INTERNATIONAL CENTER FOR DISPUTE RESOLUTION
International Arbitration Tribunal

In the Matter of the Arbitration between:

Re: [redacted]

[redacted]

Vs.

[redacted]

FINAL AWARD

I, THE UNDERSIIGNED ARBITRATOR, have been designated in accordance with the Arbitration Agreements entered into by the above-named Parties dated January 13, 2013 and July 8, 2013, and have been duly sworn in accordance with the International Dispute Resolution Procedures Rules. Further, both [redacted] ("[redacted] and [redacted] ("[redacted] have had full opportunity to present pertinent evidence and legal argument in this matter. Accordingly, having duly heard the proofs and allegations of the Parties, do hereby, FIND and AWARD, as follows.

I – Stipulated Facts:

1. At all times material, [redacted] was the operator of the [redacted] and was [redacted] employer; [redacted] was a seaman employed in the service of [redacted] ship from January 19, 2013 to July 15, 2013.
2. [redacted] entered into his first contract with [redacted] on June 19, 2006 and he began work on his final contract on January 19, 2013 as a Wine Tender.
3. [redacted] received training in safe lifting and stretching techniques.
4. [redacted] complained of a back injury while carrying out his duties on July 10, 2013. Initially, he was seen by the ship's physician, but was subsequently evaluated by [redacted] on July 12, 2013 in Greece where he had an MRI of his back.

5. [redacted] received a number of warnings pertaining to his job performance on or about the following dates: July 19, 2011, September 16, 2011, April 24, 2012, May 14, 2013, July 1, 2013, and July 9, 2013. The first three warnings resulted in a Final Warning regarding future employment. However, the last three resulted in a Master's Hearing on July 15, 2013 at which time his employment with [redacted] was terminated.

6. As a result of his termination, [redacted] was disembarked from the [redacted] on July 15, 2013 to Croatia, which [redacted] had indicated was his home country in his employment records.

7. On or about July 19, 2013, [redacted] received a letter of representation from [redacted] attorney. Thereafter, on July 30, 2013, [redacted] was advised that [redacted] would make his own medical arrangements for his continued medical care and that [redacted] would receive all receipts and records for reimbursement to [redacted]

8. After leaving the ship, [redacted] met with [redacted] in Serbia on August 12, 2013 and thereafter received physical therapy from August 13, 2013 to August 24, 2013; ten sessions.

9. [redacted] moved with his wife and daughter to Canada on or about August 31, 2013 and began working as a Cabinet Maker for a company in Edmonton. He left that job and began working as a Carpenter for another company on or about October 22, 2013 and is still employed at that job.

10. [redacted] suspended maintenance and cure benefits on October 15, 2013 and made maintenance payments to [redacted] from July 15, 2013 through October 15, 2013.

II –Factual Findings:

[redacted] was employed through a number of contracts and at the end of his employment he was a Wine Tender. He claims he suffered a back injury during his last contract with [redacted] on July 10, 2013. Though acknowledging that he received prompt care from [redacted] asserts that his injury was never fully cured and that he is not at maximum medical improvement ("MMI"). [redacted] maintains that it has provided [redacted] with all recommended curative treatment and that he reached MMI in August of 2013.

[redacted] has filed a Claim alleging Jones Act negligence, the failure to provide maintenance and cure, the failure to treat, negligence in handling [redacted] maintenance and cure and the unseaworthiness [redacted] ship. [redacted] has essentially denied these assertions.

Though there is conflicting evidence, the following facts and conclusions are determined to be supported by the greater weight of the evidence. This is as a result of careful consideration of all the evidence presented and, further, giving all relevant

evidence the weight it should be accorded. Additionally, the undersigned has had the opportunity to observe the demeanor of the witnesses and to review all arguments made and precedents cited:

[redacted] worked with [redacted] through a number of contracts, received promotions, and eventually obtained the position of Wine Tender on the [redacted] ("[redacted] at the time of his final contract. In each of his pre-employment questionnaires, [redacted] expressly denied any back issues and maintained this assertion throughout his employment with [redacted]

By [redacted] own admission, he received training with regard to lifting, carrying and stretching before each contract as well as on the job training. In fact, [redacted] testified that his work conditions were safe and that his training was adequate.

[redacted] claimed he needed to carry boxes of wine up and down stairs in order to do his job effectively. He admitted he had trolleys and elevators for his use for such transport, but that the area was always too crowded to use these modes of transport. This contradicts the testimony of [redacted] supervisor for a short period. No evidence was presented that any other back injuries were suffered by wine tenders doing this job; the weight of the more credible evidence supports the conclusion that [redacted] failed to follow the instructions he received during training and his assertion that he always had to use the stairs is not credible.

On or about July 10, 2013, [redacted] alleged he hurt his back while performing his duties. Specifically, he was lifting a box of wine with a co-worker and claims he hurt himself. [redacted] immediately received ship board medical care and though he had a normal range of motion was deemed unfit for duty and told to rest. On July 11, 2013, [redacted] returned to the sick bay and complained of continued pain. Consequently, on July 12, 2013, when the [redacted] reached port in Greece, [redacted] was sent to a neurosurgeon, [redacted] [redacted] received anti-inflammatory medications and told to rest for a week and do back strengthening exercises. [redacted] also had an MRI (the only one he ever received up to and including the final hearing). [redacted] received daily care aboard ship until July 14, 2013 when he was fired from his employment from [redacted] due to unrelated behavior.

In this regard, [redacted] had received three (3) written warnings during prior contracts and was afforded the opportunity to improve in his co-workers and guest relations rather than be fired after the required Master's Hearing. Unfortunately, [redacted] did not improve and received three (3) more warnings while on the [redacted] which resulted in the termination of his employment from [redacted], again, after a Master's Hearing. The termination was in no way related to the back injury.

[redacted] was disembarked from the [redacted] on July 17, 2013 and was repatriated to Croatia where he had indicated on his employment records he lived. [redacted] arranged for continued medical care in Croatia with [redacted]. On July 19, 2013, [redacted] received a letter of representation arising from the July 10 incident. In response, [redacted]

indicated that medical care would continue in Croatia and that [redacted] would pay for same until [redacted] reached MMI and continue maintenance and cure payments s as well.

Actually, and unbeknownst to [redacted] wife and daughter lived in Serbia and [redacted] went there to live. Thus on July 30, 2013, [redacted] was advised via [redacted] lawyer that [redacted] would arrange for his own care and would submit receipts for reimbursement. As of October 3, 2013, [redacted] had not received any receipts, medical records or any documentation reading [redacted] care. No proof was provided that [redacted] was or had received any medical care in Serbia.

Consequently, on October 3, 2013, [redacted] wrote to [redacted] via his counsel, and advised that [redacted] must submit receipts and documentation regarding care to receive payment. Further, a failure to provide this proof would result in the termination of his maintenance and cure benefits. No records of any kind were submitted and, thus, [redacted] benefits were terminated on October 15, 2013.

Notably, On April 3, 2015, during this proceeding, [redacted] finally received proof of care in Serbia for the first time. [redacted] was then reimbursed for all of the care and treatment received. Upon the conclusion of the round of care required and suggested in Serbia, no further care was indicated or recommended by his Serbian provider (the one [redacted] selected). The care in Serbia concluded on August 27, 2013.

In August of 2013, [redacted] moved to Canada, first to work as a Cabinet Maker with [redacted]. In October of 2013, [redacted] changed employment and joined [redacted] as a carpenter. A position he holds to this day and at all times material to this arbitration. This new job requires concrete form work, which includes layout, erecting and dismantling of work [redacted] is a supervisor and travels extensively by car for work. [redacted] salary is more than he earned with [redacted] and he has health insurance through his employment as well.

During his employment in Canada, [redacted] had a number of doctor visits for anxiety and eye ailments. In none of his records is there any indication that a back complaint was made. [redacted] suggested that all the doctors omitted these complaints despite his mentioning the problem, but this does not comport with the other credible evidence, Specifically, [redacted] testified that on a scale of "1-10" his pain was "8-10" at all times during his employment in Canada and impacted his marriage and relationship with his daughter. It is not credible to the undersigned that if [redacted] constantly complained of such pain that none of his doctors would record it in his medical records.

The first complaint of back pain since 2013 that was recorded was during this arbitration in February 2015. However, [redacted] complaints were different with his present physician, [redacted]. [redacted] opined that the changes in which side the back pain appears and the now existent radiation of pain is irrelevant; he opined that [redacted] needs back surgery. [redacted] also agreed nothing had changed in [redacted] condition since his MRI in Greece, that he would want new films to confirm his opinion (which didn't exist at the Final Hearing), and that all prior care was appropriate, but [redacted] needs surgery

because his present pain is due to his [redacted] event and not his heavy lifting on the job in Canada.

The undersigned finds [redacted] testimony to be unsupported by the evidence. The records and tests show [redacted] reached MMI in August, 2013 and that any present condition is completely unrelated to his [redacted] employment. This is confirmed by the examination and testimony of [redacted].

III - Legal principles:

The law does not impose the duty to provide an accident proof ship; the ship must enable the crew to perform their duties. See, Billeci v. United States, 296 F.2d 703 (9th Cir, 19620; Reinhart v United States, 457 F.2d 151 (9th Cir. 1972). [redacted] testified that the ship was safe and he received full and proper training which was constantly reinforced by [redacted]

Maintenance and cure ends once the seaman reaches MMI as [redacted] did in August of 2013. Belcher Towing v Howard, 638 F. Supp. 242 (S.D. Fl. 1986). Once MMI is reached, the ship-owner is not responsible for palliative care. Thus, even assuming [redacted] back complaints are real, [redacted] provided the care required under the law. This is true when, as here, the back pain complained of by [redacted] is unrelated to the July 10, 2013 incident. See, Breese v AWI, Inc., 823 F.2d 100 (5th Cir. 1987); McMillan v Tug Jane A. Bouchard, 885 F. Supp. 452 (E.D. N.Y. 1995).

Further, the effort by [redacted] to suggest that his present ailments first manifested on the [redacted] and are a result [redacted] negligence in failing to provide a safe work place and in failing to provide the required maintenance and cure is unsupported by the credible evidence in this matter. In fact, [redacted] testified to the contrary and the entirety of the evidence supports a different conclusion.

The weight of the more credible evidence supports the conclusion that [redacted] reached MMI in August of 2013 and that any back problems [redacted] suggest he has now are unrelated to his employment with [redacted]

Based upon the forgoing, I AWARD as follows:

1. Claimant [redacted] Claim for damages is DENIED.

2. Each party shall bear their own attorneys' fees and costs.

3. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$[redacted] shall be borne by [redacted] and

the compensation and expenses of the arbitrator totaling US$[redacted] shall be borne by [redacted]

4. Any claims not addressed herein are hereby DENIED.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Miami, Florida, USA.

