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Maintenance and Cure Update

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This CLE paper addresses recent developments in the ever-developing and often litigated area of maintenance and cure. Recent decisions issued between January 1, 2018 and March 31, 2019, are discussed herein, including those concerning the nature of maintenance and cure benefits, maximum medical improvement, application of the *McCorpen* defense, and a seaman's entitlement to recovery of punitive damages. The majority of this paper was originally published in Benedict's Maritime Bulletin — 17 BENEDICT'S MAR. BULL. [1] (First Quarter 2019).

The Nature of Maximum Medical Improvement, Future Cure, and Palliative Care

Several courts have recently addressed the nature and concept of maximum medical improvement, whether "future" cure may be ordered, and whether seamen are entitled to maintenance and cure "for life." In the context of a seaman requesting reinstatement of maintenance and cure, the U.S. District Court for the District of Alaska recently applied the U.S. Ninth Circuit's test for maximum cure, in *Conger v. K & D Fisheries, LLC*.[1] The court noted that recovery of maintenance and cure "should not be extended beyond the time when the maximum degree of improvement to a seaman's health is reached."[2] In this case, however, there was an "equivocation in regard to whether Plaintiff has achieved maximum cure." Although the employer-defendant cited United States Court of Appeals for the Fifth Circuit authority for the proposition that ongoing medical treatment is a necessary predicate to continued maintenance, the district court applied the United States Court of Appeals for the Ninth Circuit's differing standard that the maintenance obligation continues "until the seaman is well or his condition is found to be incurable."[3] The court reinstated maintenance and cure based on medical records indicating ongoing home physical therapy, including stretching and strengthening, that was "slowly improving" her left foot condition, with her physician noting that such "would likely maximize her improvement."[4]

On the other hand, in *Transoceanic Cable Ship Co. LLC v. Bautista*, the United States District Court for the District of Hawaii, following a bench trial, determined that ongoing physical therapy was palliative in nature and that the plaintiff had reached maximum medical care.[5] Following complaints of lumbar spine pain on the vessel, the seaman underwent a lumbar laminotomy and discectomy surgery.[6] Thereafter, the seaman was provided pain medication prescriptions by his

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[1] 2018 U.S. Dist. LEXIS 19255, at *1, 2018 AMC 869, 2018 WL 734651, Civ. No. 3:17-cv-00231 (D. Alaska Feb. 6, 2018).

[2] *Id*. at *3.

[3] *Id*. (citing *Permanente Steamship Corp. v. Martinez*, 369 F.2d 297, 298 (9th Cir. 1966); *Nuzum v. Dritsik Fisheries, Inc.*, 1995 U.S. Dist. LEXIS 10823, 1995 WL 455801, at *4 (D. Alaska Mar. 13, 1995)).

[4] *Id*.

[5] 2018 U.S. Dist. LEXIS 151007, at *1, 2018 WL 4225034, Civ. No. 17-00209 (D. Haw. Sept. 5, 2018).

[6] *Id*. at *6.

treating orthopedist for over a year. Unbeknownst to the treating physician, the plaintiff had also attended physical therapy once a week, which consisted of stretching and riding a stationary bicycle. His treating physician described the physical therapy as "maintenance therapy" and an IME physician retained by the defendant testified that the physical therapy served no medical purpose other than to maintain the seaman's "general physical conditioning."[7] The court noted that "a shipowner's cure obligations do not extend to paying for treatments that are merely palliative."[8] To this end, "treatments that serve only to relieve pain and suffering are not included within the scope of 'cure.'"[9] The employer-defendant provided sufficient proof by a preponderance of the evidence that the seaman's condition appeared to be stable and unlikely to change. Thus, the court found that such would result in no betterment of the seaman's knee and back conditions, and maximum cure had been reached.[10]

