

No. 87407-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IAN DEAN,
Plaintiff/Petitioner,

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STATE OF WASHINGTON
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vs.

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THE FISHING COMPANY OF ALASKA, INC. and ALASKA JURIS,
INC.,

Defendants/Respondents.

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WASHINGTON

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation, or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the substantive standard for determining a seaman's entitlement to maritime benefits for maintenance and cure, and how the standard is applied in a CR 56 summary judgment-type proceeding.¹ WSAJ Foundation previously filed an amicus curiae memorandum supporting review in this case.²

II. INTRODUCTION AND STATEMENT OF THE CASE

This review involves federal maritime law regarding a claim by seaman Ian Dean (Dean) against The Fishing Company of Alaska,

¹ The terms "seaman" and "seamen," as used in this brief, refer to both men and women serving the maritime industries.

² The 10-page WSAJ Foundation amicus curiae memorandum focused on whether the issues on review relating to maintenance and cure warranted review under RAP 13.4(b)(4), and urged that the petition for review be granted on these issues. See "Washington State Association for Justice Foundation Amicus Curiae Memorandum in Support of Review" (WSAJ Fdn. ACM). While the amicus curiae memorandum briefly surveyed the relevant law on maintenance and cure, it did not present argument on the merits.

Inc., et al. (FCA) for maintenance and cure benefits, and how this maritime law is applied in a pretrial summary judgment-type proceeding in state court. The underlying facts are drawn from the published Court of Appeals opinion and the briefing of the parties. See Dean v. Fishing Co. of Alaska, Inc., 166 Wn.App. 893, 272 P.3d 268, *review granted*, 175 Wn.2d 1017 (2012); Dean Br. at 3-6; FCA Br. at 3-7; Dean Reply Br. at 2-3; Dean Pet. for Rev. at 2-6; FCA Ans. to Pet. for Rev. at 1-9; Dean Supp. Br. at 3-7; FCA Supp. Br. at 2-3.

For purposes of this amicus curiae brief, the following facts are relevant: Dean worked as a fish processor on the FCA vessel F/T *Alaska Juris* (ship), and FCA provided Dean maintenance and cure benefits for injuries occurring or manifesting while he was in the service of the ship. These benefits began shortly after Dean ended his service, continuing from June 2006 until September 2009. During this period, Dean received medical treatment for injuries to his neck and hands, and for a congenital condition (myotonia congenita), all of which he contended occurred or manifested while in the service of the ship. The briefing of the parties does not identify the precise basis or bases upon which FCA initially provided the maintenance and cure benefits. See Dean Br. at 3; FCA Br. at 3.

By June 2009, the focus of Dean's medical treatment was on his neck injuries, and one of his physicians, Dr. Aflatooni, concluded that Dean had not reached maximum medical cure as to these service-related

injuries. See Dean Supp. Br. at 6-7. In August 2009, at FCA's behest, Dean underwent a forensic medical evaluation by Dr. Williamson-Kirkland, who concluded that "while Mr. Dean could have sustained a neck strain aboard the vessel, any such strain would have resolved within several months." FCA Br. at 6; see also id. at 19-20. Based upon this opinion, FCA terminated Dean's maintenance and cure benefits in September 2009.

Thereafter, Dean brought this action against FCA in King County Superior Court under the Jones Act, 46 U.S.C. §30104, and general maritime law. Dean moved to reinstate maintenance and cure pending trial, contending he is entitled to these benefits because he has not reached maximum medical cure for his neck injuries.

Dean and FCA disagreed regarding the proper standard by which the superior court should decide Dean's motion. Ultimately, the court agreed with FCA that the motion should be resolved pursuant to the CR 56 summary judgment standard. The court denied Dean's motion, concluding that he "has failed to show that no genuine issue of material fact exists as to his entitlement to maintenance and cure such that he is entitled to judgment as a matter of law." Order Denying Plaintiff's Motion to Reinstate Maintenance and Cure at 1.³

After denial of his motion to reinstate maintenance and cure, Dean unsuccessfully moved to compel FCA to respond to a discovery request

³ A copy of the superior court order is attached to the FCA Ans. to WSAJ Fdn. ACM at Appendix (A1.1-1.2), and is reproduced in the Appendix to this brief for the convenience of the Court.

regarding whether it had subjected Dean to surveillance in conjunction with his claim.

Following these pretrial proceedings, the parties engaged in arbitration and then filed a joint motion in superior court for entry of judgment on the maintenance and cure claim in FCA's favor, "stipulating that the outcome of this appeal would determine the prevailing party." Dean, 166 Wn.App. at 897. Dean and FCA also agreed that they would jointly request that the appellate court review the superior court's ruling on Dean's motion to compel discovery. See id.

Dean appealed to the Court of Appeals, which affirmed the superior court's denial of Dean's motion to reinstate maintenance and cure. The court declined to address the superior court's discovery ruling, finding it moot. See id. at 895, 903-04.

The Court of Appeals denied Dean's motion to reinstate the maintenance and cure benefits for two reasons. First, it found a factual dispute requiring trial due to the differing opinions of Dean's physician and FCA's forensic medical expert regarding the issue of maximum cure. In so doing, the court rejected Dean's argument that "this dispute should not preclude pretrial reinstatement of maintenance and cure because all ambiguities regarding his entitlement to maintenance and cure should be resolved in his favor." Dean at 899; see also id. at 901-02.⁴ Second, the

⁴ The Court of Appeals resolved this issue without expressly addressing the substantive standard under general maritime law regarding under what circumstances a ship owner may justifiably deny or terminate maintenance and cure on the basis that maximum medical cure has been reached. See WSAJ Fdn. ACM at 7-8.

court found a factual dispute existed whether Dean's neck injuries occurred in the service of the ship. See id. at 902.

Dean sought review in this Court regarding the Court of Appeals disposition on both the motion to reinstate maintenance and cure and the motion to compel discovery. The Court granted review on both issues.⁵

III. ISSUES PRESENTED

- 1.) What is the proper substantive standard under general maritime law for determining when a seaman is entitled to pretrial maintenance and cure, and how is this standard applied in a CR 56 summary judgment proceeding in state court?
- 2.) More particularly, may a ship owner terminate a seaman's maintenance and cure benefits based upon the ship owner's consulting physician's opinion that maximum cure has been reached, even though the seaman's physician's opinion is to the contrary?

IV. SUMMARY OF ARGUMENT

General maritime law requires ship owners to provide a seaman no-fault benefits for maintenance and cure for injuries occurring or manifesting in the service of the ship. The seaman has the relatively light initial burden of proving that the injury in question occurred or manifested while in the service of the ship, along with proof of expenses incurred as a result.

Once this initial burden is met, the seaman is entitled to maintenance and cure benefits until he or she reaches maximum cure. Pretrial, the ship owner has the burden of proving that maximum cure has been reached. To satisfy this substantive burden the medical evidence of

⁵ This brief does not address the discovery issue.

maximum cure must be *unequivocal*. Thus, a ship owner may not deny or discontinue maintenance and cure benefits when there is disputed medical evidence on whether maximum cure has been reached.

Applying the above general maritime law in a pretrial CR 56 summary judgment context, if there is expert medical opinion that the seaman has *not* reached maximum cure for the injury in question, the seaman is entitled to maintenance and cure pending changed circumstances or adjudication on the merits, even if the ship owner presents expert medical opinion to the contrary. Any such contrary opinion is *not material* for summary judgment purposes, because it is not a fact upon which the outcome of the issue depends.

V. ARGUMENT

Introduction and Scope of Brief

FCA argues that Dean's pretrial motion to reinstate maintenance and cure benefits was properly denied for the same reasons offered by the Court of Appeals below. First, Dean does not meet his initial burden of proving no genuine issue of material fact exists regarding whether his neck injuries occurred or manifested during his service on the ship; and, second, because disputed medical evidence leaves a genuine issue of material fact for trial regarding whether maximum cure has been reached as to Dean's neck injuries. See FCA Supp. Br. at 18-19; FCA Br. at 18-20. For his part, Dean contends that he satisfies the initial burden of establishing his neck injuries occurred or manifested in the service of the

ship, and further contends that FCA did not raise this issue until it decided to terminate the maintenance and cure benefits. See Dean Supp. Br. at 3-8; Dean Ans. to WSAJ Fdn. ACM at 2; Dean Br. at 2-3. In the final analysis, Dean contends FCA failed to prove on summary judgment that maximum cure for his neck injuries had been reached. See Dean Supp. Br. at 12-15; Dean Ans. to WSAJ Fdn. ACM at 1-3.

This brief focuses solely on resolution of the maximum cure issue in this pretrial summary judgment context. WSAJ Foundation does not address the question whether Dean meets his initial burden of proving his neck injuries occurred or manifested in service of the ship.⁶ The Foundation assumes for purposes of argument that the Court will conclude this initial burden is met.⁷

⁶ FCA seems to suggest that the question of whether Dean meets his initial burden of proving his neck injuries occurred or manifested while in the service of the ship is not before the Court on review. See FCA Ans. to WSAJ Fdn. ACM at 8-10. WSAJ Foundation assumes this issue is properly before the Court. The superior court order found *unspecified* genuine issues of material fact in denying Dean's motion for summary judgment. See Appendix. The Court of Appeals found genuine issues of material fact regarding whether Dean's initial burden of proof is met. See Dean, 166 Wn.App. at 900. Dean's petition for review, albeit inartfully, appears to challenge the Court of Appeals' resolution of the summary judgment motion. See Dean Pet. for Rev. at 1-2, 6-8, 14; see also Dean Supp. Br. at 3.

