UK P&I CLUB

US Bodily Injury News

DECEMBER 2010

Round Table Seminar 2010

Practical perspectives on the litigation process

Maintenance rates

Cure obligations

Arbitration clauses

Proving medical expenses in Texas

Emotional distress claims

UK P&I CLUB IS MANAGED BY **THOMAS MILLER**

Welcome

Mike Jarrett
President & CEO,
Thomas Miller (Americas) Inc.

This past September's Bodily Injury Team Round Table focused on on the developments into and through trial of a significant bodily injury case. We were pleased to have three distinguished speakers who gave very different but practical perspectives on the litigation process in such a case.

Jocelyn Cinquino, of Trial Graphix, New York City started off with a presentation that gave us insights into the impact of jury demographics. The contrast between different generations and how they assimilate information and form judgements was quite startling.

The next two speakers addressed crew issues in the United States. Gary Hemphill of Phelps, Dunbar L.L.P., New Orleans, spoke on foreign seafarer's remedies and employer's defenses in the U.S. Nick Politis of Flynn Delich & Wise L.L.P. in Long Beach covered U.S. seafarer's remedies for maintenance and the tricky areas of unrelated conditions discovered during treatment for illnesses and punitive damages. They each prepared papers, which were provided to the attendees. We have summarised and highlighted a few of the topics they covered for this newsletter which you will find on pages 3 & 5.

The rest of the afternoon was given over to preparing for the following day's mock trial – circulating initial evidence and testimony and establishing the case to be heard.

As the Hyatt Jersey City is just around the corner from the office we were able to carry on discussions informally over cocktails and then dinner in the evening.

Friday morning we presented our mock trial complete with fact and expert witnesses compressing the usual process of plaintiff's and defendant's case, closing statements and jury charge to complete the exercise by midday.

The jury deliberated their verdict over sandwiches and the outcome was a victory for the defense by four different juries. The combined expertise of the Members strictly applying the law to the facts had clearly won the day. Or was it the demographics of the jury?

Many Members had travelled considerable distance to get here, so we managed to wrap up around one o'clock and let the long haul travellers start their journeys home for the weekend. But before they left us they gave us their feedback forms which were full of encouraging ideas to improve the event. Their positive comments were very gratifying to Louise's Team, who worked hard to create such an effective and concentrated event. In essence the message was – this is great and we want more of it. The Team is already at work planning the 2011 Round Table event for next September, dates to be advised in the Spring.

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US Bodily Injury News
The TMA Bodily Injury newsletter enables a wider sharing of the Team's expertise and experience. We always welcome your feedback on the topics we cover in these newsletters. Suggestions for subjects for future coverage are also particularly welcome. Please send your comments or suggestions to Louise Livingston at Louise.Livingston@thomasmiller.com

Further information on these topics can be obtained directly from the TMA Bodily Injury Team (see back cover for contact details).

Round Table Seminar 2010 highlights

At this year's Thomas Miller Americas Bodily Injury Round Table Seminar, two of the Club's preferred personal injury defense lawyers gave presentations providing legal updates on foreign and domestic crew issues.

Nick Politis
Flynn Delich & Wise L.L.P.

Nick Politis, Managing Partner of the Long Beach, California office of Flynn Delich & Wise, presented an update on U.S. seafarers remedies for maintenance & cure, punitive damages, unearned wages, and medical conditions discovered during treatment unrelated to shipboard illness.

Pre-employment medical examinations and the consequences of misrepresentation by a seafarer:

The three part test established in *McCorpen v. Central Gulf S.S. Corp.,* 396 F.2d 547 (5th Cir. 1968) requires three factors be met to deny a claim for maintenance and cure:

- The seafarer willfully and intentionally failed to disclose pertinent medical facts;
- The non-disclosed medical facts were material to the employer's decision to hire the seafarer;
- There is a causal link (or nexus) between the pre-existing injury that was concealed and in the injury incurred in the course of seafarer's employment.

The *McCorpen* test is now followed in the 3rd Circuit [*Deisler v. McCormack Aggregates, Co.,* 54 F.3d 1074, 1080 (3d Cir. 1995)]; 4th Circuit [*Evans v. Blidberg Rothchild Co.,* 382 F.2d 637, 640 (4th Cir. 1967) decided before *McCorpen* but applying comparable test]; 8th Circuit [*Wactor v. Spartan Transp. Corp,* 27 F.3d 347, 351-352 (8th Cir. 1994)] and 9th Circuit [*Vitcovich v. Ocean Rover O.N.,* 106 F.3d 411 (9th Cir. 1997) citing *Tawada v. United States,* 162 F.2d 615 (9th Cir. 1947)]. The most recent decision denying maintenance and cure due to misrepresentation is *Atlantic Sounding v. Petrey,* 2010 WL 4746907 (5th Cir. 11/23/10) (see page 10 for more details).

Practical recommendations: Clear and comprehensive medical questionnaires; a likeable and thorough physician and a consistent procedure for rejecting employment of seafarers with pre-existing problems.

Owner's obligation to pay maintenance: Actual expenses or collective bargaining agreement rate?