In *Barto v. Ray McDermmot Int'l Vehicles, Ltd.*, the court issued a judgment requiring the employer-defendant to pay maintenance and cure until the seaman reached maximum medical improvement ("MMI").[11] The employer thereafter sought relief from the court's judgment, arguing that the plaintiff had reached MMI with respect to his lumbar spine, which he conceded, and that maintenance and cure should cease to be paid because the court's judgment had only applied to the lumbar spine injury, and not a separate injury to the seaman's cervical spine.[12] The United States District Court for the Eastern District of Louisiana disagreed, holding that the judgment referred only to MMI, not particular body parts, and that the seaman presented medical evidence of vessel-related cervical spine injury, for which he had been recommended surgery.[13] The court further explained that the employer's "obligation persists only until Plaintiff's injuries resulting from the accident can improve no further; that obligation is the same whether the injury is to the lumbar or cervical regions of Plaintiff's spine. The award is not indefinite."[14] Thus, when the seaman reached MMI, the employer had no further duty to pay him, but until such time, the maintenance and cure obligation continued.[15] "Under this order, once the plaintiff 'has reached maximum possible cure,' the defendant has no further duty to pay him."

While a court may order maintenance and cure to be paid into the future, the benefits are not "for life." In *Myers v. Aleutian Endeavors, LLC*, the United States District Court for the District of Alaska rejected the seaman's motion that he was entitled to a declaration that he was due "cure for life."[16] The seaman alleged that as a result of a slip and fall incident and separately, being struck by a board, he sustained disabling injuries to his lower back, left hip, and knee, and that such

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[7] *Id*. at *6-7.
[8] *Id*. at *13 (citing *Stanovich v. Jurlin*, 227 F.2d 245, 246 (9th Cir. 1955)
[9] *Id*. (citing *Barto v. Shore Constr., L.L.C.*, 801 F.3d 465, 477 (5th Cir. 2015); *Light v. Jack's Diving Locker*, No. CIV 05-00706 BMK, 2007 U.S. Dist. LEXIS 90841, 2007 WL 4321715, at *1 (D. Haw. Dec. 11, 2007) ("A vessel's owner is not liable for care that is only [in]tended to reduce pain, or which is not calculated to help cure the underlying medical condition.").
[10] *Id*. at *18.
[11] *Barto v. Ray McDermott Int'l Vehicles, Ltd.*, 2018 U.S. Dist. LEXIS 208319, at *1, Civ. No. 13-6081 (E.D. La. Dec. 11, 2018).
[12] *Id*. at *1-2.
[13] *Id*. at *2.
[14] *Id*. at *3.
[15] *Id*.
[16] *Myers v. Aleutian Endeavors, LLC*, 2018 U.S. Dist. LEXIS 86034, at *1, 2018 AMC 1332, 2018 WL 2327370, Civ. No. 3:18-cv-0033 (D. Alaska May 22, 2018).

injuries would "likely require medical attention for the remainder of his natural life."[17] Citing to numerous decisions, the court addressed that maintenance and cure is owed only until the point that maximum cure, or MMI, is reached.[18] Notwithstanding those decisions, the seaman would not have been entitled to indefinite cure in any event because the evidence suggested he had already achieved maximum recovery —he had not offered evidence of his current medical condition, the employer provided evidence that the seaman had been cleared for duty to return to work in the fishing industry, and there was evidence that the seaman had indeed returned to work for other employers.[19]

Determination of the Maintenance Rate

The United States Court of Appeals for the Ninth Circuit addressed the test for properly determining a seaman's maintenance rate in *Sabow v. Am. Seafoods Co.*[20] The seaman successfully moved for an order in the district court compelling maintenance at his requested rate, but was denied relief in the form of requested attorney's fees. On appeal, the Ninth Circuit rejected the employer's arguments that the maintenance rate was determined solely by reference to the cost of food and lodging aboard the ship. Rather, "seamen are entitled to maintenance in the amount of their actual expenses on food and lodging up to the reasonable amount for their locality."[21] The seaman produced prima facie evidence that his actual expenses were $37.97 per day, which then shifted the burden to the employer to show that the actual expenses were unreasonable. The employer did not did maintain that seaman's expenses were unreasonable, but instead suggested that lower expenses of $30 per day were *also* reasonable when compared to the expenses at sea.[22] The Ninth Circuit affirmed the district court's holding that the employer had failed to raise a genuine issue of material fact. Nonetheless, the court affirmed the district court's denial of attorney's fees to the seaman, reasoning that the employer had not refused to pay maintenance altogether, only that it had failed to raise the rate.[23]

The issue of a contractually set maintenance rate was recently addressed in *Knudson v. M/V American Spirit*.[24] The plaintiff was a non-union seaman, who had been required to sign a 111-page Terms and Conditions of Employment document, which the employer revised from a previous version implemented through a collective bargaining agreement with the union.[25] The

