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No. 61538-6-I

82635-8

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

JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

REPLY BRIEF OF ICICLE SEAFOODS, INC.

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I. **THE SUPERIOR COURT ERRONEOUSLY DENIED
ICICLE ITS RIGHT TO A JURY TRIAL IN STATE COURT**

A. **Endicott's Choice of Forum Determines His Right to a Bench Trial.**

The Jones Act plaintiff's election of a bench trial rests on his choice of forum. McAfoos v. Canadian Pacific Steamships, 243 F.2d 270, 272-73 (2nd Cir. 1957) (noting that plaintiff elects form of trial, jury or non-jury, by electing to proceed in federal court's admiralty jurisdiction, where there is no right to jury, or by pursuing action at law, where there is right to jury). There are two options for a Jones Act plaintiff seeking to limit his case to a bench trial. "[T]he Jones Act plaintiff can elect a non-jury trial in federal court **either** 1) by electing to sue in admiralty **or** 2) by grounding his suit on federal question jurisdiction, i.e., the Jones Act, and not requesting a jury." Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1490 (5th Cir. 1992), cert. denied, 506 U.S. 975 (1992) (emphasis added); see also Craig v. Atlantic Richfield, 19 F.3d 472, 476 (9th Cir. 1994), cert. denied, 513 U.S. 875 (1994). The Linton court's use of the either/or language illustrates the plaintiff's limited right to deprive a Jones Act defendant of its right to a jury trial.

If the Jones Act plaintiff pursues his claims in federal court at law, pursuant to the saving to suitors clause, "**both parties** have an independent basis for a jury trial." Rachal v. Ingram Corp., 795 F.2d

1210, 1213 (5th Cir. 1986). It necessarily follows that a Jones Act defendant possesses an “independent basis for a jury trial” when the plaintiff prosecutes his claims pursuant to the saving to suitors clause in state court.

In addition, the Ninth Circuit has also recognized the defendant’s right to demand a jury trial in federal court where there is an independent basis for jurisdiction “such as diversity of citizenship . . . so long as the suit is one that could traditionally have been brought ‘at common law.’” Craig, 19 F.3d at 476 (relying on Seventh Amendment). Thus, the plaintiff’s rights on this issue are identical whether suing on the law side of federal court or in state court pursuant to the saving to suitors clause. Since the Seventh Amendment does not apply in state courts, a state court must look to state constitutional and procedural law to determine the extent of the defendant’s right to a jury trial. Linton, 964 F.2d at 1487.

Rather than limiting the Jones Act defendant’s right to demand a jury trial in state court, the cases relied upon by Endicott, including Craig and Rachal, simply address the Jones Act plaintiff’s jury trial rights in two situations unique to federal court: cases brought in admiralty and cases where the sole basis for jurisdiction is a federal question pursuant to the Jones Act. Linton, 964 F.2d at 1490; Rachal, 795 F.2d at 1213. As noted

in Icicle's opening brief, the trial court's sole basis for jurisdiction in this case is the saving to suitors clause. There is no admiralty or federal question jurisdiction in state courts. Since neither of these two, unique circumstances exists in state court, the parties' entitlement to a jury trial is determined instead by state procedural law. Linton, 964 F.2d at 1487 (“[P]laintiff could sue ‘at law’ in state court. Procedurally, whether he or the defendant would have a right to trial by jury would depend on state civil procedure”).

B. Substantive Federal Maritime Law Does Not Deprive a Defendant of Its Right to a Jury Trial in Washington State Courts.

None of the **federal** cases cited by Endicott empower him to deprive Icicle of its right to a jury trial in Washington state courts. Endicott relies instead on out-of-context partial quotes to argue that he enjoys a federal substantive right to alone demand a jury trial.

Endicott's Craig quotation “only the plaintiff has a right to demand a jury trial” omits significant qualifying language. Brief of Respondent at 7 (quoting Craig, 19 F.3d at 476). The full sentence reads “The Fifth Circuit has held **where a federal court's sole basis for jurisdiction** is under the Jones Act, only the plaintiff has a right to demand a jury trial.” Craig, 19 F.3d at 475-76 (citing Rachal, 795 F.2d 1210 (5th Cir. 1986);

Linton, 964 F.2d 1480, 1489 n.16 (emphasis added)). But, as stated above, this limitation does not apply in state courts because the saving to suitors clause, not federal question jurisdiction, is the basis for the state court's jurisdiction. In fact, in the very next paragraph, the Craig court clarifies "where a federal court has an independent basis of jurisdiction over cases involving admiralty claims, such as diversity of citizenship, **both the defendant and the plaintiff have a right to demand a jury under the Seventh Amendment.**" 19 F.3d at 476 (emphasis added). As such, any bar to the defendant's right to a jury trial simply does not apply in state courts.

Additionally, Endicott's reliance on the Pope & Talbot case is misguided. The issue in Endicott's case is the entitlement to a jury, which squarely and without dispute is determined in federal court by whether a plaintiff chooses to pursue an action at law or in admiralty. See McAfoos, 243 F.2d at 272-73. In Pope & Talbot, the question was a much different application of a state theory or bar to recovery in a maritime case. Pope & Talbot v. Hawn, 346 U.S. 406, 410-11, 74 S.Ct. 202, 98 L.Ed. 143 (1953). Endicott is solely responsible for electing not to bring this case in admiralty in federal court. Instead he chose state court where a right to a jury trial exists for both parties.

Finally, in support of his argument that seamen possess a “substantive right written into the Jones Act” to deprive defendants of a jury trial in state courts, Endicott cites to a FELA case, Dice v. Akron, C. & Y.R. Co., 342 U.S. 359, 363, 72 S.Ct. 312, 96 L.Ed. 398 (1952). Unlike FELA, the Jones Act has its own jury provision. 46 U.S.C. § 30104. Therefore, Dice is neither persuasive nor informative. To the extent Dice does recognize a substantive right to a jury, that right is enjoyed by all “litigants,” and thus supports Icicle’s right to demand a jury. Id.; see also Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 340, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988).

C. The Majority of State Courts Considering This Issue Have Upheld a Jones Act Defendant’s Right to a Jury Trial.

While this is a matter of first impression for the Washington Court of Appeals, appellate courts in Illinois, Louisiana and California have all considered whether a Jones Act defendant is entitled to demand a jury trial in state court. Two of these courts have concluded that the Jones Act plaintiff cannot deprive the defendant of its right to a jury trial. Endicott relies heavily on an unpublished case out of California, Peters v. San Francisco, 1994 WL 782237, 1995 A.M.C. 788, 791 (Cal. Ct. App. 1994), because it is the only case not already overruled that found federal law, not state law, barred Jones Act defendants from requesting a jury in state

court. In fact, this unpublished case is the only state appellate case that supports Endicott's position.

The Peters case should be disregarded because it erroneously ignores the limitations of Craig, Rachal and Linton, and has nothing to do with the law in the state of Washington. Neither Craig nor Rachal considered the parties' rights to a jury trial in state court. The Linton court, however, did address application of state procedural rules when a maritime case is brought in state court, and determined when a plaintiff elects to proceed at law on his maritime claims in state court, **"procedurally, whether he or the defendant would have a right to a trial by jury would depend on state civil procedure."** Linton, 964 F.2d at 1487 (5th Cir. 1992)(emphasis added). Additionally, the Peters court's mere half paragraph of analysis of Rachal ignores its limitations. Peters, 1995 A.M.C. at 792. In particular, the analysis ignores Rachal's explanation of circumstances where the Jones Act defendant possesses an independent right to a trial by jury. Due to the significant flaws in the Peters court's reasoning and its unsupported expansive reading of Rachal, it is not persuasive.

The irony of Endicott's reliance on the Peters case is that he could not cite it to the court that issued it because the opinion is unpublished.

See Cal. R. of Court 8.1115(a). This Court should not imbue this opinion with more persuasiveness than the court that issued it. Washington courts are required to apply a uniform federal law, but are by no means required to adopt erroneous, unpublished decisions from other state jurisdictions. See American Dredging Co. v. Miller, 510 U.S. 443, 456, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994).

Instead, the majority of state appellate cases considering this issue have upheld a defendant's right to demand a jury. See e.g., Bowman v. American River Transp. Co., 838 N.E.2d 949, 954-55 (Ill. 2005), cert. denied 547 U.S. 1040 (2006)(rejecting arguments similar to those now advanced by Endicott in overturning Allen v. Norman Brothers, Inc., 678 N.E.2d 317 (Ill. Ct. App. 1997)).¹ The Bowman court determined that the plain language of the Jones Act and Illinois law supported the defendant's right to demand a jury in the state courts of Illinois. Id. See also Spencer v. Dep't of Transp. and Development, 887 So.2d 28 (La. Ct. App. 2004) (applying state law in determining that defendant had right to demand jury trial); Hahn v. Nabors Offshore Corp., 820 So.2d 1283 (La. Ct. App.

¹ The Bowman case also rejected the Peters case reasoning relied on by Endicott in overruling Gibbs v. Lewis & Clark Marine, Inc., a case that relied heavily on the Peters case analysis in concluding that only the plaintiff had a right to demand a jury. Gibbs, 700 N.E.2d 227, 232 (Ill. Ct. App. 1998) ("Moreover, we are also persuaded by the reasoning adopted by the California Court of Appeal in Peters v. City and County of San Francisco, 1995 A.M.C. 788 (Cal. App. 1994)[.]").

2002) (same); see also Herbert v. Diamond M. Co., 367 So.2d 1210, 1213, 1216 (La. Ct. App. 1978) (recognizing defendant's independent right to jury trial on plaintiff's maritime personal injury claims brought in state court pursuant to the saving to suitors clause). Certainly this body of published law, supported by two of the most prominent admiralty scholars in this country,² has more persuasive effect than the lone unpublished appellate case from California relied upon by Endicott.

D. There Was a Recognized Right to a Jury Trial in Negligence Actions in Washington at the time of Enactment of Our Constitution in 1889.

Endicott erroneously suggests there is no right to a jury trial in this case under Washington law. The basic tort theory of negligence did exist at common law in Washington in 1889. Sofie v. Fireboard Corp., 112 Wn.2d 636, 644, 771 P.2d 711 (1989). Where the "heart" of a cause of action is centered on negligence resulting in personal injury, there is a right to a jury trial because that "basic tort theory" existed at common law in 1889. Id. at 649-50; see also Edgar v. City of Tacoma, 129 Wn.2d 621, 627, 919 P.2d 1236 (1996). Common law negligence is the "essence" of a Jones Act suit. Bowman, 838 N.E.2d at 961.

Enacted in 1920, the Jones Act simply removed the bar to suits based on the negligence of "fellow servants" created by The Osceola, 189

² See Brief of Appellant, fn. 3, and articles attached thereto in Appendix.

U.S. 158, 175, 23 S.Ct. 483, 47 L.Ed. 760 (1903). Bowman, 838 N.E.2d at 961. The Osceola's bar was limited to suits based on the negligence of fellow crewmembers or the master and did not bar such suits against the vessel owner. 189 U.S. at 175; see also Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty §§ 6-2, 6-3. Accordingly, the claim asserted by Endicott against Icicle would not have been barred by The Osceola.

Furthermore, Washington courts continued to recognize negligence claims for injured seaman after The Osceola. See Larson v. Alaska S.S. Co., 96 Wn. 665, 667, 165 P. 880 (Wash. 1917)(noting both that plaintiff validly asserted negligence claims against vessel owner and that questions regarding negligence were for jury to determine).

The right to a jury determination on a negligence claim has long been treasured and constitutionally protected in Washington. City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982). The Washington Superior Court Civil Rules repeat the heightened nature of this protection for all parties:

Rule 38. JURY TRIAL OF RIGHT.

(a) Right of Jury Trial Preserved. The right of trial by jury as declared by article 1, section 21 of the constitution or as given by statute shall be preserved to the parties inviolate.

(b) Demand for Jury. At or prior to the time the case is called to be set for trial, **any party may demand a trial by jury** of any issue triable of right by a jury by serving upon the other parties a demand therefore [...].

CR 38 (emphasis added).

Endicott devotes barely a page to this constitutional and procedural protection in his brief. He argues “Icicle is forced to argue that this *type* of claim could be tried to a jury in 1889,” and concludes that “even if Icicle’s supposed right to a jury is controlled by state law, the Washington Constitution does not help Icicle’s cause.” Brief of Respondent at 12-13. He provides no analysis of Sofie and no Washington or other case support for his conclusion. Under the plain meaning of the Jones Act, a right to a jury trial is granted without limitation, meeting the “or as given by statute” clause of CR 38, above. Additionally, the right to a jury trial attaches to a Jones Act action despite the fact that it was not yet enacted in 1889. “If the right to a jury trial applies only to those *theories of recovery* accepted in 1889, rather than the types of actions that at common law were heard by a jury at that time, then the constitutional right to a jury trial would diminish over time.” Sofie, 112 Wn.2d at 648 (emphasis in original).

II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN AWARDING ENDICOTT PREJUDGMENT INTEREST

A. The Majority Rule Precludes Awarding Prejudgment Interest in Mixed Cases.

Endicott makes the broad assertion that “prejudgment interest is allowed in ‘mixed cases,’” namely those involving both Jones Act and unseaworthiness claims, as is the case here. Brief of Respondent at 14. Yet this assertion is based on a single case from the Second Circuit that so holds. As Icicle noted in its opening brief, this is the minority rule among federal courts that have addressed this issue. The clear majority of courts have held that prejudgment interest is **not** allowed in mixed cases. These cases are not only greater in number, but they are superior in reasoning, and as such, they should be followed by this Court.

As outlined in detail in Icicle’s opening brief, prejudgment interest is not available under the Jones Act. Monessen, 486 U.S. at 335. This is true whenever a Jones Act case is brought at law, whether in federal or state court, and this provision trumps the rule that prejudgment interest is generally available under the general maritime law. See, e.g., Fuszek v. Royal King Fisheries, Inc., 98 F.3d 514, 516-17 (9th Cir. 1996).

Endicott argues that denying seamen prejudgment interest runs contrary to the remedial purpose of the Jones Act. Brief of Respondent at 15. Be that as it may, the Supreme Court unequivocally ruled in Monessen that prejudgment interest is not authorized by the Jones Act. Moreover, as noted earlier, the Jones Act provides seamen with the choice

of forum, which in turn determines which remedial benefits the seaman is entitled to. If he chooses to file his Jones Act claim in federal court under admiralty jurisdiction, he is entitled to prejudgment interest, but no jury. If he instead chooses to file at law in either state or federal court, he is entitled to a jury, but not prejudgment interest. Ricardo N., Inc. v. Turcios de Argueta, 870 S.W.2d 95, 122 (Tex. App. 1993). While the Jones Act does indeed provide seamen with certain broad rights, the courts are in agreement that it does not authorize prejudgment interest for claims brought at law.

Because prejudgment interest is not authorized for Jones Act claims brought at law, the majority of courts that have considered the availability of prejudgment interest in so-called mixed cases have determined that it is likewise not available when a Jones Act claim is joined with an unseaworthiness claim. The rationale for this determination was articulated by the Fifth Circuit in Wyatt v. Penrod Drilling Co.:

If the court may not award prejudgment interest on the Jones Act claim, there is no separate 'pure' admiralty item on which to allow interest . . . [T]he plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails.

735 F.2d 951, 956 (5th Cir. 1984). Again, the notion is that a seaman is

not permitted to avail himself of the Jones Act jury trial provision, so as to have both his Jones Act and unseaworthiness claims tried to a jury, while at the same time trying to avail himself of the admiralty rule authorizing prejudgment interest. He is forced to choose between the two. Here, having brought his Jones Act claim at law in state court, Endicott cannot also seek a remedy available only in admiralty.

The case cited by Endicott, Magee v. U.S. Lines, Inc., 976 F.2d 821 (2d Cir. 1992), is the only decision by a federal circuit court that holds otherwise. The Fifth and Sixth Circuits have long held that prejudgment interest is not available in mixed cases, unless the seaman's damages can be apportioned between his Jones Act and unseaworthiness claim. McPhillamy v. Brown & Root, Inc., 810 F.2d 529, 532 (5th Cir. 1987); Colburn v. Bunge Towing, Inc., 883 F.2d 372, 378 (5th Cir. 1989); Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732, 741 (6th Cir. 1986). State courts in Louisiana, Texas, and Alaska have followed suit. Mihalopoulos v. Westwind Africa Line, Ltd., 511 So.2d 771, 781 (La. App. 1987); Cano v. Gonzalez Trawlers, Inc., 809 S.W.2d 238, 240 (Tex. App. 1990); Marine Solution Services, Inc. v. Horton, 70 P.3d 393, 412 (Alaska 2003). While it is true that Icicle acknowledged that the circuit courts are split on this issue, it is by no means an even split.