DATED: August 17, 2015 [redacted]

State of Florida)
) SS:
County of Miami-Dade)

I, [redacted], do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

[redacted]

Date: 8/17/15

State of Florida)
) SS:
County of Miami-Dade)

On this 17th day of ~~July~~ Aug., 2015, before me personally came and appeared [redacted] to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

[redacted]

Notary Public

Notary Public - State of Florida
My Comm. Expires May 19, 2017
Bonded Through National Notary Assn.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

[redacted]

Claimant,

v. ICDR Case No. [redacted]

[redacted]

Respondent.

FINAL AWARD

Counsel:

[redacted]

Counsel for Claimant

Richard McAlpin, Esq.
McAlpin Conroy, P.A.
80 SW 8th Street
Brickell Bayview Centre
Suite 2805
Miami, FL 33130
Counsel for Respondent

Arbitrator:

[redacted]

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated April 17, 2011, and having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby, AWARD, as follows:

The Final Hearing in this matter took place at the offices of International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), in downtown Miami, Florida, and commenced on April 28, 2015 and concluded on April 30, 2015.

It is noted that the attorney for Claimant, [redacted] and the attorneys for Respondent, Mr. Richard McAlpin, Esq. and Ms. Kassandra Doyle, Esq., were superb and demonstrated the highest degree of professionalism, civility, and competence in the representation of their clients.

On May 14, 2011, Claimant, [redacted] ("Claimant") was a utility worker employed by Respondent [redacted] ("[redacted] or "Respondent"). On that date, he reported that he sustained right wrist pain as a result of a slip inside his cabin bathroom. Commencing on that date with a "shoreside referral," he began receiving medical care and treatment for his wrist injury.

It is the Claimant's position that by failing to provide prompt, proper, and adequate medical treatment, which resulted in an aggravation of his condition, [redacted] breached its obligation to provide maintenance and cure.

It is the Respondent's position that the Claimant was provided prompt, proper, and adequate treatment; that his condition was not aggravated; and that [redacted] has complied with its obligation to provide maintenance and cure.

A central issue in this case is whether, in May of 2011, the Claimant sustained a traumatic injury to his right wrist which caused a volar intercalated segmental instability ("VISI") deformity, or, whether a pre-existing VISI deformity was aggravated by the trauma/fall at that time.

In support of the Claimant's position, extensive medical records were presented along with testimony from [redacted] an orthopedic physician, [redacted], [redacted] Manager, Crew Claims, and Claimant [redacted]

At the time of his slip in May of 2011, Claimant was 27 years old and resided with his family in St. Lucia. Approximately three months before commencing his employment, he started his own radiator repair business in St. Lucia. In his testimony, Claimant said he intended to work for the cruise line for approximately five (5) years in

order to save enough money to start the business. He further testified that he supervised others in his business, but did not do any of the repair work himself.

The Claimant was seen and treated by physicians selected by [redacted], [redacted] and [redacted]. Claimant was also treated by [redacted] selected occupational therapist [redacted]

The crux of the Claimant's case was presented through the testimony of [redacted] who was asked to examine and evaluate the Claimant's injury in 2013. He opined that based upon his review of medical records, X-Rays, MRI's, and his examination of the Claimant, that the [redacted] selected doctors failed to properly diagnose and treat the Claimant's VISI deformity. In his opinion, the VISI deformity should have been diagnosed and immediately treated. He further opined that the failure of the [redacted] selected physicians to diagnose and treat the VISI deformity fell below the standard of care and resulted in an irreversible and progressive injury which will result in the Claimant needing a total wrist fusion. It is noted that prior to seeing [redacted], the Claimant chose to be examined by another orthopedic physician of his choice, [redacted], in Palm Beach, Florida, who made no mention of a VISI deformity.

In order to refute the Claimant's position, [redacted] presented medical records along with the testimony of [redacted] (Orthopedist), [redacted] (Orthopedist), and [redacted] (Occupational Therapist).

The crux of the Respondent's case as presented by the Respondent's witnesses is that Claimant basically had a wrist sprain and an injury to the distal radial ulnar joint ("DRUJ joint') as opposed to a traumatic VISI deformity. In support of their position, the Respondent's witnesses opined that the Claimant had pre-existing bilateral VISI deformities in both his left and right wrists. They further opined that based upon their review of the medical records and diagnostic studies, along with their clinical examinations, the Claimant's right wrist VISI deformity was not caused nor aggravated by the May 2011 fall onboard the [redacted]

[redacted] testified that by February 9, 2012, the Claimant had no complaints of wrist pain, no diminished grip strength, and that, based upon his examination, the wrist injury had resolved and Claimant could return to his work duties without restrictions or the need for further treatment.

In April of 2012, after the Claimant returned briefly to the [redacted] he again complained of wrist pain and was sent to [redacted]. After returning home to St. Lucia, he was seen by [redacted] in Barbados who recommended that the Claimant be seen by a hand surgeon in Miami. [redacted] is the Miami hand surgeon who diagnosed the claimant with a triangular fibrocartilage complex ("TFCC") tear which he thereafter surgically repaired. This surgery was performed on April 25, 2013.

Following this surgery, the Claimant began occupational therapy with [redacted] By July 19, 2013, the Claimant reported to Mr. [redacted] that his hand was doing great. He had no pain at all and wanted to discontinue treatment. Mr. [redacted] opined that the Claimant could return to his job on the ship and perform his duties. At this time [redacted] released the Claimant back to his shipboard duties and opined that he had reached maximum medical improvement. The Claimant, on the other hand, testified that he was always in pain, was never pain free, and was unable to use his right hand to perform any work. This testimony was directly contradicted by the objective evidence of callouses on both his left and right hands during the period of time the Claimant states he never used his right hand.

The more credible evidence on these issues was presented primarily by the testimony of [redacted] and [redacted]. Both opined that the bilateral VISI conditions were anatomical anomaly's unrelated in any way to the Claimant's fall . [redacted] performed a physical examination which included an investigation into the potential for a VISI instability. He found that the carpal bones and ligaments were intact and on that basis he was able to rule out any injury to the VISI. Following the TFCC surgical repair the Claimant reported that he felt great, had full range of motion, his joint was stable, and he was pain free. It is not credible that if he had a symptomatic VISI deformity caused or aggravated by the fall that was undiagnosed and untreated that he would have reported total relief following the TFCC surgery.

In summary, the preponderance of the evidence in this case does not support the Claimants position that the [redacted] selected physicians failed to timely diagnose and treat the claimants VISI deformity and that [redacted] is liable for failing to provide prompt, proper, and adequate medical treatment which resulted in an aggravation of the Claimant's condition, or that [redacted] breached its obligation to provide maintenance and care.

AWARD

For the reasons stated above, I award as follows:

1. Claimant [redacted] claims for monetary damages are denied in their entirety.

2. Claimant's claim for attorneys' fees and cost is denied.

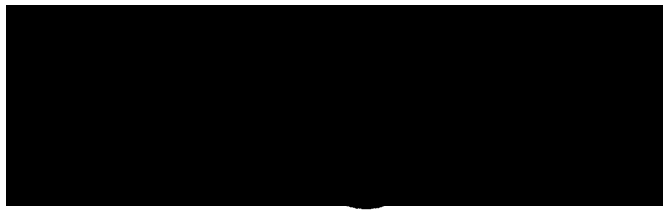
3. The administrative fees and expenses of the ICDR, totaling USD [redacted] and the compensation and expenses of the Arbitrator, totaling USD [redacted], shall be borne entirely by the Respondent.

4. This award is in full settlement of all claims submitted to this Arbitration. Any and all claims not expressly granted herein are hereby denied.

I hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Miami, Florida, United States of America.

August 14, 2015

Date



County of Miami-Dade

} SS:

City of South Miami

I, [redacted], do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

August 14, 2015

Date

[redacted]

County of Miami-Dade

} SS:

City of South Miami

On this 14th day of August, 2015, before me personally came and appeared [redacted] to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[redacted]

[redacted]
Expires March 9, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

Notary Public

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitration Tribunal

[redacted]

Claimant

ICDR CASE NO. [redacted]

VS.

[redacted]

Respondent

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, [redacted] having been designated in accordance with the arbitration agreement entered into between Claimant, [redacted] ("Mr. [redacted] and Respondent, [redacted] ("[redacted] and having heard and reviewed the testimonies from the parties and witnesses, all exhibits including but not limited to, all briefs and memoranda filed by the parties affidavits presented and admitted into evidence by agreement, and argument from all of the Parties, do hereby CONSIDER, ORDER AND MAKE MY AWARD, as follows:

SUMMARY OF THE ACTION

The present matter involves maritime claims, brought under the Jones Act and U.S. General Maritime Law. Claimant was employed by [redacted] starting on October 4, 2008 for approximately 3 years as indicated by the 3 prior back to back contracts that he entered into with his employer [redacted]

During the last contract Mr. [redacted] was employed by [redacted] as a waiter aboard the [redacted] Mr. [redacted] alleges that while he was working and employed by [redacted] he became ill and reported to the ship's infirmary. After being examined a number of times by two different physicians over a number of days, Mr. [redacted] alleges that the medical personnel aboard ship misdiagnosed him.

Mr. [redacted] alleges that the ship's physicians diagnosed and treated him for bronchitis, and failed to recognize and diagnose Mr. [redacted] underlying heart problem. Mr. [redacted] returned to work after three days and finished out his contract with no further health complaints. Prior to leaving the ship, he signed a document stating that he was in good health and had no other health issues. Approximately 10 days later while in Turkey he developed serious chest pains and underwent a quadruple coronary bypass operation.

The case's evidentiary hearings took place from March 9, 2015 through March 11, 2015.

The parties presented a number of witnesses who testified at trial and through video depositions and additionally introduced a number of exhibits including, but not limited to the ships medical records and expert reports.

After the parties concluded the arbitration hearing, the parties submitted extensive finding of facts and conclusions of law.

The arbitrator wishes to take this opportunity to express his appreciation to the parties and their counsel for the courtesy and exceptional professionalism that they exhibited throughout the arbitration.

The Claimant asserted four claims against Respondent arising under The Jones Act and the General Maritime Law of the United States:

1. Jones Act Negligence
2. Unseaworthiness
3. Failure to Provide Prompt, Proper and Adequate Treatment
4. Failure to Provide Maintenance and Cure

I find and conclude as follows:

1. Mr. [redacted] has not proven that [redacted] was negligent under the Jones Act.
2. Mr. [redacted] has not proven that [redacted] failed to provide Mr. [redacted] a safe place to work under the doctrine of unseaworthiness.
3. Mr. [redacted] has not proven that [redacted] failed to provide prompt, proper and adequate medical care and treatment for his injury.
4. Mr. [redacted] has not proven that [redacted] failed to provide maintenance and cure during the time he was injured.

STATEMENT OF THE FACTS

Mr. [redacted] was employed by [redacted] as a crewmember. His first assignment was as an assistant waiter and then later as a waiter on the [redacted] Mr. [redacted] had already completed three prior contracts with the cruise line prior to this contract.

