

63969-2

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No. 63969-2

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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TUYEN THANH MAI,

Respondent,

vs.

AMERICAN SEAFOODS COMPANY LLC and  
NORTHERN HAWK LLC,

Appellants.

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**RESPONDENT'S AMENDED BRIEF**

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court applied the correct legal standards concerning an injured seaman's right to maintenance and cure, and concerning a shipowner's duty to investigate the seaman's claim to maintenance and cure.

2. There was substantial evidence supporting the trial court's finding of fact that American Seafood Co. (ASC) wrongfully withheld payment of maintenance and cure from Mai and that such withholding of payment was "unreasonable, willful and persistent." CP 223.

3. There was substantial evidence supporting the trial court's finding of fact that ASC "withheld" maintenance and cure during the period from July 1, 2007 through December 31, 2007. CP 234.

4. There was substantial evidence supporting the trial court's finding of fact that the frozen fish box striking Mai's left knee on March 29, 2005 "was the proximate cause of an injury that required replacement of the left knee." CP 233.

## **II. ISSUES PERTAINING TO RESPONSE TO ASSIGNMENTS OF ERROR**

1. Whether a vessel owner has a right to refuse payment of maintenance and cure and demand an evaluation by a physician of

its choosing when (1) the employer has previously admitted that the treatment in question is “obviously curative in nature” and “[s]hould [the seaman] decide to have the surgery, it would be covered by maintenance and cure”; (2) the employer previously paid maintenance and cure related to the condition at issue for over two years; and (3) the employer’s primary motive for demanding the evaluation is to provide a defense on the causation issue in anticipation of a Jones Act/unseaworthiness claim—not to investigate the seaman’s entitlement to maintenance and cure.

2. Whether substantial evidence exists that defendant wrongfully withheld payment of maintenance and cure and that such withholding of payment was “unreasonable, willful and persistent” when evidence was presented at trial that (1) the employer had been paying maintenance and cure for over two years related to the seaman’s condition; (2) the employer admitted that the treatment in question is “obviously curative in nature” and “[s]hould [the seaman] decide to have the surgery, it would be covered by maintenance and cure”; (3) the employer withheld payment solely in order to compel the seaman to submit to a medical evaluation; and (4) the primary motive behind the evaluation was to provide a defense on the causation issue in

anticipation of a Jones Act/unseaworthiness claim—not to investigate the claim for maintenance and cure.

3. Whether there was substantial evidence supporting the trial court's finding of fact that defendant "withheld" maintenance and cure during the period from July 1, 2007 through December 31, 2007 when evidence was presented that (1) the employer had not paid maintenance and cure for the time period in question; (2) payment was initially withheld to compel the seaman's submission to the subject medical evaluation; (3) the purpose of the evaluation was to build a defense on the causation issue in anticipation of a Jones Act/unseaworthiness claim; (4) the seaman did not submit to the medical examination because the physician unilaterally selected by the employer to perform the evaluation was one of the seaman's treating physicians; and (5) the examination was not necessary to establish that maintenance and cure were due.

4. Whether there was substantial evidence supporting the trial court's finding of fact that the frozen fish box striking Mai's left knee on March 29, 2005 "was the proximate cause of an injury that required replacement of the left knee" when evidence was presented at trial that both Mai's treating physician and the doctor

selected by ASC that performed the CR 35 examination agreed that the falling box caused the injuries and the need for the surgery.

### **III. STATEMENT OF THE CASE**

**A. Prior to March 29, 2005, Mai was at risk for a torn meniscus, but her condition was asymptomatic.**

Mai began working for ACS on the F/T NORTHERN HAWK as a seafood processor in 2000. RP 14, l. 10-11. Prior to her injury on March 29, 2005, Mai had congenital varus deformity (bow-leggedness) in both knees which put her at risk for developing a torn meniscus. RP 171, l. 7-14; Ex. 39 p. 2. The degenerative tear in Mai's left knee which led to this litigation likely developed before March 29, 2005, RP 171, l. 15-17, however the accident caused it to become symptomatic. CP 43-44, l. 14-17; Ex. 39 p. 3.

**B. Mai's February 4, 2005 injury did not cause her left knee condition to become symptomatic.**

On February 4, 2005, Mai was carrying a bucket of soap in the factory and tripped over a hose positioned across her path. Ex. 7 p. 1. Mai was seen by a doctor on February 16, 2005 at the Iliuliuk Family and Health Services Clinic in Dutch Harbor where she reported that she had left knee pain and swelling. Ex. 21 p. 2.

However, she had no giving or popping of the joint.<sup>1</sup> Id. A McMurray's test performed to test for the possibility of a meniscus tear was negative. Id. The McMurray's test stretches the knee on tension, and an audible pop or click leads to a diagnosis of a torn meniscus. RP 178, l. 5-9. Following examination, Mai was diagnosed with a medial collateral ligament strain and allowed to return to work as long as she was seated for the following week. RP 178-79, l. 21-4; RP 34, l. 8-10. When Mai returned to work on the vessel, she recovered in less than a week and was able to stand during her 16 hour shifts. RP 34-35, l. 19-1. In the weeks before the March 29, 2005 injury, Mai's knee felt "normal." RP 35, l. 22-25. ASC's own medical expert testified that there is no causal connection between the accident on February 4, 2005 and the injury to Mai's left knee which led to her need for total knee replacement surgery. RP 224, l. 18-20. Any pre-existing meniscus tear was not symptomatic at this point. Ex. 21; CP 43-44, l. 14-17.

**C. On March 29, 2005, Mai was injured while in the service of the defendant's vessel, causing her previously asymptomatic condition to become symptomatic.**

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<sup>1</sup> In contrast, after the injury on March 29, 2005, Dr. Peterson reported that Mai had clicking and popping in the knee joint along with a painful McMurray's test, indicating a meniscus tear. Ex. 22-2.

After being hit in the left knee with a frozen fish box that fell from a conveyor belt on March 29, 2005, Mai suffered immediate pain and swelling, which increased over the following days. Ex. 8 p. 1; RP 37-38, l. 24-3; RP 41, l. 18-21. At the time of her injury on March 29, 2005, Mai was working on the dock in Dutch Harbor during offload picking 40-pound boxes of product off the dock conveyor, which is an appurtenance of the vessel. In an April 1, 2005 injury report, Mai specifically reported that she had a “[s]wollen left knee, very painful.” Ex. 8 p. 1.

