40th ANNUAL
RIVER AND MARINE INDUSTRY SEMINAR

GNOBFA

"SERVING THE MARINE INDUSTRY FOR DECADES"

April 24-26, 2024
InterContinental New Orleans
New Orleans, Louisiana

2024
RIVER AND MARINE INDUSTRY SEMINAR

April 24 - 26, 2024
InterContinental Hotel
New Orleans, Louisiana

GNOBFA
"SERVING THE MARINE INDUSTRY FOR DECADES"

GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

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ACKNOWLEDGMENTS

- The Greater New Orleans Barge Fleeting Association extends its sincere thanks to our speakers, without whose donation of time and expertise this Seminar would not be possible.

- Our thanks also to the members of the Seminar Committee, whose year-round efforts make this Seminar a professional presentation, as well as to their employers, who allow the Committee members to donate countless hours to benefit the Association:

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Seminar Co-Director
The COOPER GROUP of Companies

Thomas G. Grantham
Seminar Co-Director
Ingram Capital Fleet Inc.

Karl C. Gonzales, Ex-Officio
GNOBFA President
Cooper-Marine Inc.

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Kathy Savoie, Cooper/Consolidated, LLC

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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

2024 BOARD OF DIRECTORS

OFFICERS

PRESIDENT:	KARL C. GONZALES Cooper Marine The COOPER GROUP of Companies P.O. Box 90 Hahnville, LA 70057 Physical Address: 665 LA Hwy 628 LaPlace, LA 70068 Phone: 985-287-6048 karl.gonzales@cooper-marine.com
VICE PRESIDENT:	TOMMY G. GRANTHAM Ingram Capital Fleet, Inc. 3035 South River Road Port Allen, LA 70767 Phone: 225-338-5903 Fax: 225-383-5859 Thomas.Grantham@IngramBarge.com
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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

2024 BOARD OF DIRECTORS

DIRECTORS

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DIRECTOR OF SOUTHERN REGION:	PATRICK MORTON Ingram Marine Group Triangle/Port Allen P.O. Box 533 Reserve, LA 70084 Phone: 985-479-7258 patrick.morton@ingrambarge.com
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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

2024 BOARD OF GOVERNORS

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LEGAL ADVISOR:	Trevor M. Cutaiar Mouledoux, Bland, Legrand & Brackett 701 Poydras St., Ste. 600 New Orleans, LA 70139 Phone: 504-595-3000 tcutaiar@mblb.com
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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

PAST PRESIDENTS

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1996	James Fox | Karl C. Gonzales
1993 — 1995	Cherrie Felder
1992	Richard Cottingham
1991	Alan Savoie
1990	Richard Paquette
1989	John Cagnolatti
1988	Jerry Clower
1987	Richard McCreary
1986	Steven Talbot
1985	Richard Paquette
1984	W. Scott Noble
1982	Gregory Derbes
1981	Bob O'Neil
1980	Alan Savoie
1979	Jeff Kindl
1978	Curt Anderson
1977	Gene Dalton
1976	Joe Hines

WEDNESDAY AGENDA

WEDNESDAY, APRIL 24, 2024

7:15 – 8:30 **REGISTRATION**

8:30 – 9:00 **OPENING REMARKS**

PRESIDENT OF GNOBFA

Karl C. Gonzales
Cooper-Marine
LaPlace, LA

SEMINAR CO-DIRECTORS

Alan J. Savoie
the COOPER GROUP of companies
Hahnville, LA

Thomas G. Grantham
Ingram Barge Company
Port Allen, LA

SEMINAR MODERATOR

Marc C. Hebert, Esq.
Jones Walker LLP
New Orleans, LA

MODERATOR EMERITUS

Maurice C. Hebert, Jr., Esq.
Maurice C. Hebert, Jr., LLC
River Ridge, LA

KEYNOTE SPEAKER

Rear Admiral David C. Barata
United States Coast Guard District Eighth
District Commander
New Orleans, LA

9:00 – 10:30 **EMERGING TECHNOLOGY AND ARTIFICIAL INTELLIGENCE - HOW ARE THEY IMPACTING YOUR OPERATIONS AND THE MARINE TRANSPORTATION SYSTEM?**

- What is AI? How is AI being used within the Marine Transportation System?
- What is meant by semi-autonomous, autonomous and remote vessel operations?
- Depending upon the use of AI and what programs and technology are being adopted by the industry, what must I consider and does that require modification of my TSMS?
- Does it increase or create new liabilities for my operations?
- Is there insurance to cover changes in operations that involve new technologies and AI?
- What about cyber risk and cyber security, how does it increase with new technologies used for vessel, fleeting and terminal operations?
- What type of new fuels would be used in the fleeting and towboat industries? How does USCG view these fuel users? What impacts do they have on my insurance and operations?
- At the end of the day, am I better off with a rowboat or towboat?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Chris Allard
Chief Executive Officer
Metal Shark Boats
Industry Representative

