

**THE EMPLOYER'S DILEMMA CAUSED BY
MAINTENANCE
AND
CURE PYMENTS**

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**Presented at the Greater New Orleans Barge Fleeting Association
River and Marine Seminar**

September 10-12, 1997

PRACTICAL ISSUES REGARDING MAINTENANCE AND CURE

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I. INTRODUCTION

This paper addresses practical issues faced by vessel operators regarding maintenance and cure. Key questions that vessel operators must answer are identified and discussed. Supplemental benefits, often paid in conjunction with maintenance (i.e., partial wages, disability benefits, advances, etc.), are then considered. Finally, general suggestions are offered on handling maintenance and cure.

Maintenance and cure issues should not be viewed in isolation. In many instances, maintenance and cure are aspects of seamen's injury claims that involve potential liabilities for Jones Act damages that far exceed the value of maintenance and cure. Accordingly, the employer should consider the "big picture" in dealing with maintenance and cure issues. For example, paying the lowest amount of maintenance permitted by law may save the vessel owner money in the short run, but such a practice may result in more lawsuits and more costly lawsuits in the long run.

Unfortunately, the law of maintenance and cure does not provide specific answers to many issues that vessel operators frequently encounter. One reason is that the law is based on court decisions that have evolved over centuries. As a result, the context in which the law developed often does not reflect the realities of modern shipping. Furthermore, the detailed requirements found in workers' compensation statutes, which address many of the same issues for land-based workers, are often absent in maintenance and cure case law. An example is the lack of a clear formula for calculating the proper amount of maintenance that should be

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Unfortunately, the law of maintenance and cure does not provide specific answers to many issues that vessel operators frequently encounter. One reason is that the law is based on court decisions that have evolved over centuries. As a result, the context in which the law developed often does not reflect the realities of modern shipping. Furthermore, the detailed requirements found in workers' compensation statutes, which address many of the same issues for land-based workers, are often absent in maintenance and cure case law. An example is the lack of a clear formula for calculating the proper amount of maintenance that should be

paid, leaving the vessel owner and his representatives to establish workable policies on maintenance and cure in the face of vague legal requirements.

II. KEY QUESTIONS

A. What Are Maintenance And Cure?

Maintenance and cure are duties of vessel operators to care for seamen they

employ who are injured or fall ill in the service of their vessels. The obligations do not

require fault on the part of the employer in causing injury, and contributory fault of the

seaman is generally immaterial. "Maintenance" is payment for food and lodging

equivalent to that received by the seaman on his vessel. "Cure" is medical treatment

and related expenses. Maintenance and cure exist for the benefit of seamen and the

obligations are liberally construed in favor of seamen.¹

B. Who Is Entitled To Maintenance And Cure And Who Owes It?

Seaman or crew members of vessels are entitled to maintenance and cure, and

the test for covered employees is the same as the test for seaman status under the

Jones Act.² The seaman's employer, typically the owner or operator of his vessel,

1 See *The Osceola*, 189 U.S. 158 (1903); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938); *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Schoenbaum, Admiralty and Maritime Law* (2nd Edition 1994), § 6-28 through 6-35. Recent decision that summarize the law of maintenance and cure are *Stevens v. McGinnis, Inc.*, 82 F.3d 1353 (6th Cir. 1996); *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. 452 (E.D.N.Y. 1995); *Guevera v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995); and *Mitola v. Johns Hopkins University Applied Physics Laboratory*, 839 F. Supp. 351 (D.Md. 1993).

2 *Hall v. Diamond M Co.*, 732 F.2d 1246 (5th Cir. 1984).

is responsible for payment of maintenance and cure.³ Rights to maintenance and cure create a maritime lien of highest priority against the seaman's vessel.⁴

Since the doctrine of maintenance and cure does not apply to workers covered by the Longshore and Harbor Workers' Compensation Act ("LSHWCA") or land-based workers, determining at the outset what scheme particular employees fall under is important. In many instances there will be little doubt that employees are seamen or are not seamen. But for those employees whose seaman status is questionable, the employer must investigate and make an informed determination on seaman status; then proceed accordingly in furnishing maintenance and cure or, alternatively, benefits under the LSHWCA or state workers' compensation. Failure to classify employees properly at the outset may result in not paying the proper benefits during a period of disability, not submitting required LSHWCA/workers' compensation forms and reports (subjecting the employer to fines), and not properly assessing the employer's overall liability in particular cases.