As with all potential crewmembers, Mr. [redacted] was required by [redacted] to submit to a pre-employment physical examination prior to his employment on the ship. Mr. [redacted] completed two pre-employment physicals during his employment with [redacted] Mr. [redacted] disclosed on both of his pre-employment physicals that he smoked cigarettes. He was found fit for employment.

Mr. [redacted] alleges that while he was working and employed by [redacted] he became ill and reported to the ship's infirmary. After being examined by Dr. [redacted] Mr. [redacted] was diagnosed with bronchitis. He was prescribed a Z-Pac, and was required to use a nebulizer at the infirmary. Mr. [redacted] reported to the infirmary for three days and was seen by a second physician Dr. [redacted] and two nurses. Mr. [redacted] alleges that the medical personnel aboard ship misdiagnosed him. Mr. [redacted] alleges that the ship's physicians diagnosed and treated him for bronchitis, and failed to recognize and diagnose an underlying heart problem. Mr. [redacted] alleges that the ship's physicians had equipment aboard the ship which would have enabled them to administer a battery of tests, including cardiac enzyme, Troponin levels, D-dimers, CBC and electrolyte testing, Chest X-ray capability and 12 lead EKG. The ship also had a simple cardiac test kit which was not used on Mr. [redacted]

After a few days of treatment, Mr. [redacted] reported to the ship's physician that he felt much better and wanted to go back to work. After being examined by Dr. [redacted] he was declared fit for duty and he went back to work. Mr. [redacted] never complained about feeling ill again to anyone aboard ship and never went back to the infirmary. Mr. [redacted] remained aboard the ship for an additional sixteen days and then signed off the ship on October 9, 2011 when his contract was completed.

Ten days later while on vacation and spending time with his family in turkey, Mr. [redacted] became acutely ill, and suffered what he described as the same type of pains he had experienced and reported to the ship's physicians on the [redacted] After receiving medical evaluations and treatment in Turkey he was diagnosed with having serious blocked arteries in his heart and he subsequently underwent cardiac bypass surgery in turkey.

Mr. [redacted] alleges that the physicians on the ship should have sent him shore side immediately for evaluations and possible treatment for his heart condition. Mr. [redacted] contends that had [redacted]'s physicians not misdiagnosed him, and had [redacted] acted in a more prompt matter, that he would not have sustained the same type of heart damage that he did.

SUMMARY OF TESTIMONY

Four witnesses testified at the arbitration and four video depositions of witnesses were introduced and admitted by the Respondent. Exhibits, including medical records, were also received into evidence.

[redacted]

Mr. [redacted] was the first witness to testify at the Arbitration trial. Mr. [redacted] is thirty-five years old and is a citizen of Turkey. He comes from a family of 12 brothers and sisters, is married and does not have any of his own children. He started working as an

assistant waiter, in Turkey, at seventeen years of age and continues to work, in his chosen profession, at this time.

Mr. [redacted] testified that in 2007, he heard from friends and on the news that [redacted] was hiring. He explained that he began to seek employment with [redacted] by applying through an office in Ankara, Turkey, where he was working as a waiter. By November, of 2008, Mr. [redacted] was close to procuring employment with the cruise line. As a condition of his employment, he had to submit to a pre-employment physical, which included a chest x-ray. Mr. [redacted] testified that he disclosed, at his pre-employment physical, that he smokes cigarettes. Mr. [redacted] began smoking at age 17. He is currently 35 years old and is addicted to cigarettes.

Employees of [redacted] are required to have physicals every two years; therefore, Mr. [redacted] had another physical in 2010, where he disclosed again that he smoked cigarettes.

Mr. [redacted] testified that it was his dream job to work on a big cruise ship and to travel the world. He stated that he was earning good money working for [redacted] and could send money home to his family in Turkey. Mr. [redacted] said that he worked 7 days a week, up to 14 hours a day and that the contract lasted about 7 months.

Testimony by Mr. [redacted] indicates that he liked working as a waiter and that he wanted to continue working for the next 15 years as a waiter for his employer [redacted] By all accounts Mr. [redacted] was a good employee earning high marks from his employer and from unsolicited passenger reviews and passenger letters. The Arbitrator notes that the Claimant received ratings of 3 and 4's and that the Claimant's employer Stated that "he follows up with gold standards all the time by delivering the wow and great and smile not only with guests,

but also with co-workers". And also stated that, '[redacted] is a hard working waiter, knows what is required of the crew member at all times".

At trial, Mr. [redacted] explained that on the evening of September 21 2011, he felt shortness of breath. He was working the dinner service so he asked for and attained permission from his supervisor to go to the infirmary. He claimed that he told the nurse he had shortness of breath and pain in the chest. Mr. [redacted] explained that he was taken into another room and given oxygen. He stated that he told the first doctor that he had shortness of breath for three days, did not have a fever, but was sweaty at night. He stated that the doctor listened to his chest and back but did not take his blood pressure. Mr. [redacted] claimed that he told the doctor he had pain in his neck that moved through his left shoulder and down his left arm. He explained that he wrote down that he had a cold, on his first medical report, because of the language barrier. He stated that he could not see what notes the doctor was making and that he was not aware that the doctor had ordered an x-ray.

Mr. [redacted] testified that the doctor told him he had a chest infection and told him to go back to his cabin and rest. He stated that the doctor classified him as not fit for duty and gave him two medications and a spray to use for his chest. He was required to return to the clinic for follow up, two times a day, in order to receive medication and to use the nebulizer. Mr. [redacted] testified that he saw Dr. [redacted] when he first returned, and then Dr. [redacted]

Mr. [redacted] claimed that he was worried about both his rating and his tips, so he asked the doctors to sign him off as fit for duty, so that he could return to work. He continued working until he signed off the ship on October 9, 2011.

Mr. [redacted] explained that he was enjoying time with his family, ten days later on October 19, 2011 when he felt the same pain he felt on the ship. He described it as stomach pain and he thought it could have been caused by food or acid in the stomach. Mr. [redacted] explained that his sister told him it could be from the heart, and insisted that he get checked out. Mr. [redacted] described his experience with various clinics and hospitals in Turkey, where he received several tests including blood tests and an angioplasty. He was diagnosed with blocked arteries and had an emergency quadruple bypass heart surgery. Mr. [redacted] was released from the hospital a week after the surgery.

Mr. [redacted] testified that he began to correspond with [redacted] via email, about his surgery and medical condition. He said that he notified [redacted] that he had a heart attack and provided documentation and medical records. Mr. [redacted] testified that he paid for the surgery out of pocket and that [redacted] partially reimbursed him for the cost, seventeen months later.

On February 2, 2012, the BSK hospital in Turkey recommended that Mr. [redacted] have continued medical treatment. However, Mr. [redacted] testified that he wanted to return to work and make money. He explained that, on February 3, 2012, he requested his treating physician to issue a medical certificate that stated he was at maximum medical improvement and fit for duty with no medical restrictions.

Immediately thereafter Mr. [redacted] contacted [redacted] and sought reemployment with [redacted] In March Mr. [redacted] was informed that he would not be rehired by [redacted] Mr. [redacted] testified that, a few months later, he received a letter from [redacted] of [redacted] informing him that he was not eligible for rehire due to his extensive medical history and diagnosis. Mr. [redacted] made a demand for maintenance and cure at that time.

Although Mr. [redacted] did make a demand for maintenance and cure, Mr. [redacted] would not, according to [redacted] supply [redacted] with medical records, invoices or supporting documentation in order for [redacted] to evaluate his claims. Additionally [redacted] claims it has never seen any records that indicate Mr. [redacted] ever received any type of curative treatment following the maximum medical improvement declaration issued on February 3, 2012.

Mr. [redacted] testified that he contacted the Norwegian Seamen's Union in order to have an attorney help him procure payment for his maintenance and cure. He was put into contact with Mr. [redacted] who then arranged for him to see Dr. [redacted] in the United States. Eventually a demand for arbitration was filed and this arbitration ensued.

Mr. [redacted] stated that since the surgery, he has worked seasonally, as a waiter, in the towns of Marmaris and Bodrum, Turkey.

DR. [redacted]

Dr. [redacted] attended medical school at Emory, studied internal medicine at the University of Miami, and then went into cardiology. He has been in practice for over twenty-five years, has taught at the University of Miami and leads a medical mission in the Dominican Republic. Dr. [redacted] examined Mr. [redacted] medical records as well as affidavits and transcripts in preparation for his testimony. He also wrote reports, based on his review and in person examination of Mr. [redacted]

At trial, Dr. [redacted] referred to his July 25, 2012 report, regarding Mr. [redacted] medical records. The first thing he noted was that Mr. [redacted] September 21st medical report showed an oxygen saturation level of 94%. Dr. [redacted] stated that was low for a thirty-one year old and should have been an indication of something other than the ship's

doctor's diagnosis of bronchitis. He testified that the second thing he noticed Mr. [redacted] complaint of sweating at night, without a fever. Dr. [redacted] stated that is a representation of diaphoresis. He stated that this is not necessarily an indication of heart disease, but should have signaled to the ship's doctor that there was more to consider in the diagnosis. The third thing that he noted was Mr. [redacted] complaint of "continued neck pain", which was only written on his second medical report, not on his first.

Dr. [redacted] opined that several factors led him to believe that Mr. [redacted] treatment, in the ship's medical clinic, fell below the standard of care. These factors included Dr. [redacted] failure to take Mr. [redacted] blood pressure; check into his reported neck pain, handwritten interpretation of Mr. [redacted] complaints, including the medical term mucopurulent sputum; and the unperformed, yet prescribed x-ray. Dr. [redacted] testified that because there was an incomplete database, poorly documented records and an unexecuted medical plan, the medical care that Mr. [redacted] received on [redacted] fell below the standard of care. It was noted that the [redacted] medical clinic had the ability to perform chest x-rays, EKG's, cardiac enzymes, lipid panel and full arterial blood gas.

On cross-exam, Dr. [redacted] agreed that Mr. [redacted] is not following his medical advice by continuing to smoke. He also agreed that smoking is bad for a person with coronary heart disease. He admitted that Mr. [redacted] would have needed revascularization surgery whether or not he had worked for [redacted] because of his ongoing coronary artery disease, and that nothing [redacted] did or did not do necessitated the need for Mr. [redacted] heart surgery.

DR. [redacted]

Dr. [redacted] testified at trial on behalf of the Respondent. Dr. [redacted] went to medical school at the University of Maryland, did a one-year internship in internal medicine and then went into the public health service for two years. He was stationed, part of the time, at the National Children's Cardiac Hospital in Miami and then in eastern Kentucky. He subsequently continued training in internal medicine, at Tulane and cardiology at Emory. He did research at Columbia University and then was hired as chief of cardiology at the V.A. Hospital in Miami. Dr. [redacted] then became chief of cardiology for the University of Miami Hospital from 1973 until 2004. He is now involved with cardiovascular genetics and heart disease in young adults.