⁷ See Dean, 166 Wn.App. at 895-96 (recounting neck complaints at or around time Dean left service on ship, and related medical evidence); Dean Supp. Br. at 3-7 (describing Dean neck complaints and related medical evidence, with citations to Clerk Papers); FCA Ans. to Pet. for Rev. at 3 (recognizing Dean complained of neck pain same month that he left service of ship, and thereafter); FCA Br. at 18-20 (challenging sufficiency of Dean's evidence of neck injury, and also relying on ship owner's forensic expert's opinion); see also Vaughan v. Atkinson, 369 U.S. 527, 532 (1962) (requiring as canon of general maritime law that all ambiguities and doubts as to a seaman's right to receive maintenance and cure be resolved in the seaman's favor); infra §A (elaborating on scope and application of Vaughan rule).

A. Overview Of Federal Maritime Law Regarding Maintenance And Cure Benefits, And Requirement That The Medical Evidence Of Maximum Cure Be Unequivocal For A Ship Owner To Deny Or Terminate These Benefits.

An action for maintenance and cure is governed by general maritime law, a specie of federal common law. See Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878, 224 P.3d 761, *cert. denied*, 130 S.Ct. 3482 (2010). The substantive law is the same when maintenance and cure claims are brought in state court, although state procedural rules apply. See Endicott, 167 Wn.2d at 879, 881; Dean, 166 Wn.App. at 898. "Maintenance" refers to a living allowance for food and lodging, and "cure" refers to necessary medical expenses. See Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 76, 272 P.3d 827, *cert. denied*, 133 S.C 199 (2012).

The ship owner's obligation to provide maintenance and cure is an "ancient duty." Vella v. Ford Motor Co., 421 U.S. 1, 3 (1975). As explained in Johnson v. Marlin Drilling Co., 893 F.2d 77, 78-79 (5th Cir. 1990):

Due to the unique hazards which seamen must face in their employment, maritime nations early on recognized the need to impose greater responsibilities upon the owners of ships for the safety of seamen. The object of such a policy has been twofold, "of encouraging marine commerce and assuring the well-being of seamen." Aguilar v. Standard Oil Co., 318 U.S. 724, 727, 63 S.Ct. 930, 932, 87 L.Ed. 1107 (1943). Aguilar also states "[a]mong the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service." 318 U.S. at 730, 63 S.Ct. at 933.

The duty to provide maintenance and cure is broad, and is designed to assure easy and ready administration of those benefits, with few exceptions and little need to invite litigation or for resort to court. See Vella, 421 U.S. at 4; see also Tuyen Thanh Mai v. Am. Seafoods Co., 160 Wn.App. 528, 544, 249 P.3d 1030 (2011) (hereafter Mai).

All ambiguities and doubts as to a seaman's right to receive maintenance and cure must be resolved in the seaman's favor. See Vaughan v. Atkinson, 369 U.S. 527, 532 (1962) (hereafter *Vaughan* rule). This rule applies to resolution of factual disputes bearing upon entitlement to maintenance and cure. See Mai, 160 Wn.App. at 539 (recognizing *Vaughan* rule applies in resolving conflicting medical evidence); Johnson, 893 F.2d at 79-80 (same).

The seaman has the initial burden of demonstrating a right to maintenance and cure by proof that he or she (1) was engaged as a seaman, (2) sustained an injury or illness while in the ship's service, and (3) incurred or is incurring expenditures. See Mai, 160 Wn.App. at 538-39. The ship owner is obligated to promptly investigate and resolve whether a seaman is entitled to maintenance and cure for illness or injury resulting from service on the ship, and must resolve all doubts in favor of the seaman. See Thomas J. Schoenbaum, Admiralty and Maritime Law, §6-28 at 380 (4th ed. 2004). This burden of proof is considered relatively light, as it is not dependent on proof of fault by the ship owner. See West v. Midland Enterprises, Inc., 227 F.3d 613, 616 (6th Cir. 2000).

The right of a seaman to receive maintenance and cure generally extends to the point of "maximum medical cure," Clausen, 174 Wn.2d at 76, often referred to as "maximum cure," Miller v. Arctic Alaska Fisheries, 133 Wn.2d 250, 268, 944 P.2d 1005 (1997); Mai at 539. Pretrial, the ship owner bears the burden of proving maximum cure. See Dean, 166 Wn.App. at 898 (citing Mai); Schoenbaum, §6-33 at 394-95. The issue of maximum cure is a medical, not a legal, question. See Schoenbaum, §6-33 at 393. If there is some doubt regarding the issue of maximum cure, the ship owner may file a declaratory judgment action to determine whether it is entitled to terminate current benefits under the circumstances. See id., §6-28 at 380; Mai at 547-48.

For as ancient as the law of maintenance and cure is, there is surprisingly little authority on the substantive test for determining when maximum cure is reached. The U.S. Supreme Court appears to have only addressed the matter once, in Vella, supra. In Vella, upholding denial of judgment notwithstanding the verdict on a jury award for maintenance and cure, the Court seems to indicate that the opinion of the seaman's treating physician is the main consideration:

The shipowner's obligation to furnish maintenance is coextensive in time with his duty to furnish cure ... and neither obligation is discharged *until the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been effected*[.]

421 U.S. at 6, n. 5 (quoting with approval from the district court opinion in Victo v. Joncich, 130 F.Supp. 945, 949 (S.D. Cal. 1955), *aff'd*, 234 F.2d 161 (9th Cir. 1956); ellipses & emphasis added by Supreme Court).⁸

Subsequent federal cases have built on Vella and articulated what is referred to here as an unequivocal evidence standard for determining when maximum cure is reached. In Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 202 (5th Cir. 1980), the Fifth Circuit concluded that the seaman "was entitled to maintenance and cure until his physicians diagnosed his condition as permanent," and remanded the case to the district court "for the limited purpose of determining when [the seaman's] physicians made an unequivocal diagnosis of the permanency of his disability." (Brackets added). See also Tullos v. Resource Drilling, Inc., 750 F.2d 380, 387-89 (5th Cir. 1985) (following Hubbard unequivocal evidence standard for maximum cure, in remanding for trial issue of whether seaman's employer is liable for punitive damages for arbitrarily or capriciously denying maintenance and cure benefits); Johnson, 893 F.2d at 79-80 (indicating medical evidence of maximum cure must be unequivocal to terminate or refuse to reinstate maintenance and cure, and requiring application of *Vaughan* rule on remand in resolving ambiguities and doubts in medical evidence); Sefcik v. Ocean Pride Alaska, 844 F.Supp. 1372, 1373 (D. Alaska 1993) (applying unequivocal evidence standard for maximum cure in ordering maintenance and cure benefits reinstated pending trial on

⁸ In Vella, the only physician providing a medical opinion was one apparently procured by the ship owner. See 421 U.S. at 2.

merits); Lee v. Metson Marine Servs., Inc., 2012 WL 5381803 (D. Haw., Oct. 21, 2012) (denying termination of maintenance and cure where medical evidence was in conflict; relying on Sefcik); Lee v. Metson Marine Servs., Inc., 2013 WL 28264 (D. Haw., Jan. 2, 2013) (denying reconsideration of order denying termination of maintenance and cure based on lack of unequivocal evidence and *Vaughan* rule).⁹

This unequivocal evidence standard is also recognized by Division I in its recent opinion in Mai. In Mai, the ship owner contended it had no obligation to pay maintenance and cure during the period that the seaman refused to attend an independent medical examination (IME). In the course of upholding the superior court's ruling that the ship owner could not condition maintenance and cure on submission to an IME, the Court of Appeals noted that "a seaman's right to maintenance and cure generally continues until a maximum cure determination is both unequivocal and made by a qualified medical expert." 160 Wn.App. at 539-40 (footnote omitted).¹⁰

Substantive maritime law requires payment of maintenance and cure until the medical evidence establishes unequivocally that maximum cure has been reached. The question remains as to how this standard is applied in a pretrial CR 56 summary judgment context, when the seaman

⁹ Copies of the two unpublished opinions in Lee are reproduced in the Appendix pursuant to Fed. R. App. P. 32-1 and GR 14.1(b).

¹⁰ The omitted footnote cites to Vella, *supra*, and Tullos, *supra* (which, in turn, quotes Hubbard, *supra*). See Mai, 160 Wn.App. at 540, n.16.

is seeking benefits before adjudication of his maintenance and cure claim on the merits.¹¹

B. When A Seaman's Pretrial Motion For Maintenance And Cure Is Decided Under CR 56, The Ship Owner Must Prove Unequivocally That Maximum Cure Has Been Reached In Order To Be Relieved Of The Obligation To Pay These Benefits; Disputed Medical Evidence On The Issue Of Maximum Cure Requires Payment Of Benefits Pending A Change Of Circumstances Or Adjudication Of The Claim On The Merits.

The unequivocal evidence standard of general maritime law is compatible with state summary judgment procedure. Under CR 56, summary judgment will be denied if genuine issues of *material* fact exist.¹² As explained in Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974), "[a] 'material fact' is a fact upon which the outcome of the litigation depends, in whole or in part." Under the unequivocal evidence standard, if a seaman seeks reinstatement of maintenance and cure pending adjudication at trial, and there is medical evidence that maximum cure has not been reached, then this evidence should be determinative and the seaman is entitled to reinstatement of benefits. See §A, supra. The ship owner will have failed to meet its burden of proof. The fact that the ship owner may have some medical evidence that maximum cure has been reached is *immaterial*.¹³

¹¹ Trial of a maintenance and cure claim may involve a seaman's claim for past due benefits or for future maintenance and cure, "as may be needful in the future for the maintenance and cure of a kind and for a period which can be definitely ascertained." Salem v. U.S. Lines Co., 370 U.S. 31, 37-38 (1962) (quoting Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 531, 532 (1937)).

¹² The text of the current version of CR 56 is reproduced in the Appendix to this brief.