Division Two similarly recognized the validity of the majority rule and indicated its agreement with the reasoning behind it in Foster v. State of Washington, Dep't of Transp., 128 Wn. App. 275, 115 P.3d 1029 (Div. II, 2005). This is the only Washington decision to directly address the availability of prejudgment interest in a case involving Jones Act and unseaworthiness claims. The court in Foster denied prejudgment interest on other grounds, finding that the state had not waived its sovereign immunity with respect to that issue. Id. at 280. However, its statements in *dicta* approving of the majority rule are nevertheless a strong indication of how Washington courts would and should decide this issue.

B. Washington Law Precludes Awarding Prejudgment Interest on Unliquidated Damages.

As *Icicle* made clear in its opening brief, the availability of prejudgment interest in the present action is a matter of substantive law, and as such, is governed by federal maritime law rather than state law. Under federal maritime law, prejudgment interest is not available in Jones Act claims brought at law, and, as outlined above, a majority of courts have held that the unavailability of prejudgment interest under the Jones Act makes it impossible to award prejudgment interest in mixed cases where damages are not apportioned between claims for Jones Act negligence and unseaworthiness.

State law on the issue of prejudgment interest is therefore not controlling. Nevertheless, because the application of state law would result in the same outcome, namely the denial of prejudgment interest, it is worth noting, and worth correcting the erroneous interpretations of Washington state law presented in Endicott's brief.

Endicott maintains that Icicle's citation to Hansen v. Rothaus, 107 Wn.2d 468, 730 P.2d 662 (1986) and Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 442 P.2d 621 (1968) for the proposition that prejudgment interest can only be recovered under state law when the claim is liquidated is irrelevant because "admiralty courts [. . .] have long disdained the liquidated/non-liquidated distinction." Brief of Respondent at 16. In fact, it is Endicott's citation to Paul v. All Alaskan Seafood, Inc., 106 Wn. App. 406, 24 P.3d 447 (Div. I, 2001) that is irrelevant to a discussion of **state** law on prejudgment interest, since, as Icicle pointed out in its opening brief, **a state court may never sit in admiralty**. Brief of Appellant at 28 (citing Linton, 964 F.2d at 1487).

Icicle is well aware that neither Hansen nor Prier was a maritime case. Given that substantive federal maritime law is controlling regarding the availability of prejudgment interest in maritime cases brought in state court, one would not expect to find a Washington decision in a maritime

case where the court applied state law regarding the availability of prejudgment interest. Both were offered merely to illustrate the Washington rule regarding prejudgment interest.

In Paul, the case relied upon so heavily by Endicott, this Court held that federal maritime law preempted Washington law on the issue of prejudgment interest because there was a direct conflict between the two with respect to the portion of the plaintiffs' damages recovered under federal maritime law. 106 Wn. App. at 429. Paul is distinguishable from the present case for two reasons. First, the damages in Paul were capable of being apportioned such that the Court was able to award prejudgment interest only on the portion recovered under federal maritime law, for which prejudgment interest was authorized. Here, Endicott's damages cannot be apportioned between his Jones Act and federal maritime claims. Secondly, in Paul there was a direct conflict between federal maritime law and state law regarding the availability of prejudgment interest. By contrast, a majority of federal courts have held that prejudgment interest is not recoverable in mixed cases such as the present action, and prejudgment interest is likewise precluded in Endicott's case because his claims were unliquidated; thus, there is no such conflict.

III. THE SUPERIOR COURT ERRED WITH RESPECT TO TWO EVIDENTIARY ISSUES DURING TRIAL

A. The Erroneous Admission of the Jenkins Hearsay Statement.

Endicott asserts that the written statement apparently made by fellow crewmember Jason Jenkins was an admission by a party agent under ER 801(d)(2)(ii) or (iv). He now attempts to distinguish the cases relied upon by Icicle in its opening brief as scenarios involving statements made by company employees to **third** parties, not to a company representative internally, as was the alleged case here. Brief of Respondent at 18-21 (emphasis in original). In doing so, he makes a distinction without merit that mischaracterizes the speaking agent rule in Washington.

The speaking agent rule in Washington is more narrow than the corresponding federal rule and was intended to preserve the rule announced in pre-rule cases such as Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 422 P.2d 496 (1967). 5D K. Tegland, Handbook Wash. Evid. ER 801(d)(2) (2008-09 ed.) at 3. Although the admissions of an agent are usually thought of as statements to a third person, ER 801 is broad enough to include “in-house” admissions as well. Id. at 4. Under Washington law, the proponent of the statement must first

establish by a preponderance of the evidence that the declarant had authorization to speak for the party. Condon Bros., Inc. v. Simpson Timber Co., 92 Wn. App. 275, 284-89, 966 P.2d 355 (Div. II, 1998). Without proof of authorization, the statement is inadmissible. Id.

The question before this Court is not whether this was an internal or third-person disclosure, which would make no difference under Washington law, but instead whether Endicott established appropriate foundation with respect to this statement and whether he established by any evidence, let alone a preponderance of the evidence, that Jenkins was authorized to speak on behalf of Icicle. Neither Jenkins nor the Safety Manager testified at trial. As Icicle pointed out in its opening brief, the Jenkins statement is dated after the date of the Safety Manager's investigation. The only testimony with respect to the origins of the statement was the testimony of Icicle's Safety Director, who testified she was unfamiliar with the document, that it was not a part of her accident file maintained in Seattle, and that she was not aware of it until early 2007, more than three years after the injury.

Arguments of counsel are not evidence. But Endicott offers only that in support of his position that Icicle authorized this statement by Jenkins. There is no **evidence** that this document was part of an

investigation and Icicle rightly objected to the statement in the course of the trial because of a lack of foundation, because Jenkins was not a speaking agent, and because it was classic hearsay. Endicott states “Icicle affirmatively included the statement in the investigation file it produced to Endicott,” citing RP 87, lines 6-12. Brief of Respondent at 22. However, RP 87 lines 6-12 is an **argument of Endicott’s counsel** to the trial court, where his counsel suggested “because it was produced by Icicle, it was a part of Icicle’s investigation....they took the statement from him.” Id. While Icicle indeed did produce the document, there was no **evidence** offered that Icicle requested or authorized Jenkins to write it. Not only is this an argument of counsel, it is speculation by counsel.

Additionally, Endicott suggests that even if it is hearsay, which it is, its admission was harmless as “cumulative evidence” of Endicott’s own testimony. Brief of Respondent at 22-23. To the contrary, as Endicott himself testified and as Icicle pointed out in its opening brief, there is a significant discrepancy in even the location of the accident when comparing Endicott’s testimony to Jenkins’ statement. Moreover, the trial court used Jenkins’ statement for the truth of the matters solely asserted in it to reach conclusions with respect to findings of negligence.³ Endicott’s

³ For example, the trial court cites to what Jenkins was doing on one side of a cart in a tunnel at the time of the accident. No one would know what Jenkins was doing

suggestion that this document was in any way cumulative, which he clearly would have disagreed with at trial, is simply an after-the-fact attempt to bootstrap inadmissible hearsay into evidence.

B. The Erroneous Exclusion of Relevant Evidence with Respect to Endicott's Damages.

Finally, Endicott makes a “no harm, no foul” argument regarding the trial court’s handling of evidence of his addiction to narcotic pain medication and marijuana, as well as evidence of his mental health history, which all pre-dated his injury and impacted his asserted post-injury damages in this case. Endicott misunderstands the purpose of raising this issue on appeal. In its opening brief, Icicle established that the trial court had both admitted and rejected this evidence, although the court ultimately made no findings with respect to these issues. Icicle only asked that clarity be provided on remand to the trial court that these issues are relevant and admissible in order to avoid the circus of repeated objections to this evidence that occurred during the first trial and to avoid any suggestion on remand that Icicle waived arguments with respect to the evidence not admitted during the first trial.⁴

other than Jenkins himself. CP 116.

⁴ For example, Icicle pointed out in its opening brief the critical testimony of Dawn Moore, a social worker at the Nevada mental health facility, was not admitted. CP 88. Indeed, Endicott added her testimony to his Appendix to his brief because this is not otherwise admitted in the record.

Endicott broke his arm while working for Icicle in May 2003 and trial in this matter was held in August 2007. CP 4, 114. In June 2004, Endicott was admitted to a mental health facility in Nevada, where he was diagnosed with marijuana addiction, the same addiction for which he had been through rehab as a teenager, as well as with an antisocial personality disorder that by definition begins in childhood. RP 129-139; Brief of Respondent, A-75 to 77. Endicott only applied for one job during this four-year period between the date of injury and trial, in the fall of 2004, which lasted only a matter of days. RP 214. Endicott had a second surgery on his arm in April 2005. RP 275; A-176.⁵ According to his own surgeon, Dr. Trumble, Endicott would require only three weeks of pain medication following this surgery. A-169. Moreover, since no joint or nerve damage was implicated in this injury or surgery, according to Dr. Trumble, there would be no ongoing source of pain. A-199 to 200.

Endicott was referred by his Texas attorneys to Dr. Purtzer, a “pain specialist” in Oregon, who began treating him in January 2006, and who was still treating him at the time of the August 2007 trial. RP 143, 225, 822-23. During that time frame, Dr. Purtzer prescribed for Endicott an

⁵ The testimony of Dr. Trumble, Endicott’s surgeon, was shown by videotape. It is noted in the record, but the deposition shown during the videotaped trial was not transcribed. RP 275. It is therefore attached by Appendix, along with the transcript of another videotaped deposition shown at trial, the deposition of Endicott’s economist, Dr. McCoin.

astonishing 2,799 largely narcotic-based pills, including Hydrocodone, morphine, and Oxycodone, for an average of 5.7 pills per day. RP 823; A-180. Dr. Trumble testified that taking this type of narcotic pain medication for this injury and for this period of time was a sign of addiction. A-180.

Indeed, Dr. Edwards, a psychiatrist, testified on behalf of Icicle regarding Endicott's marijuana and opiate addictions, as well as his anti-social personality disorder, consistent with Endicott's admission to the mental health facility in June 2004. RP 378. Contrary to the incomplete record cited by Endicott, Dr. Edwards testified that while Endicott was capable of full-time work without restriction, his antisocial personality disorder could certainly factor into his desire to avoid working. RP 396-401. This same line of questioning was repeated to Icicle's economist, who testified that the unrelated mental health condition, because it would impact Endicott's frequency and stability in the workforce, would correspondingly have a material impact on Endicott's alleged damages. RP 738.

In addition to the relevance of the impact of this addiction and mental health history on Endicott's claimed post-accident wage loss of \$855,212.00, Endicott made a claim for his ongoing narcotic pain medication regime from Dr. Purtzer, and in fact the trial court, despite

finding “Dr. Purtzer’s methods of treatment were questionable,” awarded Endicott \$3,000 for this medical damages claim. A-229 to 30; A-4. Certainly a jury on remand is entitled to the complete picture, and is entitled to determine whether Endicott’s inability to work or claim for medical benefits is otherwise explained by his pre-existing addiction and mental health histories. Endicott cannot have what he argues for: to make claims for increased anxiety associated with his mental health condition as well as payment for a shocking level of narcotic pain medication and at the same time hide an explanation for these claims that has nothing to do with his May 2003 injury.

Ignoring the complete record below, Endicott fundamentally misapplies the Kramer case in concluding Washington law required the trial court to exclude this evidence. Brief of Respondent at 26. Again, the Kramer court found the trial court had properly initially determined that addiction evidence was admissible, but only abused its discretion when it made a finding that the substance abuse had affected plaintiff’s earning capacity in the absence of testimony or an offer of proof on this point. Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 557-59, 815 P.2d 798 (Div. I, 1991). As Icicle pointed out in its opening brief, both Washington courts and the Ninth Circuit have held evidence of substance abuse is

relevant and admissible to a plaintiff's damages claims. See Peake v. Chevron Shipping Co., Inc., 245 Fed. Appx. 680, 2007 A.M.C. 2973 (9th Cir. 2007)(finding that evidence of seaman's drug use in context of his lawsuit alleging negligence and unseaworthiness for injuries sustained on vessel was another suggested reason for plaintiff's absences from work following alleged incident, as opposed to plaintiff's claims that his time loss was attributable to his shipboard injury).

IV. CONCLUSION

Endicott made his choice of forum, Washington state court, and his entitlement to elect a bench trial rests on that choice of forum. Icicle enjoys the same rights as any other defendant in this forum, which include the constitutionally protected right of either party to demand a jury pursuant to state civil procedure rules. The trial court erred in striking Icicle's jury demand and this case must be remanded for a jury trial.

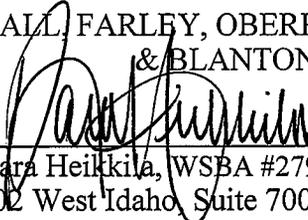
Endicott's entire argument in favor of awarding prejudgment interest rests on a single case, a case that stands alone against the weight of authority on this issue. Because it is undisputed that the Jones Act does not authorize prejudgment interest for negligence claims brought at law, it follows that prejudgment interest cannot be awarded in mixed cases where the portion of damages attributable to Jones Act negligence cannot be

apportioned. Because no such apportionment was made, and because such an apportionment cannot be made under the facts of this case, Endicott is not entitled to recover prejudgment interest, and the trial court's decision in this regard should be reversed.

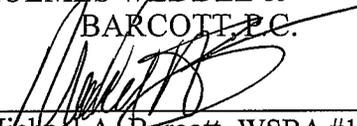
On remand, Icicle requests that the trial court be instructed that the Jenkins statement is inadmissible hearsay and that evidence regarding Endicott's addiction and mental health histories is relevant and fully admissible as to his damages claims.

RESPECTFULLY SUBMITTED this 31st day of October, 2008.

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APPENDIX

Deposition of Thomas Trumble, M.D..... A-162

Deposition of Kenneth McCoin..... A-210

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF KING
3

4 JUSTIN ENDICOTT,)
5 Plaintiff,)
6 vs.) No. 06-2-03016-8
7 ICICLE SEAFOODS, INC.,)
8 Defendant.)

9
10 PERPETUATION DEPOSITION UPON ORAL EXAMINATION
11 OF THOMAS TRUMBLE, M.D.
12

13
14 July 18, 2007

15 5:27 P.M.

16 4245 Northeast Roosevelt Way
17 Second Floor Conference Room
18 Seattle, Washington
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24 Catherine A. Decker, Court Reporter

25 CCR 1975

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I N D E X O F E X A M I N A T I O N

Examination	Page
By Ms. Heikkila -----	5
By Mr. Itkin -----	26

I N D E X O F E X H I B I T S

Exhibit	Description	Marked	Identified
1	Curriculum vitae, Dr. Trumble	5	5
2	Patient self-assessment of pain, 2/25/04	5	6
3	Review of patient medical records, 2/28/04	5	9
4	Letter from Dr. Trumble to Marler Clark, 4/19/04	5	11
5	Letter from Dr. Trumble to Marler Clark, 11/30/04	5	12
6	Preoperative diagnosis, 4/8/05	5	30
7	Radiology report, 4/7/05	5	42
8	Orthopedics output record, 4/27/05	5	31

1	10*	Bone and joint output record, 8/30/05	5	45
2				
3	12*	IME report re J. Endicott by Dr. J. Green, 1/29/04	5	35
4	13	UW Hand Institute - Established patient form, 8/3/05	5	26
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A P P E A R A N C E S

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Seattle, Washington 98104

Videographer: LINDSAY FULMER
Prolumina Trial Technologies
601 Union Street, Suite 1420
Seattle, Washington 98101

1 [Exhibit Nos. 1-5, 6-8, 10, 12, 13 were premarked.]

2

3 VIDEOGRAPHER: We are on the record. This
4 is the beginning of tape 1 in the deposition of
5 Dr. Thomas Trumble. The time is approximately
6 5:27.

7 Would the court reporter please swear in the
8 witness.

9

10 THOMAS TRUMBLE, M.D., having been sworn by the
11 Notary Public, appeared
12 and testified as follows:

13

14 E X A M I N A T I O N

15 BY MS. HEIKKILA:

16 Q. Good evening, Dr. Trumble. My name is Kara Heikkila.
17 I represent Icicle Seafoods in a lawsuit brought by
18 Mr. Endicott. We're here this evening to ask you some
19 questions about your treatment of Mr. Endicott, and I
20 note you brought your record with you; is that correct?

21 A. Correct.

22 Q. I have premarked five exhibits that I'll ask you
23 questions about. The first one is your CV off of the
24 Internet. I don't intend to ask you any questions
25 about it, but just note that it is marked for the

1 record. Your reputation and credentials are well
2 known, and I don't intend to ask you any questions
3 about that.

4 I'll direct you to your first chart note and visit
5 with Mr. Endicott, which is February 25, 2004.

6 A. What date do you have, February 25?

7 Q. February -- actually, yes. February 25, 2004, correct.

8 A. Right.

9 Q. This was your first visit with Mr. Endicott; is that
10 correct?

11 A. According to my records, yes.

12 Q. And that's about nine months after his open reduction
13 internal fixation, his date of injury of May 2003; is
14 that right?