Dr. [redacted] reviewed Mr. [redacted] medical records and other medical literature, in order to formulate his opinion. Based on this review, Dr. [redacted] opined "the nature and quality of the care that was provided to Mr. [redacted] in the context of his presentation and the nature of the facility were perfectly appropriate."

Dr. [redacted] explained some factors that influenced his opinion. He noted that Mr. [redacted] had visited the ship's medical facility on many occasions, complaining of minor infections, cough and cold, gastrointestinal complaints and urinary tract infections. Dr. [redacted] stated that it is important to get a picture of what the individual is like and, although infections are not uncommon on a ship, Mr. [redacted] frequent clinical visits indicate an individual who pays attention to his body and his health and is not afraid to ask for help.

Dr. [redacted] stated that the "quality and thoroughness of the medical history taken in the ship's clinic was adequate and appropriate for the level of the individual taking the

history and for the nature of the presentation." He explained that there are different stages in a doctor's professional life. A medical student would be expected to write a thorough, detailed history, an intern an integrated history and practicing physician only pertinent information pertinent to the presentation. Therefore, the clinical record from the ship was satisfactory for the circumstances in the case, where a practicing clinician is making the notes.

Dr. [redacted] analyzed the ship's records from September 21, 2011 and testified that there was no indication that a cardiac work up was needed. He explained that mucopurulent sputum means mucus with qualities of an infection, whereas foamy mucus may be associated with heart failure. He opined that the presentation of mucopurulent sputum, coupled with a productive cough, was consistent with the diagnosis of bronchitis. He also stated that a blood oxygen level of 94 is on the low side, but is consistent with a person who had bronchitis and smoked for fourteen years.

Dr. [redacted] admitted that a respiratory rate of 16 is a little high, but is consistent with bronchitis or respiratory infection. He explained that he does not put a lot of weight on respiratory weight measurements, because it is often estimated. Dr. [redacted] testified that if Mr. [redacted] showed up at an emergency room on land with the exact same presentation, he would have been handled in the same way as on the ship.

Dr. [redacted] stated that a chest x-ray would have no value in diagnosing Mr. [redacted] cardiac condition. He explained the purpose of a chest x-ray would be to see if Mr. [redacted] had something more than bronchitis, namely pneumonia. He explained that a chest x-ray has no value as a diagnostic tool for coronary artery disease, whereas for coronary heart disease, it is useful in showing an enlarged heart or fluid in the lungs. He stated that,

in this case, there is no evidence of congestive heart failure; therefore a chest x-ray would not have been useful in diagnosing Mr. [redacted] coronary artery disease.

Dr. [redacted] further testified that he agrees with Mr. [redacted] treating physician's MMI declaration dated February 3, 2012, and noted the testimony that he has returned to work full time as a waiter in turkey, He believed that it was more likely than not that Mr. [redacted] had coronary artery disease and that the anatomic disease pre dated his employment with [redacted] The coronary artery disease was asymptomatic while Mr. [redacted] was serving on the ship, but it was what caused the symptoms and his need for a quadruple coronary artery bypass surgery in turkey. Dr. [redacted] testified that coronary artery disease is a chronic and progressive disease which generally worsens over time. His position is that [redacted] staff was not negligent, did not cause Mr. [redacted] cardiac problems and did not aggravate them.

In terms of future care, Dr. [redacted] testified that Mr. [redacted] will need future non curative medical care in the form of medicinal therapy.

[redacted]

[redacted] is the senior manager of crew claims and litigation for [redacted] She supervises claim adjusters and provides legal advice on a variety of different matters including making determinations for maintenance and cure.

Ms. [redacted] described the nature of the contract employment agreement between [redacted] and someone who holds a position as a waiter, such as Mr. [redacted] She explained that generally these contracts last for seven months and then the employee is off for two months, at which time, they receive no benefits from the cruise line. There is no

guarantee of employment, in between contracts, so the employee can choose to come back or not and the cruise line can choose to re-hire the employee or not.

Ms. [redacted] stated that Mr. [redacted] contract is subject to the collective bargaining agreement because of his position as a waiter and his status as a union member. Ms. [redacted] explained that Mr. [redacted] is not entitled to sick wages because they only apply when a crew member does not complete the contract, due to medical reasons. She testified that Mr. [redacted] did complete his contract and received his full contract wages.

Ms. [redacted] explained the difference between a Letter of Employment and the sign-on employment agreement. She stated that the former is used basically for visa and immigration type purposes and the latter is signed when the employee begins his or her contract and has the terms and conditions of one's employment. She testified that, according to [redacted] books and records, Mr. [redacted] earned $18,233.05, including tips.

Ms. [redacted] testified that Mr. [redacted] was not re-hired because it was determined that the shipboard environment would not be suitable for him. She explained that, even though he was declared fit for duty, an individual undergoing a quadruple bypass surgery requires routine follow-ups. Therefore, it would be best that Mr. [redacted] remain at home and have access to medical care, in the event that an emergency surgery was needed.

Ms. [redacted] described maintenance and cure as a right of reimbursement, not an obligation to pre-pay medical expenses. As such, [redacted] has a right to ask for records and receipts and has the right to investigate the claim. She explained that it is [redacted] position that Mr. [redacted] condition did not manifest while he was on board the ship, therefore they have no legal obligation to him. Nevertheless, they did pay

cure of $7,700 toward his medical expenses and maintenance at the rate of $12 per day for the time that Mr. [redacted] was undergoing medical treatment, until he reached maximum medical improvement on February 2, 2012.

Article 28 of the collective bargaining agreement was read at trial and Ms. [redacted] testified that, because Mr. [redacted] did not have a disabling accident, while on board, he is not entitled to disability payments.

DR. [redacted]

Dr. [redacted] joined RCCL in September 2010 and worked on board ship until December 2012 when his contract was over. Prior to working for [redacted], Dr. [redacted] worked in internal medicine, where he came into contact and treated patients with cardio symptoms on a weekly basis. Dr. [redacted] and Dr. [redacted] worked 24 hour shifts so there would always be one doctor on call or working for that 24 hours. Dr. [redacted] was the senior physician on board the ship

Dr. [redacted] first saw the patient on September 21, 2011. He testified that he had reviewed Dr. [redacted] notes and findings at that time. He testified that 'the diagnosis of acute bronchitis was very suggestive. I mean the patient presented with coughing, and mucopurulent sputum, and wheezing was found when examining the patient, so that definitely fit the diagnosis of acute bronchitis. He testified that he did not see any signs of a cardiac event and that Mr. [redacted] did not complain of chest pains, only coughing and yellow mucopurulent sputum.

Dr. [redacted] testified that had Mr. [redacted] complained of chest pains he would have definitely noted it on the chart, and would have followed up with other tests, including an

ECG. Dr. [redacted] saw him the morning and the afternoon of September 22, 2011. They noted that he was feeling better. His saturation level had steadily risen from 94 to 97 percent. He had improved with the Z-Pac and the nebulizer and requested to go back to work. At no time during his visits with Dr. [redacted] did he ever complain of chest pains. Dr. [redacted] testified that he never saw any reason to suggest that a further work up for a cardiac event was indicated, either objectively or through Mr. [redacted] subjective complaints. Dr. [redacted] never saw Mr. [redacted] again after the afternoon of September 22, 2011.

[redacted]

Mr. [redacted] became a nurse in 1994 and was assigned to work in a hospital emergency room prior to his employment with [redacted]

Mr. [redacted] has worked for [redacted] from 2006 till the present. Mr. [redacted] holds the position of chief nurse. Mr. [redacted] has worked on nine ships since being employed by [redacted] He presently serves on the [redacted]. He has served on nine ships. He worked in the emergency ward in the Philippines and saw multiple people with cardiac problems. He would note any complaints about chest pain and chest tightness. On the ship we would notify the physician of any complaints of chest pain.

Mr. [redacted] took Mr. [redacted] vital signs and had him fill out a form in which Mr. [redacted] wrote down his complaints. Mr. [redacted] didn't remember Mr. [redacted] or what Mr. [redacted] said to him but did note that at no time did Mr. [redacted] write anything concerning chest pains only respiratory problems. He would have given him oxygen, plus other drugs if he had complained of symptoms indicative of a coronary problem. Although the doctors on board the ship had a lot of tests available, only those that are applicable would be ordered.

Mr. [redacted] testified without other complaints such as pain in his arm or crushing pain in his chest, he did not believe that Mr. [redacted] presentation indicated a heart problem.

[redacted]

Ms. [redacted] is a licensed registered nurse. She began working for [redacted] in September 2005. She worked for [redacted] until December 2012, although she covered a number of days in 2013 and 2014. In January 2013 she worked for the Royal Berkshire Hospital in reading UK. She presently works in a trauma center in an emergency department in Southampton in the United Kingdom.

Ms. [redacted] testified that she had experience working with cardiac patients including her work on a sixty bed surgical ward.

Ms. [redacted] was asked about 3 documents during her deposition. The documents were dated from September 21, 2011 through September 23, 2011, and were referred to as a crew member assessment forms. Ms. [redacted] testified that she had no recollection of Mr. [redacted] coming to the medical facility, but that some of the documents were in her hand writing. She testified that there is no mention of chest pains in the form and if there had been, she would have immediately taken him for an ECG. Additionally Mr. [redacted] chief complaint was that he had a cold. She does not believe that there was ever any mention of chest pains.

During cross examination she admitted that there were a number of things, like blood pressure that should have been written down. She again reiterates that she has no

recollection of Mr. [redacted] visit to the medical facilities and didn't want to speculate on whether he had neck pain or what might have caused neck pain.

[redacted]

Dr. [redacted] is a general medical physician and is currently the chief doctor on board the [redacted]. Her responsibilities are to supervise the medical staff aboard the ship. She has previously worked on the [redacted] and the [redacted]

Prior to her employment with [redacted] she held various positions with a provincial hospital in Johannesburg, including work as an emergency medical officer in emergency units in three different hospitals. She would be responsible for anything considered accident or emergency medicine including "from motor vehicle accidents to, you know to minor cuts, fractures, people with strokes, people with heart attacks, any kind of emergency that would walk through the door."

She testified concerning a number of additional training courses she has participated in including advanced medical life support and advanced cardiovascular life support.

Since working for [redacted], the doctor testified that she would see a crew member or guest presenting with coronary syndrome every couple of weeks. She would see complaints of chest pain every couple of days.

Dr. [redacted] was employed aboard the [redacted] from April or May 2007 until the end of 2012. She was the chief doctor from 2010 through 2012.

Dr. [redacted] did not have a specific recollection of treating Mr. [redacted]

She testified that he presented with a "three day history of shortness of breath, with a productive cough, stating that he was producing sputum that looked mucopurulent, or what we would basically call, that would be in layman's term, basically pussy or yellow or green." He confirmed being a smoker, no fever but had sweated the night before.