¹³ FCA contends that WSAJ Foundation's prior discussion in its amicus curiae memorandum, regarding what facts are "material" to the issue of maximum cure in a

Summary judgment cases seemingly to the contrary, relied on by FCA (and to some extent the Court of Appeals below), are distinguishable, because in those cases a factual dispute existed as to whether the seaman met his *initial* burden of proof regarding whether the injury occurred or manifested in the service of the ship. See e.g. Glynn v. Royal Boat Management Corp., 57 F.3d 1495, 1505-06 (9th Cir. 1995) (upholding district court refusal to order payment of maintenance and cure as condition for vacating order of default because of disputed issues of fact regarding whether seaman's injury occurred in the service of the ship); Mabrey v. Wizard Fisheries, Inc., 2007 WL 1556529 (W.D. Wash., May 24, 2007) (denying pretrial payment of cure benefits under summary judgment standard because of conflicting evidence regarding whether seaman met his initial burden of proving injury occurred in service of the ship).¹⁴ By comparison, in Gouma v. Trident Seafoods, Inc., 2008 WL 2020442 (W.D. Wash., Jun. 11, 2008)¹⁵, a decision also out of the U.S. District Court for the Western District of Washington, there was no dispute that the seaman was injured in the service of the ship and the court ruled that the seaman "is entitled to a presumptive continuance of maintenance and cure payments," notwithstanding a dispute between the

summary judgment context, falls outside of the scope of the issues on review. See FCA Supp. Br. at 7; see also WSAJ Fdn. ACM at 4-5, 8-9. This argument should be rejected. WSAJ Foundation had merely reframed the issue on review, and now continues to do so in arguing that when there is evidence maximum cure has not been reached contrary expert medical opinion on this fact issue is not material for summary judgment purposes.

¹⁴ Both Glynn and Maybrey deny maintenance and cure based upon disputed facts about whether the injury in question occurred or manifested in the service of this ship without discussing how the *Vaughan* rule is applied in this context.

¹⁵ Copies of Mabrey and Gouma are included in the Appendix to this brief pursuant to Fed. R. App. P. 32-1 and GR 14.1(b).

seaman's physician and the ship owner's consulting physician on whether maximum cure had been reached.

FCA also cites to a number of other federal cases that it urges support disposition of pretrial maintenance and cure claims by summary judgment. See FCA Supp. Br. at 11-12. Of those cases the Court may properly consider, none of them appear to uphold the denial of maintenance and cure on summary judgment based solely upon a genuine issue of material fact due to conflicting medical opinions on the issue of maximum cure. See Davis v. Icicle Seafoods, Inc., 2008 WL 418008 & 2008 WL 4189378 (W.D. Wash., Feb. 13 & Sept. 5, 2008) (denying successive motions related to seaman's pretrial entitlement to maintenance, etc. under summary judgment standard because of fact disputes over whether seaman voluntarily quit employment and whether his Bell's Palsy manifested in service of the ship)¹⁶; Loftin v. Kirby Island Marine, LP, 568 F.Supp.2d 754 (E.D. Tex. 2007) (denying emergency relief for maintenance and cure under summary judgment standard because of genuine issues of material fact whether seaman forfeited right to benefits because he intentionally misrepresented or concealed medical facts at the time he was hired); Bloom v. Weeks Marine, Inc., 225 F.Supp.2d 1334, 1335-36 (M.D. Fla. 2002) (dismissing seaman's emergency motion for maintenance and cure as improper in absence of, inter alia, motion for

¹⁶ Several of the unpublished opinions referenced by FCA (FCA Supp. Br. at 11-12) are not subject to consideration under Fed. R. App. P. 32-1 and GR 14.1(b), because they predate January 1, 2007. A copy of the remaining unpublished case, Davis, discussed in the main text, is reproduced in the Appendix to this brief, as required by the above-referenced rules.

partial summary judgment and accompanying showing of no genuine issue of material fact; leaving unresolved ship owner's contention that seaman not entitled to maintenance and cure due to willful misconduct); Pelotto v. L&N Towing Co., 604 F.2d 396, 402-04 (5th Cir. 1979) (upholding use of summary judgment procedure to resolve claim that seaman forfeited cure by rejecting maritime employer's tender of cure); Lirette v. K&B Boat Rentals, Inc., 579 F.2d 968, 969 (5th Cir. 1978) (affirming district court grant of summary judgment on reinstatement of seaman's maintenance and cure based on "uncontradicted evidence clearly indicating that he had not reached maximum possible cure").

While FCA points to no (citable) case upholding a denial of a seaman's pretrial motion for maintenance and cure under a summary judgment-type analysis based *solely* on conflicting medical opinion on the issue of maximum cure, there is some authority supporting this point of view. See Rio Miami Corp. v. Balbuena, 756 So.2d 258 (Fla. App. 2000); Royal Caribbean Cruises, Ltd., v. Rigby, 96 So.3d 1146 (Fla. App. 2012).¹⁷

In Rio Miami, the Florida Court of Appeals summarily holds "[t]he trial court erred in granting the plaintiff/appellee's motion to reinstate maintenance and cure because contradicting medical evidence existed

¹⁷ Cf. Claudio v. Sinclair Refining Co., 126 F.Supp. 154 (E.D. New York) (concluding maintenance and cure unavailable in pretrial summary proceeding, "excepting where there is no genuine issue of fact, the Courts have entertained motions for summary judgment pursuant to Rule 56"). Claudio predates Yella, *supra*, and, in any event, does not foreclose application of the unequivocal evidence standard for resolving pretrial summary judgment-type motions for maintenance and cure.

which indicated the plaintiff/appellee had not reached maximum medical improvement." 756 So.2d at 258. It is unclear in Rio Miami whether the maintenance and cure issue was before the court on pretrial motion or resolved by motion at trial (i.e. directed verdict). The court reverses and remands "with instructions to send the issue to the jury." Id. The two cases cited in Rio Miami in support of the above-quoted passage both involve reversals of issues decided on a motion for directed verdict. See id.

Yet, Rio Miami has been cited as supporting the denial of pretrial maintenance and cure because of conflicting evidence on the issue of maximum cure. See Royal Caribbean, supra (majority and dissenting opinions, and cases cited therein). However, neither the majority nor dissenting opinions in Royal Caribbean address the unequivocal evidence standard discussed in §A, nor its application in summary judgment-type proceedings, discussed above. Rio Miami and Royal Caribbean are distinguishable and unpersuasive.

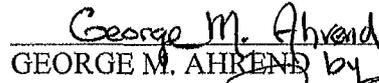
The unequivocal evidence standard is the proper substantive test for determining maximum cure at the pretrial stage of proceedings, and its application is wholly consistent with CR 56. If the evidence is not unequivocal that maximum cure has been reached, the seaman is entitled to a summary judgment granting or restoring maintenance and cure benefits, as the case may be, pending a change in circumstances or adjudication on the merits.

VI. CONCLUSION

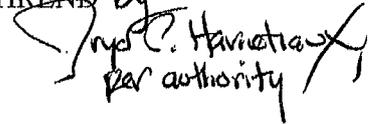
The Court should adopt the analysis advanced in this brief regarding a seaman's entitlement to pretrial maintenance and cure in a CR 56 context, and resolve this appeal accordingly.

DATED this 15th day of January, 2013.


BRYAN P. HARNETIAUX


GEORGE M. AHREND

On Behalf of WSAJ Foundation

by

per authority

Appendix

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THE HONORABLE JUDGE LAURA INVEEN

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

IAN DEAN,

Plaintiff,

v.

THE FISHING COMPANY OF ALASKA,
INC., and ALASKA JURIS, INC.,

Defendants.

Case No. 09-2-19037-2SEA

~~PROPOSED~~ ORDER DENYING
PLAINTIFF'S MOTION TO
REINSTATE MAINTENANCE
AND CURE

THE COURT, having reviewed Plaintiff's Motion to Reinstate Maintenance and
Cure, Defendants' opposition, Plaintiff's Reply, ~~if any~~ ⁷⁰¹ and the remaining record, hereby
finds and ORDERS:

1. ~~This court, being a court in law, does not possess equitable powers in admiralty.~~ ⁷⁰¹ Thus, Plaintiff's motion was assessed under the standards of Civil Rule 56.
2. Plaintiff has failed to show that no genuine issue of material fact exists as to his entitlement to maintenance and cure such that he is entitled to judgment as a matter of law.

//

ORDER DENYING PLAINTIFF'S MOTION
TO REINSTATE MAINTENANCE AND CURE - 1
Case No. 09-2-19037-2SEA

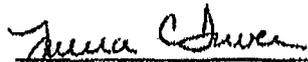
HOLMES WEDDLE & BARCOTT
999 THIRD AVENUE, SUITE 2600
SEATTLE, WASHINGTON 98104-4011
TELEPHONE (206) 292-8008

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3. Plaintiff's Motion to Reinstate Maintenance and Cure is therefore DENIED. Plaintiff raises the issue of his hands for the first time in the Reply Memorandum. Moving papers allege lack of maximum cure for neck condition. This order does not address new issues raised for the first time in the Reply.

DATED this 9 day of December, 2009.


HONORABLE LAURA INVEEN
Superior Court Judge

Presented by:
HOLMES WEDDLE & BARCOTT, P.C.


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ORDER DENYING PLAINTIFF'S MOTION
TO REINSTATE MAINTENANCE AND CURE - 2
Case No. 09-2-19037-2SEA

HOLMES WEDDLE & BARCOTT
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Superior Court Civil Rules, CR 56
RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Credits

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

2007 WL 1556529

Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

John MABREY, Plaintiff,
v.
WIZARD FISHERIES,
INC., et al., Defendants.

No. C05-1499L. | May 24, 2007.

Attorneys and Law Firms

Michael David Myers, Ryan C. Nute, Myers & Company, Seattle, WA, for Plaintiff.

Douglas M. Fryer, John Earl Lenker, Mikkelsen Broz Wells & Fryer, SEATTLE, WA, for Defendants.