15 A. Correct.

16 Q. I'll direct you to Exhibit No. 2, which was a patient
17 self assessment of pain form that it appears
18 Mr. Endicott filled out on that same date; is that
19 correct?

20 A. Yeah; February 25, 2004, correct. It's not signed, but
21 that would be our pattern to have them complete this.

22 Q. Okay. And on that, Mr. Endicott reported a pain of 5
23 out of 10; is that correct?

24 A. Correct.

25 Q. He also listed "NA," which I assume is not applicable

1 for what he was doing for his pain; is that correct?

2 A. Correct.

3 Q. And at the top of the form, when answering the first
4 two questions, he noted that pain control was not a
5 problem; is that correct?

6 A. Correct.

7 Q. Now, on the chart note of the corresponding date, it
8 appears that Mr. Endicott reported he was not taking
9 any medication; is that correct -- under "current
10 medications"?

11 A. Current medications as listed says none, correct.

12 Q. All right. Is an accurate history of medication use
13 important in terms of your assessment and treatment of
14 a patient?

15 A. Absolutely.

16 Q. According to the records we have obtained, Mr. Endicott
17 took prescription narcotic medication after his surgery
18 in May of 2003. He also continued to take medication
19 in September of 2003, Hydrocodone, from a
20 Dr. Christiansen in Nevada. Were you aware of that?

21 A. I was not aware that he was taking medication. At the
22 time of our visit, I don't believe we actually
23 questioned him as to when he would have stopped his
24 main medication for his surgery.

25 Q. Okay. According to the records we have, in January of

1 2004 he was prescribed Hydrocodone from Dr. Kent Moore
2 in Nevada. Were you aware of that?

3 A. We didn't have it in our records, so I presume we
4 weren't aware of that.

5 Q. All right. In February of 2004, again the same month
6 that you first saw him here, he was prescribed
7 Oxycodone and Naproxen from Dr. Steve Moosil [phonetic]
8 in Nevada. Were you aware of that?

9 A. I don't believe so.

10 Q. In the normal course of recovery from an open reduction
11 internal fixation procedure on an arm, how long would
12 you expect a patient to use narcotic pain medication?

13 A. Up to three weeks.

14 Q. At this first visit, Mr. Endicott denied problems with
15 alcohol or drug abuse; is that correct?

16 A. Correct. No drugs or alcohol. He did admit to using
17 tobacco.

18 Q. How much tobacco was he using?

19 A. The note, since I don't have direct recollection, says
20 possibly one pack per day from that note of February 5,
21 2004.

22 Q. Does smoking affect recovery of a bone fracture?

23 A. It can.

24 Q. In what way?

25 A. The data appears to show that nicotine slows down bone

1 healing.

2 Q. Did Mr. Endicott advise you that in February 2004, the
3 same month that he saw you, he applied for a medical
4 marijuana permit in Oregon under the care of
5 Dr. Leveque?

6 A. No, I was not aware of it.

7 Q. I'm going to direct you to Exhibit No. 3, which is his
8 application with the state of Oregon as completed by
9 Dr. Leveque. And on this form, on the first page it
10 notes that Mr. Endicott had tried Oxycontin, Oxycodone,
11 Percodan, Morphine, Percocet, Xanax, Tylenol with
12 codeine, and Vicodin since his injury in May of 2003.
13 Were you aware that he had tried any of those
14 medications?

15 A. Not specifically, no. I mean, it would be typical for
16 someone to use one or two of them for pain control.

17 Q. The patient reported, or at least as it's reported on
18 this form, that he'd been using five to six marijuana
19 cigarettes a day for the past seven years, which would
20 include six years prior to his injury. Did he disclose
21 that to you?

22 A. No.

23 Q. In June of 2004, which was four months after this visit
24 with you, Mr. Endicott was admitted to an adult mental
25 health facility in Nevada. There he disclosed a

1 history of daily cannabis use, intermittent use of
2 cocaine, methamphetamines, mushrooms, LSD, ecstasy,
3 opium, and peyote. Did Mr. Endicott disclose any of
4 that to you?

5 A. No, I don't believe so.

6 Q. I recall from your discovery deposition that you do not
7 prescribe medical marijuana for your patients; is that
8 correct?

9 A. Correct.

10 Q. On this first exam that you did of Mr. Endicott, how
11 was his range of motion?

12 A. Physical examination we note that his finger motion was
13 normal, his wrist range of motion demonstrated 80
14 degrees of flexion and 75 degrees of extension on the
15 right compared to 80 degrees of flexion and 80 degrees
16 of extension on the left. So it appears only five
17 degrees difference in wrist motion.

18 The right elbow had 0 to 150 degrees of motion,
19 the left elbow had hyperextension, that's the ability
20 to extend past neutral, of 10 degrees, and then could
21 further flex to 115 degrees. Supination, which is the
22 ability to rotate and place your hand palm up, was 80
23 degrees on the right and on the left, in pronation,
24 which is the opposite position, was 70 degrees, which
25 is the ability to rotate. And on the left forearm, the

1 motion was 80 degrees of supination and 80 degrees of
2 pronation, so again, probably 10 degrees less
3 pronation, the ability to turn palm down on the injured
4 side.

5 There was a note of "possible crepitus," that's
6 crackling that can occur in the area of the hardware.
7 So that record notes that there may have been some
8 tendons being irritated by the metal plate.

9 Q. But overall his range of motion on his affected arm,
10 was it good?

11 A. It was quite good.

12 Q. Okay. I'd like to direct you next to Exhibit No. 4,
13 which was a letter in your file dated April 19, 2004.
14 That was a letter, as I understand it, to
15 Mr. Endicott's first attorneys, Marler Clark, they were
16 here in Seattle, in response to what I believe was a
17 letter that they sent to you. Does that look familiar
18 to you, Exhibit No. 4?

19 A. It looks like our response to a request for information
20 about a work-related claim.

21 Q. And in this letter, as I understand it, you were asking
22 that Mr. Endicott's claim be reopened for some
23 additional testing?

24 A. Yes.

25 Q. And there is a reference in this letter in the third

1 paragraph that you were asking the claim to be reopened
2 so that you could return the patient back to his normal
3 job of injury; is that correct?

4 A. Correct.

5 Q. Did you believe, based on your assessment at that time,
6 that you would be able to return Mr. Endicott to his
7 normal job of injury?

8 A. Yes.

9 Q. In your experience do most patients with this type of
10 injury return to normal activity?

11 A. Yes.

12 Q. The next letter I'll direct you to is Exhibit No. 5.
13 This is a letter dated from you, November 30, 2004.
14 Does that look familiar to you?

15 A. Yes.

16 Q. And as I understand it, at this point the testing you
17 had requested, the MRI, the arthrogram, and the
18 ultrasound, had been done; is that correct?

19 A. Correct.

20 Q. Did any of the testing itself suggest a need for any
21 further surgical treatment?

22 A. Well, to summarize, the findings were consistent with
23 either normal variation or minor trauma, so that the
24 ultrasound, which is a test that can track the course
25 of a tendon, did not show the tendons were out of

1 alignment. The MRI did not show that there was -- or
2 the arthrogram did not show that there was a
3 substantial disruption of the joint. There was noted
4 to be a small tear of the lunate triquetral
5 ligaments -- that's L-U-N-A-T-E T-R-I-Q-U-E-T-R-A-L --
6 but that wasn't thought to be a significant factor in
7 his symptoms.

8 The main issue was that there was a deformity to
9 the alignment of the radius, which was present on the
10 plain x-rays. And it was felt that his symptoms
11 correlated with the incorrect alignment of the radius.

12 Q. Okay. So I understand this, and we went through this
13 in your earlier deposition, the bowing itself would not
14 be a reason to prompt the surgery; is that correct?

15 A. Well, the bowing plus the change -- there's actually
16 supposed to be a normal bow, so the change in the
17 alignment would not be a significant factor, unless
18 there was a problem with either pain or instability in
19 the joint. The two bones maintain a normal
20 relationship with the joint at the wrist and at the
21 elbow, and if they are out of alignment, they affect
22 how those joints move. So he had good motion, and I
23 guess the main factor was that he had significant pain
24 plus a plate that seemed to be causing some irritation
25 of the tendons.

1 Q. Mr. Endicott testified in his deposition that you
2 advised a corrective surgery would improve his range of
3 motion; is that correct?

4 A. I doubt it. He already had great motion.

5 Q. Mr. Endicott also testified that you advised him he
6 would never regain his full range of motion; is that
7 correct?

8 A. I don't believe so. We may have indicated that he
9 might lose some motion because with the scar tissue
10 formation that occurs from that type of surgery you can
11 lose some motion. But overall, the -- because we're
12 not working at a joint, the hope and plan is that you
13 can maintain most of the motion people have.

14 Q. I'll take you back to Exhibit No. 2. It appears that
15 Mr. Endicott answered the question, "How long have you
16 had this pain?" He listed 5/1/03; is that correct?

17 A. Correct.

18 Q. Do you have any idea why he waited until 2004 to seek a
19 surgical opinion for the pain?

20 A. Only to the extent that it would take a while for
21 someone to get their function back before they would
22 notice that motion caused a functional problem. So in
23 the early phases, if his -- if he has an injury on
24 5/1/03 and then has surgery to stabilize that, that was
25 4/7 -- I'm sorry -- or at least it would take him

1 several months to heal and be able to start using his
2 hand before he would note enough symptoms to seek
3 treatment for it.

4 Q. The surgery then was requested, and it took place in
5 April 2005, the osteotomy; is that correct?

6 A. Correct, April 7, 2005.

7 Q. There's a perioperative assessment record and a
8 preanesthesia record associated with that surgery that
9 notes he was taking Percocet, 325s, every four to six
10 hours. Do you know who was prescribing this
11 medication?

12 A. No, I do not.

13 Q. There's also reference to Marinol, and we discussed the
14 Marinol at your discovery deposition; that is a drug,
15 its primary component is marijuana. Do you know who
16 was prescribing Marinol for Mr. Endicott?

17 A. No.

18 Q. Do you endorse the use of Marinol for orthopedic
19 procedures?

20 A. No.

21 Q. From the records we have been able to obtain between
22 April of 2004 and March of 2005, Mr. Endicott obtained
23 Oxycodone, Roxicet, Trazidone from three different
24 physicians in Nevada. Did he disclose that to you?

25 A. I don't believe so.

1 Q. Can you describe the corrective osteotomies to the
2 radius that were done in his particular case?

3 A. Yes. It would probably help if I use an x-ray to kind
4 of refresh my memory.

5 MR. ITKIN: There's a dummy skeleton back
6 there, too.

7 A. Oh, good. I may put him to work as well.

8 Q. [By Ms. Heikkila] Here are your operative notes, if
9 that would help.

10 A. Thank you. The view box is behind the screen. If you
11 want I can move that.

12 Q. Can we at this point maybe just -- if you could just
13 summarize from your --

14 A. Sure. The -- well, the key effect is that he had been
15 stabilized with metal plates for his forearm. There's
16 the two bones, one for the radius and one for the ulna.
17 The radius is supposed to have a normal bow that helps
18 to keep it aligned at both the wrist and the elbow. In
19 his case it was quite severe. It took two bone cuts to
20 actually reestablish the bow, because of the way the
21 bone had healed, and stabilize with a much longer
22 plate.

23 The bone cuts are actually made with a power saw,
24 so you're essentially rebreaking the bone, realigning
25 it and then stabilizing the segments. And the element

1 that even I had not planned on at the time was that the
2 fact that one cut alone did not reconstruct the correct
3 rotation and the alignment. The bone had actually
4 healed, not only with a change in the bowing of the
5 bone but also the actual rotation. As it had
6 shortened, it had healed and been fixed with a slightly
7 different rotational alignment as well.

8 Q. You also removed hardware; is that correct?

9 A. We removed the one plate, but then of course we
10 replaced it with a much longer plate, so that didn't
11 really change the aspect of hardware in the forearm for
12 him.

13 Q. What was Mr. Endicott's prognosis at this point?

14 A. Well, it was good. He came into the procedure with
15 good motion and the element of mainly pain and a
16 deformity that you could palpate in the radius. The
17 concern I had was that when someone smokes, the bone
18 healing is slower, and now we've created two bone cuts.
19 But as either luck would have it or skill, he went on
20 to heal both quite solidly and in good order.

21 Q. And this didn't involve a joint, so there was no
22 concern of arthritis; is that correct?

23 A. Correct.

24 Q. So despite the complexity, his prognosis was good?

25 A. Yes. I mean, we had concerns that there would be a

1 down side if he was delayed in healing, but as it
2 turned out he healed quite well.

3 Q. When did you expect Mr. Endicott to reach maximum
4 medical improvement?

5 A. I don't know if I'd actually indicated in a record, so
6 you'd have to refresh my memory if we put it in there.
7 Typically we expect in an orthopedic operation of that
8 extent that within three to six months they'll reach
9 maximum medical -- level improvement. That is fairly
10 routine for something where you have to change the
11 structure of the skeleton.

12 Q. And did you expect Mr. Endicott to return to work?

13 A. Yes.

14 Q. Did you ever in your care of Mr. Endicott establish any
15 lifting restrictions for him?

16 A. Well, I don't know if there's in the current records,
17 but it would have been a matter of practice that when
18 someone is in the early phases of healing, that they
19 can have a limited restriction and return to light-duty
20 work.

21 The trouble that happens in most workplaces is
22 that oftentimes there is not a limited duty. But our
23 typical practice would be to offer at that juncture, at
24 around two to three months, the option of returning to
25 work with a light-duty restriction, say, 10 to 20

1 pounds, and then when they were, they had demonstrated
2 good recovery of their muscles and the bone -- because
3 we have to do some trauma to the muscles to elevate
4 them from the bones during the surgery -- that we would
5 then be able to lift the restrictions at least by six
6 months.

7 Q. According to the records we have, Mr. Endicott
8 continued in 2005 to visit emergency rooms in Nevada
9 for medication. And from 2006 to the present he
10 consults in person or by phone with a doctor in Oregon
11 who prescribes Hydrocodone, morphine, Oxycodone,
12 Valium, and MS-Contin, among over things. Do you have
13 any concerns about Mr. Endicott taking narcotic pain
14 medication for two years after the procedure in April
15 of 2005?

16 A. Yes. That would be signs of some sort of addiction.

17 Q. In terms of -- would there be any justification or
18 basis for that from an orthopedic or a musculoskeletal
19 perspective?

20 A. I'm sorry. Could you rephrase.

21 Q. Would his healing have been completed in any event, his
22 musculoskeletal healing have been completed in this
23 time frame?

24 A. Correct. And it wouldn't have been other
25 circumstances, such as nerve injuries can have ongoing

1 pain for the rest of your life because the nerves never
2 heal fully. But if the bones heal solidly and the
3 tendons have had a chance to heal in that time frame,
4 there shouldn't be any really extraordinary source of
5 pain.

6 Q. Okay. I'm going to direct you to your chart note dated
7 September 14, 2005. This was about five months after
8 the surgery.

9 A. Yes.

10 Q. Do you have that?

11 A. I do.

12 Q. Did Mr. Endicott advise you that three weeks prior to
13 this visit he caught his right forearm in a car window,
14 and according to emergency room records in Oregon he
15 reportedly, quote, scrapped off his hardware and
16 increased his pain, end quote?

17 A. I don't see a reference. Again, I'm using a note to
18 help my recollection, but I don't see a reference in
19 the note that he had intervening trauma.

20 Q. He listed his medications on that date as marijuana; is
21 that correct?

22 A. Correct.

23 Q. And it also notes that he had stopped taking pain
24 medication; is that correct?

25 A. Pain medications -- other than marijuana, or at least

1 the only drug that's listed is marijuana. I don't
2 see on the first review of this record that we made an
3 active assessment that he had stopped taking any
4 medications.

5 Q. At that point you noted that he was going to be sent
6 for a PCE and to look at claim closure; is that
7 correct?

8 A. Correct.

9 Q. And that's consistent with your earlier estimate of
10 MMI; is that correct -- maximum medical improvement?

11 A. I believe so. That would be a surgery --

12 Q. In April.

13 A. -- in April, so closure in September, that would be
14 reasonable.

15 Q. Do you have any note that a PCE was ever completed?

16 A. Again, I didn't review those for that record. All I've
17 seen is that the records indicated there was a plan for
18 a PCE, but I don't have that in my files.

19 Q. Do you know if he completed physical therapy as
20 recommended in 2005?

21 A. I believe he did go to some therapy; but because he was
22 out of state, it was difficult to tell to what extent
23 he completed that.

