith, does not preclude a vessel owner obtaining an IME to investigate a treatment recommendation.

h. Mai Does Not Dispute That an Award of Attorney
Fees Requires a Finding of Arbitrary and
Capricious Conduct Justify an Award of

Compensatory Damages; Mai's Evidence Was
Insufficient to Establish that ASC Acted in an
Arbitrary & Capricious Manner.

Mai does not dispute that an award of attorney fees for delay in paying M&C must be based on conduct that amounts to more than being unreasonable, but must instead involve arbitrary and capricious behavior, i.e., bad faith. This is shown by her reliance on cases such as Kopacz, Tullos, and Guevera, which make a distinction between a good faith error in determining a seaman's entitlement to payment of M&C (recovery of back maintenance only), an unreasonable refusal to pay (compensatory damages), and arbitrary, willful, capricious, and bad faith conduct in refusing to pay (attorney fees). The trial court did not consider these distinctions in awarding compensatory damages and attorney fees, and thus misapplied the law.

The facts cited by Mai in her brief do not constitute substantial evidence to support a finding of arbitrary and capricious behavior on the part of ASC. The admitted and undisputed facts and legal principles set out supra demonstrate ASC did not act in bad faith. Mai's arguments in support of the trial court's attorney fee award are not supported by the substantial evidence (e.g. "pretext;" ASC "knew" Mai was owed M&C), irrelevant (e.g., filing declaratory judgment action), or overstated (e.g., failure to serve Mai in the declaratory judgment action). (Brief at 27)

2. The Lack of Substantial Evidence To Support the Trial Court's Finding that the March 29, 2005, Injury was the Proximate Cause of the Condition Necessitating a Total Knee Replacement Requires a Reversal of the Trial Court's Judgment.

A medical expert's conjecture and guesswork do not constitute substantial evidence to support a trial court's finding of medical causation in a Jones Act case. Mayhew v. Bell S.S. Co., 917 F. 2d 961, 963-64 (6th Cir. 1990); Hancock v. Diamond Offshore Drilling, Inc., 2008 U.S. Dist. LEXIS 60934 (E.D. La. 2008). A medical expert's conclusory opinion on causation cannot constitute substantial evidence where the expert admits that it is based on conjecture and guesswork. Swords v. Norfolk & W. Rwy. Co., 1996 Ohio App. LEXIS 2020 (1996).

Respondent Mai does not dispute these legal principles, nor does she even seek to distinguish these cases. Rather, Mai merely argues that this is a Jones Act case with a reduced standard of causation – a point having no bearing on whether Dr. Tardieu's use of a "crystal ball" to derive causation is legally sufficient. .

a. A Medical Expert's Conclusory Opinion Regarding Causation Cannot Create a Triable Issue of Fact Where the Expert Admits that the Opinion is Based on Guesswork and Conjecture.

A medical expert's conclusory medical causation opinions cannot constitute substantial evidence where the expert acknowledges that the

opinion is based on conjecture and guesswork. Swords v. Norfolk & W. Rwy. Co., *supra*. In Swords, a case involving the FELA (upon which the Jones Act is based), a physician offered a conclusory opinion supporting medical causation but on cross-examination he acknowledged that his opinion was only based on guesses and possibilities. Swords, at *21. The Ohio court of appeals disregarded the conclusory opinions and held that where the thrust of the expert's testimony indicates that his opinion is based on guesswork, the opinion cannot create a triable issue of fact. Id.

Here, Dr. Tardieu acknowledged that his opinion linking the March 29, 2005, injury to the condition giving rise to Mai's need for total knee replacement surgery amounted to guesswork and would require him to look into a "crystal ball." CP 59 ("It's quite *possible* that that [the 3/29/05 incident] started the symptomology.") (emphasis added); CP 155-56 (Dr. Tardieu agreeing that he "would need a crystal ball or some sort of power that no has..." to link the 3/29/05 incident to the condition requiring total knee replacement). Thus, even though Dr. Tardieu stated in a conclusory manner that that the 3/29/05 incident caused the need for a total knee replacement, his admission that his opinion is based on guesswork does not constitute substantial evidence to support that the trial court's finding of fact on causation. Swords, at *21.

- b. Mai's Reliance on Dr. Mandt's Purported Opinion on Causation is Equally Unavailing Because the Trial Court Would Have to Guess Which "Injury" Dr. Mandt Was Referring To – Either the 3/29/05 Incident or a Previous Injury That is Not the Subject of Any Claim by Mai.
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Mai cites to Dr. Mandt's report for the proposition that Dr. Mandt opined that the 3/29/05 incident has a causal connection to Mai's TKR. Resp. Amended Brf., at 31. The passage to which Mai refers reads:

TREATMENT PLAN:....