Opinion

**ORDER DENYING MOTION TO
COMPEL PAYMENT OF CURE**

ROBERT S. LASNIK, United States District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on a motion filed by plaintiff John Mabrey, an injured seaman, to compel defendant Wizard Fisheries, Inc. ("Wizard") to pay for medical treatment related to carpal tunnel syndrome ("CTS"). (Dkt.# 37). Mabrey also seeks reimbursement of his attorney's fees and costs incurred in bringing this motion. Wizard argues that genuine issues of material fact exist regarding whether plaintiff suffers from CTS and whether it was caused while he was working in service of the vessel.

For the reasons set forth below, the Court denies the motion.

II. DISCUSSION

A. Background Facts.

Plaintiff worked for Wizard for 13 year. Plaintiff worked as a deckhand and later as an engineer. In October 2004, shortly before plaintiff ceased working on the vessel, he worked as a senior deckhand and was responsible for the vessel's maintenance, engines, and mechanical systems, and for certain on deck and fishing operations.

Plaintiff alleges that he was injured in two separate incidents in November 2003 and January 2004 aboard the F/V Wizard. Plaintiff asserts that he injured his shoulder while working on the vessel. In July 2005, Mabrey reported a problem with his knee and alleged that it was related to an injury on the vessel.

Plaintiff filed his complaint in August 2005 alleging unseaworthiness, negligence, and a violation of the Jones Act. On September 27, 2005, he amended his complaint to add a claim for injury to his left knee. Plaintiff amended his complaint a second time in December 2006 to add a claim for bilateral CTS. He attributes the CTS to repetitive work on the vessel including tying knots, attaching snaps or clips to snail and crab pots, turning wrenches, and operating crane controls.

Wizard is currently paying Mabrey maintenance.¹ In this motion, plaintiff seeks cure only related to his CTS. Plaintiff has requested that Wizard pay cure for his CTS, and Wizard has refused.

¹ Plaintiff previously filed a motion to compel Wizard to pay him maintenance of \$76.17 per day, the amount of his actual living expenses, rather than the contractual amount of \$35 per day. The Court denied the motion.

Plaintiff states that he has been experiencing constant pain in his hands since 2003. Mabrey Dep. at pp. 179-80. In April and June 2005, plaintiff complained to his occupational therapist that he was experiencing numbness in his fingertips, constant pain in his thumb and fingers, and "throbbing" pain with tingling and numbness in his "thumb, LF and IF." Declaration of Ryan Nute, (Dkt.# 38) ("Nute Decl."), Ex. 5.

Dr. Matthew Meunier, plaintiff's orthopedic surgeon, opined in June 2006 that plaintiff's electromyogram ("EMG") "shows moderate carpal tunnel syndrome, with no left ulnar neuropathy." Nute Decl., Ex. 7.

Dr. Meunier recommended a "carpal tunnel release." *Id.* Dr. Meunier opined, in a letter dated December 1, 2006, "Clinical examination and electromyographic findings are consistent with moderate carpal tunnel syndrome." *Id.*, Ex. 8. Dr. Meunier explained in his December 2006 letter that the "description of activities on the boat would be consistent with causing an increase in pressure in the carpal tunnel, and thus be consistent with carpal tunnel syndrome." *Id.*, Ex. 8. Plaintiff performed repetitive tasks with his hands aboard the vessel including tying knots² and making "snaps"³ when placing pots. Declaration of John Mabrey, (Dkt.# 38) ("Mabrey Decl.")⁴ at ¶ 4. Plaintiff began experiencing pain in his hands in 1995, and the pain worsened around 2001 when he spent most of his time operating the hydraulics and tying knots. *Id.* at ¶ 5. Plaintiff states that he requested braces for his hands in January 2003 but was told that there were none available. *Id.* at ¶ 7. The vessel's first mate testified that tying knots could lead to CTS because crew members would use their "hands to pull and twist stiff line." Soper Dep. at pp. 81-82. The Captain of the vessel did not recall plaintiff ever asking to wear a brace but he knows that "his hand got sore." Colburn Dep. at p. 108. The Captain stated that every crewmember complained at some point of "sore, tired fingers and wrists." Colburn Dep. at p. 106. One of Wizard's owners and a former captain of the vessel states that plaintiff never complained of carpal tunnel syndrome or symptoms of the condition during his employment. Declaration of John Jorgensen, (Dkt.# 48) at ¶ 3.

² Tying knots involved adding and taking off lengths of line based on the depth of the fishing water. Mabrey Dep. at p. 177. Plaintiff estimates that he and two other crew members tied roughly 250 to 500 knots per day. *Id.* at p. 178.

³ During snail fishing, crew members snapped light snail pots onto the ground line with "very stiff snaps." Soper Dep. at pp. 82-83. The vessel discontinued snail fishing in approximately 1995. Colburn Dep. at p. 106.

⁴ Plaintiff filed his declaration as an attachment to his counsel's declaration. In the future, each declaration should be filed as a separate docket entry in the electronic filing system.

² After defendant received Dr. Meunier's report, the insurer requested a second medical opinion from

Dr. William Bowman, who subsequently examined plaintiff. Dr. Bowman noted Dr. Meunier's findings but his examination did not result in objective findings of CTS. Nute Decl., Ex. 9. Dr. Bowman opined,

Although it is certainly possible this patient's carpal tunnel syndrome may have developed as a result of a cumulative injury occurring in the course of his employment as a fisherman, the lack of any complaints that is documented in the medical records leads me to conclude, to a degree of medical probability, that the patient has not suffered carpal tunnel syndrome as a result of his employment as a King Crab fisherman with the vessel "WIZARD."

Id.

Dr. James Green, who conducted an independent medical examination ("IME") on December 13, 2006, noted Dr. Meunier's findings and diagnosed plaintiff with "subclinical left [CTS]." Declaration of John Lenker, (Dkt.# 46) ("Lenker Decl."), Ex. 6; Declaration of Dr. James Green, (Dkt.# 47) ("Green Decl.") at ¶ 8. After conducting the IME, Dr. Green noted, "There is no indication of [CTS] during his working activities in the medical record. More probably than not, this condition ... is the result of a natural progression of an unrelated condition." Lenker Decl., Ex. 6; Green Decl. at ¶ 9. Dr. Green explained that although plaintiff may have experienced hand pain, it was not consistent with CTS. Furthermore, working activities do not alter the tissues in and around the carpal tunnel in such a way that CTS develops at a later date, as plaintiff alleges. Green Decl. at ¶ 9.

After plaintiff asked Wizard to reconsider its denial of cure for CTS, Wizard sought a third opinion, from Dr. Alfred Blue of Seattle Plastic Surgeons, Inc. in Seattle based on his review of the medical records. Dr. Blue's opinion regarding CTS is brief, conclusory and does not appear to consider whether the repetitive nature of plaintiff's work could have caused CTS. Lenker Decl., Ex. 5 ("He also developed a[CTS], and this in no way is related to any work activity that I can find in the record"). Dr. Hugh Stiles, plaintiff's primary care

physician, opined that when a positive EMG indicates CTS, then CTS exists. Dr. Stiles opined that plaintiff's work activities could lead to CTS. Stiles Dep. at pp. 46-47.

B. Payment of Cure.

The purpose of maintenance and cure is to provide an ill or injured seaman with food, lodging, and necessary medical care during the period when he or she is incapacitated and until maximum medical recovery is achieved. *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962). The parties dispute whether the Court should apply a summary judgment standard, and the issue is difficult to resolve. The state of the law in this area is far from clear and often contradictory. Compare *Guerra v. Arctic Storm, Inc.*, Case No. C04-1010RSL (W.D.Wash. Aug. 4, 2004) ("Other than a motion for summary judgment, [the Court is] aware of no other procedure of obtaining pre-trial judgment on the merits of a claim") with *Connors v. Iqueque USLLC*, Case No. C05-334JLR (W.D.Wash. Aug. 25, 2005) (declining to apply a summary judgment standard because that standard "squares awkwardly with the Supreme Court's instructions" that where "there are ambiguities or doubts, they are resolved in favor of the seamen") (internal citation and quotation omitted). The Court acknowledges that in exercising its admiralty jurisdiction, it is empowered to take a "flexible" approach. *Putnam v. Lower*, 236 F.2d 561, 568 (9th Cir.1956). There is also a strong policy favoring the protection of seamen. See, e.g., *Farrell v. United States*, 336 U.S. 511, 516 (1949) (explaining that "the merit of the seaman's right to maintenance and cure [is] that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations"). If the issue were presented at trial, the Court would construe all doubts as to entitlement in plaintiff's favor. See *Vaughan*, 369 U.S. at 532 ("When there are ambiguities or doubts, they are resolved in favor of the seaman"). However, neither the Supreme Court nor the Ninth Circuit has provided guidance or announced a standard by which courts should evaluate pretrial motions to compel payment of maintenance and cure. The Local Rules and the Supplemental Admiralty Rules do not provide a procedure to compel payment

without a ruling on the merits in advance of trial. Furthermore, in the only Ninth Circuit case to have addressed a similar issue, the Ninth Circuit upheld the district court's refusal to require payment of maintenance and cure as a condition of removing a default against defendants because genuine issues of material fact remained and summary judgment would have been premature. *Glynn v. Roy Al Boat Mgt. Corp.*, 57 F.3d 1495, 1505 (9th Cir.1995). In addition, whether plaintiff suffers from CTS and, if he does, whether it was caused while he was working in service of the vessel are threshold issues on which plaintiff will bear the burden of proof at trial. For these reasons, the Court applies a summary judgment standard rather than granting interim relief without an adjudication on the merits.⁵

⁵ In reaching this conclusion, the Court does not find that an award of interim relief is never appropriate. However, in this case, the trial date is quickly approaching, and plaintiff has not shown a compelling personal need to obtain cure in advance of trial.

*3 Under a summary judgment standard, plaintiff is not entitled to cure at this time. Although plaintiff has evidence to support his claim, as set forth above, there is conflicting evidence regarding whether plaintiff suffers from CTS and, if he does, whether it was caused by working on the vessel.

