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SUPREME COURT
OF THE STATE OF WASHINGTON

IAN DEAN,

Petitioner,

v.

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

Respondents.

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SUPREME COURT
STATE OF WASHINGTON
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(AMENDED) BRIEF OF *AMICUS CURIAE*
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers association (“WDTL”), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

This case is of particular interest to the Maritime section of WDTL because of the need for uniformity in maritime law and practice, particularly as concerns the nature and allocation of the burden of proof on summary judgment issues concerning maintenance and cure. The trial court correctly applied the summary judgment standard under CR 56(c), and denied Ian Dean’s pretrial motion to reinstate maintenance and cure, based on the disputed issue of fact. WDTL urges this Court to affirm the decision.

II. STATEMENT OF THE CASE

The Fishing Company of Alaska, Inc. (FCA) paid Ian Dean the general maritime remedies of maintenance and cure from 2006 to 2009.

FCA discontinued those payments in 2009 after a medical examination by a doctor determined that Dean had reached maximum cure. A second doctor disputed that factual determination. Dean sued FCA in King County Superior Court under federal maritime law and the Jones Act, 46 U.S.C. § 30104. In a pretrial motion, Dean sought reinstatement of his maintenance and cure payments. The trial court applied the summary judgment standard of review under CR 56(c), and concluded that Dean was not entitled to summary judgment because, as the moving party, he had failed to show that there was no genuine issue of material fact.

Dean argued that the trial court erred by applying the ordinary burdens of proof under CR 56(c). He asserted that the trial court should have instead concluded that because the two doctors had issued opposing opinions, a doubt existed as to his right to reinstatement and that substantive maritime law requires that doubts or ambiguities regarding a shipowner's liability for maintenance and cure must be construed in the seaman's favor. *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S. Ct. 997, 1000, 8 L. Ed. 2d 88 (1962). The Court of Appeals disagreed, and affirmed the trial court's judgment for FCA.

III. ARGUMENT

The United States Constitution extends the judicial power of the federal courts "to all cases of admiralty and maritime jurisdiction,"

preserving the general maritime law as a species of federal common law. U.S. Const. art. III, § 2; *Endicott v. Icicle Seafoods, Inc.*, 167 Wash. 2d 873, 878, 224 P.3d 761 (2010). Congress has given federal courts exclusive jurisdiction over all cases of “admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*” 28 U.S.C. § 1333(1) (emphasis added). The “saving to suitors” clause gives plaintiffs the right to sue on maritime actions in state court provided that the state court proceeds *in personam* (here, “at law”) and not *in rem* (here, “in admiralty”). *Endicott*, 167 Wash. 2d at 878-79 (citing *Madruga v. Superior Court*, 346 U.S. 556, 560–61, 74 S.Ct. 298, 98 L.Ed. 290 (1954)). In suits such as Dean’s, where a plaintiff has elected to proceed in state court, the court applies substantive federal maritime law, but state procedural law. *Id.*

The central question in this case is what legal standard should be applied to Dean’s pretrial motion seeking maintenance and cure. As the Court of Appeals recognized, this question invokes the “obvious tension [] between the summary judgment standard, which requires that all doubts be resolved in favor of the non-moving party, and the canon of admiralty law, which provides that all doubts be resolved in favor of the seaman.” *Dean v. Fishing Co. of Alaska, Inc.*, 166 Wash. App. 893, 899, 272 P.3d 268, 271, *review granted*, 175 Wash. 2d 1017, 290 P.3d 133 (2012)

(quoting *Buenbrazo v. Ocean Alaska, LLC*, No. C06-1347C, 2007 U.S. Dist. LEXIS 98731, at *8 (W.D.Wash. Feb. 28, 2007)). As will be demonstrated below, when confronted with a motion that seeks to determine the rights and liabilities of the parties pre-trial, a court's only option, even in the maintenance and cure context, is to treat the motion as one for summary judgment to apply the standard established by Rule 56.

A. Washington Courts Should Achieve Consistency and Uniformity with the Federal Maritime Law

Maritime common law requires that a shipowner pay a seaman a daily subsistence allowance (maintenance) and medical treatment (cure) when the seaman becomes ill or injured in the service of a vessel. *Tuyen Thanh Mai v. Am. Seafoods Co., LLC*, 160 Wash. App. 528, 538, 249 P.3d 1030 (2011). It is undisputed that the seaman bears the burden of establishing his or her right to maintenance and cure, and must do so by alleging and proving four elements, by a preponderance of the evidence: (1) her engagement as a seaman; (2) her illness or injury occurred, manifested, or was aggravated while in the ship's service; (3) the wages to which she is entitled; and (4) the expenditures for medicines, medical treatment, board, and lodging. *Id.* at 538-39. Once established, the seaman's entitlement continues until she reaches maximum medical recovery or maximum cure. *Id.* at 539. Maximum cure is the point at which "it appears probable that further treatment will result in no

betterment of the seaman's condition.” *Id.* (quoting *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372, 374 n. 3 (5th Cir.1981)).

It is similarly undisputed that, if the same issue was presented at a trial, the court would construe all doubts in Dean’s favor. *See Vaughan*, 369 U.S. at 532, 82 S. Ct. 997, 1000, 8 L. Ed. 2d 88 (1962). The difficulty in this case arises because of Dean’s choice to seek a determination of his right to maintenance and cure, and FCA’s defenses to his contention, using a pretrial motion.¹

States that apply maritime law under the “saving to suitors” clause cannot do so independently, but instead as a part of and in relation to the body of federal maritime law already in existence. U.S. Const. art. III, § 2; *see Endicott*, 167 Wash. 2d at 878-79. “[T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each

¹ As the Court of Appeals noted, Dean had at his disposal other procedural tools with which to try to secure an expedited determination of his right to maintenance and cure and which would have allowed the trial court to weigh the evidence. *See Dean*, 166 Wash. App. 893, 903, n. 29, 272 P.3d 268, 272, n. 29; *see also Bloom v. Weeks Marine, Inc.*, 225 F. Supp. 2d 1334, 1336-37 (M.D. Fla. 2002).

other or with foreign states.” *The Lottawanna*, 88 U.S. 558, 575, 22 L. Ed. 654 (1874); *see also*, *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct. 438, 440, 64 L. Ed. 834 (1920).

Nevertheless, State courts proceeding “at law” under the “savings to suitors” clause have some ability and authority to impact the contours of maritime law, but generally only in the absence of controlling judicial rules, federal statutes or a need for uniformity in maritime practice. *See, e.g.*, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955) (in the absence of a federal statute, controlling judicial rule or need for uniformity in maritime practice, State law held applicable to question of enforcement of coverage warranty in a fire insurance policy on a houseboat); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S. Ct. 981, 987, 127 L. Ed. 2d 285 (1994) (citing other examples of areas in which State law was permitted to augment federal maritime law).

In some cases federal substantive maritime law may be less clear than in the present case; certain laws may not require uniformity, or there may be a split among federal circuit courts that enables state courts to issue rulings that are inconsistent with how certain federal courts may decide an identical issue. *See, e.g.*, *Lundborg v. Keystone Shipping Co.*,

138 Wash. 2d 658, 665-66, 981 P.2d 854, 858 (1999) (holding in part that a maintenance rate set in a collective bargaining agreement abrogated the seaman's right to maintenance consistent with cases from the Second and Third Circuits, but contrary to opinions from the Ninth, First, Fifth, and Sixth Circuits). But where maritime law is clear and well settled, or where there is a need for uniform maritime practice, a state court does not have either the occasion or the authority to reach a contrary result. "[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Am. Dredging Co. v. Miller*, 510 U.S. at 452 (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374, 79 S. Ct. 468, 480-481, 3 L.Ed.2d 368 (1959)). Those are precisely the circumstances here.

The great weight of case law and federal authority support the conclusion reached by the trial court and affirmed by the Court of Appeals. Most federal courts to consider the issue have held that the summary judgment standard should apply to a pretrial motion seeking maintenance and cure or its reinstatement. *See, e.g.: Whitman v. Miles*, 387 F.3d 68, 74 (1st Cir. 2004) (citing to Rule 56(c) as mandating the entry of summary judgment, based on plaintiff's failure to produce evidence of an element on which she would have the burden of proof at trial); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1505-06 (9th Cir.

1995) *abrogated on other grounds by Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) (where there was a factual dispute as to whether seaman's injuries were sustained while he was in the service of the vessel, pre-trial motion to compel maintenance and cure was premature); *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 404 (5th Cir. 1979) ("Since Pelotto had the burden of proving inadequacy [of cure], his failure to submit controverting affidavits or other factual proof entitled the District Judge to enter summary judgment against him."); *Padilla v. Maersk Line, Ltd.*, 603 F. Supp. 2d 616, 622 (S.D.N.Y. 2009) *opinion adopted*, 07 CIV. 3638 RMB THK, 2012 WL 315641 (S.D.N.Y. Jan. 30, 2012) (pre-trial motion brought by seaman to determine the merits of his maintenance and cure claim treated as a motion for summary judgment; see cases cited); *Keliihananui v. KBOS, Inc.*, CIV. 09-00151JMSLEK, 2010 WL 2176105 (D. Haw. May 24, 2010) (recognizing tension over standard to be applied but granting summary judgment where vessel owner failed to raise triable issues of fact); *Baucom v. Sisco Stevedoring, LLC*, 506 F. Supp. 2d 1064, 1074 (S.D. Ala. 2007) (holding that genuine issues of material fact as to whether seaman had reached maximum medical cure precluded summary judgment on issue of maintenance and cure); *Loftin v. Kirby Inland Marine, L.P.*, 568 F. Supp. 2d 754, 759-60 (E.D. Tex. 2007) (unless seaman can show there are no

material facts in dispute and that he is entitled to summary judgment on the claim, he cannot obtain a pre-trial order for payment of maintenance and cure); *Joubert v. C & C Technologies, Inc.*, CIV.A. 6:04CV0723, 2005 WL 1830996 (W.D. La. Aug. 1, 2005) (“Since Joubert will have the burden of proof regarding his entitlement to [reinstatement of] maintenance and cure at the trial of this matter, he also bears the burden of proof at the summary judgment stage of these proceedings.”); *Blake v. Cairns*, C-03-4500 MJJ, 2004 WL 1857255 (N.D. Cal. Aug. 16, 2004) (ordinarily a suit for maintenance and cure presents questions of fact that should not be disposed of by summary judgment, nor should payment be decreed on motion); *Bloom v. Weeks Marine, Inc.*, 225 F. Supp. 2d 1334, 1336 (M.D. Fla. 2002) (unless a seaman can show there are no material facts in dispute and that he is entitled to summary judgment, he cannot obtain a pre-trial order for payment); *Freeman v. Thunder Bay Transp. Co., Inc.*, 735 F. Supp. 680, 681 (M.D. La. 1990) (“Since Freeman has the burden of proof regarding her entitlement to maintenance and cure at the trial, she also bears the burden of proof on this motion for summary judgment.”); *Davis v. Odeco, Inc.*, CIV. A. 91-1694, 1992 WL 91988 (E.D. La. Apr. 14, 1992) (vessel owner’s evidence questioning whether seaman was injured while in service of vessel and whether seaman was at

maximum medical improvement presented triable questions of fact precluding summary judgment).²

The opinion issued by the Court of Appeals in this case also cited to and relied on two federal cases from the Western District of Washington that reached the same conclusion. *Mabrey v. Wizard Fisheries, Inc.*, No. C05-1499L, 2007 WL 1556529, at *1 (W.D. Wash. May 24, 2007) (holding that the summary judgment standard should apply, in part because neither the Supreme Court nor the Ninth Circuit have provided guidance on the matter and in part because the substantive matters of plaintiff's maintenance and cure were threshold issues on which plaintiff will bear the burden of proof at trial.); *Buenbrazo*, 2007 U.S. Dist. LEXIS 98731, at *10 (holding that "in spite of the canon of admiralty law

² The Supreme Court has the discretion to consider unpublished federal opinions. The Federal Rules of Appellate Procedure provide that a court may not prohibit or restrict the citation of unpublished federal judicial opinions that have been issued on or after January 1, 2007. FRAP 32.1(a). The rules are silent as to federal opinions that were issued before 2007, and are therefore generally permissive of such citations.

Washington State's Rules of General Application, in turn, permit parties to cite to an unpublished opinion issued from jurisdictions other than Washington state courts, "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." GR 14.1(b). Thus, the permissiveness in the Federal Rules of Appellate Procedure is adopted and transposed from the issuing federal court jurisdictions into Washington state courts. In any event, citations to these unpublished cases are offered here not as binding precedent or for the persuasiveness of the reasoning contained therein, but simply to demonstrate the long-standing practice among federal courts of adjudicating pretrial motions for maintenance and cure under the summary judgment standard.

The citing party is also required to "file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." GR 14.1(b). Copies of each unpublished federal opinion are attached in the appendix below.

that all doubts and ambiguities should be resolved in favor of the seaman, the summary judgment standard should be applied to a pretrial motion to compel maintenance and cure.”).

While there are cases that have opted to overlook the procedural limitations of a trial court’s adjudicative power in the summary judgment setting and have resolved doubts in favor of the seaman, *see Gouma v. Trident Seafoods, Inc.*, C07-1309, 2008 WL 2020442 (W.D. Wash. Jan. 11, 2008); *Connors v. Iqueque USLLC*, Case No. C05-334JLR (W.D.Wash. Aug. 25, 2005), they are decidedly in the minority and disregard the plain language of Rule 56(c) while fashioning a sort of “flexible” summary judgment standard. Yet, even the determination that the evidence has generated a doubt to be construed in a seaman’s favor constitutes a question of fact and even a ship owner who is alleged to owe maintenance and cure has a right to a trial of those claims. A decision by this Court to apply the *Vaughan* standard rather than the summary judgment standard articulated by Rule 56(c) would put Washington at odds with the vast majority of federal maritime authority on the matter, and would create an exception to Rule 56(c) in maintenance and cure cases that is actually unnecessary, would prove to be unruly, and would do violence to the right of maritime defendants to a trial on the merits where the evidence presents triable questions of fact. Rather than promote a

uniform and harmonious system of federal maritime law *and practice*, such a decision would set Washington apart from virtually all other maritime jurisdictions in this country.

B. A Pretrial Maintenance and Cure Motion is Not Needed for Plaintiffs Seeking Expedited Review of their Claim to Maintenance and Cure Entitlement

Seamen who have uncontested evidence in support of each element of their maintenance and cure claim can obtain summary judgment under Rule 56(c). *Bloom v. Weeks Marine, Inc.*, 225 F. Supp. 2d 1334, 1336-37 (M.D. Fla. 2002). Those who are confronted by contested evidence on any (or all) of the elements of their claim can ask for an expedited evidentiary hearing on the maintenance and cure issues only. *Id.* Civil Rule 42 (b) provides:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

CR 42 (b). The Court of Appeals recognized this, among other options that were available to Dean. *Dean*, 166 Wash. App. 893, 903, n. 29, 272 P.3d 268, 272, n. 29. As such, the need of a seaman for prompt resolution of her contested maintenance and cure claim does not have to eclipse the right of the maritime employer to challenge the seaman's evidence and present its

own case in opposition. Rather, this Court can encourage the use of expedited separate trials in contested maintenance and cure cases where a seaman has an urgent financial need for prompt determination of her rights. Because there is a substantially similar federal procedural device available,³ the threat to uniformity of maritime practice presented by separate trials is not as great as that presented by the creation of a flexible maintenance and cure summary judgment standard within Washington State courts.