Mai began treatment with orthopedic surgeon Charles A. Peterson, M.D. on a referral from Robert Lang, claims adjuster for ASC. Ex. 22 p. 2. During his initial examination, Dr. Peterson noted that Mai suffered from pain and traumatic swelling in her left knee: “The problem now is pain and swelling in the knee and it clicks and pops and difficulty working,” *id.*, a symptom that was not present prior to the box hitting Mai’s knee on March 29, 2005. Ex. 21 p. 2. Clicking or popping is indicative of a torn meniscus. RP 178, l. 9-12. Dr. Peterson further noted a painful McMurray’s test. Ex. 22 p. 2. Less than six weeks earlier, a McMurray’s test did not indicate a meniscus tear. Ex. 21 p. 2. Prior to March 29, 2005 there was no clicking or popping. RP 63, l. 19-25. An MRI dated

April 6, 2005 showed swelling inside the knee consistent with trauma and confirmed Dr. Peterson's concern of a medial meniscus tear. Ex. 23 p. 2. This swelling was not present when Mai was examined on February 16, 2005. Ex. 22 p. 2.

Later, Mai's treating physician, Bert G. Tardieu, M.D., and ASC's expert, Peter R. Mandt, M.D., agreed that the March 29, 2005 incident caused Mai's knee to become symptomatic, and led to her need for multiple surgeries including a total knee replacement. CP 43-44, l. 14-17, Ex. 39 p. 3.

**D. Mai underwent two surgeries and experienced little improvement in her condition leading to Dr. Tardieu's conclusion that she needed a total knee replacement.**

On April 29, 2005, Dr. Peterson performed a left knee arthroscopy and medial meniscectomy without complication. Ex. 25 p. 2. Despite physical therapy and an unloader brace, Mai continued to suffer pain and swelling in her left knee, which increased when she returned to work. Ex. 22 p. 6-7. At this point, ASC was paying maintenance and cure, and paid for this surgery as part of its obligation to provide cure. Ex. 145 p. 149.

When her left knee pain continued and Dr. Peterson would not order another MRI, Mai sought a second opinion from orthopedist Jonathan L. Franklin, M.D. on October 24, 2005. Ex.

26 p. 2. ASC arranged for Mai to be seen by Dr. Franklin. RP 253, l. 9-15; Ex. 145 p. 58. During his initial examination of Mai, Dr. Franklin noted: "The patient states that she has really never fully recovered from this surgery. She continues to have swelling in the knee with activities. She has pain with walking or going up and down stairs." Ex. 26 p. 2. At Dr. Franklin's request, a second MRI was performed on October 25, 2005. Ex. 26 p. 4. On October 27, 2005, Dr. Franklin reviewed with Mai the MRI which demonstrated a continued concern for a subtle tear of the meniscus. Id. At this point, ASC was paying maintenance and cure. Ex. 145 p. 149.

Mai left Seattle and was seen by a third doctor, Dr. Tardieu, on December 6, 2005 in Salinas, California. Ex. 27 p. 2. Dr. Tardieu had successfully treated Mai for injuries to her right knee in the past. Ex. 20. Dr. Tardieu noted ongoing left knee pain and swelling. Ex. 27 p. 3. After an unloader brace and anti-inflammatory medication failed to provide relief, Mai returned on January 3, 2006 with continued painful popping in the knee and an altered gait. Id. Going up and down stairs remained a problem. Id. On March 16, 2006, Dr. Tardieu performed a second surgery, a partial menisectomy and trochlea chondroplasty. Ex. 27 p. 6. During surgery, Dr. Tardieu noted a complex tear of the medial meniscus.

Ex. 27 p. 32. Over the year following the second surgery, Dr. Tardieu continued to follow Mai while she engaged in aggressive physical therapy which was very painful, and during the course of that treatment it became clear that she was not making significant progress. Ex. 27 p. 7-13. ASC continued to pay maintenance and cure, including medical expenses related to the second surgery. Ex. 145 p. 149.

**E. Dr. Tardieu concluded that total knee replacement was proper and ASC approved the surgery in a letter to Mai's counsel.**

On September 22, 2006, Dr. Tardieu noted that Mai was a candidate for total knee replacement surgery, but she continued with more conservative treatment for several months. Ex. 27 p. 10-14. When Mai's condition did not improve, Dr. Tardieu concluded on May 1, 2007 that only a total knee replacement could offer Mai the relief that she had been unable to obtain. Ex. 27 p. 14. Dr. Tardieu recommended that she proceed with a total knee replacement to improve her pain and function. Id. Dr. Tardieu stated, "The patient has had multiple conservative maneuvers attempting to stabilize her knee and prevent pain. She has undergone at least two arthroscopic procedures with only modest benefit in identification of advance arthrosis of the medial

compartment. For these reasons, I have suggested that we go ahead and provide her with a knee replacement.” Id.

ASC first became aware that Mai was a candidate for total knee replacement surgery in 2006. Ex. 145 p. 56. After more conservative measures failed, Mai requested the surgery on May 18, 2007. RP 237, l. 19-21. Up to this point, Dr. Tardieu had sent his reports to ASC along with billings for treatment, and ASC treated these reports as sufficient to establish the duty to pay maintenance and cure. RP 232, l. 20-21; Petr. Brief at 22. However, in November 2006 ASC demanded that Mai provide further proof that she was entitled to continued maintenance and cure, and on November 30, 2006 ASC terminated payment. Ex. 145 p. 149.

In a letter to plaintiff’s counsel Arnold Berschler dated April 5, 2007, ASC’s counsel Anthony J. Gaspich wrote concerning approval of the total knee replacement recommended by Dr. Tardieu:

We understand Dr. Tardieu believes Ms. Tuyen is a candidate for a total knee replacement. Such surgery is obviously curative in nature. Should Ms. Tuyen decide to have the surgery, it would be covered by maintenance and cure.

(Emphasis added) Ex. 27 p. 51.<sup>2</sup> Robert Lang, ASC's claims adjuster received a copy of this letter, had an opportunity to correct any misrepresentations in the letter, and made no corrections. RP 238, I. 25-8. With these assurances that the procedure was "obviously curative in nature," Mai's total knee replacement was scheduled for June 11, 2007. Ex. 27 p. 16.

**F. ASC refused to reinstate maintenance and cure, and proceeded to leverage Mai's need for medical care in an effort to compel her to submit to a medical evaluation for the purpose of providing ASC a defense in anticipation of a Jones Act/unseaworthiness claim.**

Shortly before the planned surgery, ASC changed course and refused to authorize payment for surgery or reinstate maintenance and cure. Ex. 145 p. 148-152. Five days before the scheduled surgery and without citing any authority, ASC unilaterally claimed that it was entitled to have a "second opinion" from a doctor of its choosing regarding the appropriate medical course and refused to authorize surgery until Mai submitted to the examination. Ex. 145 p. 56. In a phone conversation between plaintiff's counsel Arnold Berschler and defense counsel Gaspich on June 6, 2007, confirmed by a letter the following day from Berschler to Gaspich,

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<sup>2</sup> Mai's full name is Mai Tuyen, but Tuyen is her given name and Mai is her family

defense counsel admitted that the reasons that ASC demanded the medical evaluation were, "First, '[approximately] 60,000 dollars for surgery is a lot of money.' Second, 'ASC foresees litigation in Seattle of Ms. Tuyen's personal injury claims and ASC wishes to have a doctor ASC could readily produce at trial as an expert witness.'" Ex. 145 p. 59. Furthermore, when ASC's claims adjuster Robert Lang was asked at trial if "one of the motives of delaying [Mai's] knee replacement surgery was [that] American Seafoods wanted to have her examined by a doctor who could testify in this [Jones Act] case before the knee was replaced," he responded, "If in fact there was a disagreement, then yes." RP 260-61, l. 16-22. The request for the examination was pretextual, and was not for the purpose of determining entitlement to maintenance and cure.