24 Q. I'm going to direct you to your last chart note, which
25 is May 22, 2006.

1 A. Yes.

2 Q. Do you know why there was a delay between September
3 2005 and your visit in May of 2006?

4 A. No.

5 Q. What did Mr. Endicott report to you in terms of pain in
6 his forearm at this point?

7 A. The note indicates that the patient was working in
8 physical therapy; however, the patient states that
9 quite a while ago he did slip and fall on the elbow.
10 The patient is saying that he, quote, messed up, end
11 quote, his arm, so he was discharged from therapy.

12 Q. And above that, about halfway through the paragraph, it
13 says, "Patient, however, was complaining of wrist pain,
14 stating that his forearm pain is pretty much resolved."
15 Is that an accurate reading?

16 A. Yes.

17 Q. Okay. Was that significant to you that his forearm
18 pain had resolved?

19 A. Yes.

20 Q. Was that an improvement as compared to his complaints
21 of pain prior to your April 2005 surgery?

22 A. I believe so.

23 Q. Okay. And at this point you determined that he was
24 medically stable?

25 A. I just want to make sure I have it accurately reflected

1 for you. So regarding the patient's L&I claim, "the
2 patient is currently fixed and stable regarding his
3 both bone" -- "regarding his right both bone corrective
4 osteotomy." So yes, that was noted at that time.

5 Q. Okay. I'm going to read from Mr. Endicott's
6 deposition. I asked him about this same visit to you
7 in May of 2006.

8 "Q. By May of 2006 when you saw Dr. Trumble, what
9 was the pain in your forearm like?" His answer:

10 "A. The pain in my forearm was bad, and I've
11 complained about pain in my forearm since I've had my
12 first surgery. I've complained to almost every doctor
13 about this.

14 "Q. So to this day you continue to have pain in
15 your forearm?

16 "A. Yes, very severe pain.

17 "Q. You never told Dr. Trumble that your pain in
18 your forearm had resolved?

19 "A. No."

20 Is that consistent with your chart entry of May
21 22, 2006?

22 A. No.

23 Q. Two months after this, in July of 2006, Mr. Endicott
24 saw Dr. Green for an IME where he reported constant
25 forearm pain. He could feel his hardware all day long,

1 the area was sensitive to touch over both the radius
2 and the ulna, and the condition had been the same since
3 he broke his arm. Do you have any medical explanation
4 in the difference in description of symptoms between
5 May and July of 2006?

6 A. No.

7 Q. Mr. Endicott also reported to Dr. Green "tenderness to
8 palpation nearly everywhere he is palpated about the
9 right forearm and wrist." Is that consistent with your
10 examination of him in May of 2006?

11 A. No.

12 Q. And do you have any medical explanation for the
13 difference in that description of symptoms?

14 A. No. That's usually a medical notation that the pain is
15 out of proportion when the nonanatomic areas relate
16 pain.

17 Q. At this last visit it appears you discussed hardware
18 removal with Mr. Endicott but that was not pursued; is
19 that correct?

20 A. Correct.

21 Q. And that was because his hardware was not symptomatic?

22 A. Yes. And also the fact in general the practice is to
23 leave the implants in for two years to avoid
24 refracture, and the fact that it would not have been a
25 simple matter to remove them.

1 Q. There were two incidental findings in this last visit,
2 one was a ganglion that was noted on a MRI, and the
3 other was a right thumb pain for which you took an
4 x-ray. Do you relate either the ganglion or the right
5 thumb pain to his May 1, 2003, work or injury with
6 Icicle Seafoods?

7 A. The thumb pain would clearly not be related. The
8 ganglion, at least on a more detailed evaluation, this
9 indicates a -- if I'm correct -- is a fluid margin
10 along the posterior aspect of the ulna consistent with
11 a focal ganglion. But I might question that it might
12 be fluid that develops in a bursa around one of the
13 plates. That's not a typical location for a ganglion,
14 but that may have been related to a bursa formation
15 around a plate that was used to stabilize his fracture
16 from that initial injury.

17 Q. Is a ganglion generally a continued -- could it cause
18 pain on a continued basis?

19 A. It can, but it's not common.

20 Q. Does it generally restrict movement?

21 A. Well, particularly in this location, this is an unusual
22 one, as I said. Ganglions can form at joints, get
23 large enough to block motion. But this one is actually
24 forming along the shaft of the bone, which is more
25 consistent with a bursa related to the injury and

1 stabilization of the ulna.

2 Q. Is that a yes or a no? I'm sorry.

3 A. That's a good question. Sorry. You have to repeat it.

4 Q. Would the ganglion restrict movement, generally?

5 A. Ganglion -- as I said, this one would not, so -- but
6 it's unusual, and I'm not positive it's ganglion.

7 Q. All right. My time is up. I would just want you to
8 confirm that you're offering your opinions today on a
9 more probable than not basis given your training and
10 experience as an orthopedic surgeon.

11 A. Yes.

12

13

E X A M I N A T I O N

14 BY MR. ITKIN:

15 Q. Thank you, Dr. Trumble. My name's Cory Itkin. I
16 represent Justin Endicott, who has a lawsuit, as you
17 know, against Icicle Seafoods.

18 This has been marked as Exhibit 13 by me. It's
19 apparently something from your office. Can you read
20 that? I don't know if that's your handwriting or not.
21 I'm just curious what it is, what it says.

22 MS. HEIKKILA: Do you have a copy?

23 MR. ITKIN: I don't.

24 Q. [By Mr. Itkin] You can let Kara look on, too.

25 A. This is an established patient form. It's the hard

1 copy form that we use to ensure compliance with
2 Medicare guidelines for documentation, and it indicates
3 under new musculoskeletal problems "wrist sprain."
4 That's what the word is.

5 Q. I just couldn't read the handwriting. Is that your
6 handwriting?

7 A. I don't think so. I think it's one of our PAs'.

8 Q. Okay.

9 A. They would have signed the last page, so you could
10 trace the record.

11 Q. What is "CMC arthritis"?

12 A. Carpal metacarpal arthritis. So it's arthritis at the
13 base of the thumb, which is quite common.

14 Q. Can you just explain for me and Judge McBroom and
15 anyone else who wants to watch this videotape, in
16 layman's terms, what a double corrective osteotomy
17 entails.

18 A. Sure. It basically means you're cutting the bone at
19 two locations. The radius is the bone on this side --

20 Q. The shaft that attaches to the thumb?

21 A. Right. The ulna is on the small-finger side. Of
22 course as you rotate, the orientation changes. So he
23 had -- that is, the patient, Justin Endicott, had a
24 deformity where it turns out that the bone had healed,
25 both with a change in the bowing, which is supposed to

1 help keep the elbow and the wrist aligned, plus there
2 must have been some rotational problems. So in order
3 to correct both, I had to make a bone cut, essentially
4 an osteotomy. So you're taking a saw cut through the
5 bone, breaking it surgically, and then a second one, so
6 that you can control both and get the rotation back
7 that you want.

8 Q. Okay. Is this surgery performed on Justin, is this a
9 regular surgery?

10 A. Well, osteotomies are common, but osteotomies of the
11 forearm shaft are becoming very uncommon because of the
12 training and ability of surgeons now recognizing that
13 these fractures are stabilized initially surgically.
14 So the problem was, maybe even 20 years ago, it was
15 uncommon for all of these to be treated surgically and
16 aligned properly, and it's become standard of practice
17 that these are treated surgically because they're
18 difficult to control. So the short answer is no.

19 Q. And no, it's --

20 A. Not common.

21 Q. Not common, okay.

22 A. Sorry. You're talking to a professor. We only have
23 one-word answers.

24 Q. It's okay. It's informative. I thought you noted in
25 your deposition, and correct me if I'm wrong, because

1 you noted the surgery isn't performed often, that it's
2 difficult to determine post-operation complications.
3 Am I wrong about that? Am I correct?

4 A. You're correct. I mean, having an accurate log of the
5 percentage of complications, it's difficult to tell a
6 patient when you don't have to do an operation, say,
7 more than ten times year.

8 Q. How does one's arm get in such a condition that he
9 needs this type of procedure performed?

10 A. Well, I suspect in his case it comes from the fact that
11 the bone was not stabilized anatomically at the initial
12 setting.

13 Q. From the first surgery?

14 A. Right.

15 Q. So you performed your surgery in April 2005; is that
16 correct?

17 A. Correct.

18 Q. And the first surgery was performed in May 2003,
19 correct?

20 A. Correct.

21 Q. So it's your opinion that his bone wasn't set properly
22 from May 2003 until you fixed it in April 2005,
23 correct?

24 A. Correct. I think that's what was the changing factor,
25 and I can't relate to what the complexity might have

1 been or what the other components of the fracture were.
2 But I think that's what set the course in play to need
3 the secondary surgery by me.

4 Q. Okay. And I'm going to hand you what's been marked as
5 Exhibit 6. This is your operative report which you
6 dictated the day after the surgery, on April 8th. On
7 page 2 there's a red flag, you can get rid of it. But
8 I note that you wrote in there that there is a 20 to 25
9 degree rotational malunion; is that correct?

10 A. Correct.

11 Q. What is a 20 to 25 degree rotational malunion?

12 A. Malunion is a fracture that's not healed, so it's
13 healed but it's not in the right alignment, versus a
14 nonunion would be an unhealed fracture. And so that
15 means that the bone ends may have been -- the correct
16 alignment was 25 degrees off of that, which presumably
17 was affecting his symptoms and was one part of the
18 structure that we wanted to correct.

19 Q. You mentioned that bowing is a normal part of the
20 recovery process. Can you explain that?

21 A. No. Bowing is a normal part of the radius alignment,
22 so it's supposed to have a correct bow, so that if my
23 right hand is the radius, my left hand is the ulna, the
24 ulna is typically straighter. And the two bones need
25 to contact each other in the right relationship so they

1 can rotate around each other; and if they don't have
2 the right bowing, the radius can't circumnavigate the
3 ulna correctly. The two elements to the surgery, one
4 is the bow of the radius was not anatomic, and the
5 second was the rotation of the radius was not also
6 anatomic.

7 So it turned out that we needed to correct both of
8 those, and it's very hard to -- with radiographs we
9 even tried to use markers at his wrist and his elbow
10 and tried to use computer reconstruction to identify
11 that, but it's extremely difficult to identify that
12 based on 2D reconstruction.

13 Q. Okay. Also in that operative report you noted that
14 there was bowing of an unusual nature; is that correct?

15 A. Correct.

16 Q. And that's what you were trying to fix, right?

17 A. Yes.

18 Q. Or part of the problem. Is it unusual for doctors to
19 rely on patient's complaint of pain when planning out a
20 plan of treatment?

21 A. Well, I mean, one of the principal things that you want
22 to correct in most orthopedic operations is generally
23 the relief of pain. So that if you have a symptom of
24 pain, and you have hard findings of a structural
25 problem that correlate with it, that's a fairly typical

1 standard of practice.

2 Q. I'm going to hand you what's been marked by me as
3 Exhibit 8, which is a record from you from April 27,
4 2005, a few weeks after the surgery, where -- well,
5 I'll just ask you: Did you note that there was a
6 complex deformity in Justin's arm?

7 A. Correct.

8 Q. What is the complex deformity? Is that what we've just
9 been talking about?

10 A. Correct. Having --

11 Q. Unusual bowing?

12 A. Having essentially three planes of deformity, both the
13 alignment of the way that the bone sits in relationship
14 to the ulna, and then how it had healed with rotation
15 as well. So that instead of being correctly aligned so
16 the segment of the radius at the wrist and a segment at
17 the elbow should have the same rotational alignment;
18 that is, there should be the same amount of torsion or
19 twist to it as there is in the opposite side. So
20 that's the complexity.

21 Q. Do you also see where you noted it was difficult to get
22 a good assessment of the osteotomy sites because of the
23 plates?

24 A. Correct.

25 Q. What's the significance of that?

1 A. Well, it's hard to assess bone healing. And we want to
2 make sure, as we talked about earlier in the
3 deposition, that he would present a greater challenge
4 for bone healing than a single-level osteotomy, a
5 single bone cut, and then the complexity that he had a
6 history of smoking, which also is a factor. So we want
7 to carefully monitor his ability to heal.

8 Q. Were you able to monitor that with the plates in place?

9 A. Correct. You know, I believe in this case, looking at
10 some of the x-rays, we would carefully ask the x-ray
11 techs to get the right rotation that we needed in order
12 to see the outline of the bone so it wasn't blocked off
13 by the plate.

14 Q. Were you able to get a good view from those x-rays?

15 A. You know, at every visit we were able to get at least
16 one x-ray that gave us the information. So on one
17 x-ray you may see that the plate blocks the ability to
18 see the bone healing, but you can tell -- it tells you
19 another set of information, which was the alignment is
20 good, there hasn't been any collapse, and that the
21 implants are securely stabilized from the bone, no
22 signs of screw loosening or plate loosening. So even
23 if you can't see the bone in every x-ray, there's
24 different things that tells you. But I believe that we
25 were able to follow his course of healing fairly well.

1 Q. Just to review, we've noted that there is a fracture
2 that Justin had for about a year and a half, right?

3 A. Well, he had had the -- he'd had the fracture. He
4 healed, but he had the alignment that wasn't what we
5 would call anatomic during that time period.

6 Q. So there was a malunion there?

7 A. Correct.

8 Q. And there was the unusual bowing, right?

9 A. Correct.

10 Q. And there were complaints of pain, right?

11 A. Correct.

12 Q. Is that while you performed the surgery on him?

13 A. Correct.

14 Q. Was this a reasonable and proper, medically necessary
15 surgery you performed?

16 A. Yes.

17 Q. Do you perform surgeries just for the heck of it?

18 A. No.

19 Q. Is surgery usually the last resort for you?

20 A. Well, I mean, to put it in context, there are certain
21 surgeries like his initial surgery, you know, you
22 wouldn't want to make it the last resort. It actually
23 is the first resort to stabilize a fracture that can't
24 heal properly in a cast. So we don't always go through
25 a litany of conservative options, but -- and in his

1 case, you know, more therapy or other nonoperative
2 treatments wouldn't have been able to change the
3 structural problem. But if he had come with the same
4 findings and had not had any pain and said that he
5 liked his plates the way they were, we certainly would
6 not have applied any pressure to him to have a
7 corrective osteotomy.

8 Q. Do you know who Dr. James Green is?

9 A. Not off the top of my head.

10 Q. Let me just represent to you that he is a doctor, an
11 orthopedic surgeon in, I believe, Seattle who the
12 defendants have retained and advised him about Justin's
13 medical condition so they can make a proper assessment
14 of what's wrong with him. Dr. Green said, and I quote,
15 this is in 2004, "there is no need for additional
16 treatment." Do you agree with that assessment?

17 A. At what time point in 2004?

18 Q. It was late January, January 29th, he wrote -- well,
19 I'll give you the report which I've marked as Exhibit
20 12. He noted on January 29, 2004, that, "There is no
21 need for additional directed treatment. Self-directed
22 exercises for flexibility and strength would be
23 appropriate."

24 MS. HEIKKILA: Are you going to allow him to
25 read the entire report to get that context?

1 MR. ITKIN: Absolutely.

2 Q. [By Mr. Itkin] Here is the report. His findings are
3 towards the back. Feel free to review it for as long
4 as you need.

5 A. [Witness complies.] So this is the note on page 6 of 8,
6 and this is the report of January 29, 2004, "There is
7 no need for additional directed treatment." And I
8 guess I would disagree with that, which is why we
9 subsequently arranged and completed a surgery at a
10 later point after doing a pretty exhaustive review of
11 the alignment anatomy of his forearm.

12 Q. Just so the record is clear, Doctor, you disagree with
13 Dr. Green's assessment that in January 2004 there was
14 no need for additional treatment for Justin Endicott?

15 A. Correct.

16 Q. Okay. What is chronic pain?

17 A. Well, it's pretty much as you said. It's pain that's
18 ongoing.

19 Q. How does one develop chronic pain?

20 A. Well, that would be a subject of about a four-hour
21 lecture which I give in review courses. But basically
22 there's pain that persists out of the period of normal
23 healing, which in most musculoskeletal injuries would
24 be, say, several months. Then the categories could be
25 sympathetically maintained chronic pain, which the one

1 that we're more familiar with, which also has the
2 nicknames reflex sympathetic dystrophy and causalgia,
3 and that's where usually a nerve has been involved.
4 And then there's the nonsympathetically maintained pain
5 in this chronic pain syndrome; and if anything, that
6 comes from chronic areas sometimes where you can
7 identify pathologies, such as the person who has
8 chronic low back pain, they have arthritic joints.
9 When they move they have bone-on-bone contact. It
10 hurts, that's chronic pain, it's real. But you need to
11 assess the level of the pain against the magnitude of
12 the surgery. In --

13 Q. Doctor, I don't mean to be cutting you off, but we're
14 on a time deadline. I think I can cut to the chase a
15 little bit. I've talked to an anesthesiologist about
16 chronic pain, and I'm going to tell you what he told
17 me, and you tell me if you disagree or if that sounds
18 right to you, that if someone like Justin were to have
19 pain for a year and a half which goes untreated, that
20 his brain would essentially learn -- have pain
21 programmed in it. So even though there was no external
22 pain stimulus, he would still feel pain and it would be
23 real to him.

