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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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IAN DEAN,
Plaintiff/Petitioner,

FILED

JUL 19 2012

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

v.

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

Defendants/Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION
AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

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On Behalf of
Washington State Association for Justice Foundation

ORIGINAL

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of seamen to obtain maintenance and cure.

II. INTRODUCTION

This review principally involves the issue of a seaman's entitlement to reinstatement of maintenance and cure pending trial, and the seeming tension between application of the state procedural standard for summary judgment under CR 56 and substantive maritime law. The ultimate question underlying the petition for review and answer is what facts are *material* for summary judgment purposes in resolving a claim for maintenance and cure benefits pending trial. This is an unresolved issue of federal law warranting review under RAP 13.4(b)(4). Once this substantive question is answered, uncertainty surrounding proper application of CR 56 in this context should be resolved.

III. BACKGROUND

This case involves a claim by Ian Dean ("Dean") under general maritime law for maintenance and cure against The Fishing Company of Alaska, Inc., et al. ("FCA"). The underlying facts are set forth in the published Court of Appeals opinion and the briefing of the parties. See Dean v. Fishing Co. of Alaska, Inc., 166 Wn.App. 893, 272 P.3d 268 (2012), *review pending*; Dean Pet. for Rev. at 2-6; FCA Ans. To Pet. for Rev. at 1-9; Dean Br. at 3-6; FCA Br. at 3-7; Dean Reply Br. at 2-3.

For purposes of this amicus curiae memorandum, the following facts are relevant: Dean sued FCA in state court under general maritime law for maintenance and cure arising out of his service as a fish processor on FCA's vessel *Alaska Juris* in May and June of 2006. Dean received medical treatment for both hand and neck injuries he asserts were sustained as a result of the service.

FCA initially provided maintenance and cure to Dean, although the briefing and Court of Appeals opinion are unclear as to whether these benefits were based on both the hand and neck injuries. In June 2009, one of Dean's physicians (Dr. Afatooni) diagnosed Dean with continuing neck problems. In August of 2009, Dean underwent an examination by a physician retained by FCA (Dr. Williamson-Kirkland) to assess his neck. Based upon this examination, FCA terminated maintenance and cure on the grounds that Dean's neck was normal and that any neck problems were not related to his service on FCA's vessel.

Dean filed this action, inter alia, based upon ongoing neck problems, and filed a motion to compel FCA to reinstate maintenance and cure pending trial. The superior court treated Dean's motion as one for summary judgment and concluded he failed to show no genuine issue of material fact exists regarding entitlement to maintenance and cure. See Dean, 166 Wn.App. at 897; Dean Pet. for Rev. at 4.¹ Subsequently, the parties engaged in arbitration, and following arbitration filed a joint motion for entry of judgment in FCA's favor, stipulating that the outcome of the contemplated appeal to the Court of Appeals would determine the prevailing party regarding the maintenance and cure claim. The superior court entered a judgment to this effect. See Dean at 897.²

On appeal, the Court of Appeals, Division I, affirmed, describing the principal issue before it as follows: "In this case of first impression, we must decide whether the usual summary judgment standard applies to a seaman's pretrial motion to reinstate maintenance and cure." Dean at 895. The court also noted that there is no clear guidance from the United States Supreme Court or the Ninth Circuit Court of Appeals regarding the precise standard under which courts review pretrial motions for maintenance and cure. See id. at 899-900. The court recognized that under maritime law courts are generally required to give special solicitude to the rights of seamen with respect to claims for maintenance and cure, and to resolve all

¹ In a separate pretrial motion Dean also sought to compel discovery on whether FCA had conducted surveillance of him during the life of the claim. The superior court denied this motion. Dean at 897.