Actual expenses

At its most basic, maintenance is compensation for room and board expenses incurred while a seafarer is recovering from illness or injury. See, *Berg v. Fourth Shipmore Assocs.,* 82 F.3d 307, 309 (9th Cir. 1996). The seafarer is entitled to food and lodging of the kind and quality of that which he would receive aboard ship. Courts must thus determine both what a seafarer's expenses are and whether they were reasonable in determining the amount of maintenance. *Hall v. Noble Drilling, Inc.,* 242 F.3d 582, 587 (5th Cir. 2001).

In considering maintenance rates a court first looks at the *actual* costs to the seafarer of food and lodging and the reasonable costs of food and lodging for a single seafarer in the locality of plaintiff. The court may consider evidence such as reasonable costs in the locality, union contracts specifying maintenance rates or *per diem* payments, maintenance rates awarded to other seafarers in the same region. Next, a court compares actual expenses versus reasonable expenses, awarding reasonable expenses if actual costs exceed reasonable expenses. As a general rule then, a seafarer is entitled to the actual expenses for food

and lodging up to the reasonable amount for their locality. However, if the court concludes that the actual expenses are inadequate to provide the seafarer with reasonable costs of food and lodging, the seafarer is entitled to the amount the court determines to be the reasonable of food and lodging.

There are limits though on the scope of lodging reimbursements in various circumstances. A seafarer cannot recover maintenance when they do not pay or become obligated to pay for lodging such as when a seafarer lives at home and incurs no actual expenses or liability for care and support. If a seafarer can prove they became indebted as a result of living at home, maintenance may be permitted. Another example is the maintenance rate will not include those expenses not related to living on a ship, i.e. no recovery for telephone expense, automobile expenses, toiletries, etc. Maintenance rates will also be pro-rated for lodging when family members reside with the seafarer if the seafarer was responsible for entire payment pre-accident.

Collective bargaining agreement

Maintenance rates are more often negotiated and specified in a Collective Bargaining Agreement (CBA) between a shipowner and the seafarer's union. These contracts rates are generally upheld. Most Federal Circuit courts considering the issue have generally adopted the CBA rate, except the Third Circuit. The circuits upholding the CBA rate include the First, Second, Fifth, Sixth, Ninth and Eleventh Circuit. (But see article at page 6 not all State Courts follow the majority rule of the Federal Maritime Law).

Is an owner obligated to pay cure for unrelated conditions discovered during treatment for a shipboard illness or injury?

The determination of whether or not a cure obligation is owed is whether or not the seafarer is considered to be "in the service of the ship". The general rule is that as long as a seafarer is not at MMI and is entitled to receive maintenance and cure benefits, they are deemed to be in the service of the ship. As long as crew members are in the service of the ship, a shipowner may be obligated to pay to treat *any* medical condition which arises while the crew member is unfit. *Duarte v. Royal Caribbean Cruises, Ltd.* 761 So.2d 367 (Fla. App. 3d Dist. 2000).

Yet, at least one court has held that when a crew member reached MMI for the illness which resulted in her separation from the ship, she could *not* subsequently claim maintenance and cure benefits for a "curable" condition which was a common occurrence in patients with her incurable disease and which did not manifest itself while she was in the service of the ship. *Whitman v. Miles,* 387 F.3d 68, 74 (1st Cir. 2004).

For further information or a copy of the full presentation, please contact Nick Politis.

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Round Table highlights cont'd: Foreign Crew

Gary A. Hemphill
Phelps Dunbar L.L.P.

Gary Hemphill, Partner of Phelps Dunbar in New Orleans, Louisiana provided an update on claims by foreign crew brought in the U.S.: including entitlement to maintenance and cure; U.S. choice of law analyses of foreign seafarer claims; contractual agreements on rate of maintenance; enforcement of forum selection and arbitration clauses; repatriation and the impact on maintenance and cure claims.

Foreign seafarers' entitlement to maintenance and cure

The Shipowners' Liability Convention, which went into effect in the U.S. in 1939, was intended to establish an international standard for the responsibility of shipowners for the sickness, injury or death of crew members from the date the crew member reports for duty until the date his engagement with the ship is terminated. The only exception for recovery under this Convention is a crew member's own willful act, concealment of a pre-existing medical condition or which result from the refusal of medical treatment.

Thus, the Convention provides foreign seafarers the legal right to pursue their claims for maintenance and cure in the United States. All a crew member need do is establish that a remedy is not available under the law of the country asserting jurisdiction over the area in which the incident occurred; or in the country of citizenship or residence of the individual on the date of injury or death.

Although U.S. courts have found adequate remedies are available in a number of different countries the adequacy of remedies is not a foregone conclusion. Nevertheless, a shipowner may seek to dismiss a foreign seafarer's claim on the grounds that U.S. law is not the appropriate law to be applied or that there is a more convenient forum in a foreign country.

Enforcement of forum selection and arbitration clauses

Recent trends in U.S. case law have turned towards contractual forum selection clauses and foreign arbitration clauses in employment contracts. Since 1998 case law in the Fifth Circuit Court of Appeals (which includes New Orleans) has held that foreign arbitration clauses in employment contracts, including seafarer's contracts, are presumptively valid and enforceable. See, *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140 (5th Cir. 1985); Francisco v. M/T STOLT ACHIEVEMENT, 293 F.3d 270.*

Those cases contemplate a limited inquiry by courts when considering a motion to compel arbitration and, if four tests are satisfied, a court should order arbitration: 1) there is an agreement in writing to arbitrate the dispute; 2) the agreement provides for arbitration in a territory of a Convention signatory (the Convention on Recognition and Enforcement of Foreign Arbitral Awards also known as the New York Convention); 3) the agreement arises out of a commercial legal relationship; and, 4) A party to the agreement is not an American citizen.