Despite Mai being represented by counsel, ASC made ex parte contact with Dr. Franklin, one of Mai's treating physicians, and demanded that Mai submit to an evaluation by Dr. Franklin. RP 255, l. 6-15; CP 260. Mai requested ASC provide a different doctor since Dr. Franklin was one of her treating physicians and was barred by physician-patient confidentiality from communicating

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name.

with ASC regarding the evaluation. Ex. 145 p. 96. When Mai did not submit to the medical examination, ASC refused to reinstate payments of maintenance and cure. Ex. 145 p. 150-152. Unable to fund the surgery, Mai was forced to delay the surgery and endure ongoing pain for an additional seven months while ASC held her medical treatment hostage in an attempt to force her to see a company selected doctor. RP 69, I. 3-18; CP 259.

**G. Initiation of legal proceedings.**

Without notice to Mai, ASC filed a Complaint for Declaratory Relief in the United States District Court on June 29, 2007 to force Mai to submit to a medical examination by a doctor selected by ASC, even though the company had previously admitted the treatment was curative. Ex. 135. As Mai was never served, there was no means by which the United States District Court could assert jurisdiction to determine her entitlement to maintenance and cure. The trial court found that the declaratory judgment action was filed for the purpose of delaying authorization of Mai's surgery. CP 260. After ASC refused to authorize the total knee replacement, Mai filed this state court action on August 23, 2007 seeking damages under the Jones Act and general maritime law, and to compel payment of maintenance and cure. CP 3. ASC

subsequently dismissed the federal declaratory judgment suit. Ex. 145 p. 82.

**H. Mai underwent a Civil Rule 35 medical examination at the request of ASC on December 13, 2007, which confirmed that total knee replacement surgery was reasonable and related to the March 29, 2007 injury.**

Mai underwent a defense medical examination under Civil Rule 35 with Dr. Mandt on December 13, 2007. Ex. 39. In his report, Dr. Mandt agreed that Dr. Tardieu's plan to proceed with a total knee replacement was reasonable. Ex. 39 p. 2. His report also stated that Mai's development of medial compartment problems was "accelerated from the injury as the injury likely caused the meniscus tear". Ex. 39 p. 3. With its own expert agreeing that Dr. Tardieu's proposed surgery was "a reasonable thing to do," and that Mai's injuries were related to her service on the vessel, ASC finally approved the surgery on January 22, 2008, over a month after Mai was examined by Dr. Mandt, and seven months after Mai was originally scheduled to have the surgery. Ex. 145 p. 146; CP 259. On January 30, 2007, ASC paid maintenance for the time period from May 18, 2007 to June 30, 2007 and January 1, 2008 to January 16, 2008. Ex. 145 p. 152. Although ASC finally agreed to pay for the surgery, it continued to refuse to

pay back maintenance and cure for the time period between July 1, 2007 and December 31, 2007, the time period in which ASC demanded a medical evaluation but failed to provide a suitable doctor. Id. As of the date of trial and as of today, maintenance had not been paid for the time period between July 1, 2007 and December 31, 2007. CP 259.

**I. On February 4, 2008, Mai finally received total knee replacement surgery, after a seven month delay.**

On February 4, 2008, seven months after initially scheduled, Mai was admitted to Salinas Valley Memorial Hospital for a left knee total replacement which was performed by Dr. Tardieu. Ex. 28 p. 2; CP 259. Over the course of the following year, the condition of Mai's knee gradually improved. Ex. 27 p. 19; RP 70-71, I. 9-7. Although Mai continues to have pain and limitations in her left knee, her condition has improved with the knee replacement. Ex. 27 p. 19; RP 71, I. 4-7. Supported by the medical records of Dr. Tardieu and Mai's testimony, the trial court found that Mai suffered as a result of the delay. CP 259; RP 69, I. 3-18; CP 67, I. 11-15.

**J. On July 9, 2009 the trial court awarded Mai damages and maintenance and cure.**

On July 9, 2009, the trial court entered judgment in favor of Mai and awarded \$4,600 in back maintenance, \$11,542 in attorney's fees, \$70.24 in costs, and \$10,000 in compensatory damages. CP 246, 259, 260. The court also awarded \$75,000 in past general damages and \$35,000 in future general damages, neither of which are the subject to this appeal. CP 259. On August 6, 2009 ASC filed this appeal. Ex. 135.

#### IV. ARGUMENT

**A. The general maritime law obligation of the vessel owner to pay maintenance and cure has been described as "among the most pervasive incidents of the responsibility anciently imposed upon shipowners. "**

The rights of seamen to maintenance, cure and unearned wages were established in the maritime common law of the United States. It has been described as "among the most pervasive incidents of the responsibility anciently imposed upon shipowners." Aguilar v. Standard Oil Co., 318 U.S. 724, 730, 63 S. Ct. 930, 933 (1943); see also, Vaughan v. Atkinson, 369 U.S. 527, 532 (1961); Black v. Red Star Towing, 860 F.2d 30, 32 (2d Cir. 1988). These rights have been closely guarded by the courts in carrying out its guardianship role for seamen as wards of the Admiralty. Vaughan, 369 U.S. 531-32; Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528

(1938). Maintenance and cure serve to provide seamen "essential certainty of protection against the ravages of illness and injury." Vella v. Ford Motor Co., 421 U.S. 1, 4, 1975 AMC 563, 565 (1975). To facilitate this process, maintenance and cure must be "so inclusive as to be relatively simple, and it can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays and invite litigations." Farrell v. United States, 336 U.S. 511, 516, 1949 AMC 613, 617 (1949).

The shipowner is obligated to pay maintenance and cure to a seaman who is injured or becomes ill while in the service of the ship, regardless of the cause of the disability. Walters v. Harvey Gulf Intern, Inc., 592 F. Supp. 6, 7 (E.D. La. 1983), citing, Adams v. Texaco, Inc., 640 F.2d 618, 620 (E.D. La. 1981). As United States District Judge Carolyn Dimmick held in Ridenour v. Holland America Lines Westours, Inc.:

The origin of the duty to provide maintenance and cure is ancient. Admiralty courts have been liberal in interpreting this duty "for the benefit and protection of seamen who are its wards." Calmar, 303 U.S. at 529. When there are ambiguities or doubts, they are resolved in favor of the seamen. Warren v. United States, 340 U.S. 523, 71 S. Ct. 432 (1951).