[17] *Id*. at *1-2.
[18] Id. at *7 (citing *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 946 (9th Cir. 1986) ("[t]he right to maintenance is tied to the right to cure, *i.e.*, necessary medical services, and both extend to the point of maximum recovery"); *Springborn v. Amer. Commercial Barge Lines, Inc.*, 767 F.2d 89, 95 (5th Cir. 1985) ("[t]he cut-off date for both maintenance and cure is . . . the date of maximum possible cure"); *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 300 P.3d 815, 819 (Wash. 2013)(citation omitted) ("[t]he shipowner's duty to pay maintenance and cure continues until the seaman . . . reaches the point of maximum medical recovery"). This is presumably because "[m]aintenance and cure was not intended as a pension or disability plan." *Norfolk Dredging Co. v. Wiley*, 450 F. Supp. 2d 620, 626 (E.D. Va. 2006)).
[19] *Id*. at *8-9.
[20] 737 Fed. Appx. 322, 323, 2018 AMC 2047 (9th Cir. 2018).
[21] Id. (quoting *Barnes v. Sea Hawaii Rafting, LLC*, 889 F.3d 517, 541-42 (9th Cir. 2018) (quoting *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 590 (5th Cir. 2001))).
[22] *Id*. at 324.
[23] *Id*.
[24] 2019 WL 247232 (E.D. Mich. Jan. 17, 2019).
[25] *Id*. at *1.

seaman was subsequently injured and under the employment contract was provided with maintenance at a rate of $8 per day.[26] When the seaman complained, the employer offered to increase the maintenance rate to $88.59 as an advance on eventual settlement if the seaman agreed to waive his right to a jury trial and submit to arbitration. The seaman refused and sought relief from the court for a higher maintenance rate.[27] The court found prior decisions relying upon union agreements for maintenance rates inapposite because they pertained to seaman who were represented by a union through the collective bargaining process.[28] The seaman easily met his burden of proving his prima facie case that $8 a day was an unreasonable rate of maintenance and that $45 a day was reasonable.[29] The employer paid the higher maintenance rate retroactively, but the seaman was still entitled to argue that punitive damages were owed for the 2 years he received the lower rate.[30]

Employer Claims for Recoupment of Maintenance and Cure

In *In re 4-K Marine, L.L.C.*, the United States Court of Appeals for the Fifth Circuit addressed the interesting situation where a third-party vessel is fully at fault for a collision causing an alleged injury to a seaman on the "innocent" vessel, but it is later proved that the seaman fraudulently claimed a pre-existing injury.[31]The problem for the innocent vessel owner was that it had already paid for significant medical care through its cure obligation before realizing the seaman's claim was fraudulent.[32] "A third-party must reimburse an employer only where its negligence caused or contributed to the *need* for maintenance and cure."[33] Because the offending vessel did nothing that caused or contributed to a need for maintenance and cure for the seaman's alleged back injury, it did not owe any reimbursement to his employer for the back surgery.[34] The Fifth Circuit noted that although a seaman's employer must often make an early decision to pay maintenance and cure, this is balanced by allowing an employer to investigate and reasonably withhold payment.[35]

On a related issue, the United States District Court for the Central District of Illinois recently addressed whether a counterclaim for overpaid cure on the basis of fraud is recognized under the general maritime law. In *Whitchurch v. Canton Marine Towing Co.*, a deckhand alleged that he injured his shoulder aboard the towing vessel while pulling a wire from a winch.[36] The employer-defendant paid maintenance and cure to the seaman for several months, totaling over $18,000. Shortly after this injury, however, the seaman underwent a mandated Department of Transportation physical, during which he told the medical examiner "that he had not . . . sustained any recent injury, had no physical complaints, had no joint, nerve, or muscle problems, and had unlimited use of his arms and hands." After receiving a copy of the physical report, the employer moved to file a counterclaim under Federal Rule of Civil Procedure 13(e), alleging that Plaintiff

[26] *Id*. at *2.
[27] *Id*.
[28] *Id*. at *4.
[29] *Id*. at *5.
[30] *Id*.
[31] 914 F.3d 934 (5th Cir. 2019).
[32] *Id*. at 936-37.
[33] *Id*. at 937.
[34] *Id*.
[35] *Id*. at 938-39.
[36] 302 F. Supp. 3d 986, 988 (C.D. Ill. 2018).

lied about the existence of his injury and fraudulently obtained benefits from the defendant. In addition to the physical, the defendant alleged that the seaman presented inconsistent and implausible stories as to how the accident occurred and made inconsistent statements on a disability questionnaire that his treating physician acknowledged "were not truly representative of his capabilities."