C. When Is Maintenance And Cure Owed?

Maintenance and cure is owed when a seaman is injured or becomes ill in the service of his vessel and leaves the vessel.⁵ An injury or illness arising aboard the vessel, even while the seaman is off duty, are clearly covered, as is an injury occurring on land while performing the vessel's service.⁶

3 *Morales v. Garijak*, 829 F.2d 1355 (5th Cir. 1987).

4 *Fredelos v. Merritt-Chapman & Scott Corp.*, 447 F.2d 435 (5th Cir. 1971).

5 *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 527; *Warren v. United States*, 340 U.S. 523 (1951).

6 *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724; *Farrell v. United States*, 336 U.S. 511 (1949).

7 *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. at 732-733; *Warren v. United States*, 320 U.S. 523 (1951).

8 *Archer v. Trans American Services, Ltd.*, 834 F.2d 1570 (11th Cir. 1988).

9 See *Miller v. Lykes Brothers-Ripley S.S. Co.*, 98 F.2d 185 (5th Cir. 1938); *Labianc v. B.G.T. Corp.*, 992 F.2d 394 (1st Cir. 1993); *Smith v. United States*, 167 F.2d 550 (4th Cir. 1948); *Foret v. Co.-Mar Offshore Corp.*, 508 F.Supp. 980 (E.D.La. 1981).

10 See *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. at 463-466; *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986); *Gauthier v. Crosby Marine Service*, 752 F.2d 1085 (5th Cir. 1985); *Ritchie v. Grimm*, 724 F.Supp. 59 (E.D.N.Y. 1989); *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Circuit 1984).

The law provides no mathematical formula for calculating the amount of maintenance owed in particular cases. Maintenance is intended to provide the sick or injured seaman with the cost of food and lodging, comparable to that provided on his vessel. In cases adjudicated, the seaman is required to produce evidence of the actual costs he incurred for food and lodging, and the burden then shifts to the employer to contest the reasonableness of these expenses.¹⁰

D. How Much Maintenance Is Owed?

Crew members on shore leave in foreign ports are generally considered in the service of the vessel,⁷ as are seamen in transit between vessel and home.⁸ As a general rule, a seaman will be considered in the service of his vessel if he is at location for the convenience his employer at the time of injury, but a seaman engaging in purely personal pursuits and not subject to call, such as an inland towing vessel crew member at home on his days off, is not entitled to maintenance and cure for injuries or illness arising at that time.⁹

In earlier cases, the maintenance rate of \$8 per day was often reflected in seamen's union contracts and approved by the courts.¹¹ In recent years, significantly higher maintenance awards are common, reaching \$30 to \$50 per day.¹² Although the law provides no formula for computing the amount of maintenance owed, many companies pay a standardized daily rate. A standardized maintenance rate should comport with rates courts have approved in recent decisions, and \$25 per day or somewhat more appears justifiable.¹³

A standard maintenance rate avoids the administrative problem of having to calculate a separate rate for each seaman, and enables the company to respond quickly in getting maintenance payments in place when an injury occurs. While flexibility is needed to address unusual situations that arise, variances from the standard rate should only be given in circumstances where legal obligations are not met by the standard rate, or there are other sound reasons for doing so, and the reasons for changing the rate in particular cases should be documented.

11 See *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 91 (5th Cir. 1984), and cases cited therein.

12 *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. at 463-464 (\$40 per day); *Ritchie v. Grimm*, 724 F.Supp. at 61-62 (\$54 per day); *Harper v. Zapata Off-Shore Co.*, 741 F.Supp. at 93 (\$20 per day).

13 Where union contract specifies a maintenance rate, as part of a package of benefits, the courts tend to be more lenient in upholding lower maintenance rates agreed to by seamen's unions. *Gardiner v. Sea-Land Services, Inc.*, 786 F.2d 943 (9th Cir. 1986); *McNaughton v. Exxon Shipping Co.*, 813 F.Supp. 710 (N.D.Cal. 1992).

- 17 *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. at 461; *Desmond v. United States*, 217 F.2d 948, 950 (2nd Cir. 1954).
- 16 *Breese v. AWI, Inc.*, 823 F.2d 100, 104-105 (5th Cir. 1987); *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. at 461-463.
- 15 *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975); *Pelotto v. L & N Towing Co.*, 604 F.2d 369, 400 (5th Cir. 1979).
- 14 *Farrell v. United States*, 336 U.S. at 518-519; *Vaughan v. Atkinson*, 369 U.S. at 531; *McMillan v. TUG JANE A. BOUCHARD*, 885 F.Supp. at 459.