806 F. Supp. 910, 912-13, 1993 AMC 1062 (W.D. Wa. 1992).

The rule is clear that where there are ambiguities or doubts concerning the shipowner's responsibility for maintenance, they are to be resolved in favor of the seaman. Wood v. Diamond M Drilling Co., 691 F.2d 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1069 (1983); Gaspard v. Taylor Diving and Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981) rev. denied, 657 F.2d 700, cert. denied, 455 U.S. 907, 102 S. Ct. 1252 (1982); Liner v. J.B. Talley Co., Inc., 618 F.2d 327 (5th Cir. 1980); Moore v. Sally J., 27 F.Supp.2d 1255, 1998 AMC 1707 (W.D. Wa. 1998); Etheridge v. Rainier Investments, Inc., 1998 AMC 2981 (D. Ak. 1998). As the Supreme Court held in Aguilar, the broad purposes which maintenance and cure payments are to serve should not be defeated "by restrictive and artificial distinctions. . . . If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf." 318 U.S. at 735.

**B. In order to support a refusal to pay maintenance and cure, the evidence relevant to the seaman's lack of entitlement must be unequivocal.**

Even had the physician chosen by ASC opined that the knee replacement was not recommended, this would present only a difference of opinion between a treating physician and a paid expert, and would still require ASC to pay for the recommended

surgery. Tullos v. Resource Drilling, 750 F.2d 380, 387 (5<sup>th</sup> Cir. 1985). In order to justify the termination of maintenance and cure, the evidence that the injured seaman has reached maximum cure must be unequivocal. Johnson v. Marlin Drilling Co., 893 F.2d 77, 79 (5<sup>th</sup> Cir. 1990).

In Tullos, the medical evidence was in conflict regarding whether the injured seaman had reached maximum cure. The Fifth Circuit held that under these circumstances the vessel owner was liable for maintenance and cure. 750 F.2d 380. In, Sefcik v. Ocean Pride Alaska, the District Court found the defendant liable for maintenance and cure where “it does not appear that it is unequivocal that plaintiff has reached maximum cure.” 844 F. Supp. 1372, 1373-74 (D. Alaska 1993).

**C. The trial court’s findings were supported by substantial evidence.**

When a party is challenging findings of fact, the scope of review on appeal is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court’s conclusions of law and judgment. On appeal, “trial courts [are given] great deference on issues of fact based upon trial testimony and [the appellate court] reviews only for

abuse of discretion or substantial evidence.” Yousoufian v. Office of Ron Sims, King County Executive, 165 Wn.2d 439, 463 (2009). “Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.” Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112, 937 P.2d 154 (1997), cert. denied, 522 U.S. 1077 (1998); see also, Brown v. Safeway Stores, 94 Wn.2d 359, 372-373, 617 P.2d 704 (1980); Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978); Morgan v. Prudential Ins. Co., 86 Wn.2d 432, 545 P.2d 1193 (1976). The substantial evidence test requires the reviewing court to accept the fact finder's views regarding witness credibility and the weight to be given competing inferences. Freeburg v. City of Seattle, 71 Wn. App. 367, 372, 859 P.2d 610 (1993).

1. **There was substantial evidence to support the finding that ASC wrongfully withheld payment of maintenance and cure from Mai and that such withholding of payment was “unreasonable, willful and persistent.”**

At trial, evidence was presented that when Mai was injured on March 29, 2005, ASC began paying maintenance and cure immediately and funded two surgeries and additional treatment related to the injury until November 30, 2006. Ex. 145 p. 148-152.

After two years of conservative treatment did not offer Mai sufficient relief, her treating physician, Dr. Tardieu, concluded that she needed a total left knee replacement. Ex. 27 p. 14. Dr. Tardieu's reports reflected that Mai was a candidate for total knee replacement surgery as early as September, 2006 and on May 18, 2007 she informed ASC that she planned to proceed with the surgery. Ex. 27 p. 10; RP 237, I. 19-21. In a letter dated April 5, 2007 after learning that Mai was a candidate for total knee replacement surgery and prior to her formal request that ASC pay for the surgery, ASC admitted, "Such surgery is obviously curative in nature. Should Ms. Tuyen decide to have the surgery, it would be covered by maintenance and cure." Ex. 27 p. 51. This letter is conclusive regarding ASC's actual knowledge that maintenance and cure were due.

At this point, ASC's obligation to provide maintenance and cure had been established. ASC had in its possession Dr. Tardieu's report which stated that Mai needed knee replacement surgery and that the surgery was related to her March 29, 2007 injury. Ex. 145 p. 54. These documents were sufficient to establish ASC's duty to pay maintenance and cure. Holmes v. J. Ray McDermott & Co., 734 F.2d 1110, 1118 (5<sup>th</sup> Cir. 1984) (Treating

doctor's report and hospital records are sufficient to establish duty to pay maintenance and cure). Furthermore, ASC had actual knowledge that maintenance and cure were due. Ex. 27 p. 51. When an employer knows that maintenance and cure are due, denial of payment is "unreasonable, and even [falls] to the level of being arbitrary and capricious." Parker v. Texaco, Inc., 549 F. Supp. 71, 76-77 (E.D. La. 1982); see also, Deisler v. McCormack Aggregates, Co., 54 F.3d 1074 (3d Cir. 1995).

Nevertheless, five days before the scheduled surgery, ASC completely changed course and demanded that Mai submit to a medical examination by a doctor it selected, or else it would not pay for the surgery. Ex. 145 p. 57. Under Hines v. J.A. La Porte, Inc., "terminat[ing] cure despite a lack of information concerning whether [the seaman] had reached maximum medical cure" is "arbitrary and [in] bad faith." 820 F.2d 1187, 1189 (11<sup>th</sup> Cir. 1987).

In a phone conversation between Mai's counsel Arnold Berschler and ASC's counsel Anthony Gaspich on June 6, 2007, ASC admitted that the motive for demanding this examination was that "ASC foresees litigation in Seattle of Ms. Tuyen's personal injury claim, and ASC wishes to have a doctor ASC could readily produce at trial as an expert witness." Ex. 145 p. 59. In addition,

ASC's claims adjuster Robert Lang admitted on the stand that ASC's motive for demanding the medical evaluation was that ASC wanted Mai to be examined by a doctor who could testify in this Jones Act case. RP 260-61, l. 16-22. ASC specifically admitted that disagreement among physicians as to appropriate treatment was not enough to warrant denial of maintenance and cure, and knew that even if a doctor it selected prescribed different treatment, maintenance and cure would still be due. Ex. 145 p. 57. On the issue of whether ASC could require Mai to submit to a medical evaluation, ASC's counsel told Mai's counsel, "We [ASC] lose." Ex. 145 p. 58. Further investigation was unnecessary for the purpose of establishing ASC's duty to pay maintenance and cure, and this evidence of the true motive for ASC's demand for a medical examination shows that the refusal to pay was based on pretext. Denying payment of maintenance and cure based on pretext is the type of egregious behavior that supports an award for punitive damages. Atl. Sounding Co. v. Townsend, 129 S.Ct. 2561, 2571, n. 5 (2009), citing, Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1049-1053 (1<sup>st</sup> Cir. 1973); see also, Morales v. Garijak, Inc., 829 F.2d 1355, 1360-1362 (5<sup>th</sup> Cir. 1987).