In 2004, the Fifth Circuit even compelled arbitration of a Jones Act claim brought by a U.S. citizen against his U.S. employer when the contract of employment contemplated work in a foreign jurisdiction and the injury giving rise to the claim occurred outside the U.S. *Freudensprung v. Offshore Technical Services, Inc.,* 379 F.3d 327 (5th Cir. 2004).

For further information or a copy of the full presentation, please contact Gary Hemphill.

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See, also commentary in this issue by Karen Hildebrandt on the practical implications of recent court decisions on arbitration clauses.

You have a CBA with a contractual maintenance rate; so what?

Washington state courts refuse to enforce certain contractual terms of collective bargaining agreements.

Louise S. Livingston
Senior Claims Director

A seafarer's right to a daily stipend ("maintenance") is a strict liability obligation of every Jones Act employer. Absent a negotiated contract rate, maintenance payments traditionally were in an amount sufficient to provide the seafarer with food and lodging equivalent to that which the seafarer received aboard (see highlights of Nick Politis' presentation on page 3).

As several U.S. flag blue water vessel operators have learned in recent years, the contracts they negotiate with the various maritime unions providing officers and crew to their ships are not enforced in Washington State courts. Specifically the state courts in Washington refuse to enforce the agreed upon daily rate of maintenance, (usually $16 per day). The attraction of a higher maintenance rate is one reason why plaintiff's lawyers in Washington now file in state court. This trend is despite clear U.S. Federal Maritime Law which upholds contractually negotiated maintenance rates between unions and employers. Even the Federal courts in Washington follow the general maritime law rule.

The question in Washington State Court then becomes how much should the maintenance rate be? Washington courts have held that, "a maintenance rate in a collective bargaining agreement is unenforceable if that rate is so low as to abrogate the seafarer's right to maintenance." *Lundborg v. Keystone Shipping Co.,* 138 Wn.2d 658 (1999). That holding is sufficiently vague and subjective as to allow the plaintiff's maritime bar to obtain decisions awarding up to $50/day; significantly over the negotiated contract rate of $16. Most recently, plaintiffs' counsel have demanded up to $80 per day.

Although Federal case law limits seafarers' maintenance rates to food and lodging received on board, plaintiff's maritime counsel in Washington argue that the courts should include the daily cost of living ashore in an apartment (or house), with internet access, cable television, cell phone service, three full meals served restaurant style, car insurance, gasoline and car maintenance expenses, household supplies such as laundry and dish soap, paper products, etc. Plaintiff's counsel extol the benefits of shipboard accommodations and meals, and use the operator's daily meal allowance for crew in support of their motions for higher daily maintenance rates. Unfortunately, the state courts of Washington have agreed.

Clearly, the higher daily maintenance rate has a significant impact for operators hiring crew from Washington union halls or for those operators considering trading in the Pacific Northwest. Indeed, the higher maintenance rates are not limited exclusively to Washington residents. The UK P&I Club has had recent experience with a California resident who retained a Washington maritime plaintiff's lawyer. As part of her Washington State Court lawsuit against her employer, the Washington lawyer successfully negotiated a daily maintenance rate substantially higher than the rate agreed to by the seafarer's union.

What can an employer do? The short answer is to negotiate; either with or without the assistance of local counsel. Expenses such as car insurance, gasoline, car maintenance, cell phones, and cable service are, as a matter of Federal law, not within the scope of the maintenance benefit. Information on daily home food expenses is readily available from the United States Department of Agriculture.[1] In addition, information on renting a room in a house or apartment (most similar to shipboard

accommodations) can be found on Craigslist[2] for the specific area in Washington where the seafarer lives.

The goal is to use such information to rebut the often exaggerated daily maintenance claims. The end result should be in the $30-$45/day range and, if the matter is in litigation, a stipulation as follows: that the agreed upon rate is fair and reasonable; that plaintiff dismisses any claim, partial claim or argument seeking maintenance up to the date of the agreed upon rate; that plaintiff dismisses any claim seeking punitive damages or attorneys' fees based on inadequate maintenance or rate of maintenance from the date of injury to the date of the agreement; that the employer agrees to pay the negotiated daily rate to settle the maintenance issues in that particular case on a without prejudice basis and without admitting the rate is proper in the particular case or any other and it not a waiver that the proper rate is the rate bargained for and set out in the collective bargaining agreement.

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[1] www.cnpp.usda.gov/Publications/FoodPlans/2009/CostofFoodDec09.pdf
[2] www.craigslist.com

Maintenance rates in union contracts: the Federal courts' perspective

Marc Warner explains

Marc Warner
LeGros Buchanan & Paul P.S.

Marc Warner is one of the Club's preferred personal injury defense lawyers in Seattle, Washington

As everyone knows, any seafarer who is injured or becomes ill during his/her employment is entitled to maintenance as well as cure and unearned wages. It is not necessary for an injury or an illness to have been caused by the employment, so long as a seafarer manifests the ill effects of an injury or illness while employed. Nor is there any excuse from or reduction of maintenance due to negligence on the part of the seafarer. An exception is if the seafarer is found to have knowingly concealed such pre-existing conditions from the employer, in which case, the right to maintenance, and to cure and unearned wages, may be forfeited (see highlights of Nick Politis' presentation on page 3).