24 A. That's probably not quite accurate. You know, you
25 would have to have an ongoing source of real

1 stimulation of the brain to produce that, and a typical
2 guideline is maybe a six-month period. So if you
3 had -- and this happens in reflex dystrophy. If you
4 have a nerve that's damaged, not repaired for six
5 months, that could cause changes. But they generally
6 have other manifestations.

7 Q. Okay. Are you aware that Justin has been seeing a pain
8 management specialist?

9 A. Well, I learned some of that through today's course.
10 But I think I had some at least correspondence that he
11 was seeing other physicians, but I'm not clear to what
12 extent he had. I know he had been in other ERs. I
13 have some recollection that we would get a phone call
14 from an ER doctor asking for direction.

15 Q. When assessing whether Justin is addicted to pain
16 killers, would you trust a pain management specialist
17 who's been treating him regularly or would you trust
18 your assessment right now?

19 A. Well --

20 Q. I know you're a great doctor.

21 A. I guess the difference of opinion is, we understand
22 that -- we orthopedic surgeons understand the source of
23 the pain in many of these upper-extremity cases, so
24 that it's possible to differentiate. So the context of
25 the amount of drugs prescribed seems to be out of the

1 norm of what I see and treat in the course of
2 musculoskeletal injuries, and I see a pretty broad
3 spectrum.

4 So if Justin had, say, a crush injury that had
5 involved a nerve, you know, I've done limb
6 reattachments and people have phantom pain, and this
7 level of medication would be consistent with that. It
8 just seems to be, for an area where there is not a
9 joint involved, not a major nerve involved, this seems
10 to be above and beyond what I would expect.

11 Q. Do people addicted to painkillers typically stop taking
12 them on their own?

13 A. No.

14 Q. That would be pretty rare, right?

15 A. Right.

16 Q. That'd be a sign he's not addicted to painkillers,
17 right?

18 A. Correct.

19 Q. How much weight do you think Justin could lift in that
20 year-and-a-half period before -- between his injury and
21 between the time that you did the surgery?

22 A. Well, that'd be a hard assessment. I've seen people
23 who've had major deformity who've had problems with
24 motion in the forearm still lift a substantial amount.
25 I would say that you might be close to at least 50

1 percent of the uninjured hand, but that's a bit of a
2 guesstimate.

3 Q. You deal mostly with getting bones healed up, right?

4 A. No. I actually treat the entire upper extremity, so we
5 do -- I mean, I repair nerves, blood vessels, tendons.
6 So essentially what we try to provide in our service to
7 the public is complete care of the upper extremity.

8 Q. Okay. And the upper extremity meaning the arm,
9 shoulder?

10 A. Correct. I think what the public would understand is
11 the shoulder, elbow, wrist, and hand. And that's often
12 how I've done several textbooks on the upper extremity,
13 and that's often how we try to list it out so that it's
14 clear to people. Sometimes people don't have a clear
15 understanding of what the upper extremity is.

16 Q. Okay. And do you do pain management?

17 A. Well, I mean, obviously I do a lot of pain management
18 in the acute perioperative period.

19 Q. What's the "acute perioperative period"?

20 A. Well, that would be about the three-month standpoint.
21 And then, I see, treat, and refer people who have
22 chronic pain, because I lecture on, and the medical
23 societies in the United States, the American Society
24 for Surgery of the Hand, American Academy of Orthopedic
25 Surgeons, view me as an expert on upper-extremity pain.

1 And so I have people that will come to me from all
2 around the country to have an evaluation to see what
3 can be done about their pain and the problems that it
4 has caused.

5 I don't do the special treatments directed at the
6 pain, like the pain blocks or the long-term
7 medications. But you know, in the course of
8 management, what has happened in the United States is
9 pain management physicians aren't available to the
10 routine patient. They're not often available to people
11 that are covered by workmen's compensation. So I have
12 to step in and provide a lot of the bridging treatment
13 of people with chronic pain until either I can get them
14 through it myself or I get them to a pain specialist.
15 But it's often not easy. So by de facto, I probably do
16 more pain management than --

17 Q. Than you want to?

18 A. -- I want to.

19 Q. The job falls to you. You know how to do it, and you
20 want your patients to not be in pain, right?

21 A. Right.

22 Q. And you're obviously qualified to do it, right?

23 A. To a point, right. I wouldn't do the special blocks
24 that are required for it, but I mean, the
25 straightforward matters I find that it's more

1 appropriate to start certain medication treatment for
2 patients quickly and get them in relief than to wait
3 for months to get a referral approved to pain
4 management, which can be a sort of arduous process.

5 Q. So you typically limit your pain management to
6 approximately three months after a surgery, correct?

7 A. Correct.

8 Q. And after that you would refer a patient who's still
9 having pain to a pain management specialist?

10 A. Correct.

11 Q. Is there a particular pain management specialist you
12 like in Seattle?

13 A. Well, I use the services of the University of
14 Washington probably the most frequently. But I can
15 probably tell you more than you want to know about pain
16 management. They typically have a very short snapshot
17 and often don't provide the long-term care, so -- and
18 then there's the double whammy that in the state of
19 Washington, I don't know how it works in Nevada or
20 Oregon, but our Labor and Industry board often will
21 only allow one doctor to be the prescribing doctor. So
22 they turn around and insist that I take over the
23 management for the chronic pain prescriptions, which
24 again, I'll do to a point. I typically like to
25 restrict it to three months, but I follow people for as

1 long as a year to two years.

2 Q. Okay.

3 A. Not my preferred option, but to get the care to the
4 patient that's what I'll do.

5 Q. I want to hand you -- kind of jumping around. I want
6 to hand you what's been marked as Exhibit 7. This is a
7 report from your radiologist that you ordered. And is
8 there a note there that Justin had a right forearm
9 fracture?

10 A. Yes.

11 Q. What's the date on that?

12 A. The date is April 7, 2005, so --

13 Q. Is that something you would have used in formulating
14 your treatment plan?

15 A. Correct. This is the -- well, this is the
16 interoperative view, so this is the radiologist going
17 backwards and reading what we've done at surgery.

18 Q. Okay.

19 A. It says "32 interoperative views of the right radius
20 and ulna." And it even notes that there's x-rays of
21 the opposite side, because we used that to map out what
22 would be the best treatment.

23 Q. Okay. Because the view is difficult, you want to get a
24 360 view; is that --

25 A. Well, no. There ??? are interoperative so we're doing

1 stages. So at every stage of the surgery we're
2 actually checking what we do.

3 Q. Okay.

4 A. So we --

5 Q. This report is actually from the middle of the surgery?

6 A. Well, what happens, again, in the context of how some
7 medicine is delivered is we're doing the surgery, we're
8 reading the real time x-ray, we're making all the
9 decisions. Dr. Chew is now reading what we've done the
10 next day and commenting on it to a limited extent.

11 Q. Okay. What's a "TFCC grind"?

12 A. That's when a patient has some irritation or
13 degeneration of the cartilage at the end of the wrist,
14 so that the TFCC is, I guess not the acronym, but the
15 abbreviation for the triangular fibrocartilage complex.
16 And the cartilage that sits here, when you rotate your
17 arm, sort of contrary to what seems to be intuitive, is
18 that if you make a fist like this, you can watch as you
19 rotate the thumb and the radius rotates around the
20 small finger and the ulna. So essentially your hand is
21 bolted to your radius. When you rotate, everything
22 spins on this axis. The TFCC is actually the bearing
23 surface that takes the brunt of that rotation as you
24 rotate and buffers the location of the wrist and the
25 ulna with an menisca-like surface.

1 Q. So is the ulnar joint where the ulna and the wrist come
2 together? Where's the ulnar joint?

3 A. Well, the distal ulnar joint is where the radius and
4 the ulna come together, so that forms the unit of the
5 forearm and then the hand sits on top of that. And the
6 hand is actually secured to the radius, so that it
7 allows you to spin and rotate.

8 Q. What would be the significance of someone who noted
9 signs of distal ulnar joint instability and slight TFCC
10 grind in Justin?

11 A. Well, in the context of his case, that would be
12 indicative of the fact that the radius was not -- I
13 presume in the preoperative setting, that the radius
14 was not properly aligned with the ulna due to the
15 deformity that he had.

16 Q. Do you know a Dr. Shai Luria?

17 A. Yes.

18 Q. Did he work on Justin?

19 A. He may have. More likely, he helped in the
20 postoperative evaluation.

21 Q. Here's a--

22 A. One of our fellows who's been with us.

23 Q. Here's a record he dictated that I'm marking as Exhibit
24 10. He noted in there -- do you see in there where he
25 noted that Justin had "signs of distal ulnar joint

1 instability and slight TFCC grind"?

2 A. Correct.

3 Q. And is that basically what we were just talking about?

4 A. Correct. This is actually a postoperative assessment,
5 so I'm not quite as clear as to why that would be the
6 manifestation, other than the fact that I may have
7 created some slight stress to his distal radial ulnar
8 joint by changing the alignment of his radius. So I
9 presume an explanation is, he's healed in a position
10 that is not properly aligned for a year and a half.
11 The joint has accommodated to that, the soft tissues
12 have, and now we've -- I've changed that alignment,
13 tried to restore it back to anatomic, and it may have
14 put some stress to that joint. I don't think this
15 otherwise became a long-term factor of significance for
16 him, but that's my best explanation.

17 Q. Would that cause pain?

18 A. It could.

19 Q. Would it cause restrictions in the use of his arm?

20 A. It could.

21 Q. Okay. I think my half hour is up, but I sure
22 appreciate your time, Dr. Trumble. And Justin would
23 want me to thank you for doing a good job on his arm.

24 A. Well, we appreciate it. We always love a challenge,
25 and he was that.

1 MS. HEIKKILA: I don't think we have any
2 further questions. Do you want the opportunity
3 to review your deposition transcript or would you
4 like to waive that?

5 THE WITNESS: I would be happy to waive it.

6 MS. HEIKKILA: Okay, thank you. We're off
7 the record.

8 VIDEOGRAPHER: This is end of tape No. 1
9 and concludes the deposition of Dr. Thomas
10 Trumble. The time is approximately 6:27.

11 [Signature waived.]

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT)	
)	
Plaintiff,)	NO. 06-2-03016-8
)	
vs.)	
)	
ICICLE SEAFOODS, INC.)	
)	
Defendant.)	

ORAL and VIDEOTAPED DEPOSITION OF

DR. KENNETH McCOIN

JULY 26, 2007

ORAL and VIDEOTAPED DEPOSITION OF DR. KENNETH McCOIN,
produced as a witness at the instance of the Plaintiff
and duly sworn, was taken in the above-styled and numbered
cause on July 26, 2007 from 2:07 p.m. to 3:18 p.m., before
Tracey L. Taylor, CSR in and for the State of Texas,
reported by stenograph machine at the offices of
Arnold & Itkin, LLP, 5 Houston Center, 1401 McKinney,
Suite 2550, Houston, Texas 77010.

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A-P-P-E-A-R-A-N-C-E-S

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THE VIDEOGRAPHER:

Mr. Wayne Turner

1 THE VIDEOGRAPHER: On the record 2:07 p.m.,
2 beginning Tape 1.

3 DR. KENNETH McCOIN,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 BY MR. ITKIN:

7 Q. Dr. McCain, my name is Cory Itkin. I represent
8 Justin Endicott.

9 Would you please introduce yourself for the
10 court.

11 A. My name is Ken McCain.

12 Q. Will you please walk the court through your
13 background and education and professional history.

14 A. Sure.

15 Educationally, starting at the college level, I
16 have a bachelor's degree that I received from the
17 University of Houston. And that was in 1970. That was in
18 business and finance. That was followed by a Ph.D. in
19 economics and finance in 1974, also from the University of
20 Houston. And in about 1977 I spent part of a summer at
21 Stanford University studying investments. And then in '79
22 I received a chartered financial analyst certificate, which
23 is sort of like a CPA certificate except it's -- we analyze
24 the books instead of preparing the books. And that's
25 administered out of the University of Virginia. And

1 there's three tasks that you have to pass to receive a
2 certificate. And that -- in terms of papered education or
3 degreed education, that is it.

4 I would count among my education 35 years of
5 teaching at three graduate schools: University of Houston,
6 Houston Baptist University, and Rice University. And I've
7 taught in the MBA programs at each of those three schools.

8 And right now I'm retired from that sort of
9 thing. And most of my activities today are doing forensic
10 economics.

11 Q. How long have you been doing forensic economics
12 for?

13 A. Well, I had a student who grew up to be a lawyer
14 of all things and that was about 30 years ago and got me
15 involved in it.

16 Vocationally, I worked for American General
17 Insurance and -- as an economist and chief economist. And
18 that was in the early '70s -- early to late '70s. Then
19 went to work for Mosher, McCain & Sims, where we managed
20 pension funds and profit-sharing plans. And then to
21 Private Equity, where we're a direct participation
22 broker/dealer for American Stock Exchange Company. And
23 most recently at Waterford International Asset Management,
24 where we did feasibility studies, energy trading, and
25 due-diligence studies primarily in the energy area.

1 Q. Have you testified as an expert economist in the
2 type of case you're here to testify about today?

3 A. Yes, many occasions.

4 Q. Have you only testified for plaintiffs in your
5 history as a testifying expert?

6 A. No.

7 Q. Is the breakdown 90/10, is it close to even? Can
8 you fill the court in on that, please?

9 A. Sure.

10 Most of my work is for plaintiffs. Probably
11 60 percent of work for plaintiffs, 40 percent for
12 defendants. In terms of testimony, it's more like 90/10
13 for plaintiff's testimony as opposed to defendants.

14 Q. Have you -- do you have a CV with you today,
15 Mr. McCoin?

16 A. I think there's one present. I didn't bring one
17 with me, but I think there's one here.

18 MR. ITKIN: Can we attach that as an
19 exhibit -- exhibit at the end of the deposition, Exhibit 1,
20 please, assuming we can find it?

21 (Exhibit No. 1 to be marked)

22 Q. (BY MR. ITKIN) Have you formed any opinions about
23 Justin Endicott's economic damages in this case?

24 A. Yes.

25 Q. What are those opinions?

1 A. Well -- in terms of dollars and cents?

2 Q. Yeah.

3 A. His -- let me define some terms.

4 First of all, when we're making a calculation of
5 earning capacity as it is defined under the Jones Act --
6 and this is made pursuant to the rules that govern Jones
7 Act calculations, I guess most notably the Pfeiffer case
8 out of the Supreme Court -- the terms are past and future,
9 where the past is defined from the date of the accident
10 until August the 20th, the assumed date of trial. The
11 future would begin that -- the day after and would extend
12 through the remainder of his worklife expectancy.

13 So as to his past lost earning capacity or his
14 past earning capacity, by my calculations, it's \$94,691.

15 The future figure pre-event earning capacity is
16 \$1,323,602. And the sum of the two, past and futures,
17 1,418,293. And that's his pre-event past and future
18 earning capacity.

19 Q. What's the basis of that opinion Dr. --
20 Dr. McCoin?

21 A. He was earning about \$33,600 per year at the time
22 of his injury. He got paid 7.15 per hour for the first
23 eight hours, then time and a half for the next eight hours.
24 And the nominal workday was 16 hours per day.

25 And it's assumed that he would work about 240

1 days per year, which is typical of a lot of
2 oilfield/offshore work. His, of course, would be related
3 to fishing activities. And that would -- there's certainly
4 enough fishing season out there to encompass 240 days per
5 year. But that's the basis of it in terms of his wages.

6 To that is added a measure for his fringe
7 benefits, which is based upon the national average. He did
8 receive fringe benefits or had available to him fringe
9 benefits at the time of his injury.

10 My measure of that, according to the Labor
11 Department, is 17.3 percent. And from that we're going to
12 subtract taxes, federal income taxes, state income taxes,
13 and Social Security taxes pursuant to what is Fifth Circuit
14 methodology in the case called Tallentire to subtract out
15 Social Security taxes. I don't know if that's the case in
16 the Ninth Circuit, but that's assumed.

17 Q. What if it's not the case in the Ninth Circuit in
18 Washington, how would that affect your opinion?

19 A. Well, the impact of that would be to increase it.
20 In the past, it would increase by about \$8,500. And in the
21 future, it would increase by about \$57,394.

22 Q. So -- was that \$57,000?

23 A. Yes.

24 Q. Okay. What did -- what basis are you using for
25 Justin Endicott's postinjury earning capacity?

1 A. I don't know what Mr. Endicott can do postinjury.

2 I've made an assumption that he earned \$18,000
3 per year, which is \$8.65 per hour. I know he worked
4 briefly a month or so following this event but has not
5 worked since.