She heard no crepitation that would indicate pneumonia. She diagnosed him with bronchitis. She ordered a chest x-ray, a nebulizer and a Z-Pak, and found him unfit to work. Although she did not have any independent recollection of Mr. [redacted] she testified that she reviewed his prior medical history because that is what she would do with all her patients. Having reviewed the records, she believes that her diagnosis of bronchitis was correct.

On cross exam, counsel asked whether the doctor had ruled out acute coronary syndrome. She testified that despite the fact that Mr. [redacted] had a heart attack soon after he left the ship, that he had no symptoms aboard the ship. She went on to testify that she based her opinion on the fact that he did not have any chest pain, any chest discomfort. "He didn't tell me that he was having any neck pain, any radiating pain. And he did not have any pulmonary congestion, pulmonary edema, he didn't have crepitations, his lungs were clean, he didn't have frothy sputum. He was not tachycardia, he didn't have high blood pressure, and he had no signs of a cardiac event happening at that time"

Lastly Dr. [redacted] pointed out that had Mr. [redacted] presented with any symptoms indicative of a coronary event that she would have done a full workup for someone presenting with those symptoms.

LEGAL ANALYSIS

Overview of the Jones Act and General Maritime Law

Seafarers injured while in the service of the ship generally have three main claims they may bring: (1) a claim under the Jones Act, 46 U.S.C. 30104, which is a negligence based claim for damages; (2) an unseaworthiness claim, which is a claim for damages a seaman may bring wherein the ship owner bears absolute liability where any of the ship's equipment, appurtenances, or crew is inadequate; *see generally, Fitzgerald v. US Lines Co.,* 374 U.S. 16, 83, S. Ct. 1646, 10 L. Ed. 2d 720 (1963); M. Norris, The Law of Seamen, §§ 30:1 and 30:3 (5th ed.); (3) a claim under General Maritime Law for maintenance and cure, which is not a fault based claim but rather an employment relationship claim entitling an injured seaman to medical expenses (cure) and living expenses (maintenance) as an automatic right until he reaches maximum medical improvement. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 354 (1995); and (4) a claim for failure to provide prompt, proper, and adequate medical treatment. Although seemingly a fourth maritime law claim, this claim actually arises as part of a maintenance and cure claim. *See Joyce v. Atlantic Richfield Co.,* 651 F.2d 676, 684 (10th Cir. 1981).

Because United States courts have consistently recognized seamen as wards of admiralty, the potential causes of action supplement each other and are not mutually exclusive. *See Atlantic Sounding Co. Inc. v. Townsend,* 557 U.S. (2009). In this case, the claims of Jones Act Negligence, unseaworthiness, failure to provide maintenance and cure, and failure to provide prompt, proper and adequate medical treatment are at issue.

A. Jones Act Negligence

Under the Jones Act, an employer has a non-delegable duty to provide an employee with a reasonable and safe place to work and use ordinary care to maintain the vessel in a relatively safe condition. In order to recover under the Jones Act, the employee must establish three things: (1) he was an employee of the ship owner, acting within the scope of his employment during the time of the accident. 46 U.S.C. 688(a); (2) proofs that the ship owner was negligent; and (3), the ship owner's negligence caused his injury.

The elements of a Jones Act claim must be established and the Plaintiff bears the burden of proof. *Kanischer v. Irwin Operating Co.,* 215 F.2d 300, 301 (5th Cir. 1954). The mere fact that a seaman is injured during the course of his work does not automatically mean that the employer is liable under the Jones Act. *Dempsey v. Mac Towing, Inc.,* 876 F. 2d 1538, 1542 (11th Cir. 1989). Claims under the Jones Act sound in negligence, therefore, there must be evidence from which a tier of fact can infer that the unsafe condition existed, that the company knew or should have known of the danger, and that it did nothing about the danger. *Dempsey 876* F. 2d at 1543 (citing *Perry v. Morgan Guaranty Trust Co.*, 528 F.2d 1378, 1379 (5th Cir. 1976)).).

The Jones Act provides a more lenient standard of "legal cause" than does a shore based negligence action. Under the Jones Act, the employer's negligent act need not be the sole proximate cause of an injury - - the employer is liable if its negligence contributes *in the slightest degree* to the injury, and the seaman's burden of proving such cause is "featherweight." *See Nicholas v. Barwick.* The seaman need only demonstrate that the negligence played any part, even the slightest, in producing

injuries for which the plaintiff seeks damages. *Connolly v. Farrell Lines,*_268 F. 2d 653, 655 (1st Cir. 1959).

The duty of care for a Jones Act employer is that of reasonable care under the circumstances. *Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331, 338 (5th Cir. 1997). In addition to the duty of care owed by the ship-owner, "a seaman is also obligated to act with ordinary prudence under the circumstances (including the Plaintiff's own experience, training, and education)" and to act reasonably to protect himself. *Moore v. Iron Will, Inc.,* 2001 U.S. Dist. LEXIS 2605, *11 (S.D.Ala. 2001).

B. Unseaworthiness

Under the doctrine of unseaworthiness, the ship owner, as an employer of "seamen," has a duty to provide its seamen with a safe place to work. Unseaworthiness is a claim that the vessel must be reasonably fit for its intended use and purpose. To prevail, the claimant must (1) establish the existence of a defective condition; and (2) prove that it was the cause of his injury. *Thomas,* 2008 U.S. Dist. LEXIS 13603 at *(citing *Britton v. U.S.S Great Lakes Fleet, Inc.* 302 F.3d 812 (8th Cir. 2002). With regard to proximate cause: "[Claimant] must show that the 'unseaworthiness played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result of a reasonably probable consequence of unseaworthiness.'" *Pettis v. Bosarge Diving, Inc.,* 751 Supp 2d 1222, 1243 (S.D.Ala 2010) (citing *Smith v. Trans-World Drilling Co.,* 772 F.2d 157, 162 (5th Cir. 1985).

The question of seaworthiness is one of "reasonable fitness for the intended use of the vessel and her appliances." *Johnson v. Bryant,* 671 F.2d 1279 (11th Cir. 1982). "A seaman

is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonable slippery." *Johnson,* 671 F. 2d at 1279 (citing *Haughton v. Blackships, Inc.,* 462 F.2d 788 (5th Cir. 1972)). Although a vessel owner has a duty to provide a seaworthy vessel, he is not obligated to furnish an accident free ship. *Pettis,* 751 F. Supp. 2d at 1243 (citing *Johnson*, 671 F.2d at 1279-80).

C. Duty of Maintenance and Cure

1. Generally

When a seaman becomes ill or is injured in the service of a ship owner's vessel, the ship-owner must provide the seaman with maintenance and cure payments. *U.S. v. Martin*, 2001 A.M.C. 2164, 2165 (E.D. Pa. 2001). These payments continue until the seaman reaches maximum medical cure or maximum medical improvement. *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). In general, maintenance and cure covers a seaman's food, lodging, medical treatment, wages, and other items. *Savarese v. Pearl River Nav., Inc.*, CIV. A. 09-129, 2010 WL 1817758 (E.D. La. 2010) (footnotes omitted).

In a claim for maintenance and cure, a seaman must establish, by a preponderance of the evidence that he was injured or became ill while in the service of the ship. *See* 11th Circuit Court of Appeals Pattern Jury Instruction, 6.2 Maintenance and Cure at 363-68. A claimant need not suffer from illness or injury that is causally related to his duties, *Calmar S. S. Corp. v. Taylor,* 303 U.S. 525, 527 (1938), as long as the seaman's incapacitation did not result from his own willful misconduct. *Garay v. Carnival Cruise Line, Inc.,* 904 F. 2d 1527, 1530 (11th Cir. 1990). Conversely, a ship-owner must provide a seaman with maintenance and cure payments if the seaman was injured in the service of its vessel.

These payments continue until the seaman reaches maximum medical cure or maximum medical improvement. *Pelotto*, 604 F. 2d at 400 (5th Cir. 1979).

2. **Ship Owner's Duties and Rights**

"Maintenance and cure" refers to the duty on the part of a seaman's employer pursuant to the contract of employment with its seamen to provide lodging, meals, and necessary medical attention for those seamen who are injured or become ill while in the service of the vessel. *The Osceola*, 189 U.S. 158 (1903); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938); *Cape Shore Fish Co., Inc. v. United States*, 330 F. 2d 961, 964 n.4 (Ct. Cl. 1964).

When a seaman is injured while serving aboard an employer's vessel, the seaman is entitled to "maintenance and cure" under general maritime law. *U.S. v. Martin*, 2001 A.M.C. 2164, 2165 (E.D. Pa. 2001); *see also Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975). "Maintenance is the living allowance for a seaman while he is ashore recovering from injury or illness. Cure is payment of medical expenses incurred in treating the seaman's injury or illness." *Barnes v. Andover Co., L.P.*, 900 F. 2d 630 (3d Cir. 1990). Maintenance is a per diem living allowance intended to provide a seaman with the type of food and lodging that he would receive aboard ship, payable so long as the seaman is outside the hospital and has not reached the point of maximum medical cure. *Calmar*, 303 U.S. at 525; *Pelotto*, 604 F. 2d at 400. Cure involves the payment of therapeutic medical and hospital expenses not otherwise furnished to the seaman to the point of maximum medical cure. *Id.*

A ship owner's maintenance and cure obligation is a broad "contractual"[1] duty that "extends beyond injuries sustained on board ship or during working hours to any injuries incurred in any place while the seaman is subject to the call of duty." *Id.* Furthermore, "[t]he ship-owner is obliged to pay maintenance and cure until the seaman has reached the point of maximum cure, that is until the seaman is cured or his condition is diagnosed as permanent and incurable." *Id.*

Maintenance and cure places a significant duty on an employer. This duty establishes that an employer is vicariously liable for the negligence of an on-shore physician that it hires to treat a crewman. *Olsen v. American Steampship Co.*, 176 F. 3d 891 (6th Cir. 1999); *Central Gulf Steamship Corp. v. Sambula*, 405 F. 2d 291 (5th Cir. 1968). As such, the law allows a ship owner to "monitor the seaman's medical condition to determine when cure has occurred." *Martin*, 2001 A.M.C. at 2166. Furthermore, ". . . the ship-owner is entitled, within reasonable medical bounds, to direct the seaman's care, even if it is inconvenient or painful; the seaman's refusal of appropriate treatment is insufficient to place a burden upon the ship-owner to alter the seaman's course of treatment." *Id.* Furthermore,

> [t]he general rule, reiterated in Sanford, is that a seaman has a duty to mitigate the costs of cure by accepting the employer's tender of free treatment by the Public Health Service unless the seaman establishes that these services are inadequate. If a seaman refuses the treatment of the Public Health Service without just cause he forfeits his right to recover the costs of his maintenance and cure.