C. Attorney's Fees.

Mabrey has also requested attorney's fees related to the filing of this motion. Attorney's fees are available where "the shipowner had been willful and persistent in its failure to investigate [plaintiff's] claim or to pay maintenance." *Glynn*, 57 F.3d at 1505. The Court finds no willful and persistent withholding in this case in light of the conflicting medical evidence and the fact that plaintiff did not complain specifically of CTS during his employment or for a significant period of time after leaving his employment.

III. CONCLUSION

For the foregoing reasons, the Court DENIES Mabrey's motion to compel payment of cure. (Dkt.# 37).

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KeyCite, Yellow Flag - Negative Treatment
Distinguished by *Dean v. Fishing Co. of Alaska, Inc.*, Wash.App.
Div. 1, March 5, 2012

2008 WL 2020442
United States District Court,
W.D. Washington.

Hassan GOUMA, Plaintiff(s),

v.

TRIDENT SEAFOODS,
INC., et al., Defendant(s).

No. C07-1309. | Jan. 11, 2008.

Attorneys and Law Firms

H. L. George Knowles, Injury at Sea, Seattle, WA, for
Plaintiff(s).

Michael A Barcott, Theresa K Fus, Holmes Weddie &
Barcott, Seattle, WA, for Defendant(s).

Opinion

ORDER ON MOTION TO COMPEL CURE

PECHMAN, J.

*1 The above-entitled Court, having received and
reviewed:

1. Plaintiff's Motion to Compel Cure, Including an
Award for Damages and Attorney's Fees (Dkt.
Nos. 9 and 10)
2. Opposition to Plaintiff's Motion to Compel Cure
and Request for Damages and Attorney's Fees
(Dkt. No. 12)
3. Plaintiff's Reply in Support of Motion to Compel
Cure (Dkt. No. 16)
4. Supplemental Brief in Opposition to Plaintiff's
Motion to Compel Cure and Request for Damages
and Attorney's Fees (Dkt. No. 14)
5. Plaintiff's Supplemental Briefing in Support of
Motion to Compel (Dkt. No. 19) and all exhibits

and declarations attached thereto, makes the
following ruling:

IT IS ORDERED that the motion to compel cure by
authorizing Defendants to pay for the discogram/CT
recommended by Dr. Becker is GRANTED.

IT IS FURTHER ORDERED that the motion to award
damages and attorney's fees in Plaintiff's favor is
DENIED.

IT IS FURTHER ORDERED that Defendants shall not
be permitted to unilaterally suspend payment of cure
without approval of the Court.

Background

On February 12, 2007, while working aboard the F/
V INDEPENDENCE, Plaintiff reported a work-related
back injury. Despite some on-site treatment and shifts
in job responsibilities, the problem persisted and he
eventually returned to Seattle for medical treatment.
Initially he was being treated by a Dr. Peterson, but he
switched to a physician named Dr. Becker after a few
months.

On October 24, 2007, Dr. Becker recommended a
discogram/CT, a procedure which Dr. Becker felt
would help him arrive at a decision regarding the
necessity for surgery. Defendants (who had been
paying maintenance and cure up to this point) refused
to authorize payment for the procedure without an
independent medical examination (IME), which they
scheduled for late November. Plaintiff responded by
filing this motion.

While this motion was pending, the IME was
conducted. Both sides submitted supplemental replies
incorporating the results of the IME (and in Plaintiff's
case, the response of Dr. Becker to the IME physician's
recommendations). Not only did the IME physician
disagree about the necessity for a discogram/CT, he
also reported his conclusion that Plaintiff had reached
maximum medical cure. On that basis, Defendants
have indicated that they will authorize no further
treatment of Plaintiff.

Discussion

The presumption in maritime injury cases operates in
favor of the seaman: ample case law exists for the
proposition that all doubts regarding maintenance and

cure are to be resolved in the seaman's favor (*Vaughn v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)).

Traditional tenets of maritime law have long held that the duty of the vessel owner to provide an injured seaman with maintenance and cure subsidies is broad and inclusive, intended to be straightforward, uncomplicated and free of administrative burdens. *Vella v. Ford Motor Co.*, 421 U.S. 1, 4, 95 S.Ct. 1381, 43 L.Ed.2d 682 (1975). Questions about entitlement, necessity of treatment and achievement of maximum medical cure are to be adjudicated in the manner most favorable to the seaman. *Vaughn, supra*.

*2 Defendants cite two recent decisions from this district for the position that the Court should apply a summary judgment standard to the resolution of whether Plaintiff is entitled to the continued payment of cure requested here. Judge Coughenour has reasoned that the "resolution of all ambiguities and doubts in favor of the seaman does not do away with the seaman's duty to show at trial that he was (1) 'injured or became ill while in the service of the vessel,' (2) that 'maintenance and cure was not provided; and (3) the amount of maintenance and cure to which the plaintiff is entitled' " as a basis for not granting full *Vaughn* deference to an injured seaman's request to compel payment of cure. *Buenbraxo v. Ocean Alaska, LLC, et al.*, 2007 WL 1556529, C06-1347C, Order of Feb. 28, 2007, Dkt. No. 20 (emphasis supplied).

Judge Lasnik has cited the fact that "whether plaintiff suffers from [carpal tunnel syndrome] and, if he does, whether it was caused while he was working in service of the vessel are threshold issues on which plaintiff will bear the burden of proof at trial" as a reason to apply a summary judgment standard to the seaman's motion to compel cure payments. *Mabrey v. Wizard Fisheries, Inc.*, Slip Copy, 2007 WL 1556529 (W.D.Wash.), C05-1499L, Order Denying Motion to Compel Payment of Cure, Dkt. No. 77.

Recognizing that district court opinions have no precedential authority, and without commenting on the underlying rationale, the Court finds these cases distinguishable from the instant matter. In both of the cited cases, the purely factual question of whether the seaman had been in the service of the vessel

when injured was before the court, and the fact of the unresolved "service" question was central to the findings that a summary judgment standard was an appropriate basis on which to resolve the issue. Here, there is no dispute that Plaintiff was injured while in service to Defendants' vessel; the dispute centers around the necessity of a medical procedure and whether Plaintiff has reached maximum cure.

With that understanding, it is the finding of this Court that Plaintiff is entitled to a presumptive continuance of maintenance and cure payments. Even if a summary judgment standard of review were to be applied in this context, disputed questions of material fact (e.g., the differing opinions of Plaintiff's and Defendants' physicians) would simply mean that Plaintiff would be entitled to continue to receive maintenance and cure until the matter was ultimately resolved at trial. The procedural model proposed by Defendants would mean that a vessel owner could escape maintenance and cure obligations at any time prior to trial simply by finding a physician who would pronounce the seaman at maximum medical cure. This Court is not prepared to depart from the *Vaughn* standard of resolving all doubts concerning maintenance and cure in the seaman's favor to that extent. Defendants have cited no opinion from the Ninth Circuit or the Supreme Court indicating that this historic doctrine has fallen to that level of disfavor.

*3 Similarly, Defendants may not unilaterally decide, based on the opinion of their own physician, that a seaman has reached maximum medical cure. At the very least, it violates the summary judgment standard which they themselves are championing—in the face of genuine disputes of material fact regarding the extent of Plaintiff's cure, Defendants are not entitled to summarily (and unilaterally) determine the question in their own favor. More significantly, Defendants' action appropriates to themselves the adjudicatory function of this Court—the issue of maximum cure is one of the ultimate issues before the Court in any maritime injury litigation, and no action may be taken on it without an order of the court.

Plaintiff has requested payment of damages and attorney's fees in connection with this motion. An award of attorney's fees requires a finding of bad faith on the part of the vessel owner (*see Vaughn*, 369 U.S. at 531) and is appropriate only in the most egregious

of circumstances (e.g., where the refusal is found to be arbitrary, capricious, callous or willful). *Morales v. Garjak, Inc.*, 829 F.2d 1355, 1358 (5th Cir.1987). The circumstances of this case do not warrant such a finding.

Compensatory damages are only appropriate in the face of an unreasonable failure to pay. *Vaughn*, 369 U.S. at 530-31. Although Plaintiff seeks damages for the delay in payment of cure, he cites neither evidence nor case law upon which the Court can find Defendants' delay rising to a level of unreasonableness which would justify an award of damages.

Conclusion

End of Document

Plaintiff's motion to compel cure is GRANTED and Defendants shall bear the cost of the procedure recommended by Plaintiff's physician. Defendants shall not suspend cure payments without an order from this Court. Plaintiff's request for an award of damages and attorney's fees is DENIED in the absence of evidence of egregious misconduct or unreasonable delay by Defendants.

The clerk is directed to provide copies of this order to all counsel of record.

Parallel Citations

2008 A.M.C. 863

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2008 WL 418008

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Charles DAVIS, Plaintiff,

v.

ICICLE SEAFOODS, INC., in personam;
the P/B Arctic Star, Official Number
501203, her engines, machinery,
appurtenances and cargo, in rem, Defendants.

No. 07-1565BHS. | Feb. 13, 2008.

Attorneys and Law Firms

John W. Merriam, Seattle, WA, for Plaintiff.

Philip W. Sanford, Holmes Weddle & Barcott, Seattle, WA,
for Defendants.

Opinion

**ORDER DENYING PLAINTIFF'S MOTION
FOR MAINTENANCE, UNEARNED
WAGES AND ATTORNEY FEES**

BENJAMIN H. SETTLE, District Judge.

*1 This matter comes before the Court on Plaintiff's Motion for Maintenance, Unearned Wages and Attorney Fees (Dkt.12). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. STATEMENT OF FACTS

This matter concerns whether Plaintiff is entitled to maintenance, unearned wages and attorney's fees related to an injury sustained to Plaintiff's eye while working aboard the Arctic Star. Dkt. 12. It is undisputed by the parties that Plaintiff injured his eye while aboard the Arctic Star on July 27, 2007. Dkt. 16 at 4-5. Plaintiff was aboard the Arctic Star pursuant to an employment agreement he entered into with Defendant Icicle Seafoods, Inc. Dkt. 12-2.