6 And should \$18,000 be, in the court's view, an
7 improper figure, it is a relatively simple task to adjust
8 it for some other figure that the court deems to be
9 appropriate.

10 For example, if he were to make \$19,000 per year
11 instead of 18, the loss of earning capacity would fall by
12 \$31,314 per \$1,000 of postevent earning capacity change.
13 In other words, if you go from 18 to 19, lost earning
14 capacity falls by 31,314. But if you go from 18 to 17, it
15 goes up by approximately \$31,314.

16 Q. Have you relied on any government statistics or
17 worktables in coming to your conclusions?

18 A. Yes.

19 Q. What are those?

20 A. Well, there are a number of them. You mentioned
21 worktables. There is -- worklife tables of the United
22 States is employed here. According to that table, he would
23 work about 33.98 years, about 34 years on average. He
24 could work more than that or less than that.

25 I think the proper way to view that worklife

1 statistic is to put it into the probability of work. And
2 that is about 70.6 percent of the time.

3 He's not a high school graduate. As a
4 consequence of that, his -- his probability of work
5 diminishes.

6 So in any given year, on average, he would work
7 70 percent of the time, which -- and the importance of that
8 is that we're, in essence, taking 70 percent of the \$33,600
9 as an expected value for what he would likely earn, taking
10 into consideration all the elements in the workforce that
11 cause interruptions to work, such as illness, economic
12 interruptions, disabilities, life probabilities, and so on.
13 That's one statistic.

14 The other statistics that we're using is we
15 commonly recognize that wages grow. Historically, they've
16 gone about 1 percent per year after inflation. And that's
17 what's implied here and applied.

18 We're using the below-market discount rate
19 methodology that's discussed in the Pfeiffer case. And
20 that discount rate is 1.7 percent after inflation or
21 below-market. And that corresponds, to those of us who
22 don't think in those terms, of about 6 percent as a -- as a
23 discount rate.

24 I mentioned fringe benefits. Those are added.

25 The other statistics to be aware of is a

1 reduction for income taxes as a single filer, standard
2 deduction, plus Social Security, plus state income taxes.
3 And all those items add up to a net or expected after-tax
4 wage that he would receive on average.

5 Q. What if Justin gets his GED, how would that
6 affect his -- how would that affect your opinions?

7 A. Well, the -- the impact of a GED would be one to
8 expand his ability to -- to work not only in terms of time
9 but in terms of jobs that he would be a suitable candidate
10 for employment. So that would, in essence, add about two
11 or three years to his worklife. And as a consequence, his
12 earning capacity would be more along the magnitude of about
13 1.6 million as opposed to the 1.4 million here. So it
14 would amount to about \$240,000 in virtue of being able to
15 work a longer period of time. And that worklife
16 probability, worklife expectancy was 38.9 years. So you
17 can see it's quite a -- the impact of that high school
18 degree is important.

19 Q. I know you touched on this a little bit earlier,
20 but I just wanted to be sure.

21 Have you taken the effects of inflation and
22 discounting the present value and things of that nature in
23 account?

24 A. Well, yes and no.

25 Under the Pfeiffer decision, discussions of

1 inflation are verboten. So there's not any explicit
2 treatment of or anticipation of inflation in this
3 calculation. In fact, we're trying to remove it.

4 Q. Is that why you didn't discuss it in your
5 testimony?

6 A. Yes. Again, this is done pursuant to the -- the
7 Pfeiffer decision and all the chillins that follow. So
8 that's -- that's, in essence, what's being done here.

9 Q. All right. And your opinions -- and your
10 economic opinions are tailored to the dictates of Jones Act
11 economic damages law?

12 A. Yes.

13 Q. Okay. Have you taken into -- how did you
14 determine what Justin's future economic loss as far as
15 household services is?

16 A. Well, there's -- the presumption that there are
17 certain chores around the house, generally, the more
18 physically demanding chores that a person does that he
19 cannot do. I don't know. I haven't talked with him what
20 it is he can and cannot do.

21 But what I have done, should that be the case, is
22 applied a study out of Cornell University that attempts to
23 measure that.

24 The assumption in this calculation is that he has
25 lost 20 percent of his ability to do household chores.

1 That may not be the case.

2 But if we apply the study to his circumstance and
3 assume that the replacement cost of the weighted average
4 chores that he cannot do is 8.50 an hour, then we arrive at
5 some figure. That figure for him in the past is \$2,351 and
6 in the future \$49,417, for a total of 51,768.

7 But it would be helpful, perhaps, to bear in mind
8 that should 20 percent not be the right figure, then we
9 have merely but to divide those figures that I've given you
10 by 20 percent. That will give you the value of 1 percent.
11 And then multiply it by whatever percentage is appropriate
12 under the circumstance. In essence, saying that if it's 10
13 percent instead of 20, then these figures are cut in half.
14 And if it's 40 percent instead of 20, these figures are
15 doubled and so on.

16 So that -- that's what's been done. And it may
17 be applicable. It may not. I just don't know.

18 Q. And the assumption of the value of his household
19 services is based on a Cornell study. Is that what you
20 said?

21 A. Yes, on -- this particular study is a Cornell
22 study. There are others out of the -- out of the Labor
23 Department that attempt to measure this. Basically, men do
24 about two hours or more per day. Women do vastly more than
25 that. But this is two hours per day in terms of

1 household-type chores.

2 Q. Is the Cornell study a widely-recognized and
3 accepted study in your field?

4 A. Yes.

5 It was sponsored by the ag -- Department of
6 Agriculture. It's an old study. But I don't think the
7 bottom-line results have really changed much.

8 We hear a lot about the studies. Recently, in
9 the news, you may have heard one where the value of a wife
10 around the house, all things considered, was over a hundred
11 thousand a year for -- if you had to replace all that falls
12 under a wife's responsibility. And men, I think everyone
13 would agree, is quite a bit less than that.

14 Q. Yeah.

15 A. Now, one thing I didn't make clear earlier is
16 that in -- I gave you the numbers for the pre-event earning
17 capacity.

18 Now, to take into account his postevent earning
19 capacity, assuming that he did, in fact, earn, say, \$18,000
20 per year or 8.65 per hour, you would then subtract \$563,081
21 from the 1,323,602 that was his pre-event earning capacity.
22 So his net loss of future earning capacity is 760,521, for
23 a combined and total net of \$855,212. And if you were to
24 add \$51,668 to that for household services, the grand total
25 service would be \$906,980.

1 Q. All right. My math's not really good,
2 Dr. McCoin.

3 Just to be clear, including everything you've
4 talked about today, is it your opinion that Justin,
5 assuming he can go back to work at an \$18,000-a-year job
6 after this trial, is it your opinion that he has had an
7 economic loss of \$906,9 -- \$906,000 -- \$906,980 -- I don't
8 know how to say it, Dr. McCoin.

9 Assuming -- let me start over.

10 Assuming Justin can go back to work after this
11 trial at an \$18,000-a-year job and assuming all the types
12 of losses you've talked about, what is his lost economic
13 damages as a result of this injury?

14 A. \$906,980.

15 And, again, that's a loss of earning capacity,
16 which is 855,212, plus an assumption for his household
17 service loss at 20 percent. And those would add up to
18 906,980 -- 906,980.

19 Q. So the \$906,000 figure includes the household
20 services, right?

21 A. That's correct.

22 Q. And if you don't include the household services,
23 your opinion's that he's lost approximately \$855,000 --

24 A. That's correct.

25 Q. -- from work-related income?

1 A. Right. That would be his earning capacity under
2 a Pfeiffer calculation.

3 Q. You -- is that your file I see there, Dr. McCain,
4 on the table --

5 A. Yes.

6 Q. -- or on the ground right there?

7 A. Yes.

8 Q. Do you have the materials that you relied on in
9 forming your opinion in that?

10 A. Yes.

11 Q. Do you mind if we copy that and attach that as,
12 this time for real, deposition Exhibit No. 1?

13 MS. HEIKKILA: I'm going to object to that.
14 I haven't seen it. And I don't know what the relevance
15 would be.

16 MR. ITKIN: Okay. That's fine. I mean, we
17 can talk about it at trial. I think it's just some
18 materials that Dr. McCain relied on and talked about as far
19 as worklife tables.

20 MS. HEIKKILA: And I've not -- I don't have
21 the benefit of seeing what you're talking about. So I'm
22 going to make an objection.

23 MR. ITKIN: Okay.

24 THE WITNESS: Just for the record, it's
25 material that was in the first deposition.

1 MR. ITKIN: And I understand your objection
2 still stands. And we can, you know, talk about that later.
3 But we're going to attach it as an exhibit for now and --

4 MS. HEIKKILA: I'm sorry. We're going to
5 what?

6 MR. ITKIN: Attach it as an exhibit for now.
7 And we'll argue about its admissibility at trial later when
8 you've had an opportunity to review them and decide -- and
9 decide what you do want to object to and what you don't
10 want to object to.

11 I mean, it's my understanding that you just
12 don't know what's in there and that's why you're objecting,
13 right?

14 MS. HEIKKILA: Well, and the relevance of
15 any of these documents.

16 MR. ITKIN: Right. And -- okay. That's
17 fine. I mean, I'm just making sure we have your objection
18 clearly stated and -- I mean, that's fine. Like I said, we
19 can bring it up with Judge McBroom later.

20 That's all the questions I have right now,
21 Dr. McCoin. Thank you.

22 Kara, if you need to take a minute, go
23 ahead. If not, just go ahead with your questions.

24 MS. HEIKKILA: Dr. McCoin, can you hear me?

25 THE WITNESS: I can.

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EXAMINATION

BY MS. HEIKKILA:

Q. I first wanted to confirm some of these numbers I'm hearing today because it appears to me your numbers have changed in terms of your conclusions in this case; is that correct?

A. Yes, ma'am.

Q. And have you issued another report?

A. I have not.

Q. So I guess I need to understand the basis of the change in all of your conclusions outside of the report that was issued in this case and the testimony you gave at a deposition in May of this year.

A. Sure.

It came to my attention today that Mr. Endicott is not a high school graduate. So that necessitated using a lesser work probability or worklife expect -- it had the affect of reducing the figures.

Q. That actually came to your attention when I pointed that out to you in your deposition in May, didn't it?

A. It came to my attention today. You may have pointed it out, and I had forgotten about it.

Q. So in the original report, you've made an assumption based on information that you had obtained that

1 Mr. Endicott was a high school graduate?

2 A. Yes. If you recall from the deposition, there's
3 an intake sheet. And on that --

4 Q. I'm just asking for a yes or no.

5 A. What was your question?

6 Q. You made an assumption in your original report
7 that he was a high school graduate?

8 A. No. I was told he was a high school graduate.

9 Q. And that was based on an intake form that was
10 provided to you by Mr. Endicott's attorneys?

11 A. Yes.

12 Q. Is that correct?

13 A. Yes.

14 Q. Okay. I'm sorry. I couldn't hear your answer.

15 So what I need to do at this point is understand
16 whether that is the only thing that you have changed in
17 terms of your assumptions in forming your ultimate opinions
18 here.

19 A. No, ma'am.

20 Q. I'm sorry?

21 A. No, ma'am.

22 Q. So have you changed any other assumptions?

23 A. Yes, ma'am.

24 Q. What other assumptions?

25 A. The date of the trial.

1 Q. Okay. Any other assumptions that you have
2 changed today?

3 A. Yes, ma'am.

4 Q. What is that?

5 A. I increased his work expense.

6 Q. And what was the reason for increasing his work
7 expense?

8 A. The price of gasoline has gone up.

9 Q. Any other changes?

10 A. No, ma'am.

11 MS. HEIKKILA: Okay. I'm going to object to
12 all of this information based on the fact that this was not
13 timely provided in a report under Rule CR 26. It's outside
14 of the scope of the testimony you have offered in this
15 case. I'm simply stating that objection for the record
16 given this very delinquent disclosure of this information
17 and your failure to provide that in any kind of a written
18 report.

19 Q. (BY MS. HEIKKILA) For the record, can you clarify
20 what the past lost earning capacity figure is now?

21 A. 94,691.

22 Q. And the future lost earning capacity record?

23 A. 760,521.

24 Q. I'm sorry? 7?

25 A. 760,521.

1 Q. And the total lost earning capacity?

2 A. 855,212.

3 Q. Your lost household service figure for the past?

4 A. 2,351.

5 Q. Your future lost household service figure?

6 A. 49,417.

7 Q. Total economic losses for the past?

8 A. 97,042.

9 Q. And your total future economic losses?

10 A. 809,938.

11 Q. And then total losses, total economic losses?

12 A. 906,980.

13 Q. And all those figures are correct as you have
14 read them into the record today; is that -- is that
15 accurate?

16 A. Yes, ma'am.

17 Q. And those figures are, other than the changes and
18 assumptions you've made today, accurately reflected in the
19 report that you issued previously in this case?

20 A. I don't understand your question.

21 Q. Well, you previously issued a report and provided
22 some calculations in support of the figures that you
23 ultimately concluded; is that correct?

24 A. I issued a prior report.

25 Q. All right. And other than the assumptions you've

1 made and the changes to assumptions you've made today that
2 changed those figures, these figures are otherwise accurate
3 in your estimation; is that correct?

4 A. If I understand your question -- let me
5 paraphrase it. Are these figures that I've just given you
6 accurate today? Is that your question?

7 Q. Well, they're accurate based on -- on the report
8 and the calculations that you've otherwise produced in this
9 case, other than the assumptions that you changed today?

10 A. We're making this very complicated.

11 The changes that were made, I've discussed. And
12 these are the new changes under those -- these are the new
13 results under those changes. The method --

14 Q. And what I'm getting to --

15 A. Let me finish.

16 Q. -- Dr. McCain, is you didn't -- you didn't
17 otherwise find any errors in your previous calculations; is
18 that correct?

19 A. That's correct.

20 Q. Okay.

21 A. And do --

22 Q. In coming to this conclusion of total economic
23 losses in this case, you reviewed this intake form that was
24 provided to you by the Arnold & Itkin firm; is that
25 correct?

1 A. Yes.

2 Bear with me a second. I talk slowly, hopefully.
3 But if you'll let me finish my answer, I think we'll get
4 through this a little sooner.

5 Yes, that's correct.

6 Q. And that form provided you with some general
7 demographic information on Mr. Endicott, such as his date
8 of birth and date of injury; is that correct?

9 A. Yes.

10 Q. It also told you he was a white male?

11 A. Correct.

12 Q. That form told you, as we previously discussed,
13 that he had a 12th grade education?

14 A. That's correct.

15 Q. That he was not married and had no children?

16 A. Correct.

17 Q. It also told you he made \$5,532.36 in 2003?

18 A. That's correct.

19 Q. You also reviewed, in forming your opinions, some
20 interrogatory answers, Mr. Endicott's supplemental
21 interrogatory answers that you say were dated January 11,
22 2007; is that correct?

23 A. I can't recall the date.

24 Q. Does that sound approximately correct?

25 A. Sure.

1 Q. You also reviewed some Social Security earnings
2 records from Mr. Endicott from 2002 to 2004?

3 A. There are some Social Security earnings data,
4 yes.

5 Q. And there was also a W-2 from Icicle that showed
6 Mr. Endicott made the \$5,532.36 in 2003 --

7 A. May well have --

8 Q. -- is that correct?

9 A. I'm sorry. May well have been.

10 Q. You reviewed some general information on Icicle
11 Seafoods that you printed off the Internet; is that
12 correct?

13 A. Correct.

14 Q. That information provided you some information on
15 Icicle's floating processors and the seasons that a person
16 might work; is that correct?

17 A. Among other things, yes.

18 Q. You would agree, wouldn't you, that fishing
19 seasons in western Alaska vary from year to year?

20 A. I would.

21 Q. You also had a discussion with the attorneys at
22 Arnold & Itkin about seasons and that there were seasons
23 that overlapped and went back-to-back in Alaska; is that
24 correct?

25 A. Yes.

1 Q. So you're relying on the general information that
2 you printed off the Internet for Icicle and on the
3 discussion with Arnold & Itkin to form an assumption about
4 the seasons that Mr. Endicott would have worked; is that
5 correct?

6 A. What discussion are you alluding to?

7 Q. Do you have the deposition that I took of you on
8 May 21, 2007? Do you have that available to you?

9 A. I'm looking at it.

10 Q. I would direct you to page 14. And starting at
11 line 8, I'll read the question. And you can tell me if I'm
12 reading it accurately.

13 And your answer -- "Question: All right. Did
14 you get any information verbally from Arnold & Itkin
15 regarding the case?

16 "Answer: Yes."

17 You went on in that paragraph to describe some
18 things about that conversation.

19 At line 17: "Anything else in that conversation
20 that you learned about this case?

21 "Answer: No. The -- the -- there is -- there
22 was a discussion about the season. There were seasons that
23 overlap and back-to-back and various of those things and
24 things of that nature."