Maintenance is a no-fault benefit, with no requirement that a seafarer prove or even allege his/her injury or illness resulted from negligence or unseaworthiness.

Employers generally have very limited control over *whether* and for *how long* they are obligated to pay maintenance. Control over the *rate* of maintenance is also limited. The best chance employers have of setting the rate of maintenance is through a collective bargaining agreement ("CBA") with unionized seafarers. (It should be noted that U.S. courts are generally not bound by maintenance rates that are stated to apply in a private, *non*-union contract; for instance, crew contracts that are still used in the commercial fishing industry.) While the majority of courts that have considered the issue have upheld CBA rates, some do not; and a number have not yet indicated one way or the other.

Courts upholding rates in a CBA

The United States *Federal* courts that cover the U.S. West Coast (including Alaska and Hawaii), Gulf Coast, Florida, New York, Connecticut, Puerto Rico and the New England states, Ohio, Michigan and the states along the lower Mississippi River have held that a rate of maintenance set-out in a collective bargaining agreement *will* generally be enforced as to any seafarer covered by that CBA.[1] Those courts have recognized the historical importance of maintenance as a seafarer's benefit and right, and have referred to prior case law stating that no contract, including a collective bargaining agreement, is allowed to totally do away with ("abrogate") the right to maintenance.

However, these courts have also pointed to the national labor policy in the U.S., which encourages the use of and reliance upon collective bargaining agreements. The courts have reasoned that the U.S. Congress has clearly indicated[2] that collective bargaining is a key instrument to promoting industrial peace, and that U.S. labor policy is premised upon the idea that employees can best bargain and obtain favorable working conditions and benefits by acting collectively through labor organizations.

In particular, these courts have emphasized that the rate of maintenance is only one of many issues covered in a union contract, and that there is likely to have been a great deal of "give and take" during the negotiations of such a contract, where

[1] These are the Ninth, Fifth, Eleventh Second, First and Sixth Circuit Courts. Gardiner v. Sea-Land Service, Inc., 786 F2d 943,948 (9th Cir1986); Baldassaro v. U.S., 64 F3d 206,212-213 (5th Cir. 1995); Frederick v. Kirby Tankerships, Inc., 205 F3d 1277,1291-1292 (11th Cir. 2000); Ammar v. United States, 342 F3d 133,143-147 (2nd Cir. 2003); Macedo v. F/V PAUL & MICHELLE, 868 F2d 519, 522 (1st Cir. 1989); Skowronek v. American Steamship Co., 505 F3d 482,486-489 (6th Cir. 2007).

[2] Principally in the Labor Management Relations Act, 29 U.S.C.A. §301.

concessions have been made by management as to some benefits or working conditions in return for concessions by the union on other issues. For instance, CBAs that limit the rate of maintenance have also often provided for extra wages for unpleasant tasks, generous vacation pay and/or availability of television and films on-board. Some courts have reasoned that, the determination of the adequacy of the maintenance rate, when viewed along with all other benefits provided for in the union contract, is indicated by the fact the union and its members voted for the contract.

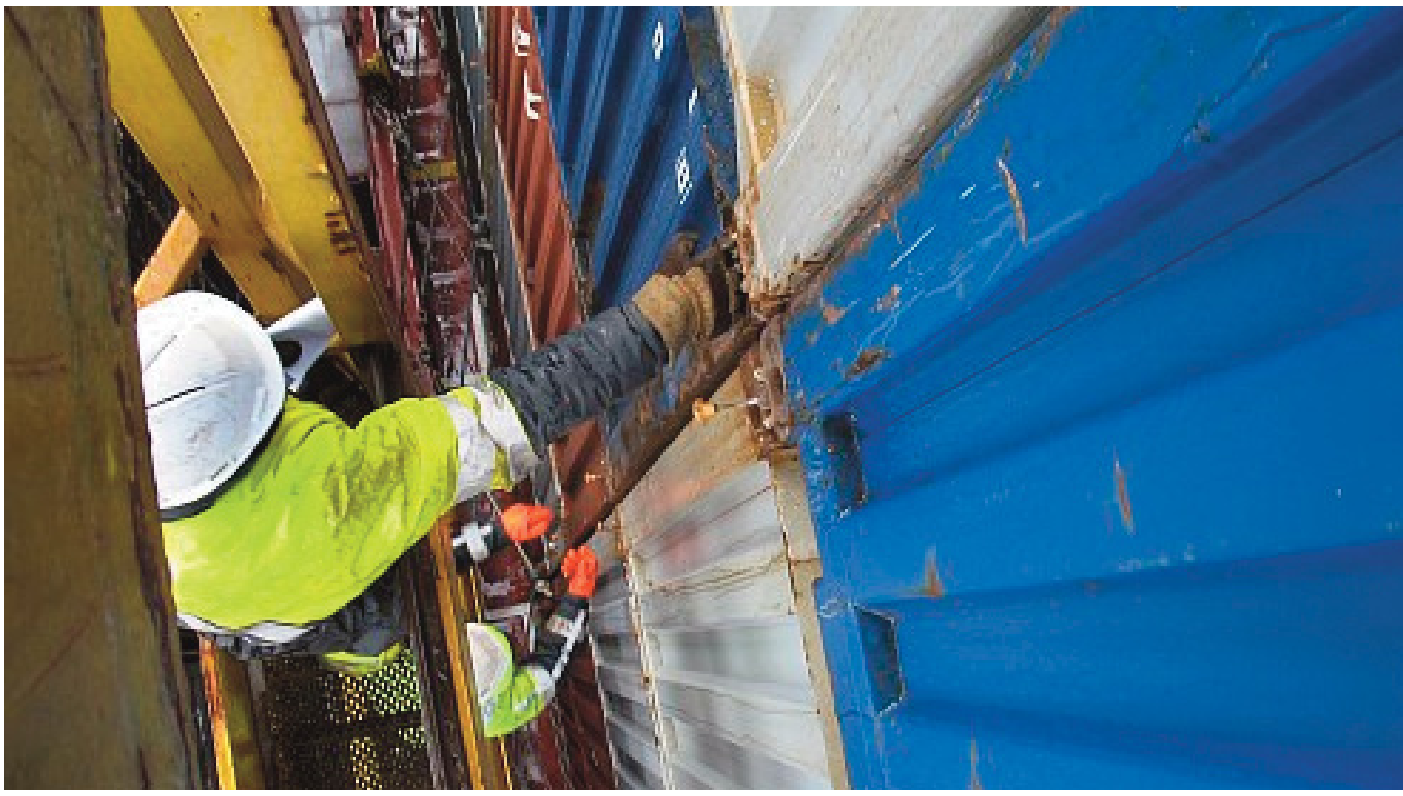
In further recognition of the complex mix of benefits involved in a collective bargaining agreement, courts have held that the adequacy of a rate of maintenance contained in such an agreement cannot be considered and judged in isolation, but rather the entire package of benefits and wages must be considered. These courts do hold out the opportunity for a seafarer to fight a CBA maintenance rate by presenting evidence that the CBA *as a whole* is unfair, and/or that the seafarer's union did not adequately represent him in the negotiations. This would be a difficult burden of proof for a claimant.