Plaintiff's injury required that he be transported off the barge for medical care and for transportation home to Seattle, Washington to receive further care. Dkt. 15 at 2. Plaintiff was transported off the barge on August 1, 2007 and received treatment at Providence Seward Medical Center on August 2, 2007 where he was diagnosed with a sty over his left eye. *Id.*, Dkt. 12-4. Plaintiff was also given a Return to Work Release that stated he was allowed to return to work with certain restrictions requiring him to return for further check-ups, wear protective eye wear, and take breaks every two hours in order to apply a hot compress on his eye for twenty minutes. *Id.* On August 2, 2007, Plaintiff was sent to Seattle, Washington at the expense of Defendant Icicle Seafoods, Inc. Dkt. 15 at 3, Dkt. 12-6.

Plaintiff contends that he was sent home for further treatment pursuant to the directions of Defendant Icicle Seafoods, Inc. and that the Return to Work Release was only issued to allow him to travel back to Seattle. Dkt. 12 at 3. Defendant Icicle Seafoods, Inc. contends that Plaintiff was originally scheduled to return to Seattle but that once he received his Return to Work Release, those plans were changed. Dkt. 15 at 3-4. Defendant Icicle Seafoods, Inc. alleges that Plaintiff was given the opportunity of continued employment in Alaska, where he could comply with the conditions contained in the Return to Work Release, or he could terminate his employment and return home. *Id.* at 3-4. Rather than choosing to return to work, Defendant alleges that Plaintiff chose to terminate his employment and returned home. *Id.*

Defendant Icicle Seafoods, Inc. does not dispute that it is obligated to provide cure to Plaintiff for the injuries he sustained to his eye while under its employment. *Id.* at 4.

II. APPLICABLE STANDARD OF PROOF

Plaintiff and Defendants dispute the standard to be applied to the instant motion. Plaintiff alleges that the applicable standard of proof to be applied to the instant matter is: "When there are ambiguities or doubts, they are resolved in favor of the seamen." *Vaughan v. N.J. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). However, Defendants contend that "in motions to determine whether a seaman is entitled to maintenance and unearned wages, the summary judgment standard applies." *Guerra v. Arctic Storm*, 2004 AMC 2319 (W.D.Wash.2004). Plaintiff counters the assertion that summary judgment should be applied by stating that summary judgment applies as to whether Plaintiff's injury

occurred while in service of Defendant aboard the barge, but once this has been established, ambiguities and doubts should be resolved in Plaintiff's favor. Dkt. 17 at 3 (citing an unpublished opinion by Judge Burgess, *Alexander v. Dorby S*, Case No. 04-5289FDB).

*2 In the instant matter there is no dispute over whether Plaintiff injured himself while in service of the Defendants aboard the barge. The dispute is over whether Plaintiff is entitled to maintenance and unearned wages or whether Plaintiff was able to return to work and instead voluntarily quit and returned home. If Plaintiff was able to return to work but voluntarily chose to return home, he would have forfeited his entitlement to maintenance and unearned wages. *Dowdle v. Offshore Exp., Inc.*, 809 F.2d 259, 265 (5th Cir.1987); see also *Caulfield v. AC & D Marine, Inc.*, 633 F.2d 1129, 1133 (5th Cir.1981). While the case law is unclear as to the standard to apply under these factual circumstances, the Court finds that where the issue of entitlement to maintenance and unearned wages is disputed due to alleged forfeiture by Plaintiff, the summary judgment standard should apply.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(e). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). See also Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

IV. DISCUSSION

*3 Plaintiff contends that, "if [Plaintiff] is entitled to cure, he is also entitled to maintenance." Dkt. 17 at 1 (citing *McCarthy v. F/T Seafreeze Alaska*, 2004 A.M.C. 2107 (W.D.Wash.2004)). As stated above, Defendants have conceded that Plaintiff is entitled to cure. Dkt. 15 at 4. However, there is a factual dispute over whether Plaintiff forfeited his right to maintenance and unearned wages due to his alleged refusal to accept alternate employment with Defendant Icicle Seafoods, Inc., instead choosing to voluntarily quit and return to Seattle for further treatment. Because this material factual issue exists, the Court finds that it would be inappropriate to summarily award maintenance and unearned wages at this time. Furthermore, an award of attorneys' fees would also be inappropriate at this time given the Court's determination that Plaintiff's motion for maintenance and unearned wages should be denied. However, the Court may be amenable to a motion seeking a separate expedited trial on the issue of maintenance and unearned wages pursuant to Fed.R.Civ.P. 42(b).

V. ORDER

Therefore, it is **ORDERED** that Plaintiff's Motion for Maintenance, Unearned Wages and Attorneys' Fees (Dkt.12) is hereby **DENIED**.

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2008 WL 4189378

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

Charles DAVIS, Plaintiff,

v.

ICICLE SEAFOODS, INC., in personam;
the P/B Arctic Star, Official Number
501203, her engines, machinery,
appurtenances and cargo, in rem, Defendants.

No. 07-1565BHS. | Sept. 5, 2008.

Attorneys and Law Firms

John W. Merriam, Seattle, WA, for Plaintiff.

Philip W. Sanford, Holmes Weddle & Barcott, Seattle, WA,
for Defendants.

Opinion

ORDER DENYING PLAINTIFF'S MOTION FOR CURE

BENJAMIN H. SETTLE, District Judge.

*1 This matter comes before the Court on Plaintiff's Motion for Cure (Dkt.31). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2007, Plaintiff Charles Davis filed a complaint against Defendants Icicle Seafoods, Inc., and P/B ARCTIC STAR for damages of personal injuries, wages, maintenance and cure. Dkt. 1. It is undisputed that Plaintiff injured his eye while aboard the Arctic Star on July 27, 2007. Dkt. 16 at 4-5. Plaintiff was aboard the Arctic Star pursuant to an employment agreement he entered into with Defendant Icicle Seafoods, Inc. Dkt. 12-2.

On January 3, 2008, Plaintiff moved the Court for an order that Defendants pay Maintenance, Unearned Wages and Attorney Fees. Dkt. 12. On February 13, 2008, the Court

denied Plaintiff's motion because of the existence of material issues of fact. Dkt. 18 at 4-5.

On March 20, 2008, Defendants moved for summary judgment on Plaintiff's claims for maintenance, cure and unearned wages. Dkt. 21. Although the title of the motion mentioned Plaintiff's claim for cure, Defendants stated that "[i]t is undisputed that cure has been paid, and that [Defendant Icicle Seafoods] will continue to pay to the point of maximum medical cure." *Id.* at 7. As for Plaintiff's other claims, Defendants argued that Plaintiff forfeited his entitlement to maintenance and unearned wage. *Id.* at 6. On May 12, 2008, the Court denied Defendants' motion because of the existence of material issues of fact regarding Plaintiff's alleged forfeiture. Dkt. 26.

On August 5, 2008, Plaintiff filed a Motion for Cure requesting that the Court order Defendants to pay for plastic surgery to his eye. Dkt. 31. It is undisputed that on August 24, 2007, Dr. Ted Zollman diagnosed Plaintiff with Bell's palsy in the same eye that Plaintiff had injured while aboard the Arctic Star. Dkt. 31-2, Deposition of Ted Zollman ("Zollman Decl.") at 5. Dr. Zollman referred Plaintiff to a plastic surgeon because Plaintiff "may experience some improvement with surgical treatment." *Id.* at 15. Plaintiff claims that plastic surgery to his eye lid will cost a maximum of \$3500. Dkt. 31-5, Declaration of John Merriam, ¶ 3. Plaintiff requests that the Court order Defendants to pay for this surgery because Defendants have "stopped paying [his] medical bills." Dkt. 31 at 3.

On August 25, 2008, Defendants responded arguing not only that there exists questions of fact regarding Plaintiff's forfeiture of his rights to cure but also that Plaintiff's Bell's palsy condition "did not manifest during his employment." Dkt. 32 at 1-2. On August 28, 2008, Plaintiff replied. Dkt. 33.

II. APPLICABLE STANDARD OF PROOF

Defendant argues that "[t]he summary judgment standard applies to Plaintiff's motion." Dkt. 32 at 6. Plaintiff counters that it "makes no difference" whether the Court applies the summary judgment standard of proof because the real question is "[w]ho bears the burden?" Dkt. 33 at 4. The parties seem to have raised this issue because of decisions that have been issued within this district that seem to be in conflict with one another. *Compare Mabrey v. Wizard Fisheries, Inc.*, 2007 WL 1556529 (W.D.Wash.2007), C05-1499L, Order

Denying Motion to Compel Payment of Cure, Dkt. 77 ("the Court applies a summary judgment standard rather than granting interim relief without an adjudication on the merits") with *Gouma v. Trident Seafoods, Inc.*, 2008 WL 2020442 (W.D.Wash.2008), 2008 A.M.C. 863 ("Plaintiff is entitled to the presumptive continuance of maintenance and cure payments").