C. Creation of a Flexible Maintenance and Cure Standard for Washington Cases Would Prove to be Unwieldy at Best

Although the issue in *Dean* concerns whether he reached maximum medical cure and therefore involves conflicting opinions of health care providers, any rule reached by this Court must also consider the many other manifestations of maintenance and cure disputes and whether they are as easily addressed on summary judgment.

For example, questions sometimes arise as to whether the plaintiff is a seaman at all and, therefore, whether he or she has the right to bring a

³ The federal counterpart to CR 42(b) is substantially similar:

For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Fed. R. Civ. P. 42 (b).

maintenance and cure claim in the first place.⁴ See *Kopczynski v. The Jacqueline*, 742 F.2d 555, 559 (9th Cir. 1984) (court did not disturb jury finding that employer's failure to pay maintenance and cure was not willful and arbitrary where the evidence established the plaintiff "originally received workman's compensation benefits as a longshoreman or harbor worker."); see also *Theriot v. McDermott, Inc.*, 611 So. 2d 129, 136 (La. Ct. App. 1992) writ denied, 615 So. 2d 342 (La. 1993).

Questions sometimes arise concerning whether the seaman was subject to the vessel's call at the time of illness or injury. Those typically occur where the illness develops or the injury occurs while the seaman is away from the vessel while on shore leave, or driving to or from work. Such cases are often very factually intense. See *Shaw v. Ohio River Co.*, 526 F.2d 193, 196-98 (3d Cir. 1975) (and discussion therein). A "benefit of the doubt" summary judgment standard applied to a question such as whether the seaman was in the vessel's service at the time of injury or illness would ultimately deprive the maritime employer of the protections afforded by the elements of a maintenance and cure claim. It would, moreover, effectively eliminate the employer's right to a trial on the merits in the presence of disputed facts.

⁴ It is axiomatic that the maritime benefits of maintenance and cure are available only to those workers who qualify as seamen. *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984) (citing *Stokes v. B.T. Oilfield Services, Inc.*, 617 F.2d 1205, 1206 (5th Cir. 1980)); *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 529 (9th Cir. 1962).

Sometimes complicated questions of medical causation arise where a seaman who is at home recovering claims to have sustained a subsequent injury and tries to relate it to the first injury or illness, or who first notifies his employer of an illness or injury that allegedly occurred on board the vessel many months after having been discharged. However, “[a] seaman whose illness or injury manifests after conclusion of his or her employment with the shipowner is generally not entitled to recover for maintenance and cure absent *convincing proof of causal connection* between the injury or illness and the seaman’s service.” *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 52-53 (2d Cir. 2004) (emphasis added) (citations and internal quotation marks omitted); accord *In re Complaint of Trawler Shrimp Texas 18, Inc.*, CIV.A.G-07-557, 2008 WL 545041 (S.D. Tex. Feb. 25, 2008); *Nelsen v. Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837, 853 (D. Haw. 1992); *Brahms v. Moore-McCormack Lines, Inc.*, 133 F.Supp. 283, 286 (S.D.N.Y. 1955); *Biesemeyer v. U.S.*, 90 F. Supp. 382, 383 (N.D. Cal. 1950).

Although there are relatively few defenses to maintenance and cure, two prominent ones that come up frequently in a maritime practice are willful misconduct and misrepresentation. A seaman whose injury or illness was caused solely by her own willful misconduct is not entitled to maintenance and cure. *Warren v. United States*, 340 U.S. 523, 528, 71 S.

Ct. 432, 435, 95 L. Ed. 503 (1951); *Silmon v. Can Do II, Inc.*, 89 F.3d 240, 243 (5th Cir.1996); *McNeil v. Jantran, Inc.*, 258 F. Supp. 2d 926 (W.D. Ark. 2003). There are often fact disputes where a maritime employer has asserted that the seaman's own willful misconduct caused her injuries or illness. It is not idle to wonder how a benefit of the doubt standard for summary judgment in maintenance and cure cases could be effectively applied to issues concerning the willful misconduct defense without considerable harm to the rights of the maritime employer.

A seaman who misrepresents her health at the time of employment is not entitled to maintenance and cure if certain other elements of the defense can be established. According to *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir.1968) and its progeny, a shipowner is not obligated to provide maintenance and cure to an injured or ill seaman who willfully concealed a material preexisting medical condition. In order to establish a *McCorpen* defense, an employer must show that:

- (1) the claimant intentionally misrepresented or concealed medical facts;
- (2) the non-disclosed facts were material to the employer's decision to hire the claimant; and
- (3) a connection exists between the withheld information and the injury complained of in the lawsuit.

Id. at 548-49; *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 171 (5th Cir. 2005); *see also Tawada v. United States*, 162 F.2d 615 (9th

Cir.1947); *Vitcovich v. Ocean Rover O.N.*, 106 F.3d 411 (9th Cir. 1997) (unpublished). When, in response to a pretrial motion for maintenance and cure, the employer presents summary judgment evidence in support of each element of a *McCorpen* defense, the seaman is ordinarily not entitled to summary judgment. *Loftin v. Kirby Inland Marine, L.P.*, 568 F. Supp. 2d 754, 763 (E.D. Tex. 2007). This, of course, would change in Washington if this Court were to adopt a “benefit of the doubt” summary judgment standard in maintenance and cure cases.

It is no doubt tempting to conclude that where two health care providers disagree over whether a seaman is at maximum medical improvement, a seaman who is ultimately going to be entitled to the benefit of the doubt should be awarded summary adjudication of his maintenance and cure claim. Yet, even within such cases there are inevitably nuances. For example, one provider may be a chiropractor and the other a distinguished orthopedic surgeon; one provider may be a well-known expert who has never treated the plaintiff and who has issued hundreds of opinions in support of plaintiffs (or defendants). The dispute may center on esoteric medical issues such as whether the condition is even one for which a cure is available.

The range of legitimately disputed issues that are at risk of getting swallowed up in a rule designed to make it faster for Mr. Dean to get his

maintenance is too great and the supposed benefits too small to justify creation of a flexible summary judgment rule where there are other procedural tools available and that were not even attempted in the instant case. It is far too facile and dangerous to the rights of maritime defendants to suggest that there is an easily applied flexible approach to summary adjudication of honest maintenance and cure disputes.

D. The Trial Court Correctly Applied State Procedural Law by Employing the Summary Judgment Standard to Dean's Pretrial Motion for Maintenance and Cure

A seaman must prove at trial, by a preponderance of the evidence, that he or she is eligible for maintenance and cure. *Mai*, 160 Wn. App. at 538-39. Factual doubts at trial are resolved in the seaman's favor under *Vaughan*. 369 U.S. at 532. Equally well settled, is the rule that summary judgment is not available for the pretrial resolution of issues about which there are material factual disputes. Here, Dean elected to pursue a determination of his maintenance and cure claims by way of a pretrial motion. As most courts have concluded, that pretrial motion essentially left the trial court with no choice but to turn to the only applicable state procedural law for the resolution of his motion — the summary judgment standard under Rule 56(c). *See, e.g., 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.”). Dean had other remedies available to him, as would any other plaintiff in his situation, but he instead chose to file a pretrial motion and argue for a modified summary judgment standard in his case. The record is silent as to why he chose to pursue summary judgment rather than the alternative procedural options.

Once Dean filed his motion seeking judgment pretrial, the summary judgment standard was the only appropriate one for the trial court to apply. Under Rule 56(c), summary judgment is proper “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.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Here, the parties do not contest the existence of a factual dispute based on the conflicting determinations of the two doctors. The trial court thus properly denied his pretrial motion.

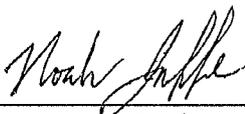
IV. CONCLUSION

This Court should affirm the trial court’s application of the summary judgment standard set forth in CR 56(c). The trial court’s decision, and the Court of Appeals opinion affirming it, are consistent with the vast majority of federal cases, and represent the only applicable

response, under state procedural law, to a pretrial summary judgment motion.

RESPECTFULLY SUBMITTED this 16th day of January, 2013.

NICOLL BLACK & FEIG.

By 

Christopher W. Nicoll, WSBA #20771
Noah Shen Jaffe, WSBA #43454
Attorneys for Amicus Curiae
Washington Defense Trial Lawyers

APPENDIX

2004 WL 1857255

American Maritime Cases

United States District Court, Northern District of California

WARREN BLAKE

v.

DOUGLAS CAIRNS,*ET AL.*

No. C-03-4500 August 16, 2004

PERSONAL INJURY - 141. Maintenance, Cure and Wages - 1441. In General, Burden of Proof.

A seaman with an injury suit pending cannot have an anticipatory order for payment of maintenance where issues of injury, maximum cure and amount of maintenance remain for trial.

Blake v. Cairns

Attorneys and Law Firms

Eugene A. Brodsky, Jennifer L. Fiore and Michael C. Miller (Brodsky Baskin & Miller, Inc.) for Blake

Desmond T. Williams, Cory A. Birnberg (Birnberg & Associates) for Cairns

David W. Condeff, Arbitrator

Opinion

Martin J. Jenkins, D.J.:

Before the Court is Plaintiff Warren Blake's Motion for Maintenance and Cure in this maritime personal injury action against Defendants Douglas Cairns, Tami Cairns and F/V *Sea Quest*. Plaintiff contends that he is entitled to maintenance and cure before trial on the merits of his claims. However, Defendants contend that triable issues of fact remain as to the circumstances and costs associated with Plaintiff's injury and therefore the motion must be denied. For the following reasons, Plaintiff's motion is hereby denied.

LEGAL STANDARD

Maintenance and cure is the obligation imposed on a shipowner, which results from a contract between the seaman and the shipowner or vessel, to pay a seaman who is ill or injured while in the service of the ship "wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached." Martin J. Norris, *The Law of Seamen* 26:2 (4th ed. 1985). To recover maintenance and cure, a plaintiff must show that he was working as a seaman, he became ill or injured while in the vessel's service, and he lost wages or incurred expenses relating to the treatment of the illness or injury. *West v. Midland Enterprises, Inc.*, 227 F.3d 613, 616, 2001 AMC 1214 [DRO] (6 Cir. 2000). Generally, "[a] suit for maintenance and cure presents questions of fact. It should not be disposed of by summary judgment nor should payment be decreed on motion." *The Law of Seamen* 26:21; see also *Bloom v. Weeks*, 225 F.Supp.2d 1334, 1336 (M.D. Fla. 2002) (denying a pre-trial AMC 81

motion for payment where no showing of absence of disputed material fact). However, if there is no dispute of material fact, then the claim may be disposed of by summary judgment. *Id.*

FACTUAL BACKGROUND AND ANALYSIS

The basic question before the Court is whether Plaintiff's request for maintenance and cure should be decided by the Court at this stage in the proceedings, or should be denied as premature. Plaintiff Warren Blake was employed on a commercial fishing boat, the *Sea Quest*, which was owned and captained by Defendant Douglas Cairns. Plaintiff contends that on February 12, 2003, while the sea craft was in navigable waters near the mouth of the Klamath River, he was injured when Captain Cairns descended a fixed ladder and stepped on Plaintiff's head and neck while he was bent over retrieving tools. Plaintiff further contends that later the same day a similar incident occurred in which Defendant Cairns again stepped on Plaintiff's neck and head. In a deposition, Defendant Cairns admitted that on February 9, 2003¹ Plaintiff "stepped underneath me twice that day when I was coming down the ladder off the house. And later that afternoon, he complained of dizziness; and I brought him back to the port."

Plaintiff argues that he suffered debilitating injury as a result of Captain Cairns' actions, and that he is entitled to maintenance and cure because he cannot continue work on the ship and has incurred expense as a result of the incident. Specifically, he attempts to show that he received state disability payments based on a doctor's certification of disability, that several doctors have evaluated him as having neck pain, and that he was charged for services at the Patd. medical clinic and for other medical evaluations. From this, he concludes that he is entitled to maintenance and cure as a matter of law.²

Defendants argue that Plaintiff is not entitled to maintenance and cure at this time because there is a triable issue of fact as to whether any injury AMC 82

occurred, whether costs were incurred as a result of the incidents, and whether he has reached maximum medical recovery. They contend that Plaintiff was not injured because he continued to work on the ship, did not inform them of any ongoing injury, did not see a doctor until several months afterwards, and fraudulently concealed a pre-existing neck condition at the time of his employment on the ship. They further contend that he has incurred no maintenance and cure costs because he lives with his father and any medical services were free due to Plaintiff's status as a Native American, and that any payment may be offset by state disability payments.

Much of Defendants' opposition brief is devoted to pointing out inconsistencies in Plaintiff's evidence, such as the alleged date of the incidents, whether or not alleged witness Allen Gates was on board the vessel at the time of the accidents, and how high the seas were on the date in question. However, Defendants have presented no contradictory evidence beyond their own assertions demonstrating that Gates was no longer employed by Defendants on the date of the accident or that the sea swells were other than as he testified. Without affirmative evidence, these bald assertions lend little support to Defendants' argument.

Defendants also rely on the deposition of Gabriel Lopez, a bartender at a bar frequented by Plaintiff, as well as depositions of other non-percipient witnesses who relayed personal observations of Plaintiff's conduct in the months following the accident indicating that Plaintiff was not injured. Plaintiff has objected to the depositions on the ground that much of this testimony is speculative or inadmissible hearsay. However, to the extent that these statements are admissible, they may present at least circumstantial evidence indicating that Plaintiff's neck was not injured in the months following the February incident on the boat that could create a fact question.

More persuasively, Defendants point to a statement made by Dr. Clifford Rossbach, an orthopedic surgeon hired by Defendants to perform an evaluation of Plaintiff, who stated on February 12, 2004 that Plaintiff is "as capable of working on a fishing boat as he ever was. There is nothing to treat." Defendants note that the medical reports relied on by Plaintiff do not expressly indicate whether or not Plaintiff could perform his duties aboard the ship, but merely show that Plaintiff saw a doctor and began complaining of neck pain and dizziness more than six weeks after the alleged incident and that further tests were recommended.

Defendants argue that Dr. Rossbach's statement creates a question of fact as to whether Plaintiff was actually injured aboard the ship, and so a decision on maintenance and cure must await a decision by the trier of fact. This argument has merit in that weighing Dr. Rossbach' evaluation against the medical AMC 83

opinions relied on by Plaintiff involves a consideration of the evidence that is within the trier of fact's, not the Court's, domain.

Defendants also argue that Plaintiff has presented no evidence that he incurred any maintenance or cure costs after the alleged injury. Generally, in order to be awarded maintenance, Plaintiff must set forth some evidence of his living expenses. *See Ritchie v. Grimm*, 1990 AMC 2948 , 2950 , 724 F. Supp. 59, 61 (E.D.N.Y. 1989). Here, there is no evidence before the Court as to Plaintiff's cost of maintenance other than Defendant's bald assertion that he incurs none because he lives with his father. Therefore, Defendants have not sustained their burden of establishing evidence that Plaintiff has not incurred expenses as a result of the injury. If such a remedy is owed, the Court is unable to determine the appropriate amount of maintenance and cure on this record.