The seaman moved to dismiss the counterclaim and the court agreed, holding that it was "reluctant to allow an unprecedented cause of action for restitution under the facts of this case, where seaman appears to have medical evidence supporting the existence of at least some injury."[37] In particular, the court relied upon the employer's ability and right to investigate the maintenance and cure claim before payments are tendered, without subjecting themselves to liability for compensatory or punitive damages. Furthermore, once payments are made, the court doubted that any judgment on a counterclaim against a seaman would be collectable and believed such relief on behalf of employers would have a "chilling effect" on seaman seeking to bring claims.[38] The court did acknowledge, however, that generally, "overpayments of maintenance and cure can only be recovered as an offset to any damages a seaman may recover under the Jones Act."[39]

Application of the McCorpen Defense

Courts continue to apply the *McCorpen* defense to the payment of maintenance and cure, as there were several instructive decisions issued in the past year affirming application, granting application of the defense on summary judgment, and denying summary judgment where issues of fact existed.

The *McCorpen* defense is applicable when an "injured seaman has willfully concealed from his employer a preexisting medical condition."[40] The *McCorpen* defense has three prongs that must be met. The employer must show that (1) the seaman intentionally misrepresented or concealed medical facts; (2) the nondisclosed facts were material to the employer's decision to hire the seaman; and (3) a link between the withheld information and the injury that is the subject of the complaint.[41] If all three prongs are met, the employer may deny a claim for maintenance and cure.

In *Thomas v. Hercules Offshore Servs.*, the plaintiff was a galley hand who alleged injuries to her lumbar spine and right hip as a result of striking her foot on a raised doorsill.[42] Maintenance and cure was instituted, and $44,490 in maintenance payments and approximately $13,000 for medical treatment was paid. In conjunction with her application for employment with the defendant, the plaintiff was required to complete a medical questionnaire. She signified on the questionnaire that she had "never sustained an injury or sought medical attention for a physical problem (except for sickness or flu, etc.)."[43] Furthermore, she denied any prior injuries or treatment to her back. However, during her deposition, she admitted two prior motor vehicle accidents resulting in lower

[37] *Id*. at 992.
[38] *Id*.
[39] *Id*. at 989.
[40] *Thomas v. Hercules Offshore Servs.*, 713 Fed. Appx. 382, 386, 2018 AMC 771 (5th Cir. Mar. 2, 2018) (quoting *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 171 (5th Cir. 2005)).
[41] *Id*.
[42] *Id*. at 383.
[43] *Id*. at 386.

back pain.[44] The plaintiff did not dispute that first prong of the *McCorpen* test was satisfied, but argued that the district court erred in its determination of the second and third prongs.

With respect to the second prong, the defendant Hercules submitted the affidavit of its Human Resources Director, who stated that had the defendant "been aware of [plaintiff's] prior history of injuries, it would have inquired further concerning her medical history prior to hiring her."[45] But the plaintiff still argued that there was a genuine issue of material fact as to the "materiality" prong because the she passed the functional capacity evaluation required by the defendant, which tested for various physical abilities. The United States Court of Appeals for the Fifth Circuit found this fact "irrelevant" because the defendant had based its hiring decision at least in part upon whether the plaintiff had previous back and neck injuries.[46] The court likewise rejected the plaintiff's arguments that the third prong addressing causal connection had not been met. As a result of the prior motor vehicle accidents, the plaintiff had received injections and been diagnosed with herniated disks in her lumbar spine. The Fifth Circuit reiterated that an employer "need not prove that the prior injuries are the sole causes of the current injuries."[47] Furthermore, there "is no requirement that a present injury be identical to a previous injury."[48] Thus, the district court's granting of the defendant's Motion for Summary Judgment as to application of the *McCorpen* defense was affirmed.[49]