When Mai did not submit to the unnecessary medical evaluation, ASC filed a declaratory judgment action to force her to submit to a medical evaluation. Ex. 135; Ex. 145 p. 150. In Atl. Sounding Co., filing a declaratory judgment action following refusal to pay maintenance and cure led to a finding of “willful and wanton disregard of the maintenance and cure obligation.” 129 S.Ct. at 2562. This evidence adequately supports a finding that ASC’s denial of maintenance and cure was “unreasonable, willful and persistent.” CP 223.

Mai filed the present action in response to ASC’s continued refusal to provide maintenance and cure, and ASC requested a CR 35 examination. Ex. 145 p. 80. The doctor initially selected by ASC to perform the evaluation was Dr. Franklin, one of Mai’s treating physicians, who as a treating physician was prohibited by the physician-patient privilege from communicating with ASC regarding the evaluation and thus was not qualified to conduct the examination. CP 260; Ex. 145 p. 96. ASC failed to produce an eligible doctor until December 13, 2007, and Mai underwent a CR 35 examination with Dr. Mandt. Ex. 39. This evidence could reasonably be interpreted to show that the delay in this examination, although irrelevant to ASC’s duty to provide

maintenance and cure, was due to ASC's failure to provide a suitable doctor—not any fault of Mai's. The trial court found that the "insistence by ASC of a second opinion from a physician for whom there was a colorable claim of patient privilege by Mai dragged the time out for no discernable reason, which combined with the filing of the federal declaratory judgment action seemed for no other purpose than delay." CP 260. Undue delay in payment of maintenance and cure is "arbitrary and capricious." Guevara v. Maritime Overseas Corp., 34 F.3d 1279 (5<sup>th</sup> Cir. 1994); Sullivan v. Tropical Tuna, 963 F.Supp. 42, 46 (D. Mass. 1997) (The shipowner's one-month delay in authorizing payment for the surgery constituted a willful failure to provide cure). Furthermore, ASC admitted that "it is responsible to pay maintenance during any period it delays treatment". Ex. 145 p. 151.

ASC did not pay maintenance and cure from May 18, 2007 until December 31, 2007. Ex. 145 p. 152. After Dr. Mandt confirmed that total knee replacement was reasonable, ASC paid maintenance and cure for the period between May 18, 2007 and June 30, 2007, but continued to refuse payment for July 1, 2007 through December 31, 2007. Id. ASC's refusal to pay maintenance and cure delayed Mai's surgery seven months and

caused her to endure ongoing pain. CP 259; RP 69, I. 3-18; CP 67, I. 11-15.

In Holmes, with facts that mirror the present case, the court found the employer's denial of maintenance and cure to be "willful and arbitrary." 734 F.2d at 1113.<sup>3</sup> In Holmes, the employer paid maintenance and cure for three months while the seaman was treated by doctors referred by the employer. Like Mai, when the seaman did not experience adequate results, he sought care from a doctor of his choosing who determined that he needed additional surgery. Despite being sent this doctor's report and hospital records, the employer refused to reinstate payment of maintenance and cure "because [the seaman's new doctor] never consulted with, or had his diagnosis confirmed by, any of the doctors that [the employer] had [the seaman] examined by." Id. at 1118. In the present case, ASC goes a step further by actually attempting to require the seaman to be examined by a company selected doctor after the treating doctor had identified the need for surgery. In

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<sup>3</sup> Holmes was expressly overruled by Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1498 (5<sup>th</sup> Cir. 1995) on issue of whether punitive damages are available when a shipowner fails to pay maintenance and cure, but Guevara did not disturb the holding in Holmes regarding what constitutes willful and arbitrary conduct. Guevara was subsequently overruled by Atl. Sounding Co., 129 S.Ct. 2561, on the issue of punitive damages, reinstating the rule set forth in Holmes.

Holmes, the court specifically held that an employer's denial of maintenance and cure is "willful" pending a consultation with a doctor of the employer's choosing, and the reports of a seaman's treating physician are sufficient to establish a duty to pay maintenance and cure. Id. at 1118. ASC had Dr. Tardieu's reports by the end of 2006, Ex. 145 p. 56, but refused to pay maintenance and cure until January 30, 2008. Ex. 145 p. 148.

In sum, the evidence in this case showed that ASC knew maintenance and cure was due, had ample documentation of Mai's need for total knee replacement surgery, refused to pay on a pretextual basis in order to compel Mai to submit to a medical examination, and filed a declaratory judgment action after being provided with documentation of Mai's need for the surgery and admitting that the surgery was included as a part of cure, yet failed to effect service on Mai to allow a judicial determination to occur. ASC's actions are similar to those of employers that courts have consistently found to be "unreasonable, willful and persistent."<sup>4</sup>

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<sup>4</sup> Other factors that have contributed to findings that denial of maintenance and cure was "unreasonable," "willful" and "persistent" include: "terminat[ing] cure despite a lack of information concerning whether [the seaman] had reached maximum medical cure", Hines, 820 F.2d at 1189; "failure to reinstate benefits after diagnosis of an ailment previously not determined medically," id. at 1190;

This is “evidence of sufficient quantity to persuade a fair-minded, rational person” that ASC’s withholding of maintenance and cure was “unreasonable, willful, and persistent.” Ino Ino, Inc., 132 Wn.2d at 112; CP 223-24.

**2. There was substantial evidence supporting the finding of fact that ASC “withheld” maintenance and cure during the period from July 1, 2007 through December 30, 2007.**

ASC did not pay maintenance and cure for the time period from July 1, 2007 through December 30, 2007. Ex. 145 p. 152. ASC initially paid maintenance and cure related to the injury Mai sustained to her left knee on March 29, 2005. Ex. 145 p. 148-152. On May 18, 2007 Mai requested total knee replacement surgery and ASC was aware that Dr. Tardieu had recommended the surgery. RP 237, I. 19-21; Ex. 145 p. 56. ASC admitted that “[s]uch surgery is obviously curative in nature” and “would be covered by maintenance and cure.” Ex. 27 p. 51. However, on June 6, 2007, five days before the scheduled surgery, ACS refused to pay for the surgery without a medical evaluation of Mai by a

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filing a declaratory relief action regarding the employer’s obligations in response to a claim for maintenance and cure after refusing to pay, Atl. Sounding Co., 129 S.Ct. at 2562; withholding payment despite discovering through an investigation

doctor it selected in order to provide a defense in anticipation of a Jones Act/unseaworthiness claim. Ex. 145 p. 57. Such an evaluation was unnecessary to establish ASC's duty to pay maintenance and cure under Holmes. 734 F.2d at 1118 (Treating doctor's reports and hospital records are sufficient to establish duty to pay maintenance and cure).