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[1] The ancient doctrine of maintenance and cure is only contractual in the sense that it is imposed by law due to the employment relationship between seaman and ship-owner. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932). Additionally, the right to maintenance cannot be abrogated by contract. *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1133 (5th Cir. 1981). But, an employer may lose its ability to direct treatment and instead allow a seaman to choose the treatment:

> The critical distinction between Sanford and the case now before us is that here the employer *never instructed the seaman to make use of the free services* available at the Public Health Service Hospital. Here the employer, after originally authorizing the plaintiff to seek treatment from the doctor of his choice, informed the seaman that if he should require further care he was expected to see a private physician chosen by the employer. Under circumstances such as these where the employer tenders to a seaman not the free care of the Public Health Service, but care from a particular private physician, we have held that the seaman does not breach his obligation to mitigate damages merely by choosing to see a different private doctor.

Id. at 1133-34 (emphasis added).

Equally well-settled is the employer's right and affirmative duty to investigate claims for maintenance and cure. *Vaughan v. Atkinson,* 369 U.S. 527 (1962), *reh'g denied,* 370 U.S. 965(1962); *Morales v. Garijak, Inc.,* 829 F. 2d 1355, 1360-61 (5th Cir. 1987); *Harrell v. Air Logistics, Inc.,* 805 F. 2d 1173, 1175 (5th Cir. 1986); *Holmes v. J. Ray McDermott & Co., Inc.,* 734 F.2d 1110, 1117-18 (5th Cir. 1984); *Harper v. Zapata Off-Shore Co.,* 563 F. Supp. 576, 581 (E.D. La. 1983); *Kratzer v. Capital Marine Supply*, 645 F. 2d 277 (5th Cir. 1981). Moreover,

> [w]hen a seaman reasserts a claim for maintenance and cure after such payments have already been terminated; it becomes the employer's obligation to reinstate such payments. *See Johnson v. Marlin Drilling Co.,* 893 F.2d 77, 79 (5th Cir.1990); *Brown v. OMI Corp.,* Nos. 92 CIV. 5371, 74112, 1994 WL 714445, at *2 (S.D.N.Y. Dec. 21, 1994). If the employer refuses to reinstate maintenance and cure, it bears the burden of establishing that it had a legitimate reason for so refusing. *Sammon, supra,* 442 F.2d at 1029. Consequently, the employer must undertake at least a minimal reinvestigation into the facts of the case, and determine whether the payments should be reinstated. *See Brown, supra,* 1994 WL 714445, at *2. However, in such a situation, "there is no authority for the proposition that

> the employer must seek a medical, as opposed to factual, basis upon which the claim for maintenance and cure can be denied in good faith.

Id. Therefore, a ship owner's duty to investigate a claim for maintenance and cure, even after it has been terminated, continues.

A ship owner's duty to pay maintenance and cure is a heavy burden, but the burden initiates after the ship-owner conducts a reasonable investigation and determines maintenance and cure is due. Despite this seemingly subjective authority to determine the right to maintenance and cure, "[if] after investigating, the ship-owner 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." *Norwegian Cruise Lines, Ltd. v. Zareno*, 712 So. 2d 791, 794 (Fla. 3d DCA 1998). A ship owner's liability for failure to pay maintenance and cure will be discussed below in Section III (B) (viii).

3. **Ship Owner's Duty to Provide Maintenance and Cure Ends Upon Finding of MMI**

An employer's duty to provide maintenance and cure ends at the point of "maximum cure" or "maximum medical improvement". *Pelotto*, 604 F. 2d at 400; *Belcher Towing Co. v. Howard*, 638 F. Supp. 242, 243 (S.D. Fla. 1986). MMI is reached when a seaman's condition is declared permanent, i.e., it will not further improve with additional medical treatment. *Pelotto*, 604 F. 2d at 400; *Farrell v. United States*, 336 U.S. 511, 519 (1949). Ambiguities as to whether maximum cure has been reached or whether the seaman is fit for duty are to be resolved in favor of the seaman. *Kratzer v. Capital Marine Supply*, 490 F. Supp. 222, 230 (M.D. LA. 1980), *aff'd* 645 F. 2d 277.

The United States Supreme Court addressed the specific standard to be applied to MMI determinations in *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975). The Supreme Court recognized that a "ship-owner is liable for maintenance and cure only until the disease is cured or recognized as incurable." *Id.* at 6 n. 5 (quoting *Desmond v. United States*, 217 F.2d 948, 950 (2d Cir. 1954). Furthermore, a ship owner's obligation for maintenance and cure is discharged at "the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been effected." *Id.* (quoting *Vitco v. Joncich*, 130 F. Supp. 945, 949 (S.D. Cal. 1955), *aff'd,* 234 F. 2d 161 (9th Cir. 1956)); *Holmes v. J. Ray McDermott & Co.*, 734 F. 2d 1110, 1117 (5th Cir. 1984), overruled on other grounds by *Guevara v. Maritime Overseas Corp.*, 59 F. 3d 1496 (5th Cir. 1995); *Belcher Towing Co. v. Howard*, 638 F. Supp. 242, 243 (S.D. Fla. 1986). Furthermore,

> [t]he accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition. Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely *relieve pain and suffering but not otherwise improve the seaman's condition,* it is proper to declare that the point of maximum cure has been reached.

Tern Shipholding Corp. v. Rockhill, 2006 A.M.C. 1708 (N.D. Fla. 2006) (emphasis in original) (citation omitted). Therefore, the law allows a ship-owner to cease maintenance and cure payments when (1) the seaman's disease or affliction is cured, (2) the seaman's disease or affliction is found to be incurable, or (3) the seaman's condition cannot be improved with further treatment.

Thus, the question of whether MMI has been reached to terminate a seaman's right to maintenance and cure is a medical, not judicial, determination. *Salis v. L&M Botruc Rental*, Inc., 400 Fed. App'x 900, 904 (5th Cir. 2010); *Breese v. AWI, Inc.*, 823

F.2d 100, 104 (5th Cir. 1987). As such, an employer is entitled to rely on the professional opinion of a physician as to a seaman's status of maximum medical improvement. So, a diagnosis that a seaman has reached MMI "is dispositive for maintenance and cure claims." *Salis*, 400 Fed. App'x at 905. The diagnosis need not contain the "magic words" of "maximum medical cure" or "maximum medical improvement," but must rather simply be a determination that the seaman is afflicted with a permanent disease or condition. *Whitman v. Miles*, 294 F. Supp. 2d 117, 124 (D. Me. 2003), *aff'd*, 387 F.3d 668 (1st Cir. 2004). Once such a diagnosis has been made, an employer's obligation to provide maintenance and cure terminates. *See Holmes*, 734 F.2d at 1117; *Cox v. Dravo Corp.*, 517 F.2d 620, 627 (3d Cir. 1975).

Furthermore, a ship-owner is not required to provide a seaman with maintenance and cure while he is weighing out his medical options. *Salis v. L & M Botruc Rental, Inc.*, 400 Fed. Appx. 900, 905 (5th Cir. 2010). The basis for this concept is that a seaman is not receiving treatment while making a decision. *Woodson v. Rentrop Tugs, Inc.*, 12-CV-01347, 2013 WL 828314 (E.D. La. 2013).

In summary, to establish that a claimant has reached MMI, a physician must make a definitive finding that a seaman's conditions are permanent, either by explicitly making a declaration of MMI or by diagnosing the disease or condition as permanent, or that it is incapable of being improved through treatment. *Whitman*, 294 F. Supp. 2d at 124, *aff'd*, 387 F.3d 68 (1st Cir. 2004) ("The rationale behind requiring a doctor's diagnosis of permanency is that physicians, not ship owners or insurance claim adjusters, are in the best position to determine whether a sailor has reached maximum medical recovery"). Again, the Supreme Court recognizes that an employer's obligation terminates at the "earliest time

when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been affected." *Vella*, 421 U.S. at 6 (n.5). Thus, the employer may rely in good faith on the medical determination of the seaman's treating physician.

4. **Ship Owner's Limited Duty to Provide Future Maintenance and Cure**

Generally, maintenance and cure is not provided for treatment after MMI is reached. *Davis v. State Boat Operators, Inc.*, CIV.A. 85-2685, 1987 WL 17334 (E.D. La. 1987). Nor, are lump sum awards for future maintenance and awards favored. *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525, 530-31 (1938). But, future maintenance and cure can be provided if (1) the type of maintenance and cure is "definitely ascertainable," and (2) the period of time is "definitely ascertainable." *Id.* This determination is provided by medical witnesses. *Chesser v. Gen. Dredging Co.*, 150 F. Supp. 592, 596 (S.D. Fla. 1957). In *Bonneau v. Guidance Fishing Corp.*, three doctors testified that the claimant would "require ankle surgery in the future." 919 F. Supp. 46, 48 (D. Mass. 1996). Despite this testimony, the court found that the doctors demonstrated only a possibility of future surgery, and the possibility of future surgery does not meet the standard of "definitely ascertainable." *Id.*

A determination of future maintenance and cure always requires a determination of MMI. As stated above, MMI is reached when a person's condition will not improve. Within the context of this MMI definition, courts have provided future maintenance and cure where continuing care will sustain a seaman's condition. *See Costa Crociere, S.p.A. v. Rose*, 939 F. Supp. 1538 (S.D. Fla. 1996); *In re Petition of RJF Intern. Corp.*, 261 F. Supp. 2d 101, 103 (D.R.I. 2003) *aff'd sub nom. In re RJF Intern. Corp. for Exoneration*

from or Limitation of Liab., 354 F.3d 104 (1st Cir. 2004). In *Costa*, the seaman had an incurable kidney disease and required dialysis or a kidney transplant. 939 F. Supp. 1538. The court found the seaman was entitled to maintenance and cure for continued dialysis or a kidney transplant because his condition with the treatment is improved as opposed to his worsened condition without the treatment. *Id.* In *re RJF Intern,* the seaman had suffered a permanent head injury, yet the court awarded maintenance and cure because there was a likely future improvement of his condition. 354 F. 3d 104 (1st Cir. 2004).

Taken all together, courts will not provide future maintenance and cure if the course of treatment cannot be immediately and finitely determined. However, if a seaman's ongoing treatment may result in likely future gains or the treatment sustains the seaman's current condition, then ongoing maintenance and cure can be provided. And, ultimately, courts heavily disfavor the award of a lump sum payment of future maintenance and cure, instead preferring to continue payments or, as will be shown in the following section, reopening a claim. *Nelson v. Stellar Seafoods, Inc.*, 2007 A.M.C. 433, 440 (W.D. Wash. 2006) (quoting *Calmar*, 303 U.S. 525).