Likewise, the *McCorpen* defense was applied in *White v. Sea Horse Marine, Inc.*, where the plaintiff concealed years of medical treatment for his lumbar spine on a questionnaire, including treatment just two days before his employment physical for the defendant.[50] The court rejected the plaintiff's argument that issues of material fact existed as to the materiality prong where the defendant was willing to employ him despite the x-ray from the physical revealing degenerative changes in his lumbar spine.[51] The court held that the defendant repeatedly asked the plaintiff about the relevant medical history, and relied on the pre-employment physical when deciding to hire the plaintiff.[52] The defendant offered uncontested evidence that, had the plaintiff fully disclosed his decade-long treatment for back and leg pain, the defendant would have required additional medical inquiry prior to extending an offer of employment. Thus, summary judgment was granted.[53]

The court similarly rejected arguments by the seaman in *Carter v. Parker Towing Co.*, that he was not required to report "every ache and pain" on the medical questionnaire and that despite concealing his prior lumbar spine injuries, he had been able to fulfill his job duties leading up to his incident aboard the vessel.[54] With respect to the latter argument, the court stated that it was

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[44] *Id*. at 387.
[45] *Id*.
[46] *Id*. at 388.
[47] *Id*. (citing *Brown*, 410 F.3d at 176).
[48] *Id*.
[49] *Id*. at 389.
[50] 2018 U.S. Dist. LEXIS 133458, *1-2018 WL 3756475, Civ. No. 17-9774 (E.D. La. Aug. 8, 2018).
[51] *Id*. at *12.
[52] *Id*. at *13.
[53] *Id*. at *14.
[54] 2018 U.S. Dist. LEXIS 75011, at *12, *15-16, 2018 WL 2065577, Civ. No. 17-2634 (E.D. La. May 3, 2018).

"not evidence but argument. Neither is it relevant."[55] Relying on *Thomas v. Hercules Offshore Services, L.L.C.*, the court noted that "the fact that the employee could perform the heavy labor tasks when he was first hired is 'irrelevant' because the employer 'based its hiring decision (at least, in part) upon whether applicants had 'Past or Present Back' pain."[56] Thus, the Motion for Summary Judgment as to *McCorpen* was granted in favor of the defendant.

Notably, in *Luwisch v. Am. Marine Corp.*, the court denied the employer's Motion for Summary Judgment as to application of the *McCorpen* defense, finding that genuine issues of material fact existed as to the materiality prong.[57] The defendant typically required candidates to complete an application packet that contained a health questionnaire, which included detailed questions concerning prior injuries and treatment.[58] The plaintiff was sent this package, but only returned the first few pages of the hiring packet, and did not fill out the health assessment. Nevertheless, he was hired by the defendant.[59] The defendant's president testified that "if [the plaintiff] had filled out our application, and told us—disclosed his condition, he wouldn't have been hired . . . we would be concerned whether he could [do] his job."[60] The court held that summary judgment was not appropriate, where the defendant had submitted no evidence, other than the declaration and deposition of its president, to prove that the plaintiff would not have been hired if the defendant had known of his degenerative disc disease.[61] The defendant had not submitted its official human resources documentation explaining hiring practices with regard to applicants with pre-existing conditions, and had not presented deposition testimony of any medical professionals opining they would not have cleared the plaintiff for work if they had known of his condition.[62]

Claim for Punitive Damages Granted

In *Barnes v. Sea Haw. Rafting, LLC*, the United States District Court the District of Hawaii addressed whether a seaman was entitled to punitive damages for failure to pay maintenance in an ongoing saga involving a court order to pay maintenance, bankruptcy of the employer, and a *pro se* defendant.[63] The seaman was injured as a result of an explosion causing a floorboard to strike him in the head. The defendants argued that in 2013, they attempted to investigate the seaman's maintenance and cure claims but were "thwarted" by his failure to cooperate fully with its discovery requests.[64] Regardless, court found in November 2013 that the seaman was entitled to an award of maintenance and cure, even without establishing the amount of such an award. Thus, the defendants were on notice for at least five years of their obligation to pay the seaman's maintenance and cure. Furthermore, the United States Court of Appeals for the Court of Appeals for the Ninth Circuit ruled earlier in 2018 that the seaman was entitled to maintenance in the amount of at least $34 per day from the date of the July 3, 2012 accident, subject to a potential