Mai declined to submit to the evaluation since it was not required in order to establish her entitlement to maintenance and cure, and the purpose of the evaluation was to provide ASC with a defense to a future Jones Act/unseaworthiness claims against ASC. Mai had a right to refuse to submit to the evaluation because ASC was provided with sufficient documentation of Mai's need for the surgery and its relation to her March 29, 2007 injury, and ASC knew that the treatment was included in its duty to provide maintenance and cure, demonstrated by ASC's April 5, 2005 letter to Mai's counsel. As discussed in the previous section in greater detail, the medical records from a treating physician are sufficient to establish the duty to provide maintenance and cure, Holmes, 734 F.2d at 118, and once an employer knows maintenance and cure

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that payment was due, Parker, 549 F. Supp. at 77; and denial of payments on a

are due, refusal of payment is “unreasonable.” Parker, 549 F. Supp. at 76-77; see also, Deisler, 54 F.3d 1074.

After legal proceedings had been initiated and ASC requested a CR 35 examination, ASC selected Dr. Franklin to perform the examination, who was one of Mai’s treating physicians. Ex. 145 p. 80. Mai requested that ASC provide a different doctor because Dr. Franklin was prohibited by physician-patient confidentiality from communicating with ASC regarding the evaluation. Ex. 146 p. 96. When ASC finally provided a suitable doctor to conduct the evaluation, Mai underwent the evaluation. Ex. 39. After receiving Dr. Mandt’s report, ASC paid maintenance and cure for May 18, 2007 through June 30, 2007, but continued to refuse to pay for July 1, 2007 through December 30, 2007. Ex. 145 p. 152.

Evidence was presented at trial showing Mai established that ASC had a duty to provide maintenance and cure including total knee replacement surgery by May 18, 2007. After receiving documentation of Mai’s need for the surgery and its link to her March 29, 2005 injury, ASC admitted that the surgery was included

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pretextual basis, Robinson, 477 F.2d at 1050.

in its duty to provide maintenance and cure. Ex. 145 p. 54. Still, ASC refused to pay maintenance and cure for July 1, 2007 through December 30, 2007. Mai was not required to submit to an examination by a doctor selected by ASC in order to establish entitlement to maintenance and cure. Once legal proceedings were initiated and Mai was required to undergo a CR 35 examination, she did so as soon as ASC provided a suitable doctor. Thus, substantial evidence exists to support the finding that ASC “withheld” payment of maintenance and cure between July 1, 2007 and December 30, 2007. CP 234.

- 3. There was substantial evidence supporting the finding of fact that the frozen fish box striking Mai’s left knee on March 29, 2005 “was the proximate cause of an injury that required replacement of the left knee.”**

Both Mai’s treating physician, Dr. Tardieu, and ASC’s CR 35 physician, Dr. Mandt, agreed that the box hitting Mai’s knee on March 29, 2005 caused the injury which led to her need for total knee replacement surgery. In his report, Dr. Mandt stated that Mai’s development of medial compartment problems was “accelerated from the injury as the injury likely caused the meniscus tear”. Ex. 39 p. 3. In its brief, ASC refers to the fact that Mai’s

need for total knee replacement surgery “had a causal connection to her injury aboard the vessel”. Petr. Brief at 38.

Dr. Tardieu noted that it was clear that Mai’s condition was worse after the March 29, 2005 injury and that an interim change had occurred when she was hit with the box:

14 Plaintiff's Exhibit 22-2, which is a chart note from  
15 Dr. Charles Peterson dated April 6, 2005. This is the  
16 chart note that was done after her March 29th, 2005,  
17 injury. And in this chart note, he makes reference that  
18 the problem now is pain and swelling in the knee, and it  
19 clicks and pops, and difficulty working.

20 What, if anything, do you consider significant  
21 about that interim history?

22 A. It's definitely taken a change. Those complaints  
23 were not present --

.....  
4 THE WITNESS: Okay. There's interval change  
5 from what was reported prior visit to this visit, and  
6 they've become more mechanical in nature in that she's  
7 reporting a painful pop, painful clicking.

8 BY MR. DAVIES:

9 Q. As an orthopedic surgeon, when you hear about  
10 clicking and popping, what concerns do you have?

11 A. We tend to believe that there's something in the  
12 joint in the nature of either a loose body or a meniscus  
13 that's torn, or cartilaginous -- the actual articular  
14 cartilage can be torn and give you those symptoms.

15 So you're thinking something more important is  
16 going on, and those kinds of complaints usually prompt  
17 MRI evaluation.

CP 43-44, l. 14-17 (emphasis added).

Regarding the relationship between the injury on March 29, 2005 and the total knee replacement, Dr. Tardieu testified:

15 Q. Do you have an opinion on a more likely than not  
16 basis, if the March 29th, 2005, incident when Mai  
17 was hit with the box at work, played a role, even the  
18 slightest, in bringing about the need for the total knee  
19 replacement?  
20 A. Yes.  
21 Q. And what is your opinion, Doctor?  
22 A. I think that we wouldn't have been talking about  
23 knee replacement May 1st without it, in 2007.  
24 Q. Without the March 29 --  
25 A. Without the event.  
1 Q. Okay. Do you have an opinion on a more likely  
2 than not basis whether the March 29, 2005, incident when  
3 Mai was hit in the left knee with a box at work was  
4 a substantial factor in bringing about the need for  
5 total knee replacement?  
6 MR. GASPICH: Objection; same objections;  
7 legal conclusion; vagueness.  
8 THE WITNESS: Yes.  
9 BY MR. DAVIES:  
10 Q. And what is your opinion, Doctor?  
11 A. I believe it was a substantial factor.

CP 65-66, l. 15-11.

Actions under the Jones Act are subject to the statutes governing personal injuries to railroad employees with regard to establishing causation. Evich v. Connelly, 759 F.2d 1432, 1433 (9th Cir. 1985). The Federal Employers Liability Act (FELA), 45 U.S.C. §51, provides for liability for injury "resulting in whole or in part from the negligence of the employer." Because the Jones Act expressly provides for seamen a cause of action, and consequently the entire judicially developed doctrine of liability granted to railroad

workers by the FELA, Kernan v. American Dredging Co., 355 U.S. 426, 439, 78 S.Ct. 394 (1958), the court may appropriately look to FELA cases to test the sufficiency of the allegations and proof in a Jones Act claim. Lies v. Pharaoh Lines, Inc., 641 F.2d 765, 770 (9th Cir. 1981).