The law requires that vessel owners/employers provide seamen with reasonable medical treatment and related expenses during the period of entitlement to

F. What Are The Employer's Obligations Regarding Payment Of Medical Expenses?

issue may be helpful.

the treating doctor are questioned, an independent medical examination addressing the cooperate in providing opinions regarding the maximum cure issue or the opinions of maximum cure has been reached is highly desirable. If a treating doctor will not terminating maintenance and cure. A written statement by the treating doctor that evidence, that the seaman has reached maximum medical cure, or is cured, before Given these requirements, the vessel owner should document, through medical

reducing pain and suffering.¹⁷

maintenance and cure when treatment is no longer curative, but is directed only at maximum cure is a medical issue.¹⁶ The employer is not obligated to continue no improvement in the seaman's condition.¹⁵ Whether a seaman has reached medical cure is achieved when it appears probable that further treatment will result in is cured or he reaches a point of maximum medical recovery or cure.¹⁴ Maximum

The duty to pay maintenance and cure continues until the seaman's condition

E. When Does The Obligation To Pay Maintenance And Cure End?

maintenance and cure.¹⁸ The treatment or “cure” must be necessary and the charges for it reasonable.¹⁹ Seamen have a right to choose their treating physicians, and whether particular care is necessary is viewed liberally in the seaman’s favor.²⁰ An employer’s wrongful refusal to authorize treatment recommended can subject it to liability for resultant worsening of the seaman’s condition.²¹

G. What Are The Consequences Of Mistakes
In The Provision Of Maintenance And Cure?

The vessel owner is subject to suit for failure to provide appropriate maintenance and cure benefits and, if the seaman wins, the employer may be required to pay the seaman’s attorney’s fees. While some cases have subjected vessel owners to punitive damages for the wrongful denial of benefits that is willful or malicious,²² recent decisions do not allow punitive damages beyond attorneys’ fees.²³

Maintenance and cure claims can be brought separately or joined with claims under the Jones Act or the unseaworthiness doctrine.²⁴ Absent claims regarding maintenance and cure owed, amounts paid in such benefits by the employer are generally not admissible in Jones Act litigation.

18 *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 528; *Guevara v. Maritime Overseas Corp.*, 59 F.3d at 1499.

19 *Naviera Maersk Espana v. Cho-Me Towing*, 782 F.Supp. 317 (E.D.La. 1992); *Calo v. Ocean Ships, Inc.*, 57 F.3d 159 (2nd Cir. 1995).

20 *Alvarez v. Bahama Cruise Lines, Inc.*, 898 F.2d 312 (2nd Cir. 1990).

21 *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 528.

22 *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984).

23 *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496(5th Cir. 1995); *Glenn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995); *O’Connell v. Interocean Management Corp.*, 90 F.3d 82 (3rd Cir. 1996).

24 *Cooper v. Diamond M Co.*, 799 F.2d 176 (5th Cir. 1986).

25 For an example of how a jury can be inflamed by an employer's conduct, see the closing argument quoted in *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, at 89, note 3.

26 *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731 (1943); *Connolly v. Farrell Lines, Inc.*, 268 F.2d 653 (1st Cir. 1959); *Rose v. Bloomfield S.S. Co.*, 162 F.Supp. 576 (E.D.La. 1958).

27 *Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972).

28 Schoenbaum, *supra*, § 6-31.

Willful misconduct of the seaman, resulting in injury, is a defense to maintenance and cure. To establish willful misconduct, a deliberate act of indiscretion is generally required.²⁶

The employer bears the burden of proving willful misconduct, and seaman are traditionally given broad latitude in their behavior.²⁷ Fighting when the seaman claiming benefits was the aggressor, intoxication and venereal disease may be deemed willful misconduct. However, whether willful misconduct occurred is a question of fact and depends on the circumstances of each case.²⁸

1. Willful Misconduct

H. What Defenses To Maintenance And Cure Are Available To The Employer?

Maintenance and cure claims brought in conjunction with Jones Act cases can have a significant effect on the entire case, especially in cases tried to a jury. Evidence that substantial maintenance and cure benefits have been paid may predispose the jury to feel the employee has been well cared-for and to favor the employer. Evidence that the employer has paid minimal benefits, or less than what it owed, can inflame a jury against the employer and cause verdicts to skyrocket.²⁵

2. Intentional Misrepresentation Of Medical Condition

Another defense to maintenance and cure is the intentional misrepresentation or concealment of injuries or medical problems by the seaman when he applies for work. Where the failure to disclose injuries or medical problems is material to the decision to hire the seaman and a connection exists between the information withheld and the injury subsequently sustained, maintenance and cure can be withheld.²⁹ If such a misrepresentation is discovered in the course of a Jones Act suit, the employer may file a counterclaim to recover maintenance and cure payments made, which places the amount of maintenance and cure paid before the jury and focuses attention on questions regarding the plaintiff's honesty.