Some of the courts have pointed to specific evidence that discussions and concessions as to the rate of maintenance took place during the negotiation of the collective bargaining agreement. Others have said that, in light of the typical realities of collective bargaining, there is an assumption that consideration and negotiation of the maintenance rate took place – but with the opportunity for a seafarer to present evidence that there actually was no such attention and bargaining as to the rate.

Therefore, the majority of courts that have considered the issue have held that, while no contract, not even a collective bargaining agreement, can totally eliminate a seafarer's right to maintenance, that benefit can be *modified* in a CBA to the extent of limiting the rate at which it must be paid. It should be noted that these courts have upheld rates as low as US$8 per day as recently as 2003; and have often expressly recognized that the enforced CBA rate was not actually sufficient to provide food and shelter comparable to what a seafarer received aboard the vessel, and would not be enforceable in a *private non-union* contract.

Courts refusing to uphold rates in CBAs

While in the minority, there are three courts, one Federal and two State[3] courts that have refused to enforce the maintenance rate set-out in a collective bargain agreement. One of these is the Federal Circuit court for the Third Circuit,[4] which



[3] Lundborg v. Keystone Shipping Co., 138 Wash2d 658, 670-671 (1999); Daniels v. Standard Marine Transport Services, 680 N.Y.2d 41, 43 (1998).
[4] Barnes v. Andover Co. LP, 900 F2d 630, 640 (3rd Cir. 1990).

covers Pennsylvania, Delaware, New Jersey and the Virgin Islands. This court acknowledged that the labor policy of the U.S., as contained in federal statutes, favors and encourages collective bargaining. However, the court held that since those federal statutes do not directly address maintenance, they do not preempt that well-established maritime obligation. (The court did indicate that if a U.S. statute was to be enacted that did specifically provide for contractual limitation of maintenance rates, this should be given over-riding effect.) The court went on to recognize that while collective bargaining agreements often provide for other enhanced benefits (e.g. paid vacations, disability pensions), and while it may be that seafarers no longer are the poor defenseless lot they used to be, until Congress or the U.S. Supreme Court specifically recognize this, the Circuit Court will continue to treat seafarers as a class of workers in need of special care.

The Third Circuit Court therefore held that a rate of maintenance stated in a collective bargaining agreement is *not* binding on a seafarer who can show higher daily expenses for food and shelter.

Courts that have not yet ruled on the issue

Neither the State nor Federal courts that cover the States of Maryland, Virginia, North or South Carolina, nor the States that border the upper Mississippi have ruled on the enforceability of maintenance rates in a collective bargaining agreement. It would seem that if and when they do, they would be more likely to side with the majority of courts in enforcing CBA rates. However, as discussed, there is authority on both sides of the issue.

For further information, please contact Marc Warner.

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Maintenance and cure: Latest developments

Louise S. Livingston
Senior Claims Director

The most recent case, *Atlantic Sounding v. Petrey 2010 WL 4746907 (Fifth Cir. 11/23/10),* involved a crew member who failed to disclose his prior hip replacement surgery at his pre-employment examination and on his medical history questionnaire. In addition, he failed to disclose his use of prescription pain medication.