Under the Jones Act, the plaintiff's burden to prove causation is "very light" and has been described as "featherweight." Cella v. U.S., 998 F.2d 418, 427 (7th Cir. 1993), citing, Zapata Haynie Corp. v. Arthur, 980 F.2d 287, 289 (5th Cir. 1992). The Ninth Circuit has stated that it is the plaintiff's burden only to prove that the defendant's negligence was a cause, however slight, of her injuries. Havens v. POLAR MIST, 996 F.2d 215 (9th Cir. 1993); Hechinger v. Caskie, 890 F.2d 202, 208 (9th Cir. 1989), cert. den. 498 US 848, 111 S.Ct. 136 (1990). The leading case construing causation under the FELA is Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443 (1957). There the court held that under the FELA, and thus the Jones Act by reference:

The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes ...

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

Id., at 506-07 (emphasis added). The Supreme Court in Rogers referred to "the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action". Id. at 509-10. See also, Lies v. Pharaoh Lines, Inc., 641 F.2d at 771. Under the Rogers standard, plaintiff need not show that the conditions aboard the vessel, or the stresses and strains placed upon her, were the sole cause or main cause or even a significant cause of her injuries; they need only have been a contributing cause. Tiller v. Atlantic Coast Line R.Co., 323 U.S. 574, 578-79, 65 S.Ct. 421 (1945); Fleming v. Husted, 164 F.2d 65, 67-68 (8th Cir. 1947).

Under applicable case law, Mai need only show that the March 29, 2005 injury was a cause, however slight, of her need for total knee replacement surgery. The trial court was presented with evidence through Dr. Tardieu's testimony that Mai's condition was worse after the March 29, 2005 injury and that on a more likely than not basis the box hitting Mai's knee was a factor in bringing about her need for total knee replacement surgery. CP 43-44, l. 14-17;

CP 65-66 I. 15-11. Further, Dr. Mandt's report states that the injury likely caused the meniscus tear, and total knee replacement surgery was "reasonable" to address her condition. Ex. 39 p. 2-3. This is "evidence of sufficient quantity to persuade a fair-minded, rational person" that the box hitting Mai's knee on March 29, 2005 was a cause of her injury that led to her need for total knee replacement. Ino Ino, Inc., 132 Wn.2d at 112; CP 233.

**D. ASC had no right to refuse payment of maintenance and cure pending an evaluation of Mai by a physician of its choosing.**

ASC makes the novel claim that a vessel owner's right to investigate claims of maintenance and cure before commencing payment provides ASC with the right to compel Mai to travel across the country from Cape Coral, Florida to Seattle, Washington to submit to a medical evaluation by a doctor chosen by ASC when ASC already had in its possession reports from Mai's treating physician indicating that the treatment she requested was reasonable and related to the injury she sustained while in service of the vessel. Petr. Brief at 22; Ex. 27 p. 14. Although vessel owners have a limited right to investigate claims of maintenance and cure prior to commencing payment, Morales, 829 F.2d at 1358, this right does not allow continued denial of maintenance and cure

after entitlement has been established or the right to compel submission to a second opinion medical examination. Parker, 549 F. Supp. at 77. In a conversation between Mai's counsel Arnold Berschler and ASC's counsel Anthony Gaspich on June 6, 2007, ASC admitted if a court were to decide on the issue of allowing Mai to proceed without any second opinion, "We [ASC] lose". Ex. 145 p. 58. In ASC's brief, it admits that "[w]hen no suit is pending, a vessel owner cannot force a seaman like Mai to undergo" a medical evaluation. Petr. Brief at 19.

Vaughan v. Atkinson, established that vessel owners have a duty to investigate claims for maintenance and cure. 369 U.S. 527. The thrust of Vaughn and subsequent cases was to prohibit vessel owners from ignoring seamen's claims for maintenance and then avoiding their duty to pay by asserting that the claim had not been substantiated. Id. at 530. Failure to investigate is not an excuse for non-payment. Id.

Morales provides that "[u]pon receiving a claim for maintenance and cure, the shipowner need not immediately commence payments; he is entitled to investigate and require corroboration of the claim." 829 F.2d at 1358. However, the investigation must be diligent and reasonable, id., and failure to

provide maintenance and cure after entitlement has been established is “unreasonable”. Parker, 549 F. Supp. at 77 (“[The employer] refused to pay medical expenses in spite of an investigation which revealed that the expenses were due and owing as a result of plaintiff’s injury aboard the vessel. The defendant was made aware of the causal relationship three months prior to receiving a bill from [the hospital]... Its refusal to pay soon thereafter must be considered unreasonable.”); see also, Deisler, 54 F.3d 1074. In addition, after commencing and then stopping payment, the fact finder is entitled to find that the interim delay of was not due to the employer’s need to investigate the claim. Guevara, 34 F.3d at 1283.

The scope of the investigation ASC was entitled to was limited to whether Mai was a seaman injured in the service of the vessel. Sullivan, 963 F. Supp. at 45 (One month “was far longer than ... needed to conduct a reasonable investigation” and “the only question for the insurer to investigate was whether Sullivan was in service of the ship at the time his injury occurred”). ASC does not cite a single case where a court has upheld a vessel owner’s ability to compel a seaman to submit to a medical examination with a doctor selected by the employer pending payment of maintenance

and cure where the employer had medical records from the seaman's treating physician showing the seaman's entitlement to maintenance and cure.

ASC claims it sought the medical evaluation for the purpose of determining if there were treatment alternatives to total knee replacement surgery for Mai. Petr. Brief at 23. Such an inquiry is outside the scope of the investigation ASC was entitled to because an answer to this question does not assist in determining whether Mai was a seaman injured while in service of the vessel. Sullivan, 963 F. Supp. at 45. ASC was only entitled to a diligent and reasonable investigation, and delaying treatment for seven months while trying to circumvent Mai's physician-patient confidentiality is not diligent. Id. (One month "far longer" than necessary to conduct a "reasonable investigation"); Guevara, 34 F.3d at 1283 (delay of six months not part of a reasonable investigation); CP 259.

Furthermore, the medical records of a seaman's treating physician have been held sufficient to establish entitlement to maintenance and cure, Holmes, 734 F.2d at 1118, and investigations allowed under Morales have generally been confined to review of the seaman's medical records from a treating physician. See, Guevara, 34 F.3d 1279; Kopacz v. Del. River & Bay Auth.,

2006 AMC 1928 (D. Del. 2006); Folse v. Gulf Tran, Inc., 873 So. 2d 718 (La.App. 1 Cir. 2004). ASC concedes that it had in its possession copies of Mai's medical records from Dr. Tardieu which described her need for the surgery. Petr. Brief at 22. Once entitlement has been established, as it was in this case by Dr. Tardieu's reports, it is unreasonable to continue to withhold payment of maintenance and cure. Parker, 549 F. Supp. at 77; Deisler, 54 F.3d 1074.