[55] *Id*. at *15.
[56] *Id*. (quoting *Thomas v. Hercules Offshore Services, L.L.C.*, 713 F. App'x 382, 387 (5th Cir. 2018)).
[57] 2018 U.S. Dist. LEXIS 105596, *1, 2018 WL 3111931, Civ. No. 17-3241 (E.D. La. June 24, 2018).
[58] *Id*. at *3.
[59] *Id*.
[60] *Id*. at *3-4.
[61] *Id*. at *5.
[62] *Id*. at *5-6.
[63] 2018 U.S. Dist. LEXIS 152330, *4, 2018 WL 4256803, Civ. No. 13-00002 (D. Haw. Sept. 6, 2018).
[64] *Id*. at *32.

upward increase at trial, and the district court issued such an Order.[65] The defendants, however, had not paid the seaman any maintenance or cure since the issuance of the Ninth Circuit's decision or the district court's Order Regarding Maintenance.[66] Aside from two maintenance payments in 2014 and a single rent payment, the defendant never paid any maintenance or cure to the seaman.[67]

The district court noted that generally, "the willful, wanton and callous conduct required to ground an award of punitive damages requires an element of bad faith."[68] "Examples of employer behavior that could merit punitive damages have included (1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer; and (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically."[69] The court acknowledged that the defendants had attempted to stipulate to a mutually agreeable maintenance rate early in the case, but had been rebuffed by the seaman. Nonetheless, even after the court had mandated maintenance payments, the defendants still did not tender them, weighing in favor of awarding punitive damages and attorney's fees.[70] One of the defendants also filed for bankruptcy, but acknowledged that he was "unsure" how the bankruptcy affected his obligation to pay maintenance and cure. Thus, the court found that the defendant's decision to forego its obligation to pay maintenance was "at least arbitrary, unreasonable, and willful."[71] Based on the length of time the seaman had not received any payments of maintenance or cure, "the complicated factual and procedural history of this case," and Defendants' *pro se* status for a considerable portion of the case, the Court awarded the seaman $10,000.00 in punitive damages.[72]

Claims for Punitive Damages Denied

In *Williams v. Cent. Contr. & Marine, Inc.*, the plaintiff attempted to raise his claim for punitive damages concerning failure to pay maintenance and cure for the first time during opening arguments of a bench trial.[73] The United States District Court for the Southern District of Illinois rejected the plaintiff's Motion to Amend his Complaint, which was based on alleged consent by the defendant to the trying of the punitive damages claim.[74] The plaintiff's original Complaint did not include a specific prayer for punitive damages. Rather, the "closest" request was for "attorney fees and all general and equitable relief as the court deems just and proper."[75] During his opening statement, Plaintiff's counsel informed the Court that he would be seeking "such punitive damages for the failure to provide cure, as the Court deems appropriate under the circumstances."[76] The

[65] *Id*.
[66] *Id*.
[67] *Id*. at *33.
[68] Id at *31 (citing *Ward v. EHW Constructors*, No. C15-5338 BHS, 2016 U.S. Dist. LEXIS 177640, 2016 WL 7407226, at *5 (W.D. Wash. Dec. 22, 2016) (citing *Harper v. Zapata Off-Shore Co*., 741 F.2d 87, 90 (5th Cir. 1984))).
[69] *Id*. (citing *Tullos v. Resource Drilling, Inc*., 750 F.2d 380, 388 (5th Cir. 1985); *Johnson v. Am. Interstate Ins. Co*., No. CIV.A. 6:08-cv-1988, 2010 U.S. Dist. LEXIS 99176, 2010 WL 3802451, at *1 (W.D. La. Sept. 20, 2010)).
[70] *Id*. at *32-33.
[71] *Id*. at *33-34.
[72] *Id*. at *36.
[73] *Williams v. Cent. Contr. & Marine, Inc.*, 2018 U.S. Dist. LEXIS 54705, *1, 2018 WL 1570834, Civ. No.15-cv-867 (S.D. Ill. Mar. 30, 2018)
[74] *Id*.
[75] *Id*. at *1-2.
[76] *Id*. at *2.