While working for Atlantic Sounding, Petrey's replaced hip displaced. When his employer learned of the hip replacement surgery and use of pain medication, it denied maintenance and cure arguing, with support of its examining doctor, that it would not have hired Petrey, had it known of the prior surgery. Petrey sought punitive damages in addition to maintenance and cure benefits. After a bench trial, the district court found, under the three prong McCorpen test, that Petrey was not entitled to the benefits.

Plaintiff appealed to the 5th Circuit which affirmed the district court's findings and declined to expand the McCorpen test as Petrey suggested. The 5th Circuit held that Petrey's disclosure of his hip replacement to co-workers and to the USCG during a physical exam after he was hired were insufficient to put the people responsible for his hiring and employment on notice of his prior surgery. Atlantic Sounding established all three elements of the McCorpen test resulting in a successful denial of benefits.

The enforceability of arbitration clauses in employment contracts

Recently, there has been a proliferation of decisions dealing with arbitration clauses in seafarer's employment contracts and their enforceability. This article suggests practical tips to remember from some of those decisions.

Karen C. Hildebrandt
Vice-President

1) If you can remove the case from state court to federal court pursuant to the UN Convention on Recognition and Enforcement of Foreign Arbitral Award, do it right away.

Even though 9 United States Code Section 205 provides for removal to federal court at any time before trial, there have been several federal court decisions holding a party waives its right to arbitration when it participates in litigation, for example, conducting discovery, to the point that the court finds it has acted inconsistently with the arbitration right and prejudiced the other side. See *Lawrence v Royal Caribbean Cruises* 2009 WL 4546633 (SD Fla. 2009) and the cases cited therein.

2) If you are a US based shipowner (or perceived to be), arbitration clauses in seafarer's employment agreements will be held void if they preclude them from relying on their statutorily created Jones Act claims.

Thus an employment agreement providing for arbitration in a seafarer's country of citizenship (Jamaica) and the substantive law of the flag of the vessel (Bahamas) to be applied was not enforced. See *Watt v NCL (Bahamas) Ltd.,* 2010 WL 2403107 (SD Fla. 2010). Perhaps if the shipowner had stipulated to the application of US law in the arbitration, the court would have upheld the arbitration locale clause as in *Gawin v Princess Cruise Lines,* 2009 WL 6364038 (SD Fla. 2009), where the court upheld arbitration in Bermuda as the defendant stipulated to the application of US law.

3) If you are non-US based shipowner, make sure your employment contract contains an arbitration clause that fits the four pronged test of *Francisco v M/T Stolt Achievement*.

It has been noted in court decisions that the overwhelming body of US law favors arbitration as a matter of public policy. If the four requirements are met the Convention requires the court to order arbitration. Those four requirements are: (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen. (See the synopsis of Gary Hemphill's presentation on page 5)

4) Make sure you have a severability clause in the employment contract.

This is basic contract drafting, but all too frequently forgotten. However, if a court can sever an objectionable clause from a contract, it leaves the remainder to be in force. For example, in *Dumitru v Princess Cruise Line,* 2010 WL 3034226 (SDNY, 2010) the employment contract with the Romanian seafarer provided for Bermudan law and arbitration. The defendant, anticipating problems with the Bermuda forum, stipulated for the arbitration to be held in one of three possible US forums at plaintiff's choice. The court refused to uphold the choice of law clause. The severability clause in the contract allowed the court to sever that clause from the contract and ruled US law should be applied in the arbitration.

It is unlikely the flow of these cases will cease in the near future and the courts will likely refine the guidelines and ship owners will revise their contracts with the above issues in mind.

Proving medical services in Texas

Texas, as we all know, can be an unusual place where strange things happen both inside and outside courtrooms. Recently, during the course of a personal injury lawsuit in Harris County, Texas, a strange thing happened…

Christina Schovajsa
Eastham, Watson, Dale & Forney, L.L.P.

Christina joined Eastham, Watson, Dale & Forney L.L.P. in 1998 and became a partner in the firm in 2003. Eastham, Watson, Dale & Forney L.L.P. is a Houston based firm specializing in admiralty and maritime law. Together with her partner, Robert L. Klawetter, Christina manages the firm's personal injury and wrongful death docket.

In the normal course of a personal injury lawsuit, a personal injury plaintiff must prove that all medical expenses he/she seeks to recover were necessary and the charges for those services were reasonable. Typically, proof of this must be in the form of expert medical testimony. However, a personal injury plaintiff in a Texas state court action has a unique procedure available to them under Texas state law which allows them to "prove up" their medical expenses by simply submitting an affidavit from the custodian of records for their medical provider. Not only is a plaintiff able to prove up the quantum charged by affidavit but also that the charges were "reasonable and necessary" and "usual and customary."

The foregoing is regardless of:
(1) whether the affiant is a medical doctor or otherwise qualified to render expert testimony on the necessity of a medical service or the reasonableness of the charges for the service; or,
(2) the amount actually accepted in satisfaction of the bills. This procedure is available through the Texas Civil Practices and Remedies Code and it effectively and immediately shifts the burden to a defendant to offer evidence that the charges were neither "reasonable and necessary" nor "usual and customary."

Significantly, the statute does not require that the plaintiff's affidavit be completed by a doctor or other medical expert. The affidavits are routinely executed by non-medical support staff. The relevant language only requires that the affidavit:
(1) be taken before an officer with authority to administer oaths;
(2) be made by:
(a) the person who provided the service; or
(b) *the person in charge of records showing the service provided and charge made;* (our emphasis) and
(3) include an itemized statement of the service and charge. TEX. CIV. PRAC. & REM. CODE § 18.001(c).