In addition, a medical evaluation conducted by a doctor ASC selected would have had no bearing on ASC's duty to provide maintenance and cure because even if the doctor had disagreed with Dr. Tardieu's treatment plan, this would amount to nothing more than a difference of opinion. Mai would still have been entitled to maintenance and cure. In Tullos, the Fifth Circuit determined it was improper for a vessel owner to cease payment of maintenance and cure when reports from a seaman's treating physicians indicated that the seaman had not reached maximum cure, but in contrast, the reports from a physician selected by the vessel owner indicated that the seaman had reached maximum cure. 750 F.2d at 387. Denial of maintenance and cure under such circumstances

was enough to send the issue of whether the vessel owner's actions were "arbitrary and capricious" to the jury. Id. at 388.

To allow a vessel owner to compel submission to a medical evaluation by a doctor it selects in order to obtain maintenance and cure would frustrate the policy goals underlying the doctrine of maintenance and cure. Maintenance and cure is intended to be readily available to seamen with few barriers. Farrell, 336 U.S. at 516; Vella, 421 U.S. at 4. Any ambiguities or doubts concerning the shipowner's responsibility for maintenance, they are to be resolved in favor of the seaman. Wood, 691 F.2d 1165; Gaspard, 649 F.2d 372; Liner, 618 F.2d 327; Moore, 27 F.Supp.2d 1255; Etheridge, 1998 AMC 2981. In Mai's case, submitting to this evaluation involved traveling across ten states from her home in Cape Coral, Florida to Seattle, Washington.

In sum, Mai established her entitlement to maintenance and cure when she provided ASC with Dr. Tardieu's medical reports detailing her need for total knee replacement surgery. Once her entitlement had been established, ASC had a duty to pay maintenance and cure, and any investigation by ASC of Mai's claim became unnecessary once entitlement was established. Requiring another medical evaluation could do nothing more than provide a

potential difference of opinion and would not abrogate ASC's duty to pay maintenance and cure. As such, ASC had no right to deny maintenance and cure pending a medical evaluation by a doctor it selected.

**E. An award of attorneys fees, costs and compensatory damages is supported by the trial court's finding that ASC's actions were "unreasonable, willful and persistent."**

The trial court specifically found that ASC's actions were "unreasonable, willful and persistent." CP 223. The availability of attorney's fees for maintenance and cure claims has been established since Vaughan, in which the Court held that the injured seaman could recover attorney's fees incurred to secure a maintenance and cure award because the shipowner had been "willful and persistent" in its failure to pay maintenance. 369 U.S. at 533; see also, Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9<sup>th</sup> Cir. 1995). In Vaughan, the United States Supreme Court held that attorneys' fees are available when a seaman is forced to hire an attorney to obtain maintenance and cure because his employers "were callous in their attitude, making no investigation" of the seaman's claims. 369 U.S. at 530. In Kopczynski v. The Jacqueline, the Ninth Circuit held that attorneys fees would be

allowed when the failure to provide maintenance and cure was "arbitrary, recalcitrant or unreasonable". 742 F.2d 555, 559, 1985 A.M.C. 769 (9th Cir. 1984), citing, Incandela v. American Dredging Co., 659 F.2d 11, 15 (2d Cir. 1981); see also, Gaspard, 649 F.2d at 375; Vaughan, 369 U.S. at 530-531.

In Morales, the court recognized that a ship owner had a right to investigate before paying the claim. 829 F.2d 1355. But, if the ship owner investigates and then unreasonably rejects the claim "when in fact the seaman is due maintenance and cure, the owner becomes liable not only for the maintenance and cure payments, but also for compensatory damages." Id. at 1358. In Brown, 410 F.3d 166, the Fifth Circuit held:

[T]here is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

Id. at 177 citing Morales, 829 F.2d at 1358.

ASC habitually denies seamen's legitimate claims to maintenance and cure, and this case is no exception. In American

Seafoods Company v. Nowak, 2002 A.M.C. 1655 (W.D. Wa. 2002), ASC had refused treatment and filed a declaratory judgment against an injured seaman whose treating physician had recommended a second surgery. Similar to this case, ASC denied not only the recommended cure but also the seaman's maintenance. United States District Judge Marsha Pechman held:

From the record, there can be no doubt that the proposed repeat arthroscopies were intended to improve Mr. Nowak's condition. From the evidence before the Court, all doctors who examined Mr. Nowak agreed that surgery was the recommended course of treatment. ASC had a duty to promptly pay for that treatment, and ASC breached that duty by filing suit.

Id. Under circumstances identical to those at issue here, Judge Pechman ordered ASC to pay medical cure, maintenance, and awarded attorneys' fees.

Similarly, in Boyden v. American Seafoods Company, 2000 A.M.C. 1512 (W.D. Wa. 2000), ASC paid plaintiff's medical expenses for injury related treatment, but refused to pay 23 days of maintenance during a period when it had conceded its obligation of cure, claiming that it would do so only when plaintiff provided evidence that treatment had been provided. Honorable Barbara Jacobs Rothstein ruled in favor of the injured seaman, stating:

Boyden is not required to make such a showing to receive maintenance. As long as ASC was obligated to pay for Boyden's treatments, if any, then they were also obligated to pay his maintenance. Boyden received further treatment only three weeks after the injections were authorized. Boyden was entitled to all benefits related to his injury until a physician determined that he had reached maximum medical improvement.

Id. at 1513-1514. Judge Rothstein held that as American Seafoods Company did not have a reasonable basis to withhold maintenance, it was liable for Boyden's attorneys fees. Id. at 1514.

The circumstances under which ASC denied Mai maintenance and cure are similar to those of other cases where ASC has been found liable for back maintenance, attorney's fees, and compensatory damages. The trial court's finding that ASC's actions were "unreasonable, willful and persistent" supports an award of attorney's fees, costs, and compensatory damages. CP 223.

**F. Request for attorneys fees and costs.**

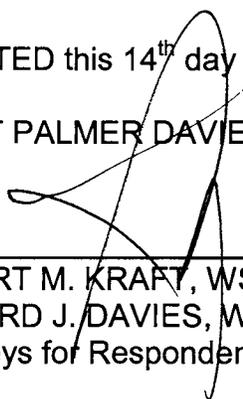
Respondent Mai also respectfully requests an award of attorneys fees and costs incurred in responding to this appeal.

**V. CONCLUSION**

For the foregoing reasons, this court should affirm the trial court's judgment in favor of Mai and uphold the award of \$4,600 in back maintenance, \$11,542 in attorney's fees, \$70.24 in costs, \$10,000 in compensatory damages. CP 246, 259, 260.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January, 2010.

KRAFT PALMER DAVIES, PLLC



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## CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this day, I caused to be served via legal messenger a copy of the following:

1. Respondent's Amended Brief

on the following parties:

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DATED this 14<sup>th</sup> day of January, 2010.



Stephanie N. Anderson