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# Vessel Owners Have Obligation to Authorize Medical Treatment in Advance . . . Maybe

*by John Merriam*

I called the insurance adjuster, "My client got hurt while working for your insured. I need your authorization for payment so he can see a doctor."

"We won't authorize medical treatment," she responded, "until you show me a medical opinion stating that the condition manifested while your client was in the service of the vessel."

"He doesn't have the money to get a medical opinion unless you authorize a visit to the doctor."

"I'll authorize that visit when you show me that the type of treatment he wants is medically indicated for something that happened on the boat while he was working."

That's how the phone conversation ended. I couldn't send my client to a doctor, to link the need for treatment to the boat, unless the insurance company paid for it. The insurance company wouldn't pay for a visit to the doctor unless I had a doctor's opinion that linked the need for treatment to the boat. Catch-22.

A federal trial court back East was presented with a similar situation when a doctor required pre-approval before performing surgery on a seaman. The insurance company refused, saying, "it had no obligation to pay for (the seaman's) treatment before it was actually performed." *Sullivan v. Tropical Tuna,* 963 F.Supp. 42, 1997 A.M.C. 2017 (D. Mass. 1997). The shipowner's insurance company further claimed that "an insurer lacks the authority to authorize medical treatment." There was a one-month delay in the seaman's surgery as a result of the refusal to authorize it in advance. 1997 A.M.C. at 2017-18.

> In light of the realities of the current health care system, this Court observes that an injured seaman often will be unable to obtain necessary medical treatment unless he can first demonstrate the ability to pay. As a result, the Court holds that a shipowner's duty to pay maintenance and cure encompasses a duty to guarantee payment prior to treament for all reasonable medical expenses.

1997 A.M.C. At 2019. The *Sullivan* court ruled that the one-month delay was unreasonable and awarded attorney fees. The court found that although the delay in surgery did not aggravate the seaman's medical condition, it did cause "unnecessary pain and suffering," and awarded compensatory damages for the unreasonable refusal to authorize the surgery. *Id.* at 2020-23.

Locally, federal judge Marsha Pechman cited the *Sullivan* case in a decision where she ordered the vessel owner to guarantee payment for neurological testing in advance.

> The court has found no Ninth Circuit case that addresses this particular question. This Court finds that the reasoning in *Sullivan* is persuasive and therefore reaches the same conclusion.

*Kezic v. The Alaska Sea,* 2004 A.M.C. 2376, 2378-79 (W.D. Wash. 2004).

The law seems settled on this issue . . . but maybe not anymore.

My analysis here assumes that the seaman needing medical attention has already established that he or she is entitled to some measure of maintenance and cure in the first instance. That is, it is not disputed that the seaman suffered illness or injury while in the service of the vessel, and he or she is not disqualified from receiving maintenance and cure by allegations

of misconduct or fraudulent concealment of prior injuries.

But what about the situation where the vessel owner concedes that the seaman was injured or taken ill in the service of the vessel but claims that no medical treatment is needed, or that the seaman does not need the type of treatment for which advance authorization is sought? In state court, at least, insurance defense counsel could use a recent decision from Division I of the Washington Court of Appeals to argue against advance authorization for medical treatment by creating an issue of disputed fact.

*Dean v. Fishing Company of Alaska,* 166 Wn.App. 893, 2012 A.M.C. 682, petition for review, ___, Wn. 2d ___ (5/7/12) involved the issue of who has the burden of proof in a summary judgment motion for maintenance and cure. The seaman brought what he thought was a motion -- and later appeal -- for the reinstatement of maintenance and cure, after he'd been receiving benefits for three years. His treating physician had recommended additional treatment for one of the seaman's several ailments. The insurance company hired a doctor who declared that all the seaman's medical problems were at maximum cure. In a decision of questionable clarity, Division I treated the issue as one of the seaman's initial entitlement to maintenance and cure, ruling that a traditional summary judgment standard applied -- that the dispute of any material fact meant the moving party loses the motion. 2012 A.M.C. 682. That means that the vessel owner can avoid paying for the recommended treatment until the time of trial, simply by hiring a doctor to opine that the treatment is unnecessary, thus creating a disputed issue of material fact. By the same token, the vessel owner can cut off all maintenance and cure benefits until the time of trial by purchasing a medical opinion that the injury for which treatment is sought did not occur aboard the vessel, or that the seaman had already achieved maximum cure and thus was not entitled to any more benefits until liability was determined at trial.

In King County it takes about 17 months after filing suit to get a trial date in state court, and about 12 months in federal court. That delay in the hands of vessel owners is a powerful tool with which to coerce out-of-work seaman into settling cheap. The only solution offered by Division I in *Dean* was for the seaman to request an expedited trial or hearing pursuant to CR 42(b) on the maintenance and cure entitlement. 2012 A.M.C. 689 at n. 29.

Injured seamen in this area typically receive $20-30/day in maintenance. Expedited trials or evidentiary hearings under CR 42(b) would require paying doctors to testify, so the court could determine which doctor was more credible about the need for treatment. That kind of expense and delay -- paying for and arranging an expedited trial -- would be prohibitive. Maintenance and cure benefits are supposed to give the seaman "a sure remedy devoid of most of the exceptions and delays which ordinarily hamper and defeat illness and injury claims." Force and Norris, *The Law of Seamen* sec. 26-45 (5th ed. 2003). As Justice Brennan observed:

> Moreover, easy and ready administration of the shipowner's duty would seriously suffer from the introduction of complexities and uncertainty that could stir contentions, cause delays and invite litigations.

*Vella v. Ford Motor Co.,* 421 U.S. 1, 1975 A.M.C. 563 (1975).

With all due respect to Division I, the *Dean* decision is at best confusing. At worst, it was wrongly decided. Mr. Dean has filed a petition for review with the state Supreme Court.

Once the seaman has established an entitlement to maintenance and cure, the vessel owners should be required to authorize and promptly pay all treatment recommended by the seaman's treating physician.

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