Controverting affidavit

Once a plaintiff serves an affidavit on a defendant, the defendant must file a counter-affidavit in order to challenge the necessity of the service and the reasonableness of the charge contained in the plaintiff's affidavit. TEX. CIV. PRAC. & REM. CODE § 18.001(b). Failure to do so can result in the defendant being precluded from presenting controverting evidence at trial. *Hong v. Bennett,* 209 S.W.3d 795, 800 (Tex.App. – Fort Worth, 2006).

A defendant must serve a counter-affidavit on the plaintiff within 30 days of being served with the plaintiff's affidavit or at least 14 days before the first day evidence is presented at trial.

Unlike the plaintiff's affidavit, the defendant's counter-affidavit *must be completed by an expert witness.*

The relevant provision states as follows:
The counter-affidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. *The counter-affidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.* (Our emphasis) TEX. CIV. PRAC. & REM. CODE § 18.001(f).

Effect of filing counter-affidavit

Texas appellate courts are not in agreement as to the effect on the plaintiff's evidentiary burden at trial of a defendant filing a counter-affidavit. Several courts have held that if a defendant files a counter-affidavit, the plaintiff cannot rely on its "non-expert" affidavit to prove the reasonableness and necessity of medical services and charges and, instead, must do so by expert testimony. *In re Mendez,* 234 S.W.3d 105, 109 (Tex.App. – El Paso, 2007, mandamus denied); *Hong,* 209 S.W.3d at 801.

However, other Texas appellate courts have held that the filing of a counter-affidavit only creates a fact issue to be decided by the finder of fact (either a jury or judge). For example, the Eastland Court of Appeals held that the issue of the reasonableness and necessity of medical expenses can be decided solely on the basis of affidavits and counteraffidavits submitted under the procedures contained in Section 18.001, without requiring any live witness testimony. *Ozlat v. Priddy,* No. 11-96-240-CV, 1997 WL 33798173 (Tex. App. – Eastland, May 29, 1997, error denied).

Effect of failing to file counter-affidavit

Texas appellate courts also disagree over whether a failure to file a counter-affidavit precludes a defendant from offering *any* controverting evidence regarding the reasonableness and necessity of medical care and costs. For example, in *Hong,* the court stated as follows:
Section 18.001 is an evidentiary statute that accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges that would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) *it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly filed controverting affidavit* (our emphasis). *Hong,* 209 S.W.3d at 800.

In contrast, the Austin Court of Appeals held as follows:
Section 18.001 merely addresses three evidentiary issues: (1) the amount of the charges, (2) the reasonableness of the charges, and (3) the necessity of the charges… While an uncontroverted section 18.001 affidavit provides legally sufficient evidentiary support for a fact finding on the amount of damages, it is not binding on a jury and does not operate to limit a jury's discretion in assessing damages… Section 18.001 affidavits are not conclusive of the amount of damages; they are merely "sufficient evidence to support a finding of fact… [Plaintiff] suggests that section 18.001 establishes conclusive, irrefutable proof preventing a defendant from cross-examining plaintiff-witnesses on the issue of causation or introducing evidence on prior medical conditions. We hold that affidavits filed in accordance with section 18.001 are not conclusive of the reasonableness or necessity of the charges or of causation of the corresponding injuries…It was not error to allow cross-examination and argument contesting [Plaintiff's] medical expenses. *Grove v. Overby,* No. 03-03-00700-CV, 2004 WL 1686326 *6, (Tex. App. – Austin, July 29, 2004, no pet.).

In sum, because there is a split of opinions at the Texas appellate court level, a defendant must obtain and timely file a counter-affidavit from a qualified expert or risk being precluded from offering any evidence at trial controverting the plaintiff's affidavits as to the cost and necessity of medical services.

By way of an example, we note that in our recent personal injury case in Harris County, Texas, affidavits of costs and necessity attempting to prove up over $110,000 in medical expenses were filed on behalf of a seafarer plaintiff. One of the affidavits submitted on behalf of the plaintiff was to prove up charges totaling approximately $30,000 from a day surgery center. However, according to a medical auditing firm consulted by the shipowner, the usual and customary charges for those services only totaled $9,000 and the provider agreed to accept that amount in settlement of the charge. Failure to file a counter-affidavit, could have precluded the shipowner from offering this evidence at the trial of the matter.

For further information, please contact Christina Schovajsa.

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Negligent infliction of emotional distress claims expand

Ninth Circuit Court of Appeals expands availability of negligent infliction of emotional distress claims in *Stacy v. Rederiet Otto Danielsen,* 609 F.3d 1003, 2010 AMC 1782 (9th Cir. 2010). Linda Wright explains.

Linda Wright
Claims Executive

It was a densely foggy summer afternoon along the Northern California Coast near Point Reyes, California. Visibility was nearly zero. Just outside the Golden Gate, the M/V EVA DANIELSEN was departing San Francisco, California bound for Portland, Oregon. Fishing boats were trolling for salmon in the same area. One of those boats, the MARJA, was owned and operated by Stacy. He picked up the EVA DANIELSEN on his radar about one mile away on a collision course with the MARJA. He radioed the ship of his findings and the EVA DANIELSEN altered her course to avoid collision. The EVA DANIELSEN passed close enough to the MARJA for Stacy to hear the ship's engine and feel the ship's wake but he did not see the ship due to the dense fog. Stacy continued fishing.