5. **Seaman's Perpetual Right to Future Maintenance and Cure Claims**

As stated above, an employer's duty to provide maintenance and cure ends at the point of "maximum cure" or "maximum medical improvement". *Pelotto*, 604 F.2d at 400. And the determination of MMI or maximum cure is based upon a medical opinion. *Salis*, 400 Fed. App'x at 904. Oftentimes, a seaman's maintenance and cure ceases because he has reached MMI, but the underlying disease or injury has not been cured. This is a testament to present-day limits of medical science. Medical science will advance. What is incurable today may be cured tomorrow. Maritime law recognizes the ebb and flow of

medical science: "Of course, if new treatments become available that will control or eradicate the illness, Rockhill [seaman] will be able to claim maintenance and cure again." *Tern Shipholding Corp. v. Rockhill*, 2006 A.M.C. 1708 (N.D. Fla. 2006). The law is clear, if the advancement of medical science provides a previously incurable seaman with a cure, he is entitled to the reinstatement of maintenance and cure, and the same applies to new technology or techniques that may improve a seaman's condition. *Smith v. Delaware Bay Launch Serv., Inc.*, 972 F. Supp. 836, 848 (D. Del. 1997).

Furthermore, a seaman can petition to have his maintenance and cure reinstated should his condition deteriorate from a previously MMI's injury or illness:

> In this sense, therefore, the ship owner's obligation *may* continue for the life of the seaman. We also point out that Rose's counsel stated at oral argument that the Plaintiffs' obligation would cease once Rose [seaman] received a transplant and thereafter reached a point of stabilization. In light of this representation, the Plaintiffs' [ship-owner] fear that they will be required to reimburse the Defendant [seaman] for an "endless round of surgery, dialysis and more surgery" if the transplant fails is less persuasive. At all events, the Court may, upon appropriate application from the parties, consider again the scope and duration of Plaintiffs' obligation in light of future developments affecting Rose's condition.

Costa Crociere, S.p.A. v. Rose, 939 F. Supp. 1538, 1557 (S.D. Fla. 1996) (emphasis in original); *see also Chesser v. Gen. Dredging Co.*, 150 F. Supp. 592, 596 (S.D. Fla. 1957). So, courts foresee that a seaman may be at MMI after a procedure, but the procedure may fail or deteriorate, and at that point, a new determination for maintenance and cure is appropriate. A ship owner's duty may be perpetual for the life of the seaman. *Costa*, 939 F. Supp. at 1557.

6. **Seaman's Obligations – Duty to Mitigate**

Despite the heavy and wide burden placed on a ship-owner to provide maintenance and cure when one of its seamen becomes injured or ill in the service of the vessel, the law also places several burdens upon the seaman if he hopes to collect his maintenance and cure.

First, as stated in the previous section, the seaman must prove entitlement to maintenance and cure. *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 404 (5th Cir. 1979). Second, the seaman must "act with reasonable diligence and seek medical aid to find out what is really the matter with him after an injury . . . ." *Diddlebock v. Alcoa S. S. Co.*, 234 F. Supp. 811, 814 (E.D. Pa. 1964). Third, even if a seaman seeks medical aid, he "has a duty to keep the cost of his maintenance and cure at a minimum. *Id.* Fourth, ". . . a seaman must follow the expert recommendation of a physician or precluded from recovering damages which might be avoided thereby." *Id; Gaynor v. United States*, 90 F. Supp. 751 (E.D. Pa. 1950) ("Of course, an injured seaman may not willfully prolong for an indefinite time the ship owner's liability for his maintenance and cure. He is bound to seek treatment needed to improve his condition, to avoid aggravation of his injury and to undergo nonhazardous surgery if that offers a good prospect of a cure.").

A seaman may forfeit his claim to maintenance and cure if he fails to meet these burdens. *Prendis v. Cent. Gulf S. S. Co.*, 330 F.2d 893, 896 (4th Cir. 1963) (Libellant failed to carry burden of alleging and proving facts to claim maintenance and cure); *Dowdle v. Offshore Exp., Inc.*, 809 F.2d 259, 264 (5th Cir. 1987) ("The rationale underlying our decisions that a seaman may forfeit his right to maintenance and cure is that the seaman has a duty to mitigate his damages."); *Lipari v. Mar. Overseas Corp.*, 493 F.2d 207, 214 (3d Cir. 1974) ("We are satisfied that the evidence clearly demonstrates the

plaintiff's failure to seek treatment, and that therefore, on this record a suspension of maintenance and cure for the period in question should be ordered."). However, "only a willful misbehavior or a deliberate act of indiscretion will be sufficient to deprive a seaman of his maintenance and cure." *Diddlebock*, 234 F. Supp. at 814. Ultimately, as to the obligations of both ship-owners and shipmen, the law of maintenance and cure, humanitarian though its purposes are, should be construed justly as well as generously." *Mackey v. Nat'l Steel Corp.*, 292 F. Supp. 222, 232 (N.D. Ohio 1967).

7. **Remedies Available Under Maintenance and Cure**

A ship owner's obligation and coverage required under maintenance and cure is well-settled: "The maritime employer's duty of maintenance and cure, which dates at least to the medieval sea codes, obligates him to pay for the lost wages, medical care, food, lodging, and other incidental expenses of a seaman who falls ill or is injured while in the service of the vessel. The duty is practically absolute." *Savarese v. Pearl River Nav., Inc.*, CIV. A. 09-129, 2010 WL 1817758 (E.D. La. 2010) (footnotes omitted); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir. 1995) ("The cause of action for maintenance and cure includes three specific items of recovery: (1) maintenance, which is a living allowance; (2) cure, which covers nursing and medical expenses [;] and (3) wages."). As to unearned wages, "they are measured from the time of the seaman's incapacity until the end of his employment contract." *Id.* However, this remedy assumes a ship-owner did not fail to pay maintenance and cure; such a failure could result in additional claimable remedies by a seaman.

8. **Remedies for Failure to Pay Maintenance and Cure**

A Claimant who establishes, by a preponderance of the evidence, that his or her employer failed to provide maintenance and cure may be rewarded the cost of the food, lodging, and medical services which the crewmember actually incurred as a result of the failure to provide maintenance and cure. *See e.g. McWilliams v. Texaco, Inc.,* 781 F. 2d 514 (5th Cir. 1986); *Smith v. U.S.*, 943 F. Supp. 159 (D. R.I. 1996).

The ship owner's failure to pay maintenance and cure gives rise to a claim for money damages for any prolongation or aggravation of physical injury suffered by the seaman. *Hines v. J.A. Laforte, Inc.*, 820 F. 2d 1187 (11th Cir. 1997). Thus, the ship-owner is liable not only for the increased medical expenses and maintenance that may become necessary, but also for the full tort damages that result. *Gaspard v. Taylor Diving & Salvage Co., Inc.,* 649 F. 2d 372 (5th Cir. 1981) (*citing Cortes v. Baltimore Insular Line,* 287 U.S. 367, 374-75 (1932)). These tort damages include lost wages, pain and suffering, and attorney's fees. *O'Connell v. Interocean Mgmt. Corp.*, 90 F.3d 82, 84 (3d Cir. 1996).

Furthermore, under general maritime law, attorney's fees are appropriate where the ship-owner willfully and arbitrarily refuses to pay maintenance and cure. *Vaughn v. Atkinson*, 369 U.S. 527, 530-531 (1962). Bad faith or callous and recalcitrant refusal to pay maintenance and cure can be found where the employer conducts an "impermissibly long" investigation of a claim to determine whether the claim should be paid. *Breese v. AWI, Inc.,* 823 F. 2d 100 (5th Cir. 1987). Therefore, a ship owner's actions may reach two threshold standards that entitle a seaman to additional damages and fees: if the refusal to provide maintenance and cure is unreasonable, the claimant is entitled to additional tort damages, but if the refusal to provide maintenance and cure is arbitrary and willful, the

claimant is entitled to attorney's fees as well. *Norwegian Cruise Lines, Ltd., v. Zareno*, 712 So. 2d 791 (Fla. 3d DCA 1998).

D. <u>Duty and Remedies to Provide Prompt, Proper, and Adequate Medical Treatment</u>

A claim for failure to treat arises from the traditional duty of a ship owner to care for his crew. *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2nd Cir.1971) (noting that the maritime law has long imposed upon shipowners the duty to provide proper medical treatment for seamen suffering injury in the service of the ship). This duty arises as part of the duty to provide an injured seaman with maintenance and cure. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 684 (10th Cir. 1981). Whether the seaman is entitled to cure is dispositive when determining whether a seaman has a Jones Act cause of action for failure to treat. *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1533 (11th Cir. 1990) (the duty of treatment only arises when the ship owner is under a duty to provide maintenance and cure).

It is the injured seaman's burden, to prove that the employer breached this duty and that the breach contributed to a worsening of the seaman's condition or aggravation. *See, e.g., Smith v. Trans-World Drilling Co.*, 772 F. 2d 157, 162 (5th Cir. 1985) (plaintiff seaman must demonstrate that the employer's negligence played any part, no matter how small, in bringing about the injury); *Gaymon v. Quinn Menhaden Fisheries, Inc.*, 108 So. 2d 641 (Fla. 1st DCA 1959) (plaintiff seaman bears burden of proof on Jones Act claim). Further, in order to recover damages for a failure to provide prompt, proper, and adequate maintenance and cure, the seaman must prove that the ship owner's refusal was without a reasonable defense, or otherwise unreasonable. *Deisler v. McCormack Aggregates, Co.*,

54 F. 3d 1074 (3d Cir. 1995) (citing *Morales v. Garijak*, 829 F. 2d 1355, 1358 (5th Cir. 1987)).

APPLICATION OF LEGAL STANDARDS TO THIS CASE

ISSUES

1. Was [redacted] Negligent under the Jones Act?
2. Did [redacted] fail to provide Mr. [redacted] with a seaworthy vessel during the time of his illness under the doctrine of unseaworthiness?
3. Did [redacted] fail to provide Mr. [redacted] maintenance and cure during the time he was ill?
4. Did [redacted] fail to provide prompt, proper and adequate medical care and treatment to Mr. [redacted] for his illness?

ANSWERS

1. Mr. [redacted] has not proven that [redacted] was negligent under the Jones Act.
2. Mr. [redacted] has not proven that [redacted] failed to provide Mr. [redacted] a safe place to work under the doctrine of Unseaworthiness.
3. Mr. [redacted] has not proven that [redacted] failed to provide maintenance and cure during the time he was ill.
4. Mr. [redacted] has not proven that [redacted] failed to provide prompt, proper and adequate medical care and treatment for his illness.

FINDINGS and CONCLUSIONS

In reviewing the testimony of the witnesses, the arbitrator followed the standards promulgated in Florida Standard Jury Instruction (civ) 601.2 concerning the believability of witnesses and the weight to be given their testimony.[2]

Mr. [redacted] has failed to prove that [redacted] was liable under any of the four maritime claims which were brought under the Jones act and general maritime law in this case.