With respect to cure, Defendants argue that Plaintiff has incurred no cure expenses because any treatment is free due to his status as a Native American. Dr. Dennie Schultheis, an employee of United Indian Health Services who saw Plaintiff, testified that "as long as you're a California Indian, all the services are free.' However, the invoices submitted by Plaintiff show that he was billed \$71.81 per visit for at least four visits. Plaintiff also contends that he incurred expenses relating to evaluation by Dr. Dedo and Dr. Maukonen. However, Defendants argue that these consultations were not medically necessary and merely in furtherance of this litigation. The Court finds, upon review of the entire record, that there exist questions of fact that preclude disposing of the issues posed by the motion at this state of the proceedings. *Bloom*, 225 F.Supp.2d 1334.

CONCLUSION

In light of the issues of fact remaining in this case, Plaintiff's motion for maintenance and cure is denied. Given the Court's disposition of this motion, Plaintiff's request for attorney's fees is hereby denied.

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Parallel Citations

2005 A.M.C. 80

Footnotes

- 1 Defendant points to evidence showing that the boat was not in navigable waters but instead docked on February 12, 2003, apparently in an attempt to show Plaintiff's deception with respect to the occurrence of the incident. However, Plaintiff's confusion about the precise date of the incident lends little weight to Defendant's argument.
- 2 Plaintiff does not move for summary adjudication of the maintenance and cure issue, but alludes to the fact that the Court could construe the motion as such. Both parties have submitted evidence outside the pleadings with respect to this issue, and to the extent the evidence is relevant it will be considered. The Court declines to convert the motion into one for partial summary judgment, but notes that the result reached here would not be different had the Court converted the motion and resolved it under Rule 56.

2007 WL 3165523

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

William BUENBRAZO, Plaintiff,

v.

OCEAN ALASKA, LLC, a Washington corporation, and F/T Ocean
Alaska, her tackle, gear, furniture, apparel and equipment, Defendants.

No. Co6-1347-JCC. | Oct. 24, 2007.

Attorneys and Law Firms

Angela Wong, Moran Windes & Wong, Seattle, WA, for Plaintiff.

James P. Moynihan, Joseph M. Browne, Bauer Moynihan & Johnson, Seattle, WA, for Defendants.

Opinion

ORDER

JOHN C. COUGHENOUR, United States District Judge.

*1 This matter comes before the Court on Defendants' motion for partial summary judgment (Dkt. No. 21) and Plaintiff's Response and cross motion to compel maintenance, cure, and unearned wages (Dkt. No. 26). Having considered the briefs and supporting documents, and finding oral argument unnecessary, the Court hereby rules as follows.

I. BACKGROUND

The facts of this case were set forth in the Court's Order of February 28, 2007 (Dkt. No. 20), denying Plaintiff's motion to compel maintenance, cure and unearned wages, and therefore will not be repeated in detail here. In the intervening period, the parties have conducted further discovery, including a number of expert depositions regarding the nature and cause of Plaintiff's shoulder injury. Plaintiff suffered injury to his shoulder on two different occasions, first in April 2005 and then later in February 2006. The legal issues in the case hinge on which one of these occasions produced the Type II SLAP tear for which Plaintiff subsequently underwent surgery. Plaintiff contends that the injury occurred in or around April 2005, when a heavy roll of plastic fell on him while working aboard the Defendant vessel. (Pl.'s Resp. 3 (Dkt. No. 26).) Defendants dispute this theory of causation, and ask the Court to find, as a matter of law, that the injury did not occur in April 2005. (Defs.' Mot. 18 (Dkt. No. 21).)

II. DISCUSSION

A. Standard of Review

In its February 28, 2007 Order, the Court noted "an obvious tension" between the summary judgment standard and the canon of admiralty law providing that all doubts be resolved in favor of the seaman. (Order 5 (Dkt. No. 20).) The Court ultimately determined that "the summary judgment standard should be applied to a pre-trial motion to compel maintenance and cure." *Id.* at 6. Accordingly, that is the standard that governs here.

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part, that "[t]he 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 of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In order to defeat a motion for summary judgment, the nonmoving party must make more than conclusory allegations, speculations or argumentative assertions that material facts are in dispute. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir.1994).

B. Causation of Plaintiff's Type II SLAP Tear

*2 Defendants ask the Court to find that as a matter of law, Plaintiff cannot link his Type II SLAP tear to the April 2005 incident. The primary basis of this assertion is deposition testimony by Dr. Joel Shapiro, Plaintiff's treating physician. Specifically, Dr. Shapiro stated that a Type II SLAP tear could be caused by an acute injury, such as dislocation of the shoulder joint. (Shapiro Dep. 7 (Dkt. No. 22 at 22).) When asked a hypothetical question about whether a dislocation could occur under the circumstances of the April 2005 incident Plaintiff describes, Dr. Shapiro replied that it was “conceivable” if the force were sufficient. *Id.* at 8. However, Dr. Shapiro also stated that there was “no way for [him] to know if [Plaintiff] had a partial or complete dislocation” without being present or viewing an x-ray. *Id.* at 8-9. From this testimony, Defendants claim that “no one can establish that a dislocation did indeed occur.” (Defs.' Mot. 15 (Dkt.21).) Furthermore, Defendants claim that Plaintiff's subsequent work history belies his claim that he suffered a Type II SLAP tear in April 2005, and that his description of the February 2006 incident is more consistent with a Type II SLAP tear. *Id.* at 15-16.

Plaintiff argues that the testimony of Dr. Shapiro, cited above, was in response to a hypothetical question posed by Defendants' counsel, and did not take into account Plaintiff's individual health history and self-report of symptoms. (Pl.'s Resp. 11-12 (Dkt. No. 26).) This is a significant distinction, Plaintiff asserts, because Dr. Shapiro's actual diagnosis was that, on a more probable than not basis, Plaintiff's Type II SLAP tear was caused by the direct trauma associated with the April 2005 accident. *Id.* at 13. Furthermore, Plaintiff maintains that Defendants' medical expert, Dr. Lance Brigham, offered speculative, inadmissible and conflicting assessments of the cause of Plaintiff's injury, *id.* at 13-18, and therefore the Court should essentially decide the causation issue in Plaintiff's favor as a matter of law, and thereby compel Defendants to pay maintenance, cure, and unearned wages. *Id.* at 18-19.

The Court disagrees that the depositions of Dr. Shapiro and Dr. Brigham obviate further factual development, making the causation question amenable to resolution as a matter of law. That the parties have filed what amount to cross motions for partial summary judgment on this issue demonstrates a dispute of material fact. The question is whether it is already apparent that there is insufficient evidence for the Court to find in favor of one of the parties.

With regard to Defendants' motion, Dr. Shapiro's inability to diagnose a shoulder dislocation at deposition does not prove fatal to Plaintiff's theory of causation. First, the fact remains that Dr. Shapiro has asserted that the April 2005 incident, more likely than not, caused the Type II SLAP tear. (Pl.'s Resp. 3 (Dkt. No. 26).) Second, it is unclear to the Court at this time whether a finding that Plaintiff suffered a dislocation in April 2005 is a prerequisite for reaching the ultimate question of whether he suffered a Type II SLAP tear at the same time. Third, even assuming such a prerequisite exists, it is unclear whether Dr. Shapiro's deposition testimony, in response to a hypothetical and perhaps without the aid of all the relevant medical records, is the limit of what he could offer at trial. Finally, while the undisputed fact that Plaintiff continued to work after the April 2005 incident is probative as to the extent of his injury, this fact alone does not dispose of the question. Plaintiff has introduced evidence suggesting that he endured great discomfort in order to continue working. *Id.* at 4-6. This is consistent with Dr. Shapiro's statement that motivation and pain tolerance vary from person to person. (Shapiro Decl. 3 (Dkt. No. 27).) Accordingly, reasonable minds could differ on the significance of Plaintiff's continued ability to work. In sum, Defendants have not demonstrated that, with all inferences drawn in Plaintiff's favor, a reasonable fact finder could not find that the injury occurred in April 2005.

*3 Plaintiff's request that the Court compel maintenance, cure and unearned wages amounts to a cross motion for summary judgment on the causation issue, and fares no better. As the Court stated in its prior Order, the viability of Plaintiff's claim turns on the "pivotal factual issue" of "whether Plaintiff was injured in 2005, while crew for the OCEAN ALASKA, or in 2006, while working to repair the docked vessel." (Order 7 (Dkt. No. 20).) Plaintiff's interpretation of the expert depositions taken since that Order was issued notwithstanding, a genuine issue of material fact remains. In contradiction to Dr. Shapiro's testimony, Defendants' expert, Dr. Brigham, clearly states that in his professional opinion, the Type II SLAP tear did not occur in April 2005. (Brigham Decl. 2-3 (Dkt. No. 25).) This professional assessment and its underlying rationale are properly part of the fact finder's calculus. Plaintiff cites *McCarthy v. F/T SEAFREEZE ALASKA*, 2004 WL 3007093 (W.D.Wash.2004) for the contrary proposition. However, Plaintiff overlooks a key distinction between that case and this one. There, the court explicitly found that there was "no evidence of any other causative event" for the injury. *Id.* at 2. Furthermore, it was undisputed that plaintiff was a "seaman" and in the ship's service at the time of her injury, and therefore no genuine issue of material fact remained as to defendants' liability for maintenance. *Id.* In this case there are competing theories about when the injury occurred, each of which connects to a separate causative event. Plaintiff's claim depends entirely on which event caused the Type II SLAP tear. Under these circumstances, the question of causation is one on which reasonable minds could differ and therefore not amenable to resolution by the Court on summary judgment.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment (Dkt. No. 21) is DENIED. Plaintiff's cross motion to compel maintenance, cure and unearned wages (Dkt. No. 26) is also DENIED.

SO ORDERED this 24th day of October, 2007.

2005 WL 2206922

American Maritime Cases

United States District Court for the Western District of Washington (Seattle),

PATRICK J. CONNORS

v.

IQUEQUE U.S.L.L.C., *ET AL.*

No. C05-334JLR August 25, 2005

DAMAGES - 124. Maintenance, Cure and Wages - PERSONAL INJURY - 1413. Amount - 1441. In General, Burden of Proof - PRACTICE - 264. Burden of Proof - 287. Summary Judgment.

A seaman claiming injury aboard ship cannot have summary judgment for maintenance and cure with issues open as to concealment, injury and recovery but, in light of the policy to construe the claim liberally in favor of the seaman, the court must resolve in his favor the tension between his claim and the ship owner's concern about recovering payments not ultimately justified at trial and so, when the seaman has presented substantial evidence of the elements of the claim, maintenance will be ordered for a period after which it may be considered further. A fixed rate in an individual employment contract does not have the same force as in a collective bargaining agreement and the court may therefore set a higher rate based on the evidence.

Connors v. Iqueque U.S.L.L.C.

Attorneys and Law Firms

George Luhrs *for Connors*

David Bratz (Le Gros, Buchanan & Paul) *for Iqueque U.S.*

Opinion

James L. Robart, D.J.:

I. INTRODUCTION

This matter comes before the court on Plaintiff's motion to compel maintenance and cure. For the reasons stated below, the court grants the motion in part and denies it in part.

II. BACKGROUND

Plaintiff is a maritime engineer who served aboard the F/V *Unimak* ("*Unimak*"), a ship that Defendants own, beginning in late May or early June 2004. On June 15, 2004, Mr. Connors experienced chest pain while lifting a pump onboard the *Unimak*. On June 21, 2004, while on shore, Mr. Connors again experienced chest pain. His treating physician, Dr. Lawrence Haft, later diagnosed the June 21 incident as a mild heart attack. Since then, he has undergone treatment, including two surgical procedures. He continues to take numerous medications. Dr. Haft does not believe that Plaintiff will ever be able to return to maritime employment. AMC 2155

Between June 21, 2004 and February 15, 2005, Defendants paid just under \$5,000 in maintenance, just under \$5,000 in unearned wages, and just over \$100,000 in cure payments. On February 15, 2005, Defendants terminated maintenance and cure payments.

Plaintiff now moves to compel additional maintenance and cure payments.

III. ANALYSIS

A shipowner's obligation to provide maintenance and cure has its roots in ancient maritime law. *Vaughan v. Atkinson*, 369 U.S. 527, 532, 1962 AMC 1131, 1135 n.4 (1962). When a seaman is injured in service of his vessel, the shipowner has an obligation not only to bring the seaman to a port for treatment, but to pay maintenance (compensation for room and board equivalent to what the seaman would have received aboard the vessel) and cure (payments for medical treatment necessary to restore the seaman to health). *Id.*; see also Martin J. Norris, *The Law of Seamen* 26:5-26:6 (3d ed. 1985). Maintenance and cure are available even where the shipowner is not at fault for the seaman's injury in the service of the vessel. *Berg v. Fourth Shipmor Assocs.*, 1996 AMC 1591, 1593, 82 F.3d 307, 309 (9 Cir. 1996). A seaman's entitlement to maintenance and cure continues until he reaches "maximum cure" - a recovery as complete as the injury or illness allows. *Id.*

The critical question before the court is under what standard it should consider Plaintiff's motion. Defendants urge the court to treat the motion as one for summary judgment. Plaintiff argues that the court can order maintenance and cure pending trial on a lesser showing than that required for summary judgment. As another court in this district has noted in addressing a motion for maintenance and cure, "[o]ther than a motion for summary judgment, [the court is] aware of no procedure of obtaining pre-trial judgment on the merits of a claim." *Guerra v. Arctic Storm, Inc.*, 2004 AMC 2319, 2320, U.S. Dist. LEXIS 24388, at *2-3 (W.D. Wash. 2004). In deciding a motion for summary judgment the court must resolve reasonable doubts against the moving party and draw all inferences in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9 Cir. 2000). This squares awkwardly with the Supreme Court's instructions to defer to seamen in determining maintenance and cure questions. *E.g.*, *Vaughan*, 369 U.S. at 532, 1962 AMC at 1135 ("When there are ambiguities or doubts, they are resolved in favor of the seamen."); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735, 1943 AMC 2156

AMC 451, 461 (1942) (duty to pay maintenance and cure should "not be narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes").

Although the Supreme Court has cautioned against "exceptions or conditions [that would] stir contentions, cause delays, and invite litigations" over maintenance and cure, it has never announced a standard under which courts should review pretrial motions seeking maintenance and cure. *Vella v. Ford Motor Co.*, 421 U.S. 1, 4, 1975 AMC 563, 565 (1975) (quoting *Farrell v. United States*, 336 U.S. 511, 516, 1949 AMC 613, 617 (1949)). The Ninth Circuit has reviewed grants of summary judgment for maintenance and cure, but has never decided whether summary judgment is the only procedural vehicle a seaman can use to obtain maintenance and cure in advance of trial. *E.g.*, *Glynn v. Roy Al Boat Management Corp.*, 1995 AMC 2022, 2036 -37, 57 F.3d 1495, 1505-06 (9 Cir. 1995). Many district courts within the Ninth Circuit have treated a motion to compel maintenance and cure as a motion for summary judgment under Rule 56. *E.g.*, *Guerra*, 2004 AMC at 2320, 2004 U.S. Dist. LEXIS 24388, at *3; *Blake v. Cairns*, 2005 AMC 80, 80 -81, 2004 U.S. Dist. LEXIS, at *2-3 (N.D. Cal. 2004). Others have employed a variety of less demanding standards. *E.g.*, *Kezic v. Alaska Sea*, 2004 AMC 2376, 2378 -80, 2004 U.S. Dist. LEXIS, at *5-7 (W.D. Wash. 2004); *Boyden v. American Seafood Co.*, 2000 AMC 1512, 1514 (W.D. Wash. 2000). As another court within this district has noted:

Applying a summary judgment standard to the payment of maintenance and cure would invite litigation and cause delays by involving the court in the medical determinations of maximum medical improvement, thus undermining the policy of simplicity in these matters.