court rejected the plaintiff's arguments that the defendant's failure to object to certain medical bills and correspondence demonstrated "implicit consent" to try the issue of punitive damages. Such exhibits were relevant to other properly pleaded issues, such as Jones Act damages.[77] Furthermore, the defendant's alleged failure to object to the mention of punitive damages in the plaintiff's opening statement did not equate to consent. "As jurors are routinely reminded by this Court, opening statements by attorneys are not evidence." Further, "a brief mention of punitive damages during opening statements of a trial of significant complexity was not sufficient to give [the defendant] a fair opportunity to defend and present additional evidence had it known sooner the substance of the amendment."[78]

In *Kalyna v. City of New York*, the United States District Court for the Eastern District of New York addressed an entirely different issue concerning the plaintiff's allegation of punitive damages for failure to pay cure — the City of New York's policy and procedure requiring a seaman to first seek medical care and deal directly with medical provider, and then the City would satisfy the outstanding cure with the medical provider following a review of a submitted claim for cure.[79] The plaintiff, who was employed by the City of New York, claimed that this procedure was too "onerous and difficult" and that he had to engage attorneys to handle the processing of his maintenance and cure claim, costing him fees and resulting in a delay of treatment.[80] He sought to amend his Complaint to add a punitive damages claim. The City argued that its procedures were "simple," had been in place over 20 years without complaint, and resulted in payment to the seaman and his medical providers when the procedures were followed.[81] The court held that the seaman's punitive damages claim would be futile and refused to allow amendment of the Complaint, reasoning that the plaintiff failed to allege the length or nature of any alleged delay, failed to allege that any delay worsened his injuries, and failed to suggest that the City's procedure was arbitrary and capricious or "otherwise so divorced from the legitimate needs of the municipality to channel and process claims within the organization that it evinces an intentional disregard of seamen's rights."[82]

All. Marine Servs., LP v. Youman, issued out of the United States District Court for the Eastern District of Louisiana, dealt with a claim for punitive damages following a substantive denial of cure based on a maintenance and cure investigation.[83] First, the investigation resulted in the court granting the defendant's Motion for Summary Judgment as to application of the *McCorpen* defense based on the plaintiff's intentional concealment of pre-existing lumbar conditions.[84] Next, the court addressed the plaintiff's claim that the defendant had been arbitrary and capricious in denying cure for the plaintiff's recommended lumbar surgery, prior to the granting of the *McCorpen* defense. The record evidence showed that the defendant had conducted an investigation of the plaintiff's claim, "as it was entitled to do."[85] A marine claims adjuster was assigned to handle the investigation into the incident. The defendant's human resources department was in contact with

[77] *Id*. at *4.
[78] *Id*. at *4-5.
[79] 2018 U.S. Dist. LEXIS 43701, *1, 2018 WL 1342488, Civ. No. 16-cv-273 (E.D.N.Y. Feb. 28, 2018).
[80] *Id*. at *3-4.
[81] *Id*. at *7-8.
[82] *Id*. at *16-17.
[83] 2018 U.S. Dist. LEXIS 209455, at *1, 2018 WL 6523134, Civ. No. 17-8124 (E.D. La. Dec. 12, 2018).
[84] *Id*.
[85] *Id*. at *22.

the plaintiff following his return to shore and the adjuster attempted to meet with him, but the plaintiff cancelled. The investigation revealed evidence that the plaintiff had pre-existing back problems that he intentionally concealed from the defendant. Once suit was filed, the defendant continued its investigation into the plaintiff's maintenance and cure claim, determining the existence of pre-existing and concealed conditions, deposing plaintiff and his physician, and retaining its own physician to review the pre and post-incident MRIs of the plaintiff's lumbar spine. This informed the defendant's decision not to fund the surgery that was ultimately performed by the plaintiff's treating physician. The court agreed that as a matter of law, the record evidence would not support a finding that it acted arbitrarily or capriciously or egregiously or wantonly.[86]

In conclusion, courts appear wary of allowing claims for punitive damages where the seaman has not shown any additional harm caused by the employer's procedures or where the employer has conducted a diligent investigation into the maintenance and cure claim. Furthermore, the *McCorpen* defense remains strong, so long as the employer has a well-documented procedure for its employment physicals and medical questionnaires. Meanwhile, courts remain open to a broad interpretation of maximum medical improvement in favor of seaman and reluctant to find a seaman has reached MMI without nearly unequivocal evidence that the seaman has reached maximum cure.

[86] *Id*. at *26-27.