² The parties also agreed they would jointly request the appellate court review the superior court ruling on the surveillance issue. Dean at 897.

doubts regarding payment of such benefits in the seaman's favor. See id. at 898-99, 903. However, it concluded that the CR 56 procedural requirement, that the facts be viewed in the light most favorable to FCA as the non-moving party, was controlling and upheld denial of pretrial maintenance and cure because disputed issues of material fact existed regarding Dean's entitlement to these benefits. See id. at 902-03. In so doing, the court rejected the notion that the special solicitude required under maritime law impacted the summary judgment standard, particularly when it viewed the record as suggesting a factual dispute whether Dean met his threshold burden of establishing his neck problems are related to service on FCA's vessel. See id. at 902. Dean now seeks review in this Court regarding the maintenance and cure issue.³

IV. ISSUE PRESENTED

Dean frames the overall issue as "Who has the burden of proof for summary judgment motions involving the reinstatement of maintenance and cure?" Dean Pet. for Rev. at 2. FCA describes the issue as "the question of the proper legal standard to be applied to a pre-trial motion for maintenance and cure." FCA Ans. to Pet. for Rev. at 10. The issue might be more precisely stated as follows:

Assuming a seaman establishes the threshold requirements for entitlement to maintenance and cure, may a ship owner terminate such benefits in the absence of agreement or court order based upon its

³ The Court of Appeals did not reach the other issue raised by Dean regarding pretrial surveillance, finding it moot. See Dean at 903-04. While Dean seeks review of the surveillance issue, it is not addressed by this amicus curiae memorandum. See Dean Pet. for Rev. at 2.

consulting physician's opinion that maximum cure has been reached, even though the seaman's physician's opinion is to the contrary?

V. ARGUMENT IN SUPPORT OF REVIEW

A. Overview Of General Principles of Federal Maritime Law On Maintenance And Cure.

An action for maintenance and cure is governed by general maritime law, a species of federal common law. See Endicott v. Icicle Seafoods, Inc., 167 Wn.2d 873, 878, 224 P.3d 761, *cert. denied*, 130 S.Ct. 3482 (2010). "Maintenance" refers to a living allowance for food and lodging, and "cure" refers to necessary medical expenses. See Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 76, 272 P.3d 827 (2012), *cert. pending*. Under general maritime law, all ambiguities and doubts as to a seaman's right to receive maintenance and cure must be resolved in the seaman's favor. See Vaughan v. Atkinson, 369 U.S. 527, 532 (1962) (hereafter "Vaughan canon").

The ship owner's duty to provide maintenance and cure is broad, and is designed to assure easy and ready administration of those benefits, with few exceptions and little need for resort to court. See Vella v. Ford Motor Co., 421 U.S. 1, 4 (1975). A seaman has the initial burden of demonstrating a right to maintenance and cure by proof that he or she (1) was engaged as a seaman, (2) sustained an injury or illness while in the ship's service, and (3) incurred or is incurring expenditures. See Tuyen Thanh Mai v. Am. Seafoods. Co., 160 Wn.App. 528, 538-39, 249 P.3d 1030 (2011) (hereafter Mai). The right to maintenance and cure generally extends to the point of "maximum medical cure," Clausen, 174 Wn.2d

at 76, often referred to as “maximum cure,” Mai at 539. The ship owner bears the burden of proving maximum cure. See Dean, 166 Wn.App. at 898; Thomas J. Schoenbaum, Admiralty and Maritime Law, §6-33 at 394-95 (4th ed. 2004).

The issue of maximum cure is a medical, not a legal, question. See Schoenbaum, supra §6-33 at 393. The Vaughan canon has been applied in resolving conflicting medical opinions on whether a seaman has reached maximum cure. See Mai, 160 Wn.App. at 539. The ship owner is obligated to promptly investigate and resolve whether a seaman is entitled to maintenance and cure for illness or injury resulting from service on the vessel, and must resolve all doubts in favor of the seaman. See Schoenbaum, supra §6-28 at 380. The ship owner may file a declaratory judgment action to determine whether it is entitled to terminate current benefits. See id.

Maintenance and cure claims lodged in state court are governed by general maritime law, although state procedural rules apply. See Dean at 898; Endicott, 167 Wn.2d at 879, 881. Both state and federal courts have commented on the perceived tension between the substantive law of maintenance and cure (including the Vaughan canon) and the summary judgment principle that sets over for trial controversies involving genuine issues of material fact. See Dean at 899-903 (identifying issue and surveying federal cases). Resolving this seeming tension is at the heart of the issue presented for review here.