Boyden, 2000 AMC at 1514 (Rothstein, D.J.).

The court is persuaded that the Supreme Court's instructions to construe claims for maintenance and cure liberally in favor of seamen counsel against applying the rigid standards of Rule 56 to a pretrial motion to compel maintenance and cure. In exercising its admiralty jurisdiction, the court is empowered to take a "flexible" approach. *Putnam v. Lower*, 1956 AMC 2059, 2068, 236 F.2d 561, 568 (9 Cir. 1956). The court acknowledges the tension between a seaman's claim to payments for medical attention and living expenses and a shipowner's concern that if it ultimately proves that the seaman is not entitled to maintenance and cure, it may be left with little realistic opportunity to recover the payments. Nonetheless, the court must resolve that tension in favor of the seaman. AMC 2157

Turning to the facts of this case, it is clear that Plaintiff would not prevail if the court construed his motion as one for summary judgment. There are several major disputes. The parties disagree over whether Plaintiff sustained an injury in service of the *Unimak*. Dr. Haft maintains that Plaintiff's June 21, 2004 heart attack was the result of lifting the pump aboard the *Unimak* on June 15, 2004. Dr. Robert Thompson, who reviewed Plaintiff's medical records for Defendants, opines that the heart attack was unrelated. Dr. Haft maintains that the treatment Plaintiff currently receives is "curative" in nature, suggesting that Plaintiff has not reached maximum cure. Dr. Thompson states that Plaintiff has recovered as fully as his condition allows. In addition, Defendants contend that Plaintiff's heart condition and concomitant susceptibility to heart attacks was a pre-existing condition that he intentionally concealed when he sought employment on the *Unimak*.¹ Such conduct can bar a seaman from recovering maintenance and cure. *Burkert v. Weyerhaeuser Steamship Co.*, 1966 AMC 1015, 1019, 350 F.2d 826, 829 n.4 (9 Cir. 1965).

Because Plaintiff has put forth evidence supporting each element of his maintenance and cure claim, the court grants his motion to compel in part. The court orders Defendants to pay maintenance from February 15, 2005 through November 30, 2005. Between now and the end of November, Defendants may, if they choose, conduct additional discovery (including a medical examination of the Plaintiff under Fed. R. Civ. P. 35) to bolster their defense to the maintenance and cure claim. Plaintiff may file a second motion for maintenance and cure beyond the end of November if circumstances warrant such relief.

The court denies Plaintiff's motion to the extent that it seeks cure payments. Although Plaintiff claims just under \$10,000 in medical bills, he provides no evidence linking those bills to treatment designed to help him achieve maximum cure. The court's denial of this portion of Plaintiff's motion is without prejudice to a subsequent motion that better establishes the curative nature of medical treatment he has received.

The court must also determine an appropriate maintenance rate. Under Plaintiff's employment contract, he is entitled to \$20 per day. The court is not bound by a contractual rate, however, particularly in "instances in which the payment is not adequate to provide him with lodging and three meals per day of the kind and quality he would have received aboard the AMC 2158

vessel." *Rutherford v. Sea-Land Service, Inc.*, 1984 AMC 1496, 1502, 575 F. Supp. 1365, 1370 (N.D. Cal. 1983); *see also Am. Seafoods Co. v. Nowak*, 2002 AMC 1655, 1658, 2002 U.S. Dist. LEXIS 20254, at *6-7 (W.D. Wash. 2002) ("a seaman's right to a reasonable payment for maintenance is a legal right that cannot ordinarily be abrogated by an individual employment contract.") After reviewing the parties' evidence, the court concludes that \$40 per day is an appropriate maintenance rate.²

The only remaining question is Plaintiff's request for attorney's fees for this motion. Fees are available in instances where the shipowner "willful[ly] and persistent[ly]" withholds maintenance and cure. *Glynn*, 1995 AMC at 2028, 57 F.3d at 1501. The court finds no willful or persistent withholding here. Defendants made substantial maintenance and cure payments until February 2005, and cut off payments only in light of substantial evidence supporting their defenses to maintenance and cure.

IV. CONCLUSION

For the reasons stated above, the court grants Plaintiff's motion in part and denies it in part.

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Parallel Citations

2005 A.M.C. 2154

Footnotes

- 1 The evidence suggests that Plaintiff intentionally concealed his heart condition in response to a pre-employment questionnaire, but Defendants have yet to seek summary disposition of this claim.
- 2 The court cannot accept Plaintiff's contention that the court should include living expenses for his wife as part of the maintenance award. The court awards maintenance purely as a substitute for shipboard housing and food. Plaintiff clearly had no entitlement to his wife's company aboard the *Unimak*. As the court is not awarding cure at this point, it makes no comment on whether expenses for Plaintiff's wife may be a component of a properly supported claim for cure.

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1992 WL 91988

Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.

Beverly P. DAVIS, wife of/and Willie Earl Davis

v.

ODECO, INC.

CIV. A. No. 91-1694. | April 14, 1992.

Opinion

ORDER AND REASONS

ARCENEUX, District Judge.

*1 Plaintiff, Willie Earl Davis (“Davis”), filed a motion for summary judgment on the issues of Jones Act seaman status, prescription, and maintenance and cure. Having considered the memoranda in support of this motion, the opposition memoranda, and the applicable law, the court finds the motion to have merit, in part.

BACKGROUND

The court finds the following facts to be undisputed. Plaintiff Davis filed this Jones Act and general maritime law action on May 2, 1991, alleging that he sustained injuries as a result of exposure to toxic solvents and/or hydrocarbons.

Defendant Murphy Exploration & Production Company (“Murphy”), formerly Odeco, Inc., employed the plaintiff as a roustabout and a floorhand on February 28, 1990. Davis had been assigned to thirteen other vessels owned by the defendant during his employment with that company.

Davis reported for work aboard the D/B OCEAN AMERICA on February 23, 1990. On February 28th, Davis apparently expressed physical complaints to his employer. Odeco removed him from the rig on or about March 1, 1990, and took him to West Jefferson Medical Center for an examination.

Davis was admitted to West Jefferson Medical Center on March 1, 1990. At or about that time, his physicians diagnosed him as having Goodpasture's Syndrome, a condition or illness involving kidney damage and pulmonary hemorrhaging (among other effects). Prior to that time, the uncontroverted facts show that no doctor or other medical professional ever diagnosed Davis as suffering from this illness. The earliest possible physical manifestation by Davis occurred in November 1989 when he coughed up blood aboard the OCEAN TITAN, a rig owned by defendant. Davis apparently continues to be treated for Goodpasture's Syndrome as of this date.

Plaintiff moves this court to enter summary judgment on the issues of Jones Act seaman status, prescription, and maintenance and cure. Defendant Murphy concedes that Davis met the standards for a Jones Act seaman. Murphy, however, opposes the plaintiff's motion on the issues of prescription and maintenance and cure. The court now turns to the merits of the arguments.

DISCUSSION

1. Jones Act Seaman Status

Both parties agree that Davis met the standards for seaman status under the Jones Act at the time of his illness. Under the applicable jurisprudence, the plaintiff must establish the following to prove seaman status:

1. he was assigned permanently to an identifiable fleet of vessels or performed a substantial part of his work on such fleet of vessels; and,

2. the capacity in which he was employed or the duties that he performed contributed to the function of such fleet of vessels or to the accomplishment of such fleet's missions or to the operation or maintenance of such an identifiable fleet of vessels during their movement or while at anchor for the fleet's future trips. A person need not aid in the navigation of a fleet of vessels to qualify as a seaman. U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions (Civil Cases)* § 4.1 (1992); see *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807 (1991); *Bach v. Trident S.S. Co.*, 920 F.2d 322 (5th Cir.), vacated, 498 U.S. —, 111 S.Ct. 2253 (1991), *aff'd on rehearing*, 947 F.2d 1290 (5th Cir.1991); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir.1986); *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir.1959). The U.S. Court of Appeals for the Fifth Circuit has defined a fleet of vessels as "an identifiable group of vessels acting together or under one control." *Barrett*, 781 F.2d at 1074. The uncontroverted facts clearly demonstrate that Davis met the requisites of Jones Act seaman status. The court, therefore, finds him to have been a Jones Act seaman at the time of his illness as a matter of law.

2. Prescription

*2 Davis next asks the court to find that, as a matter of law, his claims have not prescribed. Defendant Murphy contends that triable issues of material fact exist to preclude summary judgment. The court, however, does not agree.

The relevant jurisprudence provides that Davis' Jones Act and general maritime law claims must have been commenced within three years from the date his cause of action accrued. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir.), *cert. denied*, 502 U.S. 924, 112 S.Ct. 337 (1991); *Clay v. Union Carbide Corp.*, 828 F.2d 1103, 1105 (5th Cir.1987). The Fifth Circuit in *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223 (5th Cir.1984), distinguished between the time of event rule and the discovery rule as applied to statutes of limitation. *Id.* at 228–29. Murphy and Davis do not contest that, because plaintiff's injury may be characterized as latent, the discovery rule applies to this case.

The *Albertson* court stated that, when the discovery rule applies, "the plaintiff's cause of action does not accrue on the date the tortious act occurred, but on the date the plaintiff discovers, or reasonably should have discovered, both the injury and the cause." *Id.* at 229; see *Crisman*, 932 F.2d at 415. Thus, if Davis should have discovered both his affliction with Goodpasture's Syndrome and the cause of such affliction prior to May 3, 1987, his claims would be prescribed (or, at a minimum, a triable issue of material fact would remain).

The court, upon considering the arguments and evidence before it, cannot find any material fact in dispute to preclude summary judgment on the prescription issue. Murphy, citing *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769 (5th Cir.1991), argues that the issue of prescription in a Jones Act/general maritime law action necessarily precludes summary judgment except in clear cases.

Defendant further attempts to create a material fact by arguing that, because Davis' experts address his intense exposures to toxic vapors and because Davis testified to knowing about safety instructions and manuals, a triable issue of fact exists as to whether Davis should have known about the result of his exposure to these vapors. Murphy, however, fails to support its contentions with any affidavits, deposition testimony, or other relevant evidence. Defendant ostensibly argues that more discovery will

create a triable issue of fact but does not even attempt to comply with the requisites of Rule 56(f) of the Federal Rules of Civil Procedure to request a continuance.

Murphy's arguments, therefore, fail to persuade the court. No party disagrees that the first instance in which Davis experienced any physical signs of his ailment occurred in November 1989 when he coughed up blood. The *Crisman* court, relying on the Fifth Circuit's *Albertson* decision, recently stated that, "A cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two." *Crisman*, 932 F.2d at 415; see *Albertson*, 749 F.2d at 228. In this case, plaintiff had no reasonable opportunity to discover his injury until November 1989, which the court finds to be the most remote date possible for purposes of prescription. Moreover, this court arguably finds March 1990 to be an even more appropriate date for the start of prescription as no doctor diagnosed Davis' affliction as Goodpasture's Syndrome (the injury complained of by this action) until such time.

*3 The court, in conclusion, finds that plaintiff has met the burden of establishing no material facts in dispute relative to the issue of prescription. As a matter of law, this court concludes that plaintiff's claims have not prescribed.

3. Maintenance and Cure

Davis' third and final application for relief seeks summary judgment on the issue of maintenance and cure. Defendant again opposes this motion and asserts that triable issues of material fact remain to be decided by a jury. While the court does not fully agree with Murphy's position, it will leave this issue to trial on the merits.

Plaintiff argues that he became ill while in the service of the D/B OCEAN AMERICA and, therefore, must receive maintenance and cure. Conversely, Murphy contends that a triable issue of fact exists as to whether Davis fell ill while in the service of its vessel or whether the Goodpasture's Syndrome manifested itself prior to his boarding Murphy's vessel. Moreover, the defendant avers that fact issues remain as to the periods for which maintenance and cure may be due, whether plaintiff has reached maximum medical cure, and the amounts due for maintenance and cure.

The court, however, places Murphy on notice that it will not hesitate to direct a verdict as a matter of law on this issue at trial. Maintenance and cure represents the duty of a vessel owner to pay a seaman who falls ill while in the service of its vessel. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). See generally Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-2 (1987 & Supp.1989) (discussing seaman's right to maintenance and cure). Such payments must be made regardless of the cause of the seaman's illness. *Taylor*, 303 U.S. at 527. In the court's view, Murphy's argument that Davis did not fall ill while in the service of the vessel raises a triable issue of fact—albeit a weak one. The other arguments in opposition offered by this party relative to maximum medical cure and the appropriate amounts due also raise material issues of fact (and the court finds them more persuasive). Therefore, the court finds that triable issues of material fact exist to preclude summary judgment on the issue of maintenance and cure.

Murphy, in the court's view, may be subjecting itself to punitive damages. The court, however, finds that the issue of whether Davis fell ill in the service of the vessel (and the evidence supporting such contention) raises a sufficient dispute to preclude summary judgment.

CONCLUSION

Plaintiff Davis presents strong arguments and meets its burden of proof for summary judgment on the issues of Jones Act seaman status, prescription, and maintenance and cure. Murphy, however, has raised sufficient fact disputes as to maintenance and cure to preclude summary judgment. For the reasons herein stated, plaintiff's motion for summary judgment is hereby GRANTED

as to the issues of his Jones Act seaman status and the lack of merit in defendant's prescription defense but is hereby DENIED without prejudice as to his right to recover maintenance and cure.

*4 IT IS SO ORDERED.

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2008 WL 2020442

American Maritime Cases

United States District Court, Western District of Washington

HASSAN GOUMA

v.

TRIDENT SEAFOODS, INC., *ET AL.*

No. C07-1309 January 11, 2008

PERSONAL INJURY -- 1412. Duration -- 1445. Procedure, Trial.

On a seaman's pre-trial motion to compel cure, where there is no question about his having been in the service of his vessel when injured, he is entitled to a presumptive continuation of his maintenance and cure payments, without resorting to summary judgment procedure as in cases where the service issue was unresolved, and continued medical care is therefore ordered until maximum cure, as determined by order of the court.

Attorneys and Law Firms

H.L. George Knowles *for Gouma*

Michael A. Barcott and Theresa K. Fus (Holmes Weddle & Barcott) *for Trident Seafoods*

Opinion

Marsha J. Pechman, D.J.:

The above-entitled Court, having received and reviewed:

1. Plaintiff's Motion to Compel Cure, Including an Award for Damages and Attorney's Fees
2. Opposition to Plaintiff's Motion to Compel Cure and Request for Damages and Attorney's Fees
3. Plaintiff's Reply in Support of Motion to Compel Cure
4. Supplemental Brief in Opposition to Plaintiff's Motion to Compel Cure and Request for Damages and Attorney's Fees
5. Plaintiff's Supplemental Briefing in Support of Motion to Compel

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 *864 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, 1962 AMC 1131, 1135 (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, 1975 AMC 563, 565 (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*.

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 *865 seaman's request to compel payment of cure. *Buenbrazo 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.

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 *866 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, 1962 AMC at 1133-34) 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.*, 1988 AMC 1075, 1078, 829 F.2d 1355, 1358 (5 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, 1962 AMC at 1133. 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

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.

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Parallel Citations

2008 A.M.C. 863

2004 WL 3007097
United States District Court,
W.D. Washington.

Carlos GUERRA, Plaintiff,

v.

ARCTIC STORM, INC., Arctic Storm Management Group, LLC, and Arctic Storm Fisheries, LLC, in personam, and the F/V Arctic Storm, Official Number 903511, her engines, machinery, appurtenances and cargo, in rem, Defendants.