*2 In *Mabrey*, the plaintiff moved the Court for an order to compel defendant to pay cure for his carpal tunnel syndrome. *Mabrey*, 2007 WL 1556529 at *1. Judge Lasnik found that there were material issues of fact regarding "whether plaintiff suffers from [carpal tunnel syndrome] and, if he does, whether it was caused while he was working in service of the vessel." *Id.* at 2. Judge Lasnik concluded that these were threshold issues upon which plaintiff bore the burden of proof at trial and, therefore, preliminary judgment on the merits was inappropriate. *Id.*

On the contrary, in *Gouma*, plaintiff suffered from a work-related back injury and defendant originally paid maintenance and cure. *Gouma*, 2008 WL 2020442 at * 1. When plaintiff's doctor recommended a discogram/CT procedure, defendant refused to authorize payment for that procedure without an independent medical examination. *Id.* Plaintiff then moved the Court for an order to compel payment of cure. *Id.* Judge Pechman distinguished *Mabrey* on the basis that Judge Lasnik was faced with "the purely factual question of whether the seaman had been in the service of the vessel when injured." *Id.* at *2. Judge Pechman found that, in the case before her, "there [was] no dispute that Plaintiff was injured while in service to Defendants' vessel; the dispute center[ed] around the necessity of a medical procedure and whether Plaintiff ha[d] reached maximum cure." *Id.* Judge Pechman concluded that doubts should be resolved in favor of the injured seaman (see *Vaugh v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)) and granted plaintiff's motion for cure.

In this case, it is undisputed that Plaintiff injured his eye while in service aboard the ARCTIC STAR. What is disputed is whether Plaintiff's Bell's palsy is a result of that injury. Defendants have paid for medical cure for Plaintiff's injuries regarding his eye infection and nerve damages. Defendants, however, have refused to pay for surgery related to Plaintiff's Bell palsy, an injury in which the treating physician has stated that there is "no known cause" for 40% of the reported cases. See Zollman Decl. at 8-9. Thus, Plaintiff's instant motion presents the issue of whether this Bell's palsy injury occurred while he was in the service of the ARCTIC STAR. As this

is a threshold factual issue and is not a dispute regarding maximum cure, the Court will apply the summary judgment standard to Plaintiff's motion for cure.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(e). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). See also Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

*3 The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

IV. DISCUSSION

Defendants argue that “[i]t is [Plaintiff’s] burden to evidence that his Bell’s palsy condition manifest during his employment with the employer.” Dkt. 32 at 7. Plaintiff counters that Defendants must bear the “burden to show that [Plaintiff’s] Bell’s palsy did *not* manifest while [Plaintiff] was in the service of [Defendants].” Dkt. 33 at 4 (emphasis in original). Plaintiff, however, provides no authority for his proposition. In fact, it is his duty to show at trial that he was “injured or became ill while in the service of the vessel” and “the amount of ... cure to which the plaintiff is entitled.” Ninth Circuit Model Civil Jury Instruction 7.11 (2007). The fact that Plaintiff is the movant for purposes of summary judgment does not shift the burden to Defendants to show that Plaintiff’s injury did not manifest while he was aboard the ARCTIC STAR. Accordingly, the fact that Plaintiff has introduced *some* evidence “that his blinking problems started while he was still working for [Defendants]” does not establish that he is entitled to cure for the Bell’s palsy surgery.

Defendants have shown that there are multiple questions of fact regarding key issues in this case. First, the Court has already ruled that there are questions of fact on the issue of whether Plaintiff forfeited his entitlement to cure. *See* Dkt. 26. Second, Plaintiff’s treating physician stated that he had no way of knowing when the Bell’s palsy manifested. Zollman Decl., at 5-6. Moreover, Dr. Zollman referred to Plaintiff’s

Bell’s palsy injury and his eye infections as separate injuries. *See id.*, at 12-15. If they are separate injuries, Plaintiff bears the burden to show that he is entitled to cure for both. *See supra*.

Therefore, the Court denies Plaintiff’s motion to compel cure because there exists material issues of facts whether Plaintiff is entitled to cure for the surgery to his eyelid. The Court is aware, however, that Defendants unilaterally decided when to stop paying Plaintiff’s medical bills. Although the Court is unaware of any authority that allows a defendant the sole discretion to determine when a plaintiff has obtained maximum cure, Plaintiff may recover compensatory damages for the pain he must endure until a ruling on the merits can be obtained. *See* Comments to Ninth Circuit Pattern Jury Instruction 7.11 (2007) (citing *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371, 53 S.Ct. 173, 77 L.Ed. 368 (1932)). In addition, Plaintiff may recover attorney’s fees if he can show that Defendants acted willfully and arbitrarily in refusing to pay medical expenses. *See Koczynski v. The Jacqueline*, 742 F.2d 555, 559 (9th Cir.1984).

V. ORDER

*4 Therefore, it is **ORDERED** that Plaintiff’s Motion for Cure (Dkt.31) is **DENIED**.

2012 WL 5381803

Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

Robert Eric LEE, Plaintiff,
v.

METSON MARINE SERVICES,
INC., et al., Defendants.

Civ. No. 11-00169 ACK-
BMK. | Oct. 31, 2012.

Attorneys and Law Firms

Dennis E.W. O'Connor, Jr., Jeffrey W. Juliano, Lahela H. Hite, O'Connor Playdon & Guben LLP, Honolulu, HI, Gregory N. Bilyeu, Bellingham, WA, for Plaintiff.

Michael J. Nakano, Mark S. Hamilton, Frame & Nakano, Honolulu, HI, for Defendants.

Opinion

FINDINGS AND RECOMMENDATION THAT DEFENDANT UNITED STATES OF AMERICA'S MOTION TO TERMINATE MAINTENANCE AND CURE BE DENIED

BARRY M. KURREN, United States Magistrate Judge.

*1 Before the Court is Defendant United States of America's Motion to Terminate Maintenance and Cure (Doc. 69). The Court heard this Motion on August 28, 2012. After careful consideration of the Motion, the supporting and opposing memoranda, and the arguments of counsel, the Court finds and recommends that Defendant's Motion be DENIED.

BACKGROUND

Plaintiff Robert E. Lee has a history of back injuries and back pain. Some of those injuries occurred while he was employed as a seaman. Prior to June 2010, Plaintiff underwent back surgery, but he continued to experience back pain.

Dr. Allen W. Jackson conducted an independent medical examination on Plaintiff and completed his report on June 29, 2010. (Defendant Ex. B.) He noted that Plaintiff was experiencing pain in his back and left lower extremity. (*Id.*) Dr. Jackson also noted that nearly a year had passed since Plaintiff underwent back surgery and opined that "Plaintiff is approaching [maximum medical improvement¹] at this point in time." (*Id.* at 8.)

¹ Maximum medical improvement will be referred to as "MMI" throughout this document.

Plaintiff later visited Dr. Wu Zhuge, an orthopedic surgeon, on April 13, 2011. (Defendant Ex. C.) Plaintiff complained of "chronic debilitating left leg pain." (*Id.* at 3.) Dr. Zhuge recommended various treatments, including an electromyography test ("EMG") if the other recommended treatments did not result in pain relief. (*Id.* at 3.) Plaintiff subsequently underwent an EMG, and Dr. Zhuge reviewed the results. (Defendant Ex. D.) After meeting with Plaintiff and reviewing the EMG results, Dr. Zhuge informed Plaintiff that "surgery to remove the scar around the nerve roots is doable, but the result is very unpredictable." (*Id.* at 2.) Indeed, surgery might "make his back condition worse." (Defendant Ex. E.) Instead of recommending surgery, Dr. Zhuge recommended that Plaintiff undergo a "spinal cord stimulator trial," which "help[s] those patients who have failed previous back surgery." (Defendant Exs. D, E.)

On November 23, 2011, Plaintiff visited Dr. Kelvin D. Franke, who also recommended a "spinal cord stimulator evaluation." (Defendant Ex. F.) Plaintiff visited Dr. Nazanin Jafarian a few weeks later. (Defendant Ex. G.) Dr. Jafarian recommended "a multi-modal approach" for Plaintiff's treatment, including weight management, medication adjustment, spinal cord stimulation, and physical therapy, which could "improve cervical and upper extremity muscular strength and range of motion." (*Id.* at 3.)

Dr. Jackson, who had examined Plaintiff in 2010, prepared another report on March 23, 2012 after reviewing more recent medical records. (Defendant Ex. H.) In June 2010, Dr. Jackson had opined that Plaintiff was "approaching MMI" at that time.

(Defendant Ex. B.) However, in his March 2012 report, Dr. Jackson stated: "It is my opinion that [Plaintiff] is at maximal medical improvement." (Defendant Ex. H at 5.) He also opined that "spinal cord stimulation is not curative but is palliative if successful for controlling chronic radicular pain." (*Id.*)

*2 Finally, on May 8, 2012, Plaintiff was examined by Dr. Richard S. Goka. (Plaintiff Ex. A.) Dr. Goka disagreed with Dr. Jackson's June 2010 and March 2012 opinions regarding MMI:

It is my opinion [Plaintiff] did not reach maximum medical improvement in June 2010 nor has he reached MMI yet. He had not reached a plateau in his treatment nor was it unlikely that any further treatment would not improve his function. All treatment options have not been exhausted.

(*Id.* at 11.) Dr. Goka suggested the following treatments for Plaintiff, which he believed would "improve his ability to function": spinal cord stimulator, pharmacological trials, intrathecal medication, and a functional restoration pain program. (*Id.* at 8, 10 ("[I]n my opinion the above treatment options will improve his functionality and will reasonably control his pain without major side effects.")) Dr. Goka stated that the "treatments outlined above are necessary to maximize [Plaintiff's] function in activities of daily living and possible return to some gainful employment." (*Id.* at 12.)

DISCUSSION

In the present Motion, Defendant seeks to terminate maintenance and cure payments to Plaintiff.