B. The Proper Legal Standard Under Federal Maritime Law For Determining A Seaman's Pretrial Entitlement To Maintenance And Cure Is An Issue Of Substantial Public Interest Under RAP 13.4(b)(4), Given The Uncertainty Surrounding This Legal Issue And The Prevalence of Maritime-Related Industries And Services In Washington.

The ultimate issue underlying the petition and answer is an unresolved question of substantive maritime law worthy of review under RAP 13.4(b)(4). Dean urged the Court of Appeals, in conducting its de novo review of the superior court's summary judgment determination, to adopt the analysis of Gouma v. Trident Seafoods, 2008 WL 2020442 (W.D. Wash. 2008). See Dean Br. at 9.⁴ In Gouma, the district court compelled the ship owner to provide cure pending trial notwithstanding a difference of medical opinion between Gouma's physician and the ship owner's consulting physician over whether maximum cure had been reached. See Gouma, supra at *2. In so doing, Gouma found the Vaughan canon controlling, and rejected the notion that a ship owner could terminate cure based upon the opinion of its own physician. See id. at *2-4. Without explanation, the Court of Appeals rejects the Gouma analysis as unpersuasive dicta. See Dean at 901-02.⁵ Having done so, it further

⁴ Although unpublished, the order in Gouma may be cited under Fed. R. App. P. 32.1 and GR 14.1(b). See Dean, 166 Wn.App. at 900 n.15 & 901 n.23. Pursuant to GR 14.1(b), a copy of Gouma is included in the Appendix.

⁵ Notably, Headnote 6 to the Washington Reports opinion states what amounts to a categorical rule: "When an injured seaman's maintenance and cure has been discontinued and the seaman subsequently seeks compensation under the Jones Act and general maritime law for further alleged injuries, the seaman's motion for pretrial reinstatement of maintenance and cure may properly be decided by applying the standard for summary judgment and be denied under that standard if the medical opinions in the record support competing inferences over whether the seaman is entitled to maintenance and cure for the further alleged injury. Notwithstanding the tension between the summary judgment standard, which requires that all doubts be resolved in favor of the nonmoving party, and the canon of admiralty law, which provides that all doubts be resolved in favor of the

concludes Gouma does not apply in any event because a factual dispute exists regarding whether Dean meets the threshold burden of proving his neck problems occurred in the service of the vessel. See id. at 902-03.⁶

The parties and Court of Appeals have struggled with the role of CR 56 summary judgment practice in resolving a seaman's pretrial claim to reinstatement of maintenance and cure, while failing to fully address the underlying issue of maritime law. The answer to this substantive question may well resolve uncertainties about summary judgment practice in this context. For example, if maritime law allows the ship owner to reject an attending physician's opinion regarding maximum cure, and to terminate maintenance and cure based on its own consulting physician's views, then both opinions are relevant and a seaman's motion to compel maintenance and cure may be properly denied pending trial. Under CR 56, the factual dispute between the seaman's attending physician and ship owner's consulting physician creates an issue of fact that precludes summary judgment in favor of the seaman. See Mabrey v. Wizard Fisheries, Inc., 2007 WL 1556529 (W.D. Wash. 2007).⁷

seaman, the summary judgment standard should be applied to a motion for pretrial reinstatement of maintenance and cure, particularly if the dispute is over an initial entitlement to maintenance and cure." Dean at 893-94. Although not binding, this formulation may well be viewed by bench and bar as persuasive of how the Court of Appeals opinion should be interpreted.

⁶ This conclusion is based on FCA's contention that Dean's neck problems did not occur as a result of service on its vessel. See Dean at 902; see also Ans. to Pet. for Rev. at 1. While made in the course of conducting de novo review, the court's determination is also unexplained. Moreover, it is troubling because the opinion otherwise notes Dean complained of neck problems from the outset. See Dean at 895-96; see also Dean Reply Br. at 3; Dean Pet. for Rev. at 7-8.

⁷ Pursuant to GR 14.1(b), a copy of Mabrey is included in the Appendix.

On the other hand, should general maritime law dictate that the view of the seaman's attending physician is determinative regarding the pretrial issue of maximum cure, or that the medical evidence of maximum cure must be unequivocal, then it would not matter that the ship owner obtains a contrary view from another physician regarding maximum cure. Under these circumstances, in the summary judgment context, while there may be a genuine issue of fact, it is not a *material* one under the governing substantive law.