No. C04-1010L. | filed May 5, 2004. | Aug. 4, 2004. | last filing Sept. 16, 2004.

Attorneys and Law Firms

David Carl Bratz, Legros Buchanan & Paul, Seattle, WA, Attorney to be Noticed, for Arctic Storm Fisheries LLC, (Defendant).

John W Merriam, Seattle, WA, Lead Attorney, Attorney to be Noticed, for Carlos Guerra, (Plaintiff).

Gordon C Webb, Bellevue, WA, Lead Attorney, Attorney to be Noticed, for Carlos Guerra, (Plaintiff).

Opinion

ORDER DENYING PLAINTIFF CARLOS GUERRA'S MOTION FOR MAINTENANCE AND CURE

LASNIK, J.

I. Introduction

*1 This matter comes before the Court on Plaintiff's motion for maintenance and cure (Dkt.# 8). Plaintiff has requested that the Court order Defendants to reinstate maintenance and cure, retroactively, "until defendants can sustain their burden of proof or, at minimum, until they put forth enough evidence to create a triable issue of fact on the causal link between the two injuries." (Reply at 5.) For the reasons set forth in this order, the Court denies Plaintiff's motion for maintenance and cure.¹

II. Background

Plaintiff was a crew member on Defendants' vessel, Arctic Storm, on or about July 15, 2003, during which time he claims to have sustained "severe, painful and disabling injuries to his back and lumbar spine and other injuries not fully known at this time." (Compl.¶ 7.) Plaintiff alleges that his injuries were directly and proximately caused by the unseaworthiness of the vessel and the negligence of Defendants. (Compl.¶ 8.) Plaintiff further alleges that, as a result of the injury sustained aboard the Arctic Storm, he has incurred reasonable charges for medical care and attention, and has been unable to engage in his normal occupation since his injury. (Compl.¶ 9-10.) Plaintiff concedes that he sustained a prior injury in the same part of his anatomy as his current injury. (Reply at 2.) Plaintiff also admits that he did not disclose that prior back injury when he applied for employment on Defendants' vessel. (Motion at 1.)

III. Discussion

A. Standard

While not explicitly stated, Plaintiff's motion appears to be a motion for partial summary judgment pursuant to Fed.R.Civ.P. 56. "Other than a motion for summary judgment, we are aware of no procedure of obtaining pre-trial judgment on the merits of a claim." *McNeil v. Jantran, Inc.*, 258 F.Supp.2d 926, 930 (W.D.Ark.2003); see also *Bloom v. Weeks Marine, Inc.*, 225 F.Supp.2d 1334, 1336 (M.D.Fla.2002) (citing *Sanfilippo v. Rosa S. Inc.*, 1985 WL 4565 at *2 (D.Mass.1985)) (" '[U]nless the seaman can show that there are no material facts in dispute and that he is entitled to summary judgment on the claim, he cannot obtain a pre-trial order for payment [of maintenance and cure].' ").

The Federal Rules of Civil Procedure dictate that summary judgment motions be granted only if the evidence shows "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." Fed.R.Civ.P. 56(c). "In ruling on a motion for summary judgment, the 'evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor.' " *Orsini v. O/S Seabrooke O.N.*, 247 F.3d 953, 958 (9th Cir.2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The moving party bears the burden of demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Based on the Court's review of the evidence presented thus far, there remain material issues of fact which must be resolved before either party is entitled to judgment.

B. Motion for Maintenance and Cure

*2 "From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 41-42, 63 S.Ct. 488, 87 L.Ed. 596 (1943). "Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). Admiralty courts are liberal in interpreting this duty for the protection of seamen who are considered wards of the court. *Id.* at 531-32. Generally speaking, in order to be entitled to maintenance and cure, a seaman need only prove that his injury arose while he was serving the defendant's ship.

However, maintenance and cure is not always granted to seamen who claim its benefits: "Where a seaman is asked to disclose pertinent information during a pre-hiring medical examination or interview and intentionally conceals or misrepresents material facts, he is not entitled to an award of maintenance and cure." *Burkert v. Weyerhaeuser Steamship Co.*, 350 F.2d 826, 831 n. 4 (9th Cir.1965).² The intentional concealment defense does not require subjective intent if the seaman fraudulently concealed information regarding a preexisting condition, *about which he was directly questioned*. In such situations the defendant has the burden to show that (1) the plaintiff intentionally misrepresented or concealed material facts; (2) the intentionally concealed facts were material to the employer's decision to hire the plaintiff; and (3) there is a causal link between the preexisting injury and the injury allegedly sustained while employed by the defendant. See *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547, 549 (5th Cir.1968). The question of the seaman's subjective belief only arises if he is not directly questioned about preexisting conditions. *Burkert*, 350 F.2d at 831 n. 4. In such cases a seaman who has a good faith belief that he is fit for duty will not be denied maintenance and cure for failing to voluntarily disclose a prior medical condition.³

Here it is undisputed that Plaintiff was employed by Defendants on or about July 15, 2003, when the injury allegedly occurred. It is also undisputed that Plaintiff concealed a prior back injury when he applied for employment with Defendants. However, the parties disagree on the materiality of the concealed back injury. Additionally, issues of fact remain in dispute regarding whether a causal link exists between the previous injury and the injury allegedly sustained in 2003. Defendants have submitted a medical history questionnaire which appears to show that Plaintiff explicitly denied any previous back injuries when seeking employment with Defendants. (Bratz Decl. Ex. J.) Defendants have further provided the Court with medical records which show that the previous injury and the injury which allegedly occurred in 2003 are, at the very least, located in the same area of

the anatomy. (Bratz Decl. Exs. D, M.)⁴ Viewing the facts in the light most favorable to Defendant, the Court must find that disputed issues of fact prevent summary determination that Plaintiff is entitled to maintenance and cure.⁵

*3 For all of the foregoing reasons, Plaintiff's motion for maintenance and cure (Dkt.# 8) is DENIED.

Parallel Citations

2004 A.M.C. 2319

Footnotes

- 1 Defendants requested oral argument in accordance with Local CR 7(b)(4). Having considered the motion, response, reply, and supporting materials, the Court finds that resolution of this matter without oral argument is appropriate.
- 2 *Accord Evans v. Blidberg Rothchild Co.*, 382 F.2d 637, 639 (4th Cir.1967); *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547, 549 (5th Cir.1968); *West v. Midland Enters. Inc.*, 227 F.3d 613, 617 (6th Cir.2000); *Sulentich v. Interlake Steamship Co.*, 257 F.2d 316, 320 (7th Cir.1958); *Wactor v. Spartan Transp., Co.*, 27 F.3d 347, 352 (8th Cir.1994).
- 3 Plaintiff repeatedly cites Schoenbaum's *Admiralty and Maritime Law* for the proposition that a plaintiff may be entitled to maintenance and cure even if he fraudulently concealed a material injury with a causal link to the more recent injury by directly lying to a defendant. Schoenbaum cites three cases in support of this proposition: *Sammon v. Central Gulf S.S. Corp.*, 442 F.2d 1028 (2d Cir.1971), *Couts v. Erickson*, 241 F.2d 499 (5th Cir.1957), and *Capone v. Boat St. Victoria*, 1989 WL 47387 (D.Mass.1989). Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-31 n. 27 (4th ed.2004). In *Sammon* the record contained no evidence that the "plaintiff deliberately suppressed anything which he knew to be relevant." *Sammon*, 442 F.2d at 1029. The plaintiff in *Sammon* did not volunteer information about a previous wart condition on his foot about which he was not directly questioned. In *Couts* there was no evidence that the plaintiff purposefully concealed or misrepresented his prior medical history. *Couts*, 241 F.2d at 503. *Capone* involved a situation where there was no pre-employment physical examination or inquiry into the plaintiff's medical past. *Capone*, 1989 WL 47387 at *2. Here, in contrast, the Plaintiff allegedly concealed and purposefully misrepresented a prior back condition about which he was directly questioned.
- 4 The Court did not consider the report of neuroradiologist Gary K. Stimac, submitted on July 16, 2004.
- 5 A plaintiff is not entitled to a pre-trial order for payment of maintenance and cure if disputed issues of fact prevent a court from granting summary judgment on the issue. "[F]ederal maritime law does not mandate a remedy more expeditious than summary judgment to a plaintiff seeking maintenance and cure[.]" *Perry v. Allied Offshore Marine Corp.*, 618 So.2d 1033, 1036 (La.Ct.App.1993); *accord Bloom v. Weeks Marine, Inc.*, 225 F.Supp.2d 1334 (M.D.Fla.2002); *c.f. Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir.1995) (holding that maintenance and cure could not be imposed on defendant as a condition for vacating default when issues of fact remained in dispute regarding plaintiff's entitlement to maintenance and cure).

2008 WL 545041

Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Galveston Division.

In the Matter of the COMPLAINT OF TRAWLER SHRIMP TEXAS 18, INC., Owner of the Fishing Vessel "Texas 18" and Edward Garcia, Sr., for Exoneration from Limitation of Liability.

Civil Action No. G-07-557. | Feb. 25, 2008.

Attorneys and Law Firms

James H. Hunter, Jr., Royston Rayzor Vickery and Williams, Brownsville, TX, for Trawler Shrimp Texas 18, Inc. Owner of the Fishing Vessel, "Texas 18" and Edward Garcia, Sr.

Opinion

OPINION AND ORDER

JOHN R. FROESCHNER, United States Magistrate Judge.

*1 Before the Court by referral from the Honorable Ewing Werlein, United States District Judge, is the "Motion to Compel Payment of Maintenance and Cure Benefits" of Claimants, Jose Hurtado, Rene Boeza and Juan Ortiz, filed in this limitation of liability action initiated by Petitioners TRAWLER SHRIMP TEXAS 18, INC, and Edward Garcia, Jr.. Having considered the Motion and heard arguments of counsel, the Court now issues this Opinion and Order.

In support of their Motion the Claimants allege that they suffered severe injuries when, as crew members, they were forced to abandon the TEXAS 18 due to a fire onboard the vessel. Conversely, Petitioners allege that none of the Claimants was injured while in service of the TEXAS 18. The burden, therefore, is on each Claimant "to offer 'convincing proof of causal connection' between the alleged injury and his service on the ship." *Nelsen v. Research Corp. of Univ. of Hawaii*, 805 F.Supp. 837, 853 (D.Hawai'i 1992), quoting *Brahms v. Moore-McCormack Lines, Inc.*, 133 F.Supp. 283, 286 (S.D.N.Y. 1955) Petitioners correctly assert that they are entitled to a reasonable amount of time to investigate the legitimacy of the claims. *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279, 1282 (5th Cir. 1994)

Because the disputed issue of the Claimants' entitlement to maintenance and cure will require a trial, or at least an evidentiary hearing, it is the opinion of this Court that the Parties must be afforded an opportunity to conduct adequate discovery for that purpose. It is the further opinion of this Court that given the nature of maintenance and cure and because the maintenance and cure claims are exempt from the limitation of liability rules in admiralty, *In re RJF Intern. Corp. for Exoneration*, 354 F.3d 104, 107 (1st Cir. 2003) citing *Brister v. AWI, Inc.*, 946 F.2d 350, 360-61 (5th Cir. 1994), this necessary discovery should be conducted on an expedited basis. The Court offers no opinion on whether the ultimate need for a trial or evidentiary hearing on the maintenance and cure issues will necessitate lifting the stay imposed on the Claimants' state court litigation.

For the foregoing reasons it is **ORDERED** that the Parties **SHALL** complete the discovery needed to litigate the issue of each Claimant's entitlement to maintenance and cure by **April 18, 2008**.

It is further **ORDERED** that the Parties **SHALL** make the disclosures and conduct the conference required by Rule 26 of the Federal Rules of Civil Procedure **on or before March 7, 2008**.

In light of the foregoing Orders, the “Motion to Compel Payment of Maintenance and Cure Benefits” (Instrument no. 14) of Claimants is **DENIED**.

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2005 WL 1830996

Only the Westlaw citation is currently available.
United States District Court,
W.D. Louisiana.

Mark A. JOUBERT

v.

C & C TECHNOLOGIES, INC.

No. Civ.A. 6:04CV0723. | Aug. 1, 2005.

Attorneys and Law Firms

Robert K. Guillory, Robert K. Guillory & Assoc., Lafayette, LA, for Mark A. Joubert.

John S. Hunter, Courtenay, Hunter & Fontana, Daryl J. Daigle, Taylor, Wellons et al., and Maurice E. Bostick, Courtenay, Hunter & Fontana, New Orleans, LA, for C & C Technologies, Inc.

Opinion

MEMORANDUM RULING

MELANÇON, J.

*1 Before the Court are a Motion for Partial Summary Judgment on the Issue of Re-Instating Maintenance and Cure filed by plaintiff Mark A. Joubert [Rec. Doc. 24], a cross-Motion for Summary Judgment Denying Maintenance and Cure filed by defendant C & C Technologies, Inc. [Rec. Doc. 26], plaintiff's opposition to defendant's cross-motion [Rec. Doc. 31], and defendant's Motion to Strike Plaintiff's Opposition [Rec. Doc. 34]. For the following reasons, plaintiff's motion for partial summary judgment will be denied, defendant's cross-motion for summary judgment will be denied, and defendant's motion to strike will be denied.¹

I. Background

This case arises out of events surrounding an accident and alleged injuries sustained by plaintiff Mark A. Joubert during the course and scope of his employment as a boat engineer/deckhand for defendant C & C Technologies, Inc. (hereafter "C & C") aboard the M/V Ocean Surveyor, a vessel owned and operated by the defendant. (*Complaint* ¶ 3-4.) On or about July 17, 2003, Joubert was working aboard the Ocean Surveyor when he allegedly fell while cleaning up the "void room," a room adjacent to the engine room. (*Plaintiff's Motion*, 2.) Joubert reported the accident that evening to the vessel's captain, and an accident report was filed. (*Id.*, Ex. 1.) The Ocean Surveyor arrived at port the following day, July 18, 2003, and Joubert was examined by Dr. Donald Langford in Lafayette, Louisiana. (*Id.*, 3.) Joubert was diagnosed with a lumbar disc herniation at the L5-S1 level, and surgical intervention was recommended on March 24, 2004 by Dr. John Cobb. (*Id.* 4-6.)

Joubert now moves for partial summary judgment on the issue of the reinstatement of his maintenance and cure benefits from C & C, who halted payment of his maintenance benefits of \$20.00 per day in March 2004, and who has refused to pay for his medical care up to date. (*Plaintiff's Motion*, 8.) Joubert has asked the Court to order that he undergo the spinal fusion surgery recommended by Dr. Cobb, and has requested that reasonable attorneys' fees be awarded due to C & C's arbitrary, wilful, wanton, and/or callous termination of Joubert's benefits. (*Id.*)

C & C opposes Joubert's motion, and argues that Joubert has no right to the reinstatement of maintenance and cure benefits, or to coverage of his alleged medical expenses. (*Defendant's Motion*, 1-2.) C & C claims that Joubert fabricated the accident onboard the Ocean Surveyor in order to obtain Lortab, a narcotic pain medication, to which C & C alleges Joubert to be addicted. (*Id.* at 2.)

II. Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir.1994)(en banc). When a party seeking summary judgment bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if such evidence were uncontroverted at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim. *Celotex Corp.*, 477 U.S. at 324.