25 Did I read that correctly?

1 A. Yes, ma'am.

2 Q. That's all of the case-specific factual data that
3 you used in forming your assumptions and ultimately your
4 opinions in this matter; is that correct?

5 A. I don't know that that's the case.

6 Q. Well, if you turn, then, to page 16 of your prior
7 deposition. And if you'd like, you can take the time to
8 begin at page 12 where I covered these various items with
9 you.

10 But at 16, line 15 -- in fact, I asked it
11 twice -- "Question: And, again, other than individuals and
12 documents that I've asked you about, have you reviewed any
13 other materials in order to prepare your opinions?

14 "Answer: No, ma'am."

15 Did I read that accurately?

16 A. You did.

17 Q. You didn't personally interview Mr. Endicott, did
18 you?

19 A. No, ma'am.

20 Q. You didn't review any of his educational records?

21 A. I did not.

22 Q. You did not review any employment records from
23 Mr. Endicott?

24 A. I don't recall that I did, other than that which
25 would be contained on his Social Security records.

1 Q. You did not review his Icicle personnel file?

2 A. I did not have it. Correct.

3 Q. You did not review his Icicle payroll records?

4 A. Correct.

5 Q. You did not review employment records from other
6 employers?

7 A. That's correct.

8 Q. You did not know that Mr. Endicott was employed
9 by a security company in Nevada in 2004, the year after his
10 injury, did you?

11 A. Correct.

12 Q. So earlier in this deposition when you said you
13 know he worked briefly since this injury and has not worked
14 since then, that's something that you've been updated with
15 in the last several months after you formed your opinion in
16 this case; is that correct?

17 A. That's correct.

18 Q. You did not have information from Icicle of the
19 actual seasons that would have been available to
20 Mr. Endicott in 2003 had he continued to work after his
21 May 1 date of injury?

22 A. Did not.

23 Q. Now, you requested information from
24 Mr. Endicott's attorneys regarding work schedules and
25 seasons, but this was not made available to you; is that

1 correct?

2 A. I don't recall. I may have asked them that. I
3 just don't recall. But I don't have any particular data as
4 to what the seasons -- the actual seasons have been. In
5 other words, when --

6 Q. Well, if you turn to page 24 of your
7 deposition --

8 A. Would you let me --

9 Q. -- prior deposition.

10 MR. ITKIN: Are you going to let him finish
11 his answer, Kara?

12 MS. HEIKKILA: Sure.

13 THE WITNESS: Kara, slow down a little bit
14 and let me get these words out. I'm -- you're -- you're
15 racing to a conclusion here without hearing what I have to
16 say.

17 I'm sorry, Kara. What is it you want me to
18 do?

19 Q. (BY MS. HEIKKILA) I want you to turn to page 24
20 of your deposition. And beginning at line 6 -- actually
21 beginning at line 2, my question was: "...what
22 information, other than the three months that he actually
23 did work for Icicle, would be helpful to you in terms of
24 forming assumptions about how much he would be earning each
25 year?"

1 Your answer: "Well, what would be really handy
2 would be a work schedule for the fellows, what they
3 typically work, what the schedule might be.

4 "Question: Did you request that information?

5 "Answer: Yes, it was discussed. And,
6 apparently, they didn't have a schedule for him.

7 "Question: I'm sorry. Apparently they --

8 "Answer: Do not have a schedule for him.

9 "Question: ...when you refer to 'they' do not
10 have a schedule, who are you referring to?

11 "Answer: His attorneys."

12 Did I read that correctly?

13 A. Yes, ma'am.

14 Q. You did not review any medical records on
15 Mr. Endicott; is that correct?

16 A. Correct.

17 Q. You did not talk to any of Mr. Endicott's medical
18 providers?

19 A. That's correct.

20 Q. So you didn't talk to the doctors in Texas that
21 Mr. Endicott saw on referral from his Texas attorneys?

22 A. That's correct.

23 Q. You didn't review any medical records that
24 specifically reference Mr. Endicott's ability to return to
25 work?

1 A. Correct.

2 Q. You've assumed in your calculations that
3 Mr. Endicott will not be able to return to work until
4 January 1, 2008, at which time he'll be making \$18,000 a
5 year; is that correct?

6 A. That's the assumption, yes.

7 Q. And that assumption is based on the fact that
8 these are relatively round figures and easy time frames to
9 grasp; is that correct?

10 A. In part.

11 The other -- the other reasons for that is I'm
12 not a physician. And if I talked to a physician, I could
13 probably assure you I wouldn't know what he was telling me.
14 Nor am I a vocational person.

15 My task, as I appreciate it, is trying to give
16 the judge in this matter, this court material it can use in
17 formulating its own decision.

18 Q. Other than these are round figures and they're
19 easy to grasp, you have no basis, in other words, you have
20 no other opinion or document that you're relying on to
21 establish those figures and dates; is that correct?

22 MR. ITKIN: Objection; form.

23 A. Yes.

24 My -- I -- I would say to you no one knows what
25 he's going to do. But this court is being asked to make a

1 decision on that basis. And I'm trying to give the court
2 the tools the court needs to make that decision. I'm
3 not --

4 Q. (BY MS. HEIKKILA) Other than these are round
5 figures and easy to grasp, Dr. McCain, you have no basis
6 and no other opinion or document that you're relying on to
7 establish those figures and dates; is that correct?

8 A. I've already -- I've answered that just before
9 this question.

10 Yes.

11 Q. I please would ask for a yes or no answer.

12 A. That's right.

13 Q. You did not use a vocational counselor or review
14 or rely on opinions of any vocational counselor in reaching
15 these opinions, did you?

16 A. Correct.

17 Q. You're not sure why a vocational counselor was
18 not used by plaintiff's counsel in this case, are you?

19 A. I do not know.

20 Q. In your experience, vocational counselors are not
21 used in cases where a person has died or it's obvious
22 they're not going to return to work; is that correct?

23 A. Yes.

24 Q. A good percentage of your cases call for a
25 vocational counselor; is that correct?

1 A. Correct.

2 Q. In the past two years you've produced
3 approximately two dozen reports for the Arnold & Itkin law
4 firm; is that correct?

5 A. Something of that magnitude, yes.

6 Q. You leave the review of medical records to the
7 vocational counselors because you can't read medical
8 documents; is that correct?

9 A. Yes, ma'am.

10 Q. But an opinion as to whether Mr. Endicott could
11 return to work in this case with some restrictions would
12 have been helpful to you; is that correct?

13 A. Sure.

14 Q. And in your earlier deposition testimony you said
15 that what Mr. Endicott could do postinjury would be an
16 appropriate inclusion in your report; is that correct?

17 A. Yes.

18 Q. I want you to assume as correct that a
19 Dr. McMahon in Oregon released Mr. Endicott to light duty
20 in October of 2003.

21 Might this modify your assumption as to
22 Mr. Endicott's return to work duty or his return to work
23 date?

24 A. It could.

25 Q. I want you to assume as correct that Dr. Trumble,

1 who is Mr. Endicott's Seattle surgeon for his second
2 surgery, has testified that Mr. Endicott could return to
3 work by September 2005.

4 Does your assumption as to his date that he could
5 return to work need to be modified based on that
6 information?

7 A. Well, I think we have to draw a distinction
8 between being released and returning to work and, in fact,
9 working. There is a process that one does not walk out of
10 the doctor's office and then walk into a job. There are
11 other factors involved.

12 But, again, I don't have any knowledge or insight
13 or skill as to when he should have or will likely return to
14 the labor market. I just don't know. But I'm willing to
15 make whatever assumptions you wish to make to address
16 whatever questions you have in that -- in that area.

17 Q. And if you do then assume as correct that
18 Dr. Trumble released Mr. Endicott after his second surgery
19 in September 2005, that would -- that would change your
20 fundamental assumptions as to his return-to-work date --

21 A. Again --

22 Q. Is that correct?

23 A. I'm sorry.

24 Again, I don't have any opinions as to when he
25 could go back to work.

1 If your question is if we started him back to
2 work economically at some other date, would that change the
3 opinions and, yes, it would.

4 Q. If you assume that Dr. Trumble has testified that
5 Mr. Endicott could return to his job of injury, would your
6 assumptions as to his future lost earning capacity need to
7 be modified?

8 A. It could if he could do the job, if he could
9 secure the job.

10 Q. You've assumed a 1 percent per year growth rate
11 for compensation; is that correct?

12 A. Yes, ma'am.

13 Q. You've also assumed a discount rate of
14 1.7 percent?

15 A. That's correct.

16 Q. That was based on a rate of return for U.S.
17 T-bills?

18 A. That's correct.

19 Q. So specifically a three-month T-bill?

20 A. That's correct.

21 Q. You agree that you're required to consider the
22 best and safest investments?

23 A. That's the -- that's the instruction in the case.

24 Q. Which would include long- and short-term
25 securities?

1 A. They -- for purposes of the Pfeiffer decision,
2 it's just defined as treasury securities long or short.

3 Q. Okay. I'm looking at -- at -- and I'm not asking
4 or offering to admit this. But I'm looking back at the
5 Economic Report of the President, Exhibit 6 to your
6 deposition, Table B-73.

7 A. Okay.

8 Q. And I sent that to the court reporter, so it's
9 available to you today if you'd like to take a look at it.

10 A. I see it.

11 Q. I'm looking at the year 2001, comparing the
12 three-month yield of 3.45 percent and the ten-year yield of
13 5.02 percent.

14 A. That's correct.

15 Q. Am I reading that correctly?

16 A. Yes, ma'am.

17 Q. If there's no difference in risk, do you agree
18 that it makes sense to look at a higher yield for an
19 investment?

20 A. But that's the point. There's a vast difference
21 in risk.

22 Q. If there's no difference in risk, do you agree it
23 makes sense to look at a higher yield for an investment?

24 A. If there were no difference in risk, they would
25 all have the same produce. It's the law of one price.

1 Q. If there is no difference in risk, do you agree
2 it makes sense to look at a higher yield for investment?

3 A. Your question is a non sequitur.

4 Q. I'm simply asking you to answer my question,
5 Dr. McCoin.

6 A. I can't answer the question because it doesn't
7 make any sense. You don't understand.

8 Q. Well, I'll ask it one more time.

9 On a hypothetical level, if there's no difference
10 in risk, do you agree it makes sense to look at a higher
11 yield for an investment?

12 MR. ITKIN: Objection; asked and answered.

13 A. There is -- there is three Nobel prizes having
14 been awarded on this subject in economics. You cannot have
15 a U.S. Government security issued by the same government
16 offering different levels of return if they did not have a
17 different level of risk.

18 The risk here is purchasing-power risk. And you
19 cannot do that. They're not the same thing.

20 Q. (BY MS. HEIKKILA) Ignoring for a moment Table
21 B-73, on a general level, if there's no difference in risk,
22 do you agree it makes sense to look at a higher yield for
23 an investment?

24 A. You cannot -- it does not work that way. I can't
25 answer this question any other way.

1 Q. Okay. In your opinion, you chose a three --
2 three-month T-bill investment for this 23-year-old
3 individual; is that correct?

4 A. That's correct.

5 Q. And you did not consider a CD as an investment
6 option; is that correct?

7 A. It's precluded under Pfeiffer.

8 Q. You did not consider a CD as an investment
9 option; is that correct?

10 A. That's correct.

11 Q. Now, you actually applied a discount rate of 1.7;
12 is that correct?

13 A. Yes, ma'am.

14 Q. And in your original report, that resulted in a
15 future preinjury earning capacity figure of 1,542,735; is
16 that correct?

17 A. I don't know. I'd have to look and see.
18 1,543,735.

19 Q. And you double-checked your math, I presume?

20 A. Yes, ma'am.

21 Q. You also assumed a 17.3 benefit addition; is that
22 correct?

23 A. That's correct.

24 Q. You also actually applied 17.3 percent in this
25 case?

1 A. That's correct.

2 Q. And you also double-checked your math?

3 A. Yes, ma'am.

4 Q. And that accounts for about 410,000 of the
5 original \$1.5 million figure; is that correct?

6 A. I don't know.

7 Q. I'm looking at your prior deposition at page 38.

8 A. Okay.

9 Q. And down -- starting about line 23, you were
10 walking us through these various figures.

11 And it says, "And then we're going to discount,
12 but in the same process, we're going to add in fringe
13 benefits. It's about 410,000."

14 Does that help refresh your recollection to what
15 that figure was?

16 A. What's your question?

17 Q. My question was: Fringe benefits accounted for
18 about 410,000 of that preinjury earning capacity figure; is
19 that correct?

20 A. From my deposition, yes.

21 Q. But those numbers have been modified today, is
22 that what you're saying?

23 A. Well, yes, for the new trial date. Yes.

24 Q. And you made an assumption in your original
25 report that Mr. Endicott elected benefits from Icicle, but

1 you had nothing to support that; is that correct?

2 A. Say that again, please.

3 Q. You made an assumption that Mr. Endicott elected
4 benefits when he worked for Icicle, but you had nothing to
5 support that; is that correct?

6 A. Well, it's -- he had benefits available to him.
7 I don't recall if he elected them or not.

8 Q. I'm looking at page 27 of your deposition,
9 beginning at line 18.

10 A. Okay.

11 Q. "My question for you is: What information do you
12 have that Mr. Endicott elected benefits while working for
13 Icicle?"

14 Your answer --

15 A. "I don't know that he elected any at all."

16 Q. I would appreciate if you would let me finish
17 that.

18 "Question: So you're making the assumption
19 entirely?"

20 "Answer: Yeah."

21 Is that correct?

22 A. I'm looking at line 21. It says, "I don't
23 know" -- and that's what I read.

24 I don't know what he elected, any at all.

25 Q. And you had nothing in your file to support that

1 assumption; is that correct?

2 A. Which assumption?

3 Q. That he elected benefits while working for
4 Icicle.

5 A. It doesn't matter. From my standpoint, it
6 doesn't matter. These jobs have benefits. His job had
7 benefits. Whether he had elected to do so at that time
8 is -- is not germane to his whole life. He may -- he may
9 change his options as his needs change.

10 MS. HEIKKILA: I'm going to object to that
11 answer and move to strike as being unresponsive.

12 I'd like the court reporter to hand the
13 deponent what's been premarked as a trial Exhibit No. 11.
14 And for purposes of this deposition, I'm not sure if it's 2
15 or 3. Do you have that?

16 THE REPORTER: Hold just a moment, please.

17 MR. ITKIN: I think we're fishing for it
18 right now.

19 THE REPORTER: Is it the Icicle Seafoods
20 Health Benefit Election Form?

21 MS. HEIKKILA: That's correct.

22 Q. (BY MS. HEIKKILA) Dr. McCain, we're handing you
23 what's been marked for this deposition -- is this 2 or 3?

24 A. 3.

25 (Exhibit No. 3 to be marked)

1 Q. (BY MS. HEIKKILA) And I'll represent to you that
2 this is a document from Mr. Endicott's Icicle personnel
3 file in which he declined health insurance from Icicle in
4 2003.

5 If you assume that this is accurate, do you agree
6 that your assumption was wrong in terms of his election of
7 benefits with Icicle?

8 A. No, ma'am.

9 Q. You've also assumed that Mr. Endicott made wages
10 with Icicle of 33,600 a year; is that correct?

11 A. No, ma'am.

12 Q. It's not correct?

13 A. It's not.

14 Q. You've used an assumption of 33,600 a year for
15 his wages; is that correct?

16 A. That's correct.

17 Q. And that was based on your belief that
18 Mr. Endicott would be working 240 days each year, about 16
19 hours a day?

20 A. That's correct.

21 Q. And you know from the intake sheet that you got
22 that his start date with Icicle was January 11, 2003; is
23 that correct?

24 A. That's his date of hire.

25 Q. Yes.

1 And his date of injury was May 1, 2003; is that
2 correct?

3 A. Correct.

4 Q. In that four-month period, you know that he made
5 \$5,532.36; is that correct?

6 A. That's what's assumed.

7 Q. If you were to assume these wages for the
8 remainder of the year, that would be less than half of
9 \$33,600; is that correct?

10 A. That may well be the case. But it doesn't --
11 just because he got hired on that date doesn't mean the
12 clock started, he started gaining pay on that day.

13 Q. You're not sure if you're overstating the annual
14 rate of pay at 33,600, are you?

15 A. No, I'm not overstating it. It's clearly defined
16 \$7.15 an hour plus overtime. That's --

17 Q. You're not sure if you're overstating the annual
18 rate of pay at 33,600, are you?

19 A. Please let me finish my response.

20 Q. I thought you had.

21 A. Well, if you would pause, we could be sure.

22 The assumption is he may earn \$7.15. He got paid
23 straight time for the first eight hours and double time for
24 the second eight hours.

25 Now, the assumption goes on that he earned --

1 worked 240 days a year. Well, when you do that math, it's
2 \$33,600.