These formulations are worthy of consideration by the Court. The Gouma order, discussed above, focuses on the attending physician's views and relies on the U.S. Supreme Court's opinion in Vella, *supra*. In Vella, the Court cites with approval the district court opinion in Victo v. Joncich, 130 F.Supp. 945, 949 (S.D. Cal. 1955), *aff'd*, 234 F.2d 161 (9th Cir. 1956), in the course of describing the basis for a ship owner's duty to provide maintenance and cure:

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

421 U.S. at 6, n. 5 (ellipses & emphasis added by Supreme Court)⁸; see also Hubbard v. Faros Fisheries, Inc. 626 F.2d 196, 202 (1st Cir. 1980) (concluding seaman generally entitled to maintenance and cure "until his

⁸ Vella involved review of a maintenance and cure decision following trial on the merits, where the only physician providing a medical opinion was one apparently procured by the ship owner. See 421 U.S. at 2.

physicians diagnosed his condition as permanent"). The view requiring unequivocal evidence to terminate maintenance and cure is represented by Sefcik v. Ocean Pride Alaska, Inc., 844 F. Supp. 1372, 1372-74 (D. Alaska 1993), which provides that summary judgment procedure must account for this aspect of maritime law, and reinstates maintenance and cure in light of conflicting testimony between an attending and consulting physician. See also Mai, 160 Wn. App. at 539-40 (stating "a seaman's right to maintenance and cure generally continues until a maximum cure determination is both unequivocal and made by a qualified medical expert"; footnote omitted).

VI. CONCLUSION

The ultimate question presented to the Court here is one of general maritime law, which the U.S. Supreme Court has not addressed. This question is one of substantial interest to Washington's maritime community, as this is both a coastal state with numerous ports, and has one of the largest navigable rivers in the country. The highest court of this state should decide the issue.⁹

DATED this 3rd day of July, 2012.


FOR BRYAN P. HARNETIAUX
WITH AUTHORITY


GEORGE M. AHREND

On behalf of WSAJ Foundation

⁹ To the extent FCA may argue that the issue discussed herein is not subject to review because Dean cannot meet the threshold proof requirement that his neck problems occurred in service of the ship, this argument will turn on whether the Court reads the petition for review as necessarily encompassing the question. See Dean Pet. for Rev. at 1-2, 7-8, 14.

Appendix

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

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

Hassan GOUMA, Plaintiff(s),
v.
TRIDENT SEAFOODS,
INC., et al., Defendant(s).

No. Co7-1309. | Jan. 11, 2008.

Attorneys and Law Firms

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

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

Opinion

ORDER ON MOTION TO COMPEL CURE

PECHMAN, J.

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

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

and declarations attached thereto, makes the following ruling:

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

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

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

Background

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

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

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

Discussion

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

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

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

*2 Defendants cite two recent decisions from this district for the position that the Court should apply a summary judgment standard to the resolution of whether Plaintiff is entitled to the continued payment of cure requested here. Judge Coughenour has reasoned that the "resolution of all ambiguities and doubts in favor of the seaman does not do away with the seaman's duty to show at trial that he was (1) 'injured or became ill while in the service of the vessel,' (2) that 'maintenance and cure was not provided; and (3) the amount of maintenance and cure to which the plaintiff is entitled'" as a basis for not granting full *Vaughn* deference to an injured seaman's request to compel payment of cure. *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.

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

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

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

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

Conclusion

End of Document

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

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

Parallel Citations

2008 A.M.C. 863

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2007 WL 1556529

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

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

No. Co5-1499L. | 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, Mikkkelborg Broz Wells & Fryer, SEATTLE, WA, for Defendants.

Opinion

ORDER DENYING MOTION TO COMPEL PAYMENT OF CURE

ROBERT S. LASNIK, United States District Judge.

I. INTRODUCTION

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

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

II. DISCUSSION

A. Background Facts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

B. Payment of Cure.

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

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

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

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

C. Attorney's Fees.

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

III. CONCLUSION

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

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