*2 Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Id.* The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Little*, 37 F.3d at 1075. If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. Fed.R.Civ.P. 56(c); *Celotex Corp.*, 477 U.S. at 322. Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Id.*

III. Analysis

Joubert requests that the Court grant partial summary judgment in his favor and find that he is entitled to a reinstatement of maintenance and cure benefits from C & C, retroactive to the date of their termination in March 2004. (*Complaint* ¶ 2.) After the initial showing of the basis for its motion, the party who has the burden of proof at the trial has the responsibility to present evidence supporting its contentions. See *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Since Joubert will have the burden of proof regarding his entitlement to maintenance and cure at the trial of this matter, he also bears the burden of proof at the summary judgment stage of these proceedings. *Freeman v. Thunder Bay Transp. Co., Inc.*, 735 F.Supp. 680, 681 (M.D.La.1990).

A seaman's right to recover maintenance and cure is broad, and the burden of proof is a relatively light, since recovery is not dependent on the negligence or fault of the vessel or its owner. See M. Norris, *The Law of Seaman* § 26.21, at 53 (4th ed.1985). To recover maintenance and cure at the summary judgment stage of proceedings, Joubert must show that no genuine issue of material fact exists with respect to the following factors: (a) his engagement as a seaman; (b) his illness or injury, that it occurred, was aggravated or manifested itself while in the ship's service; (c) the wages to which he may be entitled; and (d) the expenditures or liability incurred for medicines, nursing care, board and lodging, etc. *Id.*

The parties have agreed that Joubert qualifies as a seaman, however C & C strongly contests the evidence that Joubert has put forth on summary judgment to satisfy the second factor for entitlement to maintenance and cure benefits. C & C argues that Joubert fabricated the accident in the void room to obtain prescription pain medication, to which Joubert is addicted. (*Defendant's Motion*, 2.) C & C points out that Joubert has provided three varying accounts of the accident, further placing into doubt his allegation that it occurred. In Joubert's accident report, filed the evening the accident allegedly took place, he states that he tripped and fell backwards while moving boxes to clean the void room (*Id.*, Ex. A.) Approximately 6 months after the alleged accident, Joubert presented at Doctor's Hospital in Opelousas, where he claimed that he had been hit in the back when

a cable popped. (*Id.*, Ex. D.) When Joubert was deposed in relation to the instant suit, he testified that he fell in the void room due to the movements of the vessel itself. (*Id.*, Ex. B.) C & C points out that is in direct contradiction to a statement made by Joubert approximately two weeks after the alleged accident, at which time Joubert specifically stated that the movement of the vessel had nothing to do with his fall. (*Id.*, Ex. C.) In response to C & C's argument, Joubert replies that he has never deviated in his description of the most important details of the accident-that he was ordered to clean the void room and while doing so he lost his balance and fell. (*Plaintiff's Opposition*, 4.) Joubert also argues that two of the vessel's captains support his claim that the accident occurred as suggested. (*Id.* at 5.)

*3 In addition to contesting the occurrence of the alleged accident, C & C contests Joubert's claim of injury. Specifically, C & C argues that Joubert's own medical records demonstrate that he has presented on 22 prior occasions to local hospitals complaining of back pain and injuries, with a resulting documentation of 15 alleged accidents causing related back injuries. (*Defendant's Motion*, 4.) At every visit, Joubert requested Lortab or a similar narcotic pain medication from the treating physician. (*Id.* at 4-5.) When deposed in relation to the instant suit, Joubert stated that he lied all of those times in order to obtain Lortab and admitted having been addicted in the past to the medication. (*Id.*, Ex. B.)

Although Joubert denied being addicted to Lortab in July 2003, on June 16, 2004 he overdosed on the medication, combined with alcohol, according to medical records from Acadian Ambulance Service. (*Id.*, Ex. D.) On July 10, 2004, Acadian Ambulance records show that Joubert had to be transported to Opelousas General Hospital after attempting to commit suicide by shooting himself with a .22 caliber handgun. (*Id.*) Joubert has been accused by his wife in a sworn statement given in relation to the instant suit of beating her and other family members in order to obtain money to feed his drug addiction. (*Id.*, Ex. I.) In response to these allegations, Joubert admits having been addicted to Lortab and having received rehabilitation for his addiction. (*Plaintiff's Opposition*, 7.) Joubert even admits to being addicted to Lortab presently. (*Id.* at 10.) Joubert maintains that his addiction to narcotics has no bearing on the instant matter, however, and that accident occurred as he alleged and as a result he is entitled to his benefits.

Finally, C & C argues that Joubert's medical records indicate lower back problems that pre-existed his alleged accident on July 17, 2003. (*Defendant's Motion*, 11.) Joubert denies any pre-existing injury and maintains that his present disc herniation was caused by the July 17, 2003 accident. (*Plaintiff's Opposition*, 16.)

As noted above, summary judgment can only be granted if the pleadings, depositions and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Before a court can find that there are no genuine issues of material facts, it must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir.1991). In the instant case, the parties have submitted different versions of the facts relevant to the issue of Joubert's entitlement to a reinstatement of maintenance and cure benefits. Joubert appears to have related multiple versions of the alleged accident on various occasions. Joubert's medical records also do not present a close and shut case. On the one hand, the Court has been presented with evidence that Joubert needs surgical intervention to treat a documented back injury. On the other hand, the Court has reviewed evidence of a narcotics addiction that gives Joubert a motive to provide his physicians with false reports of pain and injury in order to obtain prescription pain medications, as well as a motive to lie about being injured in a work-related accident such as the one he maintains occurred on July 17, 2003 aboard the Ocean Surveyor. These facts add to the controversy created by the parties, and fail to provide the Court with a concrete, unquestionable explanation for Joubert's back pain and injuries subsequent to the alleged accident. A seaman's right to maintenance and cure is predicated directly upon these types of factual questions, and in an instance where the key facts are in dispute, the claim cannot be properly disposed of by summary judgment. *Billiot v. Toups Marine Transport, Inc.*, 465 F.Supp. 1265 (E.D.La.1979).

*4 The Fifth Circuit has held that while a seaman has the right, which Joubert here chose to exercise, to join his claim for maintenance and cure and the other general maritime law claims with his Jones Act claim, and to obtain a jury trial of all of these claims, he is not obligated to do so. *Tate v. American Tugs, Inc.*, 634 F.2d 869, 871 (5th Cir.1981) (*quoting Pelotto v. L*

& *N Towing Co.*, 604 F.2d 396 (5th Cir.1979)). If a seaman originally joins his claim for maintenance and cure with claims brought pursuant to the Jones Act and general maritime law, the maintenance and cure claim may be severed and tried on an expedited basis by the Court. *Id.* at 871.

In determining whether to sever a claim for maintenance and cure, a court should consider the plaintiff's interest in expediting trial of the issue, whether plaintiff requested a jury trial, and the proximity of the scheduled trial date. *See Hampton v. Daybrook Fisheries*, 2002 WL 1974107, *2 (E.D.La.) (citing *Tate v. American Tugs, Inc.*, 634 F.2d 869, 871 (5th Cir.1981)). The trial of this matter is currently set for September 19, 2005. The Court finds that if Joubert is entitled to a reinstatement of maintenance and cure benefits, it is an issue which can be resolved along with the remainder of the case at trial without causing any undue prejudice to either party.

Accordingly, the Court will deny both Joubert's and C & C's motions for summary judgment, and the maintenance and cure claim will be resolved at the trial of this case on September 19, 2005.

IV. Conclusion

For the foregoing reasons, the Court finds that genuine issues of material fact exist regarding Joubert's claim for the reinstatement of maintenance and cure benefits. Accordingly, Joubert's motion for partial summary judgment is denied, C & C's motion for summary judgment is denied, and Joubert's claim will proceed to trial.

Footnotes

- 1 While the Court notes that plaintiff's Memorandum in Opposition [Rec. Doc. 31] was initially deficient, exceeding ten pages and lacking a table of contents, as well as untimely filed under Local Rule 7.5W, the Court will DENY defendant's Motion to Strike Plaintiff's Opposition [Rec. Doc. 34], and consider the memorandum for purposes of the instant ruling.

2010 WL 2176105

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

David KELIIHANANUI, Plaintiff,

v.

KBOS, INC., a domestic for profit corporation, et al., Defendants.

Civil No. 09-00151 JMS/LEK. | May 24, 2010.

West KeySummary

1 Seamen ↪ Persons Entitled

Seaman was entitled to maintenance and cure for injuries he sustained while in the service of a vessel. Seaman injured himself while jumping onto the vessel to get it ready for the day's work. Although seaman was injured thirty minutes before he was scheduled to start work, seaman injured himself in serving the vessel's interest, not his own. Jones Act, 46 App.U.S.C.A. § 688(a) et.seq.

Attorneys and Law Firms

Jacob M. Merrill, Harold G. Hoppe, Honolulu, HI, for Plaintiff.

James P. Dandar, Law Offices of James P. Dandar, Honolulu, HI, for Defendants.

Opinion

ORDER: (1) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF SEAMAN'S STATUS AND COVERAGE UNDER 46 U.S.C. § 30104, THE JONES ACT; (2) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT COMPELLING MAINTENANCE AND CURE; AND (3) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANTS' PRIVACY AND KNOWLEDGE WITH RESPECT TO THE OPERATION OF THE M/V ALOHA PARASAIL AND TO STRIKE DEFENDANTS' LIMITATION OF LIABILITY DEFENSE

J. MICHAEL SEABRIGHT, District Judge.

I. INTRODUCTION

*1 Starting in October 2007, Plaintiff David Keliihananui ("Plaintiff") was employed by Defendant KBOS, Inc. ("KBOS"), assisting with its parasailing tours on the M/V ALOHA PARASAIL (the "M/V ALOHA PARASAIL" or the "Vessel") and completing other duties. On January 30, 2009, Plaintiff injured his knee while boarding the Vessel, and now brings this action alleging Jones Act negligence, unseaworthiness, maintenance and cure, and vessel owner negligence against Defendants KBOS, Morning Star Cruises, Inc. ("Morning Star"), Aloha Parasail, Inc. ("Aloha Parasail"), the Vessel, PY Investments, Inc. ("PY Investments"), and Paul Yip ("Yip") (collectively, "Defendants").

Currently before the court are Plaintiff's Motions for Summary Judgment against Defendants on: (1) Plaintiff's status as a seaman ("Pl.'s Mot. 1"); (2) Plaintiff's claim for maintenance and cure ("Pl.'s Mot. 2"); and (3) Defendants' affirmative defense under the Limitation of Liability Act of 1851 (the "Limitation Act"), ("Pl.'s Mot. 3"). Based on the following, the court: (1) GRANTS Plaintiff's Motion for Summary Judgment as to Plaintiff's seaman status; (2) GRANTS in part and DENIES in part Plaintiff's Motion for Summary Judgment on maintenance and cure; and (3) GRANTS in part and DENIES in part Plaintiff's Motion for Summary Judgment on Defendants' limitation of liability defense.

II. BACKGROUND

A. Factual Background

Yip is the 100% owner of PY Investments. Pl.'s Ex. I at 56.¹ KBOS and Morning Star are wholly owned by PY Investments, and Aloha Parasail is wholly owned by Morning Star. *Id.*; *see also* Pl.'s Ex. A (Plaintiffs' Requests for Admissions).² Yip is the president, secretary, treasurer, and director of PY Investments and KBOS, and the president and director of Morning Star and Aloha Parasail. Pl.'s Ex. A.

On November 2, 2007, Plaintiff was hired by KBOS on a part-time, on call basis. Yip Decl. ¶ 4; *see also* Defs.' Ex. B (showing that Plaintiff worked anywhere from zero to 133 hours per month from October 2007 through January 2009).

Plaintiff asserts that he spent almost all of his time working aboard the M/V AIKANE, a jet ski barge, and the M/V ALOHA PARASAIL, a 28 foot, six-passenger open motor boat. *See* Pl.'s Decl. ¶ 7. Specifically, Plaintiff asserts that he spent approximately 25% of his time either getting the boats prepared to get underway or cleaning the boats up at the end of the day, and spent the remainder of his time working on the boats while they were either underway or anchored offshore. *Id.* ¶ 4. His work aboard the boats included handling the mooring lines, making sure the boats were fueled and the gear properly prepared, helping passengers on and off the boat, and helping passengers with parasailing, scuba, and jet skiing activities. *Id.* ¶ 5.

In deposition testimony, Yip confirmed that Plaintiff was a deckhand, *i.e.*, a member of the crew on the M/V ALOHA PARASAIL. Pl.'s Ex. I at 103-104. Yip also asserts, however, that Plaintiff performed a variety of duties including janitorial and maintenance services, operating KBOS vehicles, greeting and assisting customers, cleaning and maintaining equipment, and working as a deckhand aboard the Vessel. Yip Decl. ¶ 6.

*2 On January 30, 2009, Plaintiff started work at 6:30 a.m., prior to his official 7:00 a.m. start time, to get the M/V ALOHA PARASAIL ready for the day. Pl.'s Decl. ¶ 8; *see also* Pl.'s Ex. K; Yip Decl. ¶ 9. Because the Vessel did not have any gangway, plank, or ladder as a means to board, individuals were required to jump from the pier onto the boat. Pl.'s Decl. ¶ 12; *see also* Pl.'s Ex. B (showing Vessel moored to dock). When jumping onto the Vessel, Plaintiff injured his knee. Pl.'s Decl. ¶ 13.

Randell Yamane, Plaintiff's supervisor, subsequently completed a Coast Guard "Report of Marine Accident, Injury or Death" form indicating that Plaintiff was a deckhand and injured his knee while boarding the vessel. Pl.'s Ex. C. Yamane also listed Morning Star as the operating company of the Vessel.

Plaintiff has incurred over \$30,000 in medical bills for the surgery and treatment of his knee, Pl.'s Ex. F, but has not fully recovered. A June 2, 2009 memo by Dr. Kevin Christensen, Plaintiff's doctor, states that Plaintiff lacks full extension in his knee and suffers anterior knee pain. Pl.'s Ex. D. Dr. Christensen prescribed a hinged-knee brace and physical therapy and asserts that without these treatments Plaintiff can regain full knee extension. *Id.* Plaintiff has not received these services, however, because he cannot afford them. Pl.'s Decl. ¶ 20.

KBOS paid Plaintiff maintenance in the amount of \$30.00 per day, *see* Pl.'s Ex. E; Defs.' Opp'n Mot. 2 Ex. E, but stopped paying Plaintiff in July 2009 when Defendants formed the belief that Plaintiff was not injured in the course of his employment or while servicing the vessel. Yip Decl. ¶ 15; Pl.'s Decl. ¶ 16. In early August 2009, Yip sent Plaintiff's attorney a letter stating

that Plaintiff was no longer employed by KBOS because its parasailing permit was found invalid. Pl.'s Exs. G, H. Plaintiff began receiving unemployment benefits in January 2010. Pl.'s Decl. ¶ 18.

Plaintiff has been unable to find steady work since his injury, Pl.'s Decl. ¶ 19, but did find work for three weeks in October 2009 on the fishing vessel the KOLEA, and has offloaded tuna from boats *See* Defs.' Ex. A at 112-13. Plaintiff asserts that he has depleted his savings, lived on handouts of food, borrowed money from family and friends, and receives food stamps. *See* Pl.'s Decl. ¶ 19. Prior to his injury, Plaintiff slept on one of Defendants' boats, the ALEALEKAI V, but has been homeless for most of the time since KBOS stopped paying maintenance. *Id.* ¶¶ 7, 19.