3. Collateral Sources Of Benefits

The employer need not pay maintenance in certain circumstances where the seaman's room and board are furnished to him without cost.³⁰ For example, if the employer is paying for the seaman's hospitalization, additional maintenance payments are not required, because room and board are provided in connection with the hospitalization. Maintenance is not owed to an injured seaman who is in prison or while a seaman is in a public health hospital.³¹ But recent cases create considerable confusion as to when collateral benefits received by the seaman may be credited against the vessel owner's maintenance and cure obligations, as discussed below.

29 *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347 (8th Cir. 1994); *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547, 548 (5th Cir. 1968); *Tawada v. United States*, 162 F.2d 615 (9th Cir. 1947).

30 *Vaughan v. Atkinson*, 369 U.S. at 533.

31 *Brown v. Aggie & Millie, Inc.*, 45 F.2d 1293 (5th Cir. 1973).

That so many vessel operators pay injured seamen significantly more than the minimal maintenance required by law suggests that such supplemental payments benefit Jones Act employers as well as seamen in the long run. Paying generous benefits during convalescence, which enable injured seamen to meet their financial obligations, probably prevent many injuries from becoming Jones Act lawsuits. In cases that go into litigation, joining a maintenance claim that results in evidence of the employer having paid minimal benefits while the seaman was convalescing may inflame the jury and result in significantly higher damage awards. Many jurors are

amounting to 2/3 of usual wages. payments to seamen during convalescence, resulting in a package of benefits are entitled to 2/3 of their usual wage. Jones Act employers often supplement Act, covered employees who are temporarily disabled as a result of job-related injuries compensation laws and the federal Longshore and Harbor Workers' Compensation supplemental wages, disability benefits, loans or advances. Under many state workers' allowance required by law. Often the additional payments are called partial or Many vessel operators pay injured seamen more than the minimum maintenance

III. SUPPLEMENTAL PAYMENTS

Maintenance and cure may be suspended if a seaman fails to cooperate in his own medical treatment or in providing his employer with information regarding his medical condition.³² Suspending benefits in appropriate circumstances can be an effective tool in obtaining needed cooperation from the seaman.

4. Failure To Cooperate In Medical Care

aware that paying 2/3 of wages to injured employees is the norm under workers' compensation. Accordingly, a package of benefits that is significantly lower than 2/3 of wages may be viewed with hostility. Further, many companies wish to treat injured employees well as a matter of principle and to attract and keep high quality workers.

If an employer wishes to pay benefits beyond the minimum maintenance required by law, what is the best way to do so? One approach would be to pay 2/3 of wages, or a similar amount, and call the full payment maintenance. However, many companies denominate a portion of the payment (say \$25 a day) as maintenance and the balance as partial wages, an advance or a loan. The purported advantage of so designating a portion of the benefits paid is that the employer hopes to recover some of the benefits when the case is settled or tried to a conclusion. If the additional payments are designated as wages, it is hoped that the amount so designated can be offset against an award for wage loss in a Jones Act case. If the supplemental payments are designated as a loan or an advance on settlement, the hope is that when the case is resolved the employer can recover that amount.

Another advantage to the employer of designating part of the payment to an injured employee as maintenance and part as a supplemental benefit is that the employer has the flexibility of stopping the supplemental benefits, which are voluntary, before the duty to pay maintenance has terminated. Some employers pay the supplemental benefit for a specified period (perhaps up to 6 months); others terminate supplemental benefits on a more discretionary basis. Such flexibility may be helpful in balancing the objectives of treating injured workers generously and encouraging them to return to work.

- 33 *Stanislowski v. Upper River Servs.*, 6 F.3d 537 (8th Cir. 1993); *Mitola v. Johns Hopkins University*, 839 F.Supp. 351 (D.Mar. 1993); *Shaw v. Ohio River Co.*, 526 F.2d 193 (3d Cir. 1975).
- 34 *Phillips v. Western Co. of North America*, 953 F.2d 923, 929-934 (5th Cir. 1992); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1992); *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345 (5th Cir. 1982).
- 35 *Hae Woo Young v. Maritime Overseas Corp.*, 605 So.2d 187, 206 (La.App. 5th Cir. 1992); *Sampsel v. B&I Welding Services and Consultants, Inc.*, 638 So.2d 477 (La.App. 4th Cir. 1994); *Yost v. American Overseas Marine Corp.*, 798 F.Supp. 313, 320 (E.D.Va. 1992), and cases cited therein.
- 36 See discussion of this issue in *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984).