The EVA DANIELSEN reported a possible collision to the USCG and conducted a search. Hearing the radio conversation, Stacy joined the search along with other nearby fishing boats. During that search Stacy believed the EVA DANIELSEN reported it collided with his boat, the MARJA. He radioed all that he was safe and the MARJA was afloat and the search was terminated. Mr. Stacy returned to fishing.

Over four days later, Stacy learned of the sinking of the BUONA MADRE and the death of her Captain, Mr. Wade. Stacy was not acquainted with Mr. Wade nor did he know the BUONA MADRE was one of the fishing boats in the area on the day of the incident.

All of the above facts are essential in considering how the Ninth Circuit responded to Mr. Stacy's case against the Owner alleging a single cause of action for negligent infliction of emotional distress ("NIED"). Stacy claimed he was "placed in grave and imminent risk of death or great bodily harm" causing him to suffer physical and mental pain and suffering, stress and anxiety. Stacy also claimed he required medical treatment and sustained economic loss because he couldn't work.

Owners of the EVA DANIELSEN challenged Stacy's allegation of NIED and moved to dismiss the case as a matter of law based on a failure to state a cause of action. The trial court applied the "zone of danger" test expressed in *Chan v. Society Expeditions, Inc.,* 39 F.3d 1398 (9th Cir. 1994). That test requires a plaintiff to show two facts: 1) that he or she witnessed the peril or harm to another; and 2) that he or she was threatened with physical harm due to the negligence of the defendant. Plain and simple…you must see someone suffer an injury or death AND be close enough to the peril that your own safety is at risk. In applying the "zone of danger test" to Stacy's allegations, the district court dismissed Stacy's complaint finding he failed to show that he witnessed another being serious injured or killed while simultaneously being threatened with physical injury to himself.

Stacy appealed the dismissal of his case to the Ninth Circuit Court of Appeals. In a startling decision, the Ninth Circuit refused to follow binding Circuit precedent and reversed the trial court. The majority view of two of the three Appellate Justices was based on a strained interpretation of *Chan* and reliance on *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, (1994). The *Gottshall* decision of the United States Supreme

Court was decided while the *Chan* case was pending before the Ninth Circuit Court of Appeals.

In *Gottshall,* the U.S. Supreme Court recognized a federal common law claim for NIED in the context of a railroad worker subject to the Federal Employers' Liability Act ("FELA"). [The Jones Act incorporates FELA and thus legal decisions on FELA apply seafarer injury cases.] However, due to a concern that allowing such claims posed a "very real possibility of nearly infinite and unpredictable liability for defendants," the Supreme Court limited the class of plaintiffs who could recover damages for negligent infliction of emotional distress. The *Gottshall* decision allowed only "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." Stacy was never put in "immediate risk of physical harm"; he continued to fish after the ship passed and after the search was terminated. Yet the majority of the Ninth Circuit justice held that plaintiff was in the zone of danger and could state a claim for NIED. However, if the emotional distress does not appear for four days, how could they conclude there was a connection between the danger and the "psychic injury" Stacy claimed? Even under the more liberal Chan "zone of danger" test, Stacy did not and could not claim he witnessed peril or harm to another and that he himself was threatened with physical harm due to the EVA DANIELSEN's negligence.

In reviewing the *Chan* and *Gottshall* cases and how they were applied to the Stacy facts, the results are puzzling. When was Stacy frightened – when the ship went by? No, he watched it pass on radar and continued fishing. Was he frightened during the search? No, he assisted in the search and then resumed fishing. Was he frightened for three days after the incident? No. Finally, was he frightened after hearing of Mr. Wade's death four days later? Yes, but does that satisfy the zone of danger test? The Ninth Circuit decision simply defies common sense. Can other fishermen out that day also allege they were in the "zone of danger"? Given the Ninth Circuit's holding, possibly. All we know so far is that four days after an incident is acceptable. What about five days? 20 days? A month later? That has not been decided. If this loose interpretation of the "zone of danger" test is affirmed, the potential plaintiffs claiming NIED would expand considerably.

Fortunately, due to the potential ramifications in future maritime injury cases, the Owners of the EVA DANIELSEN are in the process of submitting a Petition for Writ of Certiorari to the United States Supreme Court. They are seeking other interested parties to file amicus (or Friend of the Court) briefs in the hopes the Supreme Court will take the case and reverse the Ninth Circuit decision.

To be continued…

Point Reyes, California

Collective expertise

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More than half of the Club's personal injury claims over $100,000 are brought in the American courts. The TMA Bodily Injury Team are a specialist group of executives from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with these demanding cases on our Members' behalf. Under the leadership of Louise Livingston, they apply collective expertise and experience to a variety of bodily injury matters. Louise, Karen Hildebrandt, Jana Byron and Dee O'Leary are all former practising attorneys in both Federal and State courts. Linda Wright has 29 years' experience as a P&I correspondent dealing with personal injury claims. The Team review and determine strategy and estimates in all major injury cases and attend settlement conferences and mediations with, and sometimes on behalf of, our Members.

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