"A seaman injured in the service of the ship is entitled to maintenance and cure until he reaches the point of maximum medical cure," also called maximum medical improvement or MMI. *Light v. Jack's Diving Locker*, CV. NO. 05-00706 BMK, 2007 WL 4321715, at *1 (D.Haw. Dec. 11, 2007) (citing *Farrell v. United States*, 331 U.S. 511, 518 (1949)). Payments for maintenance and cure are "designed to ensure the

recovery of [seamen] upon injury or sickness sustained in the service of the ship." *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir.1979). "Maintenance and cure are due without regard to the negligence of the employer or the unseaworthiness of the ship." *Id.* "Maintenance is a per diem living allowance, paid so long as the seaman is outside the hospital and has not reached the point of 'maximum cure.'" *Id.* "Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman, again, until the point of 'maximum cure.'" *Id.*

Maximum medical cure or maximum medical improvement is achieved "when it appears probable that further treatment will result in no betterment of the seaman's condition." *Light*, 2007 WL 4321715, at *1 (citing *Pelotto*, 604 F.2d at 400). "Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved." *Pelotto*, 604 F.2d at 400; see *Sefcik v. Ocean Pride Alaska, Inc.*, 844 F.Supp. 1372, 1373 (D.Alaska 1993) ("Maximum cure is reached when it is medically determined that further improvement in a plaintiff's health is not reasonably possible."). "The obligation to 'cure' a seaman includes the obligation to provide him with medications and medical devices that will improve his ability to function, even if they do not improve his actual condition," *Messler v. Bouchard Transp.*, 756 F.Supp.2d 475, 481 (S.D.N.Y.2010).

*3 "Although the injured seaman bears the burden of establishing that he is eligible for maintenance and cure, the shipowner has the burden of proving that maximum medical cure has been reached." *Light*, 2007 WL 4321715, at *1 (citing *Smith v. Delaware Bay Launch Serv.*, 972 F.Supp. 836, 848 (D.Del.1997)). The "decision to terminate must be unequivocal." *Sefcik*, 844 F.Supp. at 1373. All available medical evaluations should be considered in deciding whether to terminate maintenance and cure payments. *Id.* "Any ambiguities whether maximum cure has been reached are to be resolved in favor of the seaman." *Id.* at 1374.

Defendant argues that Plaintiff "has reached the point of maximum medical improvement" and that, therefore, "maintenance and cure benefits should be

terminated." (Motion at 7.) Defendant points to various medical records and reports, including both of Dr. Jackson's reports. In the June 29, 2010 report, Dr. Jackson stated that Plaintiff "is approaching MMI at this point in time." (Defendant Ex. B.) In his March 23, 2012 report, which was based on more recent medical records, Dr. Jackson stated: "It is my opinion that [Plaintiff] is at maximal medical improvement." (Defendant Ex. H.) Defendant also argues that, because the recommended spinal cord stimulation treatment is palliative and not curative, "Plaintiff is no longer entitled to maintenance and cure and those benefits should be terminated." (Motion at 10.)

Plaintiff counters that he has not reached maximum medical improvement and supports this argument with the independent medical examination report of Dr. Goka, who evaluated Plaintiff on May 8, 2012. In his report dated June 15, 2012, Dr. Goka disagreed with Dr. Jackson's opinion that Plaintiff reached maximum medical improvement: "In my opinion [Plaintiff] did not reach maximum medical improvement in June 2010 nor has he reached MMI yet." (Plaintiff Ex. A.) Dr. Goka supported his opinion by stating that Plaintiff "had not reached a plateau in his treatment nor was it unlikely that any further treatment would not improve his function. All treatment options have not been exhausted." (*Id.*) Indeed, Dr. Goka outlined possible treatments that he believed "are necessary to maximize [Plaintiff's] function in activities of daily living and possible return to some gainful employment." (*Id.*) Dr. Goka continued: "Once [Plaintiff] has received optimal treatment and stabilized, then and only then can he be consider[ed] to have reached Maximum Medical Improvement." (*Id.*)

As noted above, "the decision to terminate must be unequivocal" and that decision shall be based on "all available medical evaluations." *Sefcik*, 844 F.Supp. at 1373. Further, "[a]ny ambiguities whether maximum cure has been reached are to be resolved in favor of the seaman." *Id.* at 1374. The Court finds that the evidence provided by Plaintiff and Defendant establishes the

lack of "an unequivocal endorsement that [Plaintiff] attained maximum cure." *Id.* Indeed, Dr. Jackson opined in March 2012 that Plaintiff reached MMI, while Dr. Goka opined more recently that Plaintiff has not reached that status. (Defendant Ex. H; Plaintiff Ex. A.) In light of this disagreement as to whether Plaintiff reached maximum medical improvement, the Court finds that Defendant has not met its "burden of proving that maximum medical cure has been reached." *Light*, 2007 WL 4321715, at * 1. Accordingly, the Court recommends that Defendant be "directed to continue maintenance payments until the issue is resolved at trial" or by further order of the Court.² *See Sefcik*, 844 F.Supp. at 1374 ("Because there is disagreement as to whether additional psychological/psychiatric treatment is necessary for plaintiff, defendant is directed to continue maintenance payments until the issue is resolved at trial.").

² The Court's recommendation that Defendant continue to make maintenance and cure payments is based on the physicians' disagreement as to whether Plaintiff achieved maximum medical improvement. In reaching this recommendation, the Court need not and does not determine whether spinal cord stimulation treatment is palliative or curative and, therefore, the Court does not address whether to strike Dr. Jeffrey S. Wang's declaration, which was proffered solely for that issue.

CONCLUSION

*4 For the foregoing reasons, the Court finds and recommends that Defendant's Motion to Terminate Maintenance and Cure be DENIED.

Any objections to this Findings and Recommendation shall be filed in accordance with the Federal Rules of Civil Procedure and this Court's Local Rules.

IT IS SO ORDERED.

2013 WL 28264

Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

Robert Eric LEE, Plaintiff,

v.

METSON MARINE SERVICES,
INC., Et Al., Defendants.

No. 11-00169 ACK-BMK | Jan. 2, 2013.

Attorneys and Law Firms

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Michael J. Nakano, Mark S. Hamilton, Frame &
Nakano, Honolulu, HI, for Defendants.

Opinion

ORDER DENYING DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR RECONSIDERATION

BARRY M. KURREN, United States Magistrate
Judge.

*1 Before the Court is Defendant United States of
America's Motion for Reconsideration of this Court's
Findings and Recommendation that Defendant's
Motion to Terminate Maintenance and Cure Be
Denied (Doc. 120). After careful consideration of the
Motion and the supporting and opposing memoranda,
Defendant's Motion is DENIED.¹

¹ The Court elects to decide this Motion without a
hearing, pursuant to Local Rule 7.2(d).

Defendant contends that this Court "applied a
new standard" regarding whether Plaintiff reached
maximum medical improvement. (Motion at 1.) The
Court disagrees that reconsideration should be granted,
as explained below.

"In the Ninth Circuit a successful motion for
reconsideration must accomplish two goals." *White v.
Sabatino*, 424 F.Supp.2d 1271, 1274 (D.Haw.2006)

"First, it must demonstrate some reason why the court
should reconsider its prior decision." *Id.* "Second,
a motion for reconsideration must set forth facts or
law of a strongly convincing nature to induce the
court to reverse its prior decision." *Id.* According
to the Ninth Circuit, there are "three grounds
justifying reconsideration: (1) an intervening change in
controlling law; (2) the availability of new evidence;
and (3) the need to correct clear error or prevent
manifest injustice." *Id.* The District of Hawaii has
implemented these standards in Local Rule 60.1,
which provides:

Motions for reconsideration of interlocutory orders
may be brought only upon the following grounds:

- (a) Discovery of new material facts not previously
available;
- (a) Intervening change in law;
- (c) Manifest error of law or fact.

"Mere disagreement with a previous order is
an insufficient basis for reconsideration." *White*,
424 F.Supp. at 1274. Furthermore, a "motion for
reconsideration may not present evidence or raise legal
arguments that could have been presented at the time of
the challenged decision." *Id.* "Whether or not to grant
reconsideration is committed to the sound discretion of
the court." *Id.*

In its Motion for Reconsideration, Defendant argues
that, in determining whether Plaintiff reached
maximum medical improvement, this Court "applied
a new standard" instead of "applying the palliative v.
curative standard ... as established by the Ninth Circuit
and the District of Hawaii." (Motion at 1.)

The Court disagrees and notes that the Findings and
Recommendation cited to and was based on case law
from within the Ninth Circuit. Importantly, this Court
cited case law from the District of Alaska, which held
that "the decision to terminate must be unequivocal."
Sefcik v. Ocean Pride Alaska, Inc., 844 F.Supp. 1372,
1373 (D.Alaska 1993). This holding is in line with the
United States Supreme Court's view of a shipowner's
liability for maintenance and cure:

Admiralty courts have been liberal in interpreting
this duty [for providing maintenance and cure] "for

the benefit and protection of seamen who are its wards." We noted in *Agullar v. Standard Oil Co.*, 318 U.S. 724, 730, that the shipowner's liability for maintenance and cure was among "the most pervasive" of all and that *it was not to be defeated by restrictive distinctions nor "narrowly confined."* *When there are ambiguities or doubts, they are resolved in favor of the seaman.*

*2 *Vaughan v. Atkinson*, 369 U.S. 527, 531-32 (1962).

In its Findings and Recommendation, this Court did consider "the palliative v. curative standard for determining Maximum Medical Improvement." However, as directed by the case law cited above, this Court also considered whether the decision to terminate maintenance and cure was unequivocal,

and whether the evidence before the Court was ambiguous or created doubt. After considering the evidence before it, this Court's ultimate conclusion was that "the evidence provided by Plaintiff and Defendant establishes the lack of 'an unequivocal endorsement that Plaintiff attained maximum cure.' " (Doc. 118 at 8.) Given that the doctors' reports were conflicting, ambiguous, and created doubt as to whether maximum medical improvement was attained, this Court complied with the Supreme Court's mandate that ambiguities or doubts "are resolved in favor of the seamen." *Vaughan*, 369 U.S. at 532. This Court committed no manifest error of law or fact and, accordingly, this Court denies Defendant's Motion for Reconsideration.

IT IS SO ORDERED.

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Dear Mr. Carpenter:

Attached in PDF form is the WSAJ Foundation's amicus brief in DEAN. This brief is being served electronically this date per prior arrangement with counsel.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
On Behalf of WSAJ Foundation