B. Procedural Background

On April 6, 2009, Plaintiff filed his Complaint against Defendants, alleging Jones Act negligence, unseaworthiness, maintenance and cure, and vessel owner negligence.

Plaintiff first filed a motion for summary judgment on the issues of Jones Act negligence, unseaworthiness, and maintenance and cure on October 21, 2009. In opposition, Defendants argued, among other things, that they should be granted a Federal Rule of Civil Procedure 56(f) continuance to allow the parties to carry out discovery relevant to Plaintiff's claims. During a November 19, 2009 status conference, Plaintiff agreed to withdraw his motion for summary judgment to allow discovery.

*3 On February 10, 2010, Plaintiff filed the present Motions for Summary Judgment. Plaintiff argued that summary judgment should be granted because, among other reasons, Defendants had failed to carry out any discovery. During a March 22, 2010 status conference, Defendant again requested additional time for discovery, and the court granted a short continuance by moving the hearing date on Plaintiff's Motions from April 6, 2010 to May 24, 2010. On May 3, 2010, Defendants filed their Oppositions, and Plaintiff filed his Replies on May 10, 2010. A hearing was held on May 24, 2010.

III. STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Rule 56(c) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir.1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007) (citing *Celotex*, 477 U.S. at 323); *see also Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir.2004). "When the moving party has carried its burden under Rule 56(c) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a *genuine issue for trial*." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation and internal quotation signals omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." *In re Barboza*, 545 F.3d 702, 707 (9th Cir.2008) (citing *Anderson*, 477 U.S. at 248). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus.*

Co., 475 U.S. at 587; see also *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir.2008) (stating that “the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor.” (citations omitted)).

IV. DISCUSSION

*4 Plaintiff brings three separate Motions for Summary Judgment on (1) Plaintiff's status as a seaman, (2) Plaintiff's right to maintenance and cure, and (3) Defendants' defense under the Limitation Act. The court addresses each of Plaintiff's Motions in turn.³

A. Applicability of the Jones Act: Seaman Status

The Jones Act “provides a cause of action in negligence for ‘any seaman’ injured in the course of his employment.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) (quoting 46 U.S.C. § 688(a)). The rights afforded a “seaman” under the Jones Act are mutually exclusive to those provided by the Longshore and Harbor Workers' Compensation Act (the “LHWCA”) for land-based maritime workers. *Id.* at 355. Further, only if neither the Jones Act nor the LHWCA applies may an individual seek recovery under a state workers' compensation plan or under general maritime tort principles. *Id.* at 355-56.

Plaintiff argues that he should be afforded seaman status such that his injury falls within the purview of the Jones Act. Although the Jones Act does not define the term “seaman,” the Supreme Court has outlined a “status-based standard” with two “essential requirements:” (1) the employee's duties must “contribute to the function of the vessel or to the accomplishment of its mission;” and (2) the employee must have a “connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.” *Id.* at 368.

This inquiry into seaman status is fact-specific and should generally be submitted to a jury. *Id.* at 371; see also *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997) (finding that the issue of seaman status under the Jones Act “is a mixed question of law and fact, and it often will be inappropriate to take the question from the jury.”). Summary judgment may be appropriate, however, if “the facts and the law will reasonably support only one conclusion.” *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); see also *Chandris*, 515 U.S. at 371 (“And where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict.”). The court therefore addresses the two requirements to determine whether Plaintiff is entitled to seaman status as a matter of law.

The first requirement—that Plaintiff's duties contribute to the function of the M/V ALOHA PARASAIL and/or its mission—is easily met. This requirement is “very broad,” and renders “[a]ll who work at sea in the service of a ship” eligible for seaman status. *Chandris*, 515 U.S. at 368 (internal quotations omitted). Defendants admit that Plaintiff's duties included being a deckhand aboard the Vessel, Yip Decl. ¶ 6, and Plaintiff assisted the Vessel with its functions as a tourist boat. Pl.'s Decl. ¶ 5. In fact, Defendants do not appear to dispute that this first requirement is met. See Defs.' Mot. 1 Opp'n at 6 (arguing only that Plaintiff's connection with the vessel “was not substantial either in its duration or nature”). Accordingly, Plaintiff has carried his burden on this first requirement.

*5 Defendants do dispute, however, that Plaintiff has proven the second requirement that Plaintiff has a connection to the Vessel that is substantial in terms of both its duration and its nature. The “substantial connection” requirement is designed to “separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the peril of the sea.” *Chandris*, 515 U.S. at 368. In other words, this requirement focuses on “whether the employee's duties take him to sea.” *Papai*, 520 U.S. at 555. The specific facts of each case should guide the court and the “ultimate inquiry

is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Chandris*, 515 U.S. at 370.

Plaintiff has carried his summary judgment burden on his seaman status. First, the evidence presented establishes that Plaintiff's connection to the M/V ALOHA PARASAIL is substantial in terms of duration. A "rule of thumb" for an ordinary case for determining seaman status is that "[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."⁴ *Id.* at 371. Applying this principle, Plaintiff has a clearly adequate temporal connection to the M/V ALOHA PARASAIL-the evidence establishes that Plaintiff spent most of his work day aboard the M/V AIKANE and the M/V ALOHA PARASAIL either preparing them for tourist operations or during the tourist events themselves. *See* Pl.'s Decl. ¶ 7. Specifically, Plaintiff asserts that he spent approximately twenty-five percent of his time either preparing or cleaning the boats, and spent the remainder of his time-*i.e.*, seventy-five percent-working on the boats while they were either underway or anchored offshore. *Id.* ¶ 4; *see also Mudrick v. Cross Equip. Ltd.*, 250 Fed. Appx. 54, 59 (5th Cir.2007) (finding that plaintiff carried his burden on the temporal requirement where he worked thirty-two percent of his time performing marine work on vessels).

Plaintiff has also put forth evidence showing that the nature of his connection to the M/V ALOHA PARASAIL is substantial. Plaintiff's work aboard the boats included handling the mooring lines, making sure the boats were fueled and the gear properly prepared, helping passengers on and off the boats, and helping passengers with parasailing, scuba, and jet skiing activities. Pl.'s Decl. ¶ 5. In sum, Plaintiff has met his burden on summary judgment by showing that the totality of his work-*i.e.*, the time Plaintiff spent aboard the Vessel and the nature of his work-leads to the singular conclusion that Plaintiff was a Jones Act seaman. *See Mudrick*, 250 Fed. Appx. at 60.

In response, Defendants have failed to present "specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Instead, Defendants rely on the Yip Declaration, which asserts in conclusory fashion that Plaintiff performed a variety of duties including janitorial and maintenance services, operating KBOS vehicles, greeting and assisting customers, cleaning and maintaining equipment, and working as a deckhand aboard the M/V ALOHA PARASAIL. Yip Decl. ¶ 6. Even drawing all inferences in favor of Defendants, this evidence fails to contradict Plaintiff's proof. Specifically, the Yip Declaration does not contradict Plaintiff's statement that the tasks he performed all related to the operation of the vessel-Plaintiff asserts that he prepared the vessel at the beginning of the day, cleaned the boats at the end of the day, and assisted passengers. More importantly, the Yip Declaration does not challenge in any manner Plaintiff's unequivocal assertion that seventy-five percent of his working time was spent actually on vessel-the Yip Declaration admits that Plaintiff worked as a deckhand and is otherwise silent regarding how Plaintiff's time was allocated between tasks.⁵ *Cf. Becker v. Dillingham Const. Pac., Ltd.*, 2001 WL 969085, at *7 (D.Haw. Mar.21, 2001) (finding a fact question existed where Plaintiff claimed he spent forty percent of his time on the vessel, while Defendants estimated that Plaintiff spent only ten to twenty percent of his time on the vessel). Accordingly, the court finds that Defendant's vague assertions about Plaintiff's duties are insufficient to create a fact question that Plaintiff did not have a substantial connection to the M/V ALOHA PARASAIL.

*6 Defendants also argue that Plaintiff was not a seaman because he worked at most only on a part-time basis. Defs.' Opp'n at 7-8. Defendant cites no caselaw to support the proposition that a part-time employee cannot be a seaman. Indeed, the court finds no such requirement. *See Lunsford v. Fireman's Fund Ins. Co.*, 635 F.Supp. 72 (E.D.La.1986) (finding that a part-time cleaning lady aboard a docked pleasure yacht was a "seaperson" for purposes of the Jones Act). Further, to the extent that Defendants suggest that Plaintiff's connection with the vessel was only "transitory or sporadic," the court rejects this argument. The evidence presented establishes that Plaintiff "performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity," satisfying the test for seaman status. *See Chandris*, 515 U.S. at 368-69; *cf. Papai*, 520 U.S. at 1542 (finding that the twelve prior discrete working engagements the plaintiff had with the vessel, spanning over 2-1/4 years, were separate from the one in question such that his connection to the vessel was "transitory or sporadic" and plaintiff was not a seaman).

The court therefore GRANTS Plaintiff's Motion for Summary Judgment on his seaman status under the Jones Act.

B. Plaintiff's Claim for Maintenance and Cure

Plaintiff argues that as a seaman injured while servicing a vessel, he is entitled to maintenance in the amount of at least \$50 per day, and cure for all of his medical expenses. The court first addresses whether Plaintiff is entitled to maintenance and cure, and, finding that Plaintiff is entitled to receive maintenance and cure, addresses the proper time period for maintenance and cure, the amount of compensation, and which specific Defendants are liable for maintenance and cure.

1. The Obligation to Pay Maintenance and Cure

"Maintenance and cure is the obligation ... to care for a seaman injured during the course of maritime employment." *Kopczynski v. The Jacqueline*, 742 F.2d 555, 559 (9th Cir.1984). "'Maintenance' is compensation for room and board expenses incurred while the seaman is recovering from the illness or injury." *Berg v. Fourth Shipmor Assocs.*, 82 F.3d 307, 309 (9th Cir.1996); see also *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir.1986) ("The seaman is entitled to food and lodging of the kind and quality of that which he would receive aboard ship." (citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 82 L.Ed. 993 (1938))). In comparison, "cure" refers to the employer's obligation "to pay the seaman's medical expenses until he reaches maximum recovery." *Berg*, 82 F.3d at 309. When a seaman is injured in the service of a vessel, the employer must pay maintenance and cure even where the employer is not at fault. *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730, 63 S.Ct. 930, 87 L.Ed. 1107 (1943); see also *Crooks v. United States*, 459 F.2d 631, 632 (9th Cir.1972).⁶

*7 The court finds that Plaintiff has carried his burden of establishing that he is entitled to maintenance and cure. As discussed above, Plaintiff is a seaman. The undisputed evidence presented further establishes that Plaintiff injured himself in the service of the M/V ALOHA PARASAIL. Specifically, Plaintiff injured himself while jumping onto the Vessel to get it ready for the day's work. See Pl.'s Decl. ¶ 8.

In opposition, Defendants argue that Plaintiff did not injure himself while in service of any vessel because he was scheduled to start work at 7:00 a.m. and was never compensated for any work performed that day. See Yip Decl. ¶¶ 9-10. The court recognizes that there are instances where a seaman injured while off-duty and on personal recreation time is not covered by the Jones Act. See *King v. Holo Holo Charters, Inc.*, 2007 WL 1430348 (D.Haw. May 10, 2007) (discussing cases). There is no question, however, that Plaintiff was serving the Vessel's interests at the time of the accident-the undisputed evidence presented establishes that Plaintiff boarded the M/V ALOHA PARASAIL to begin work and not for some form of personal recreation. That KBOS was not to begin paying Plaintiff until his scheduled 7:00 a.m. start times does not change this analysis-Plaintiff injured himself in serving the Vessel's interest, not his own. To deny Plaintiff maintenance and cure under these circumstances would be inconsistent with Defendants' obligation to care for Plaintiff's injuries sustained during the course of his maritime employment and would undermine the strong public interest in requiring a maritime employer to provide maintenance and cure. Accordingly, Plaintiff is entitled to maintenance and cure.

2. Time Period

"A shipowner is liable to pay maintenance and cure until the point of maximum medical cure, where it is probable that further treatment will result in no betterment of claimant's condition. Whether a seaman has reached maximum medical cure is a medical question." *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir.1996) (internal citation omitted); see also *Farrell*, 336 U.S. at 517-19; *McMillan v. Tug Jane A. Bouchard*, 885 F.Supp. 452, 459 (E.D.N.Y.1995) (" 'Maximum medical cure' is reached when the seaman recovers from the injury, the condition permanently stabilizes or cannot be improved further."); *Whitman v. Miles*, 294 F.Supp.2d 117, 123 (D.Me.2003) (opining that maintenance and cure does not hold a ship to permanent liability for a pension, and that obligation ceases once disabling condition has been deemed incapable of being improved, irrespective of need for continuing medical treatment and care).

As for the time period for maintenance and cure, Plaintiff has carried his burden of coming forth with the evidence that he has not yet reached maximum recovery such that he remains entitled to compensation. Specifically, a June 2, 2009 memo by Dr.

Kevin Christensen, Plaintiff's doctor, states that Plaintiff lacks full extension in his knee and still suffers anterior knee pain. Pl.'s Ex. D. Dr. Christensen prescribed a hinged-knee brace and physical therapy and asserts that Plaintiff can regain full knee extension. *Id.* Plaintiff has not received this physical therapy, however, because he lacks funds. Pl.'s Decl. ¶ 20.

*8 In opposition, Defendants argue that Plaintiff is no longer injured because Plaintiff was able to work for three weeks on the fishing vessel the KOLEA and has offloaded tuna from boats. While Plaintiff did carry out these jobs after his injury, that Plaintiff performed some work does not address the *medical* question of whether he is has reached maximum cure. *See Rashidi*, 96 F.3d at 128; *see also Collick v. Weeks Marine, Inc.*, 680 F.Supp.2d 642, 657-58 (D.N.J.2009) (“The fact that Plaintiff has taken a part-time job as a cabinet maker in order to make his mortgage payments does not lessen the public interest in requiring a maritime employer to provide maintenance and cure benefits to its injured employee.”). Without any medical evidence calling into question Dr. Christensen's statements, Defendants have failed to raise a genuine issue of material fact that Plaintiff has not reached maximum medical cure.

Defendants further argue that Plaintiff is no longer injured because he is now receiving unemployment benefits, which means that he is able and available for work. *See* Defs.' Opp'n to Pl.'s Mot. 2 at 8 (citing Hawaii Revised Statutes § 383-29). The court rejects this argument as well-that Plaintiff can perform some work does not shed light on whether he is able to perform the work he previously did before his injury or whether he has reached maximum medical cure.

Finally, Defendants argue that any amount of maintenance awarded should be offset by the monies Plaintiff received through subsequent work and unemployment benefits. The Supreme Court has rejected such argument:

It would be a sorry day for seamen if shipowners, knowing of the claim for maintenance and cure, could disregard it, force the disabled seaman to work, and then evade part or all of their legal obligation by having it reduced by the amount of the sick man's earnings. This would be a dreadful weapon in the hands of unconscionable employers and a plain inducement ... to use the withholding of maintenance and cure as a means of forcing sick seamen to go to work when they should be resting, and to make the seamen themselves pay in whole or in part the amounts owing as maintenance and cure.

Vaughan v. Atkinson, 369 U.S. 527, 533, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) (citations omitted).

Accordingly, the court finds that Plaintiff is entitled to maintenance and cure from the date of his injury until he reaches maximum cure.