3 Q. Dr. McCoin, I'll direct you to page 24 of your
4 deposition, beginning at line 21.

5 A. What page?

6 Q. 24.

7 A. Okay.

8 Q. "Question: Do you think you're overstating his
9 rate of pate at \$33,600 per year?

10 "Answer: Don't know."

11 Did I read that accurately?

12 A. Yes.

13 Q. Now, you increased the wage figure each year
14 between 4 and 5 percent through 2007 based on increases in
15 the general labor market wage figures; is that correct?

16 A. Correct.

17 Q. But starting in 2000, your assumption is that
18 wages grow at only 1 percent; is that correct?

19 A. That's the below-market growth rate.

20 Q. Your preinjury figures also included a
21 calculation of \$12 a day for meals; is that correct?

22 A. Yes.

23 Q. And your source for that was that you eat at Jack
24 in the Boxes and McDonald's; is that correct?

25 A. No, ma'am.

1 Q. If I direct you to page 28 of your deposition,
2 beginning at line 6 --

3 A. All right.

4 Q. "What is the basis for the meal calculation of
5 \$12 a day?

6 "Answer: Well, one has to eat. And I assume
7 there's not a Jack in the Box, you know, out there
8 available to them. So I would assume that that would be
9 provided for them, food would be provided.

10 "Question: I understand that. What's -- I'm
11 trying to understand how you came to the figure of \$12 per
12 day.

13 "Answer: Oh, it's just -- it would be the
14 replacement cost of Jack in the Box. In other words, the
15 value you would attach to these meals would be whatever the
16 replacement cost of the meals would -- he would be
17 receiving.

18 "Question: I understand that. I'm wondering how
19 you came to the figure of \$12 per day for that amount.

20 "Answer: Well, I regularly eat at Jack in the
21 Box and McDonald's and places like that and, on that basis,
22 use that as an estimate of what the daily cost would be."

23 Did I read that correctly?

24 A. Yes.

25 Q. You're not aware of how much Mr. Endicott

1 received from the workers' compensation system for wage
2 benefits between 2003 and 2007, are you?

3 A. No.

4 Q. Well, now, the figures that you calculated for
5 lost household services were based on the study you earlier
6 described called the dollar value of household work; is
7 that correct?

8 A. Correct.

9 Q. So when I read the quote from your earlier
10 deposition exactly, what you described, beginning at page
11 34, was: This was a "study that gives us a longitudinal
12 profile of what men allegedly do around the house..." Is
13 that correct?

14 A. Yes.

15 Q. In fact, you don't know what Mr. Endicott can or
16 can't do around the house; is that correct?

17 A. That's correct.

18 Q. You're not aware of any medical opinion that
19 Mr. Endicott needed help to perform household chores?

20 A. That's correct.

21 Q. Is that correct?

22 A. Correct.

23 Q. You don't know whether he paid anyone to perform
24 household chores since his date of injury?

25 A. Correct.

1 Q. You don't even know if he lives with anyone?

2 A. That's correct.

3 Q. Under the assumptions you talked about in your
4 earlier deposition -- and I want to just clarify your
5 earlier testimony today. You described in your
6 methodology, beginning at page 37 of your earlier
7 deposition, of an expectation that he would be working
8 about 80 percent of the time?

9 A. Correct.

10 Q. Earlier in this deposition you described that as
11 an assumption that he would be working about 70 percent of
12 the time; is that correct?

13 A. That's correct.

14 Q. So you've changed that assumption; is that
15 correct?

16 A. And you recall why, don't you?

17 Q. I'm not -- I just want to make sure that I
18 understand that that assumption has been changed. Is that
19 correct?

20 A. Yes. It's in virtue of the fact that he
21 apparently does not have a high school degree.

22 Q. One of the other assumptions that you used in
23 your methodology was that Mr. Endicott would have an
24 average life expectancy and average worklife expectancy; is
25 that correct?

1 A. Yes.

2 Q. And when you were asked in your earlier
3 deposition what you consider an atypical scenario to be,
4 you described if someone "became America's Idol and became
5 a singing sensation"; is that correct?

6 A. I don't recall.

7 Do you want to put it in context?

8 Q. I'm -- I'll direct you to page 35.

9 A. Okay.

10 Q. And beginning at line 2 is where I asked whether
11 there was any other assumptions. Line 5 was where you
12 answered that you assumed he had the average life
13 expectancy and average worklife expectation or -- sorry --
14 expectancy.

15 Beginning at line 10, my question was: "What
16 would a not-so-atypical scenario be for you?"

17 "Answer: Well, he walked off there and walked
18 onto stage and became America's Idol and became a singing
19 sensation or in some way highly different from what we
20 would expect." Is that correct?

21 A. Yes.

22 Q. You don't know Mr. Endicott's employment history;
23 is that correct?

24 A. I don't have a complete history of his -- where
25 he's worked, no.

1 Q. And you don't know his medical history?

2 A. Correct.

3 Q. So hypothetically speaking, you'd be unaware of a
4 diagnosis of a mental health disorder that might make some
5 difference as to his average worklife expectancy; is that
6 correct?

7 A. That's correct.

8 MS. HEIKKILA: I don't have any further
9 questions for you at this time, Dr. McCoin.

10 THE WITNESS: Thank you.

11 MR. ITKIN: Could we take a two-minute
12 break? I need to go to the restroom.

13 THE VIDEOGRAPHER: Off the record 3:02 p.m.

14 (Recess from 3:02 to 3:07)

15 THE VIDEOGRAPHER: On the record 3:07 p.m.,
16 beginning Tape 2.

17 FURTHER EXAMINATION

18 BY MR. ITKIN:

19 Q. Dr. McCoin, has your methodology changed at all
20 from -- between today and the time you gave your first
21 deposition?

22 A. No.

23 Q. Has only the inputs changed?

24 A. Yes. The -- his worklife expectancy changed
25 because of the recognition that he is not currently a high

1 school graduate.

2 Q. Are you a medical doctor?

3 A. No.

4 Q. Are you a vocational rehabilitation specialist?

5 A. No.

6 Q. Is your task simply to look at Justin's pre --
7 preinjury earning capacity and then extrapolate what it
8 might be in the future?

9 MS. HEIKKILA: I'm going to object to your
10 leading questions.

11 Q. (BY MR. ITKIN) Well, what do you view your task
12 as a witness in this case is, Dr. McCain?

13 A. Well, my -- my task, as I appreciate it, is to
14 assist this court in making its own decisions based upon
15 all the facts that this court will see, weight -- according
16 to the weight that only a judge can attach to the evidence.

17 My role, as I appreciate it, is to try to assist
18 the court in their determination, equip the court with
19 materials it needs to make whatever adjustments is required
20 when all the facts are in. It's not my judge to -- my
21 purpose to be judgmental about any of this.

22 Q. When you say it's not your purpose to be
23 judgmental about any of this, does the "this" refer to
24 Justin's physical capabilities or what does it refer to?

25 A. Well, it refers to the -- the evidence has to be

1 brought into context. And I think it -- it's most useful
2 if we take it in a form that allows modification in the
3 judge's eyes as opposed to my eyes. I don't know that some
4 of these sequences of events follow to the conclusion that
5 one might -- might be readily indicated. It's more complex
6 than that.

7 Q. Dr. McCoy, I want you to assume with me for a
8 minute that there's going to be conflicting opinion about
9 what Justin's physical abilities are and his abilities to
10 work from various medical providers in this case.

11 Using that assumption, is it possible that the
12 judge is going to say he can do certain things and other --
13 well, let me rephrase the question.

14 I want you to assume with me for a minute,
15 Dr. McCoy, that there's going to be conflicting medical
16 opinion in this case about Justin's physical capabilities
17 to work. Do you understand that?

18 A. Yes.

19 Q. Is that why your methodology is important, so the
20 fact-finder can take whatever facts he believes are
21 credible and then apply them to your methodology?

22 MS. HEIKKILA: Object to your leading
23 question.

24 A. Well, the methodology doesn't change. The
25 methodology is given to us by the Supreme Court of the

1 United States.

2 What is available to anyone in this matter is, if
3 they pay attention and listen, they can adjust these
4 calculations to conform to whatever circumstance they --
5 that observer believes is appropriate. And they can order
6 their -- argue their case accordingly.

7 So this is -- I don't have a dog in the fight.
8 It's just really something to equip anyone who has an
9 interest in it to -- to get at the questions they have with
10 the means that's hopefully been illuminated.

11 Q. (BY MR. ITKIN) Are your opinions based on
12 assumptions that Mr. Endicott had benefits available to him
13 at the time of his injury?

14 A. No.

15 Obviously, he had benefits available to him. He
16 doesn't -- he's not required to take them.

17 Now, it would be a different circumstance if we
18 could say with high confidence that he would never take
19 them. This is his first voyage. He may have chosen not to
20 do it on that circumstance. He's a young man, a baby, in
21 my view. And as a consequence, all babies think themselves
22 to be quite bullet-proof. But as they get older, they may
23 find that those benefits have a purpose in life. And I
24 suspect he's willing to change his mind.

25 I think we ought to give him the benefit of a

1 doubt just based upon his inexperienced youth.

2 So, no. That's -- we measured his earning
3 capacity on the assumption that he was typical, that he was
4 like most workers, they have access or -- to benefits.

5 Q. And that goes to his capacity to earn?

6 A. Exactly.

7 Q. Okay. How did you come to the conclusion that
8 Justin's preinjury earning capacity was approximately
9 \$33,000 per year?

10 A. Well, that was his wage rate at the time.

11 MS. HEIKKILA: Asked and answered.

12 A. That was the wage rate at the time.

13 And, again, in this particular circumstance,
14 it's -- the first eight hours is straight time, the second
15 eight hours is -- is at time and a half. And the real
16 assumption here is how many days a year he's going to work.
17 240 days is not far from what the average person sitting at
18 a desk works, 244 days a year. There are a lot of offshore
19 workers that work 200 -- 14 on, 7 off. This is somewhat
20 typical eight months out of the year. There's a fishing
21 season going on 11 months out of every year. So there's
22 obviously -- he has obviously the opportunity to work 240
23 days a year.

24 Q. Is your opinion about his yearly salary in any
25 way inconsistent with the actual wages he earned on the

1 fishing vessel before being injured?

2 A. No.

3 Now, the other thing to bear in mind is these
4 wages are adjusted by the probability of work; in his case,
5 70 percent. So we're taking 70 percent of 33,600 to
6 account for periods when he's not working.

7 We're not saying he's working \$33,000 a year each
8 and every year now until -- until the day he retires.
9 That's not the case. He works a lesser amount. Something
10 on the order or magnitude of about \$24,668 would be his
11 wages in 2004 adjusted for probabilities of work.

12 Q. What -- can you -- you and the counsel for Icicle
13 kind of lost me when you guys were discussing differences
14 in risk. Can you explain to me what you were -- the point
15 you were trying to get across there was?

16 A. Yes.

17 We have to define what risk is. And risk is an
18 outcome different than that which is expected. Now, that's
19 the -- the proper definition of risk in the financial
20 markets.

21 Now, what does this mean? Well, it means it's
22 composed of default risk. And that's not an issue really
23 with U.S. Government securities.

24 The same government that issued treasury bills
25 also issues long-term bonds. Typically, long-term bonds

1 have a higher prospective yield because they're -- they
2 have greater purchasing-power risk. If you buy a long-term
3 bond, that bond has risks that the short-term bond doesn't
4 have. So investors, in order to get them to buy it, demand
5 a higher return under most circumstances.

6 So there's no such things as having -- there's no
7 such thing as having -- something has the same financial
8 risk and offering the same return. That violates what's
9 called the law of one price. In one market, where
10 they're -- you're free to move among suppliers and vendors
11 and sellers, sellers and buyers, only one price can exist
12 because of something called arbitrage.

13 So when we look at -- I think the -- the example
14 here was 3 percent and 10 -- or 5 percent for long-term
15 bonds, the reason why long-term bonds have a higher
16 prospective yield is because the market perceives greater
17 risks for it and they demand to be compensated for it.

18 There's no way you can equilibrate the risk.
19 That just won't happen. It's a technical argument, but, I
20 can assure you, one that is quite substantiated in the
21 economic and financial literature.

22 Q. Well, why did you choose T-bills versus bonds?

23 A. Well, because of the following: We adjust his
24 work -- the probability he's going to earn these wages by
25 work probability. That's 70 cents on the dollar.

1 Now, we need the same sort of statistic for
2 investments. There's no -- that investment, that long-term
3 bond is not assured of giving us what -- what it was
4 selling for at the moment. And there are plenty examples
5 of that through history.

6 So in order to make an apples-to-apples
7 comparison, you would want to use an investment rate that
8 was as free from a risk as the income stream after we
9 adjusted it for work probability. So we're -- these are
10 called certainty equivalence in the parlance of economics.
11 We've reduced the income stream to certainty. Now we need
12 to discount it at an equally-appropriate discount rate.
13 And that's something with a low level of risk, such as
14 T-bills; otherwise, it's an imbalanced comparison.

15 Q. How did you come to your conclusions regarding
16 Justin's food allowances as it relates to his economic
17 loss?

18 MS. HEIKKILA: Cory, could you repeat that?
19 I'm having difficulty hearing.

20 MR. ITKIN: Sure. I'm sorry.

21 Q. (BY MR. ITKIN) Dr. McCain, how did you come to
22 your conclusions regarding Justin's food allowance as it
23 relates to his economic loss?

24 A. He received --

25 MS. HEIKKILA: Objection; asked and

1 answered.

2 A. He received food on the vessel, as I appreciate
3 it.

4 And the question is what is the replacement cost
5 of it, what's the value to him. And you're trying to
6 assign some value to it. And one measure of that would be
7 what you would pay at McDonald's or a cafeteria, something
8 of that nature.

9 Now, in terms of arriving at prices, you would be
10 hard-pressed, I think, at McDonald's or -- what's the other
11 one -- Jack in the Box, whatever it is, Burger King to get
12 three meals a day at \$12 a day. So that's the -- that's
13 what you're trying to do. You're trying to replicate the
14 value of those meals as he received them.

15 MR. ITKIN: That's all I have. Thank you.

16 THE WITNESS: Sure.

17 MS. HEIKKILA: I don't have any further
18 questions. Thank you.

19 (Discussion off the record)

20 THE VIDEOGRAPHER: Off the record 3:18 p.m.,
21 ending Tape 2.

22 (Exhibit No. 2 marked)

23 (Deposition concluded at 3:18 p.m.)

24

25

1 I, DR. KENNETH McCOIN, have read the foregoing
2 deposition and hereby affix my signature that same is true
3 and correct, except as noted above.

4

5 _____
DR. KENNETH McCOIN

6 THE STATE OF _____)

7 COUNTY OF _____)

8 Before me, _____, on this
9 day personally appeared DR. KENNETH McCOIN, known to me (or
10 proved to me under oath or through)

11 _____ (description of identity card or
12 other document) to be the person whose name is subscribed
13 to the foregoing instrument and acknowledged to me that
14 he/she executed the same for the purposes and
15 consideration therein expressed.

16 Given under my hand and seal of office on this
17 the _____ day of _____, _____.

18

19

20 _____
NOTARY PUBLIC IN AND FOR
21 THE STATE OF _____

22

23

My Commission Expires: _____

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT)	
)	
Plaintiff,)	NO. 06-2-03016-8
)	
vs.)	
)	
ICICLE SEAFOODS, INC.)	
)	
Defendant.)	

REPORTER'S CERTIFICATE OF
ORAL and VIDEOTAPED DEPOSITION OF
DR. KENNETH McCOIN
July 26, 2007

I, Tracey L. Taylor, Certified Shorthand Reporter
in and for the State of Texas, hereby certify to the
following:

That the witness, DR. KENNETH McCOIN, was duly
sworn by the officer and that the transcript of the oral
deposition is a true record of the testimony given by the
witness;

That pursuant to information given to the
deposition officer at the time said testimony was taken,
the following includes all parties of record:

- Attorneys for Plaintiff:
 - Mr. Cory D. Itkin, Pro Hac Vice,
 - Mr. Anthony L. Rafel, and Ms. Lisa A. Hayes
- Attorneys for Defendant:
 - Ms. Kara Heikkila and Ms. Heidi Baxter

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I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on this _____ day of _____, 2007.

Tracey L. Taylor, CSR 7163
Expiration: December 31, 2008
Stratos Legal Services, LP
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1001 West Loop South, Suite 809
Houston, Texas 77027
Phone: 713.481.2180

No. 61538-6-I

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

JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
STATE OF WASHINGTON
1008 OCT 31 AM 2:01

I hereby certify that on this 31st day of October, 2008, I caused a true and correct copy of the **Reply Brief of Icicle Seafoods, Inc.** to be served on the following in the manner indicated below:

*Via Hand Delivery (Legal
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DATED this ²31 day of October, 2008.

Respectfully submitted,

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