In some instances courts have allowed offsets from wage loss awards in Jones Act cases for amounts designated as supplemental wages and paid by the employer.³³ In other cases, courts have denied credit for such payments on the ground that the benefits were funded partially by payroll deductions from the employee or were truly fringe benefits and not wages,³⁴ or that the supplemental benefit was paid in satisfaction of the maintenance obligation and not as wages.³⁵ Other cases hold that amounts employers claimed were loans to injured employees could not be recovered because they were, in fact, voluntary payments intended to induce the plaintiff to settle.³⁶

It is by no means certain that credits for supplemental payments will be given. Whether a credit is given will depend on the facts of a particular case and the jurisdiction in which it is litigated. If such supplemental payments are designated as partial wages, credit will more likely be given if a clear record is made that the payments are wages. Issuing separate checks for maintenance and partial wages, deducting taxes from the wages (but not from maintenance payments), and writing

a letter to the seaman at the outset explaining that separate wage and maintenance payments will be made are measures that will help make such a record.

With regard to supplemental payments designated as disability payments, there is a greater likelihood of recovery if the employee does not contribute to these benefits through payroll deductions, and company literature does not describe them as fringe benefits. If supplemental payments are considered loans against settlement or judgment, the loan arrangements should be set forth in writing and clearly understood by the employee.

The great majority of Jones Act cases settle. Supplemental payments made during convalescence are generally not discussed in settlement negotiations or deducted from settlements. For cases that are tried to conclusion (a small minority), if supplemental payments are properly designated and documented, the likelihood of offset or recovery will be increased but is by no means certain. Whether or not a set off for supplemental payments occurs, providing supplemental payments is probably a wise policy from the perspective of overall claims management and cost containment.

IV. SOME PRACTICAL SUGGESTIONS

A. Have A Plan

Companies that think through maintenance and cure issues and have a policy for handling maintenance and cure that comports with legal requirements and sound personnel and claims practices will avoid many problems. When seamen are injured, maintenance and cure payments should start promptly and related issues that arise must be addressed. Forethought and planning greatly increase the likelihood of correct decisions in this area. A company policy regarding the amount of maintenance

to be paid in most instances (a daily maintenance rate) is recommended, with flexibility to make adjustments where unusual circumstances require.

B. Monitor Cases Closely

The best way to avoid overpayment of maintenance and supplemental benefits

is to carefully monitor each case where an injured seaman is off work to insure that the employee receives appropriate care, is released to return to work as soon as reasonably possible, and is generally cooperating with efforts to get him well and back to work. In instances where a residual disability precludes return to work, the company should seek prompt determinations as to when maximum medical cure has been reached. Obtaining written opinions by the treating physicians regarding maximum medical cure is desirable. In cases where malingering is suspected or there are questions as to the reliability of the opinions of a treating physician selected by the employee or his attorney, efforts should be made to get an independent examination and opinion on maximum medical cure.

Maintenance and cure should never be terminated arbitrarily or as a tactic to force a minimal settlement on an employee. However, recent cases holding that punitive damages are generally not awarded for termination of maintenance and cure reduce the risks of terminating maintenance, provided the employer has a good-faith basis for doing so. The employer can suspend maintenance if the seaman is not cooperating in the necessary medical treatment.

C. Seek Advice When Needed

While many decisions regarding maintenance and cure can be handled by informed company claims representatives, third-party administrators, or insurance carrier claims representatives, situations arise where seeking legal advice on the best way to handle a maintenance and cure issue is wise. Such circumstances include: (1)

where it is not clear whether an employee is a seaman entitled to maintenance and cure or a person entitled to benefits under the Longshore and Harbor Workers' Compensation Act; (2) when considering terminating maintenance and cure, in cases involving serious injuries, when medical evidence on whether maximum cure has been reached is unclear or disputed; (3) before denying claims or seeking to recover benefits previously paid on the grounds of a seaman's willful misconduct, a seaman withholding information regarding his medical condition during the hiring process, or failure to cooperate in medical care; and (4) when confronted with unusual medical conditions, where it is not clear if the condition arose in the service of the vessel. Discussing such cases with counsel before taking action may be helpful and cost-effective in the long run. In some cases a declaratory judgment action by the employer may be useful in seeking a judicial determination of the employer's obligations.

D. Maintain A Broad Perspective

Vessel operators and their representatives who deal with maintenance and cure should not lose sight of the larger objectives of controlling claims costs and promoting sound claims and personnel practices. Employers should pay sufficient benefits to reduce the likelihood of litigation, but monitor cases closely to insure that seamen are meeting their obligations.

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