... I believe that in her case because of her severe deformity developing medial compartment problems in her was inevitable, but was probably accelerated from *the injury as the injury* likely caused the meniscus tear, which lead to her arthroscopy, and the partial absence of functional meniscus likely accelerated the inevitable medial compartment osteoarthritis.

Ex. 39-2, 3 (emphasis added). However, what Mai fails to inform this Court is that Dr. Mandt, in the "History" section of his report, addresses not one but *two* different "**injuries,**" i.e., the injury in early 2005 (for which Mai has made no claim) and the 3/29/05 injury:

HISTORY OF PRESENT ILLNESS:...

... Initially, she was said to have had no problems with the knee until *a job-related injury in early 2005* when she slipped on a hose impacting her left knee against a steel deck. *She reportedly had a second injury on March 29, 2005,* when a box fell off a conveyor belt and struck her knee....

Ex. 39-1 (emphasis added). It is unclear to which injury the cited passage relates. Thus, the trial court could not rely on Dr. Mandt's statement about "the injury" accelerating the osteoarthritis (causing the need for TKR) because the trial court would have had to speculate that Dr. Mandt was referring to the 3/29/05 injury and not the injury occurring earlier that year. Such guesswork does not support a trial court's finding of fact. See, e.g., *Brower Co. v. Baker & Ford Co.*, 71 Wn.2d 860, 864 (1967) (reversing trial court's finding based on speculative evidence).

- c. Dr. Tardieu's Reliance on Dr. Peterson's April 2005 Chart Note Cannot Support the Trial Court's Factual Finding on Medical Causation.

Mai cites to Dr. Tardieu's testimony in which he purports to rely on Dr. Peterson's April 6, 2005, chart note for the proposition that something "new" occurred to Mai's knee after her alleged 3/29/05 incident. Mai ignores the portions of Dr. Peterson's chart note and of Dr. Tardieu's testimony acknowledging the complaints after both accidents were the same.

Dr. Peterson was the first physician to examine and treat Mai after she left the NORTHERN HAWK in April 2005. He did not testify at trial, so the only evidence from Mai's condition from which to base an opinion on causation is limited to his chart notes. Dr. Tardieu bases his causation

149-151. Dr. Peterson made no such finding in his chart note. Dr. Tardieu admitted that a finding of pain when doing this manipulation is inconclusive. Id. Even if one assumes, *arguendo*, that this constitutes evidence of a torn meniscus, it still has no probative value with respect to a causation opinion because Dr. Tardieu agreed that the degenerative meniscal tear that Dr. Peterson later found at surgery pre-existed both accidents. RP 132-33.

- d. Mai Cannot Rely on ASC's Alleged Reference to the Obligation to Pay Maintenance and Cure to Support the Trial Court's Finding of Fact on Causation.

Mai's final argument is that ASC a causal connection in its opening brief:

In its brief, ASC refers to the fact that Mai's need for total knee replacement surgery "had a causal connection to her injury aboard the vessel." Petr. Brief at 38.

Resp. Amended Brief, at 32. The full passage, however, reads:

A seaman has a duty to cooperate with a shipowner's investigation into her claimed entitlement to maintenance & cure; this "is a 'usual' or 'ordinary' fact of life for the maritime industry ... Mai's [sic] refused to do so. If she had agreed to the IME, the confirmation of its reasonableness and that it had a causal connection to her injury aboard the vessel would have been known by July 1, 2007. It was solely the result of Mai's actions that cure was delayed and maintenance was withheld.

ASC's Amended Opening Brief, at 38 (citation omitted). First, as ASC notes in the preceding sections, a shipowner is obligated to pay M&C for conditions that manifest themselves while the seaman is in the service of the vessel. Thus, if Mai's right knee became symptomatic aboard ship as a result of the February 2005 injury,⁴ the 3/29/05 injury, or no particular incident at all, then all of the ramifications of a M&C claim, including ASC's right to investigate entitlement to the same, would come into play. Thus, ASC's statement of the law set forth above can in no way be read to constitute an acknowledgement that there was substantial evidence supporting the trial court's factual finding on the medical causation issue.

B. CONCLUSION

For the foregoing reasons, American Seafoods LLC and Northern Hawk LLC respectfully request that this Court reverse the trial court judgment in its entirety and order that judgment be entered in favor of American Seafoods Company LLC and Northern Hawk LLC.

⁴ Of course, even if one were to take the word "injury" out of context and give the word meaning beyond ASC's intent, it is undisputed that Mai had at least two reported injuries to her knee during the time in question.

Respectfully submitted this 16th day of February, 2010.

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CERTIFICATE OF SERVICE

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

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

2. On February 16, 2010, I caused a true and correct copy of this Appellant's Opening Brief to be served on the following in the manner indicated below:

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DATED this 16th day of February, 2010



Sibel Yasarturk