The Jones Act is found at 46 U.S.C. 30104 (recently renumbered from 46 U.S.C. 688) and provides a seaman with a cause of action against his employer when his employer, supervisor, or his co-employee fails to exercise reasonable care and the failure causes a subsequent injury. *Toucet v. Maritime Overseas Corp.*, 991 F. 2d 5 (1st Cir. 1993). The Jones Act provides a more lenient standard of "legal cause" than does a shore based negligence action. In order to recover, the Claimant must establish three things. One, that

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[2] In evaluating the believability of the witnesses and the weight to be given the testimony of the witnesses, the undersigned considered the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of my own experience and common sense. Additionally, regarding the testimony of the expert witnesses, the undersigned either accepted such opinion testimony, rejected it, or gave it the weight it deserved, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case. *See* Fla. Std. Jury Instr. (Civ.) 601.2.

Mr. [redacted] was an employee of [redacted] and acting as such within the scope of his employment during the time of the accident. (Incident) See 46 USC ¶ 688(a). See *Nasser v. CSX Lines, LLC*, and 2002 Westlaw 440565 (E. D. N.Y. 2002). The next required element of proof is the negligence of the ship owner. Finally, Claimant must establish that the [redacted] negligence caused his injuries.

The elements of a Jones Act claim must be established and the Plaintiff bears the burden of proof. *Kanischer v. Irwin Operating Co.,* 215 F.2d 300, 301 (5th Cir. 1954). The mere fact that a seaman is injured or becomes ill during the course of his work does not automatically mean that the employer is liable under the Jones Act. *Dempsey v. Mac Towing, Inc.,* 876 F. 2d 1538, 1542 (11th Cir. 1989).

The Jones Act provides a more lenient standard of "legal cause" than does a shore based negligence action. Under the Jones Act, the employer's negligent act need not be the sole proximate cause of an injury - - the employer is liable if its negligence contributes *in the slightest degree* to the injury, and the seaman's burden of proving such cause is "featherweight." *See Nicholas v. Barwick.* The seaman need only demonstrate that the negligence played any part, even the slightest, in producing injuries for which the plaintiff seeks damages. *Connolly v. Farrell Lines,* 268 F. 2d 653, 655 (1st Cir. 1959).

The Plaintiff has a "featherweight" burden of proof in establishing a claim for Jones Act negligence. See *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership,* 111 Fed. 3d 658 (9th Cir. 1997); *Bavaro v. Grand Victoria Casino,* 2001 Westlaw 289782 (N.Dist. IL, Mar. 15, 2001). Several circuits have held that the "quantum of evidence necessary to support a finding of Jones Act negligence is less than required for common law negligence, . . . and even the slightest negligence is sufficient to sustain a finding of liability. *Ribitzki*

v. Canmar Reading & Bates, Ltd. Partnership, 111 Fed.3d 658, 662 (9th Cir. 1997), quoting *Havens v. F\HOLLAR, 996 Fed.2d 216, 218 (9th Cir. 1993);* see also *Harbin v. Burlington Northern Railroad Co.,* 921 Fed.2d 129, 131 (7th Cir. 1990); *Lane v. Trip*, 788 So.2d 751 (Fla.3d DCA 2001).

The Claimant contends that [redacted] failed to provide prompt proper and adequate medical care and treatment to Mr. [redacted] and additionally failed to provide him a safe place to work due the alleged poor medical treatment by the physicians and nurses on board the ship. (unseaworthiness). As previously discussed, the evidence indicated that Mr. [redacted] presented to the shipboard medical facility with what appeared to be bronchitis. He was examined by the ship's physician, found to be suffering with bronchitis and found unfit for duty. He was treated for bronchitis with a Z-Pak (antibiotics), an expectorant, and a nebulizer which required him to inhale medication thru a mask for a number of days. During the 3 days in which he reported to the medical clinic, he was seen by a total of (4) four medical personnel.

He responded appropriately to the treatment and asked to go back to work. Mr. [redacted] served out the remainder of his contract and never complained about feeling ill nor did he report back to the medical clinic for any further treatment during the sixteen days he remained on the ship. The day before he signed off the ship he signed a written statement indicating that he was in good health and free from any injury or illness. He left the ship and went back home to Turkey. Ten days later he began to experience severe chest pains and where after being examined by a number of physicians eventually underwent a quadruple bypass.

At trial it was the Claimant's position that the medical staff was negligent for failing to diagnose an underlying cardiac condition. The Claimant further alleges that because he was not given prompt proper and adequate medical care and treatment, that he suffered damage to his heart which he would not have suffered had he been properly diagnosed and treated shore side before his contract was completed. Dr. [redacted] testified on behalf of the Claimant. He opined that several factors led him to believe that Mr. [redacted] treatment, in the ship's medical clinic, fell below the standard of care. These factors included Dr. [redacted]'s failure to take Mr. [redacted] blood pressure, handwritten interpretation of Mr. [redacted] complaints, including the medical term mucopurulent sputum; and the unperformed, yet prescribed x-ray. Dr. [redacted] testified that because there was an incomplete database, poorly documented records and an unexecuted medical plan (an x-ray that was ordered but no record of it being read) the medical care that Mr. [redacted] received on [redacted] fell below the standard of care.

Dr. [redacted] testified on behalf of the Respondent. He reviewed Mr. [redacted] medical records and other medical literature, in order to formulate his opinion. Based on this review, Dr. [redacted] opined "the nature and quality of the care that was provided to Mr. [redacted] in the context of his presentation and the nature of the facility were perfectly appropriate." Additionally Dr. [redacted] analyzed the ship's records from September 21st and testified that there was no indication that a cardiac work up was needed. He explained that mucopurulent sputum means mucus with qualities of an infection, whereas foamy mucus may be associated with heart failure. He opined that the presentation of mucopurulent sputum, coupled with a productive cough, was consistent with the diagnosis of bronchitis.

A complete review of all the testimony and documents in the case simply does not support the Claimant's position the [redacted] and its medical staff was negligent and the cause of Mr. [redacted]s unfortunate acute cardiac incident ten days later in his home country of Turkey. There is simply not enough evidence to indicate that the ship was either unseaworthy or the [redacted] did not provide prompt, proper and adequate medical care and treatment. There is insufficient evidence to prove that the medical treatment provided for Mr. [redacted] illness was negligent and the cause of his illness after he left the ship at the end of his contract.

The Claimant also makes a claim under Maintenance and cure. [redacted] position is that Mr. [redacted] was never entitled to maintenance and cure because he left the ship in good health after his contract was completed.

After his surgery and after his MMI declaration was issued on February 3, 2012 by his treating physician, Mr. [redacted] made further demands for maintenance and cure. During that time, [redacted] requested and never received any supporting medical records, documents, or invoices indicating Mr. [redacted] receiving any further care or treatment even though he was required to provide [redacted] with the documentation in order for [redacted] to do an appropriate evaluation of Mr. [redacted] claim. A vessel owner may request reasonable documentation from the seaman before it commences payment of maintenance. *McWilliams v Texaco.* Inc.781 f.2d 514 (5th cir. 1986).

According to the Respondent, it voluntarily paid for Mr. [redacted] Surgery and related expenses in the amount of $7,784.54 and paid maintenance until the MMI declaration on February 3, 2012. (a daily stipend of $12.00 dollars from October 9, 2011 the date of Mr. [redacted] sign off until February 3, 2012 the date of the MMI declaration by Mr. [redacted]

treating physician). There is no evidence to indicate that [redacted] breached its obligation under maintenance and cure during that time period.

The remaining issue under maintenance and cure is whether Mr. [redacted] is entitled to any further maintenance and cure into the future. The arbitrator finds against the Claimant on this remaining issue after considering all the evidence and testimony in the case.

Dr. [redacted] testified that he agrees with Mr. [redacted] treating physician's MMI declaration dated February 3, 2012 which notes no restrictions and additionally notes the testimony concerning Mr. [redacted] return to work full time as a waiter in Turkey. He believes that it was more likely than not that Mr. [redacted] had coronary artery disease and that the anatomic disease pre dated his employment with [redacted] The coronary artery disease was asymptomatic while Mr. [redacted] was serving on the ship, but it was what caused the symptoms and his need for a quadruple coronary artery bypass surgery in Turkey. Dr. [redacted] testified that coronary artery disease is a chronic and progressive disease which generally worsens over time. His position is that [redacted] staff was not negligence, did not cause Mr. [redacted] cardiac problems and did not aggravate them. In terms of future care, Dr. [redacted] testified that Mr. [redacted] will need future non curative medical care in the form of medicinal therapy, which would not ordinarily be covered under maintenance and cure.

I find Dr. [redacted] testimony as well as all other evidence and testimony compelling on this issue. Therefore the arbitrator finds against the Claimant on this remaining issue after considering all the evidence and testimony in the case.

The arbitrator has not ruled on the Respondent's affirmative defense of comparative fault concerning the claimant's continued smoking addiction since the

arbitrator has already found no liability on the part of [redacted] and its staff on any of the causes of action brought by the Claimant. The arbitrator has also not ruled on the obligation of the Claimant to mitigate his damages by utilizing free medical services if they are available in his country under maintenance and cure because of the finding of no liability on the part of [redacted]

ATTORNEY FEES

Under general maritime law, attorney's fees are appropriate under the Jones Act and where the ship-owner willfully and arbitrarily refuses to pay maintenance and cure. *Vaughn v. Atkinson,* 369 U.S. 527, 530-531 (1962). Bad faith or callous and recalcitrant refusal to pay maintenance and cure can be found where the employer conducts an impermissibly long investigation of a claim to determine whether the claim should be paid. *Breese v. AWI, Inc.,* 823 F. 2d 100 (5th Cir. 1987).

In this case, the Arbitrator has already found that already found no liability on the part of [redacted] and its staff on any of the causes of action brought by the claimant and so an award of attorney's fees would be inappropriate.

COSTS

Pursuant to Articles 21, 31 and 28(2) of the International Dispute Resolution Procedures, the undersigned must construe an award of costs pursuant to the terms of the applicable Employment Contract between the parties. In the instant matter, the employment contract in effect at the time of the injury sustained by Claimant provides,

with regard to the allocation of costs, as follows:

Each party shall bear its own attorneys fees and costs.

FINAL AWARD

For the reasons stated above I, the Undersigned Arbitrator, AWARD as follows:

i. All Claims of the Claimant Mr. [redacted] are denied.

ii. Each party shall bear its own attorney's fees and costs.

iii. The administrative fees and expenses of the AAA totaling $[redacted] are to be born by [redacted] The compensation and expenses of Arbitrator totaling $[redacted] are to be borne by [redacted]

I HEREBY CERTIFY that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Miami-Dade County, Florida, United States of America.

Date: July 15, 2015

[redacted]

State of Florida)
) SS:
County of Miami-Dade)

I, [redacted] do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

7/15/15
Date

[redacted]
Arbitrator

State of Florida)
) SS:
County of Miami-Dade)

On this 15 day of July, 2015, before me personally came and appeared [redacted] to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[redacted]
Notary Public

[redacted]
NOTARY PUBLIC STATE OF FLORIDA
MY [redacted]
EXPIRES: MAY 27, 2017
Bonded through 1st State Insurance