3. Amount of Maintenance and Cure

The evidence presented establishes that Plaintiff has incurred over \$30,000 in medical bills, and that Plaintiff still needs additional medical care to reach maximum recovery. Plaintiff is plainly entitled to these amounts as cure.

In determining maintenance, the court must look at not only reasonable expenses, but also Plaintiff's actual expenses. Specifically, “[a] seaman is entitled the reasonable cost of food and lodging, provided he has incurred the expense.” *Hall v. Noble Drilling, Inc.*, 242 F.3d 582, 587 (5th Cir.2001). Determining the maintenance award involves three steps:

*9 First, the court must estimate two amounts: the plaintiff seaman's actual costs of food and lodging; and the reasonable cost of food and lodging for a single seaman in the locality of the plaintiff. In determining the reasonable costs of food and lodging, the court may consider evidence in the form of the seaman's actual costs, evidence of reasonable costs in the locality or region, union contracts stipulating a rate of maintenance or per diem payments for shoreside food or lodging while in the service of a vessel, and maintenance rates awarded in other cases for seamen in the same region.

...

Second, the court must compare the seaman's actual expenses to reasonable expenses. If actual expenses exceed reasonable expenses, the court should award reasonable expenses. Otherwise, the court should award actual expenses. Thus, the general rule is that seamen are entitled to maintenance in the amount of their actual expenses on food and lodging up to the reasonable amount for their locality.

Third, there is one exception to this rule that the court must consider. If the court concludes that the plaintiff's actual expenses were inadequate to provide him with reasonable food and lodging, the plaintiff is entitled to the amount that the court has determined is the reasonable cost of food and lodging. This insures that the plaintiff's inability to pay for food and lodging in the absence of maintenance payments does not prevent him from recovering enough to afford himself reasonable sustenance and shelter.

Id. at 590.

Applying this framework, the evidence Plaintiff has presented is insufficient for the court to determine the proper amount of maintenance.

First, Plaintiff's proffer of reasonable expenses, without more explanation, is insufficient. Plaintiff presents evidence regarding reasonable expenses through the 2006 report of economist Jack P. Suyderhoud (the "Suyderhoud Report"), who calculated the cost of living in Hawaii as \$57.00 per day for a seaman-plaintiff in *Miller v. Smith Maritime, Ltd.*, Civ. No. 05-00490 HG-BMK. Pl.'s Ex. H. The Suyderhoud Report calculates this amount based on two sets of data-one set from the Economic Research Institute providing information for a single minimum wage earner living with friends or parents contributing partial rent ("ERI data"), and the second from the U.S. Bureau of Labor Statistics providing data on single-person households with annual income in the \$50,000 to 70,000 range ("Labor statistics").

The Suyderhoud Report is insufficient because it provides no explanation of why the ERI data and Labor statistics are the appropriate measures for maintenance for a seaman, much less precisely how the Suyderhoud Report used this data to calculate maintenance. Further, both the ERI data and Labor statistics include in their calculations amounts which either should not be included and/or are too vague to determine whether they should be included in the maintenance calculation, such as "consumables," "entertainment," and "miscellaneous." *Id.* at 3-4. Without more precise information, the court cannot determine whether \$57 per day is indeed a reasonable amount to cover food and lodging in the Honolulu area.

*10 Second, Plaintiff has presented no direct evidence of actual expenses, which is a necessary component in determining maintenance. *See Hall*, 242 F.3d at 590 ("The plaintiff must present evidence to the court that is sufficient to provide an evidentiary basis for the court to estimate his actual costs."); *see also Miller v. Smith Maritime, Ltd.*, 2007 WL 1450421, at *1 (D.Haw. May 14, 2007) (explaining that maintenance requires consideration of actual expenses); *McCart v. Prysmian Power Cables & Systems USA, LLC*, 2007 WL 2257149, at *1 (W.D.Wash. Aug.3, 2007) (discussing that courts consider both actual costs and reasonable costs in determining maintenance); *Peake v. Chevron Shipping Co.*, 2004 WL 1781008, at *5 (N.D.Cal. Aug.10, 2004) (considering evidence of actual expenses).

Instead, Plaintiff asserts that he has depleted his savings, lived on handouts of food, borrowed money from family and friends, has been homeless, and receives food stamps. *See* Pl.'s Decl. ¶ 19. While the court certainly sympathizes with Plaintiff's position-caused at least in part due to his injury and KBOS's termination of maintenance payments-this statement is not evidence of Plaintiff's actual expenses and the court cannot speculate regarding how much Plaintiff has spent on food and lodging since January 30, 2009. While it appears that Plaintiff's actual expenses over this time period are likely "inadequate to provide him with reasonable food and lodging" such that the "reasonable" cost of maintenance should be substituted for the actual costs, *see Hall*, 582 F.2d at 590, Plaintiff has not presented sufficient evidence at this time to carry his burden.

In opposition, Plaintiff cites to *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir.1986), as suggesting that maintenance can be determined without considering actual expenses. *McWilliams* does not support Plaintiff's position, and indeed specifically

recognizes that actual expenses are “a relevant starting point in this fact-specific inquiry.” *McWilliams*, 781 F.2d at 518. Simply put, actual expenses are a relevant inquiry to determine maintenance and Plaintiff has failed to provide the court sufficient information to determine the proper amount of maintenance.⁷

Thus, Plaintiff is entitled to maintenance from January 30, 2009 until the time he reaches maximum cure. Plaintiff has failed to prove, however, the proper amount of maintenance.

4. Defendants Liable for Maintenance and Cure

Finally, the court addresses which specific Defendants Plaintiff has established are liable for maintenance and cure. “[T]he Jones Act applies only between employees and their employers.” *Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 170 (2d Cir.1973) (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Panama R.R. v. Johnson*, 264 U.S. 375, 387-88, 44 S.Ct. 391, 68 L.Ed. 748 (1924)). Accordingly, “[a]n action for maintenance and cure can [] be maintained only against the employer because the right arises out of and is implied in the contract of employment.” *Id.* (citing *Aguilar*, 318 U.S. at 730; *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 527, 58 S.Ct. 651, 82 L.Ed. 993 (1938)).

*11 Plaintiff was employed by KBOS; therefore KBOS is liable for maintenance and cure. Plaintiff further argues, however, that all Defendants are jointly and severally liable because they are all mere alter egos of Yip. To prove alter ego liability, Plaintiff must establish, among other things, that Yip exercised such domination over these companies that none of them manifested any corporate interests of their own, and that respecting corporate separateness would work an injustice on a third party. *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853 (9th Cir.1986); *see also Robert's Hawai'i Sch. Bus, Inc. v. Laupahoehoe Trans.*, 91 Haw. 224, 241-42, 982 P.2d 853, 870-71 (1999), *overruled on other grounds by* Hawaii Revised Statutes § 480-2 (stating that a corporation may be the alter ego of another “where recognition of the corporate fiction would bring about injustice and inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim”).⁸ While Plaintiff has presented evidence that Yip owns all of the corporate Defendants, this evidence, standing on its own, is insufficient to establish alter ego liability as to all Defendants. The court therefore finds that Plaintiff has proven at this time only that KBOS is liable to Plaintiff for maintenance and cure.

In sum, the court GRANTS Plaintiff's Motion for Summary Judgment against KBOS as to cure, and GRANTS in part and DENIES in part Plaintiff's Motion as to maintenance and the other Defendants.

C. Defendants' Defense of Limitation of Liability

Plaintiff seeks summary judgment on Defendants' defense of limitation of liability pursuant to the Limitation Act.

The Limitation Act, 46 U.S.C. § 30505 (formerly codified as 46 U.S.C. app. § 183) limits a vessel owner's liability on a negligence or unseaworthiness claim to the value of the vessel so long as the owner did not have privity or knowledge of the causative agent.⁹

To the extent Defendants plead this defense as to Plaintiff's claim for maintenance and cure, such defense does not apply—“a shipowner cannot limit its liability for maintenance and cure. It may bring a limitation action only in response to a finding of negligence or unseaworthiness.” *Brister v. A. W.I., Inc.*, 946 F.2d 350, 361 (5th Cir.1991); *see also In re R/JF Int'l Corp.*, 354 F.3d 104, 107 (1st Cir.2004) (“[M]aintenance and cure is exempt from the limitation of liability rules in admiralty.”). Accordingly, to the extent that Defendants allege a limitation defense on Plaintiff's claim for maintenance and cure, the court GRANTS Plaintiff's Motion for Summary Judgment.

As for Plaintiff's other claims, the court finds that determining Plaintiff's Motion would be premature at this time due to the burden-shifting framework required in determining Defendants' claim for limited liability. Under the Limitation Act, a claimant seeking to recover damages must first demonstrate the vessel owner's negligence or unseaworthiness of the vessel. *Walston v.*

Lambertsen, 349 F.2d 660, 663 (9th Cir.1965); *see also Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4 (1st Cir.1999). If the claimant does not carry its burden, then the vessel owner is exonerated on those claims. *See In the Matter of Hechinger*, 890 F.2d 202, 207 (9th Cir.1989) (“The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit.”). If the claimant does carry its burden, then the burden shifts to the vessel owner to show lack of privity or knowledge. *Carr*, 191 F.3d at 4.

*12 Plaintiff asks the court to skip the first inquiry and address only the second inquiry. The court will not address the second inquiry, however, until after negligence and/or unseaworthiness has been determined. *See Brown v. Teresa Marie IV, Inc.*, 477 F.Supp.2d 266, 274 (D.Me.2007) (declining to address privity and knowledge where genuine issue of material fact existed as to seaworthiness). Otherwise, the court’s determination of the second inquiry only would amount to an impermissible advisory opinion.

In opposition, Plaintiff argues that caselaw addressing limitation actions-as opposed to the defense of limitation-supports the proposition that the court may decide privity and knowledge without addressing liability. Pl.’s Mot. 13; Pl.’s Reply 4. The Limitation Act allows a ship owner to bring an action seeking limitation of liability, which may prevent the injured party from bringing its own action for damages until after the limitation is determined. Courts have found that where privity and knowledge are apparent, the proper course of action is to allow the injured party to bring its own action so that a jury may determine negligence. *See, e.g., Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1063 (11th Cir.1996); *Fecht v. Makowski*, 406 F.2d 721, 722-23 (5th Cir.1969). No such circumstances apply here-the cases cited by Plaintiff do not address the *defense* of limitation of liability and Plaintiff is able to litigate his claims in this action.

The court therefore GRANTS Plaintiff’s Motion for Summary Judgment on Defendants’ limitation of liability defense as to Plaintiff’s claim for maintenance and cure, and DENIES the Motion as to Plaintiff’s other claims.

V. CONCLUSION

Based on the above, the court: (1) GRANTS Plaintiff’s Motion for Summary Judgment as to Plaintiff’s seaman status; (2) GRANTS in part and DENIES in part Plaintiff’s Motion for Summary Judgment on maintenance and cure; and (3) GRANTS in part and DENIES in part Plaintiff’s Motion for Summary Judgment Defendants’ limitation of liability defense. As a result of this Order, Plaintiff is deemed a seaman for purposes of the Jones Act and KBOS is ordered to pay Plaintiff cure for his medical expenses incurred to date and until he reaches maximum recovery. As agreed upon at the May 24, 2010 hearing, within twenty-four hours of receiving this Order, counsel for Plaintiff shall contact Magistrate Judge Leslie E. Kobayashi for the parties to discuss a reasonable maintenance amount and settlement of this action.

IT IS SO ORDERED.

Footnotes

- 1 Unless otherwise noted, all references to exhibits are from Plaintiff’s Motion for Summary Judgment on the issue of seaman status. Doc. No. 48
- 2 Defendants never filed any response to Plaintiff’s First Request for Admissions to Yip, and the court therefore deems them admitted. *See Fed.R.Civ.P. 36(a)(3)*.
- 3 In addition to the arguments addressed below, Plaintiff argues that he is entitled to summary judgment because Defendants failed to follow Local Rule 56.1 requiring Defendants to file a concise statement of facts. Defendants’ failure to follow the Local Rules is inexplicable, especially after Defendants delayed in having the court address Plaintiff’s Motions. The court finds, however, that the sanction contained in the Local Rules-that Plaintiff’s material facts be deemed admitted, *see* Local Rule 56.1(g)-is unnecessary given that Defendants have largely failed to counter Plaintiff’s evidence.

- 4 The court recognizes that this thirty percent rule of thumb “serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases.” *Chandris Inc. v. Latsis*, 515 U.S. 347, 371, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995). As described in this Order, however, the facts of Plaintiff’s work aboard the M/V ALOHA PARASAIL do not justify a departure from this guideline, especially where the evidence establishes that Plaintiff spent the majority of his work day on the vessel and his work was directly related to its operation.
- 5 While the Yip Declaration does not include specific information that would raise a fact question whether Plaintiff is a seaman, Defendants argue in their Opposition that “Plaintiff spent less than thirty percent of his time engaged in work as a deck hand” and instead “spent the majority of his time engaged in land-based work activities performing janitorial services, cleaning equipment, and driving employer-owned vehicles.” Defs.’ Opp’n to Pl.’s Mot. 1 at 7. Because “arguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment,” the court does not consider these unsubstantiated statements. *See Barcamerica Int’l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n. 4 (9th Cir.2002) (quoting *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th Cir.1974) (per curiam)).
- 6 The court recognizes that it is an open question whether a pretrial motion for maintenance and cure should be viewed under the summary judgment standard or through an approach that takes into account the flexibility that admiralty law affords to the court and the deference afforded to seamen. *See, e.g., Best v. Pasha Haw. Transport Lines, LLC*, 2008 WL 1968334, at *1 (D.Haw. May 6, 2008) (discussing that Ninth Circuit cases have not treated such motions consistently); *Buenbrazo v. Ocean Alaska, LLC*, 2007 WL 3165523, at *1 (W.D.Wash. Oct.24, 2007) (noting the “obvious tension” between summary judgment and resolving all doubts to the seaman). The court need not resolve this issue—even applying the summary judgment standard, the court finds that Plaintiff is entitled to maintenance and cure. Further, as to the portions of Plaintiff’s Motion that the court denies, even under a more flexible approach, Plaintiff has not provided the court sufficient information to determine the amount of maintenance and the specific Defendants liable for these amounts.
- 7 This requirement should come as no surprise to Plaintiff’s counsel. In *Miller*, where Plaintiff’s counsel submitted the Suyderhoud Report, Plaintiff was required to submit information on Plaintiff’s actual living expenses. *Miller v. Smith Maritime, Ltd.*, 2007 WL 1450421, at *3 (D.Haw. May 14, 2007).
- 8 Plaintiff does not address whether state or federal law applies to the alter ego determination, and the court need not decide which substantive law applies because the standards are similar and Plaintiff has not carried his burden under either standard.
- 9 The Limitation Act, 46 U.S.C. § 30505, provides:
- (a) In general.—Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner’s proportionate interest in the vessel and pending freight.
 - (b) Claims subject to limitation.—Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

2007 WL 1556529

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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, Mikkeltorg 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.

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 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

*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).

Footnotes

- 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.
- 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.
- 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.

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Mr. Carpenter:

I attach an *Amended Brief of Amicus WDTL*, which attaches copies of certain federal cases cited in the original brief. See p. 10, n. 2.

Thank you and we regret the omission.

Stew

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Dear Mr. Carpenter:

Pursuant to our prior application please find attached WDTL's *proposed* Brief of Amicus Curiae in the above matter. (Our application was submitted January 3d and remains pending.)

I am contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes
Chair, WDTL Amicus Committee

STEWART A. ESTES

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