Rear Admiral Wayne R. Arguin
Assistant Commandant for Prevention Policy
U.S. Coast Guard Headquarters
Washington, D.C.
U.S. Coast Guard Representative

Captain Andrew Meyers
Chief, Office of Port & Facility Compliance
U.S. Coast Guard Headquarters
Washington, D.C.
U.S. Coast Guard Representative

10:30 – 10:45 **BREAK**

10:45 – 12:15 **"THE PAST, PRESENT AND FUTURE" OF MAINTENANCE AND CURE – WHAT ARE RIGHTS OF THE EMPLOYER AND ITS INSURER IN PAYING, OR NOT PAYING, M&C?**

IT'S NO LONGER JUST $40.00 A DAY, PLUS REASONABLE MEDICALS…

- Am I obligated to voluntarily pay "Found" if Maintenance and Cure is legally owed? By the way, what is "Found?" Does my marine insurer cover this?
- What amount of maintenance is "legally owed" and how is it determined – does or should it be the same for each injured employee/seaman? How is it calculated? – can a seaman get it increased? Does the cost and expense for an internet, social media equipment, ability to communicate online with vendors count as an expense toward maintenance amount?

- Don't I have a right to investigate, factually and medically, whether Maintenance and Cure is even owed and before I start paying it?
- What do I do if my investigation disputes the facts and medical of the injured seaman and my lawyer says Maintenance and Cure is, in his/her opinion, not owed?
- What happens to my company and insurer if we decide not to pay Maintenance and Cure and the Court finds we were wrong – BAD THING? Punitive damages might be owed? What should my insurer tell me to do? Or, do I tell my insurer what I want to do? Should I make any decision before consulting with my insurer?
- There is no lawyer or lawsuit involved by the insured seaman – remember these practices, generally referred to as:
  - "Advance on Settlement"
  - "Partial Salary"
  - "Reduced Salary"
- What is the employer trying to accomplish with any of these practices? Must the insurer approve any of these practices used to recover back the sums paid to the seaman and most importantly, should taxes be withheld? Also, must maintenance still be paid – separate checks?
- What defenses do I have to Maintenance and Cure and what is that so-called "McCorpen" defense?" Suppose the injured employee lives with parents, is incarcerated, returns to sideline job with income, etc. – do I stop paying maintenance? What about cure?
- I have an IME medical done to the injured seaman and the findings of the IME clearly dispute the medical opinions of the seaman's doctors. Do I now terminate Maintenance and Cure? What if I am wrong? If I continue paying, can I file a cross-claim against the injured seaman to recover back the payments made should the jury agree with me?
- Where does "Punitive" damages come in? Does my insurance cover me for this? What are my insurers' opinions on all of the issues discussed above?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Kristi A. Post, Esq.
Blake Jones Law Firm
New Orleans, LA
Plaintiff Attorney

Guerric S.D.L. Russell, Esq.
Nicoletti Hornig & Sweeney
New York, NY
Defense Attorney

12:15 – 1:30 **LUNCH**

1:30 – 3:00 **OCCUPATIONAL MEDICINE AND FCE'S, HOW AND WHY ARE THEY IMPORTANT TO MY COMPANY AND MANAGING PERSONAL INJURY CLAIMS?**

- What is "occupational medicine" and how does it differ from services provided by a typical hospital or urgent care clinic How do I use an OccMed facility and its doctors?
- What is the best way of working with my OccMed provider in pre-employment physicals as well as accidents or illnesses that occur on board my vessels, at my terminal or at my fleet?
- How is occupational medicine viewed by the insurance carrier and what benefits may it have with insurance renewals and premiums?
- How do I structure payments to my OccMed service provider for routine physicals versus incidents, and is this covered by my health and accident or marine insurance?
- How do OccMed providers manage reporting and filing of insurance claims?
- What pre-employment post-offer recommendations for physicals and tests are made by OccMed providers?
- What is a functional capacity evaluation - that is, an FCE? How is it viewed by the Judge or jury?
- What information is used to support it, and how is it viewed by the company and the insurers in valuing the case?
- How is an FCE used to impact the wage loss claim?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Kent Morrison, Esq.
Phelps Dunbar LLP
New Orleans, LA
Defense Attorney

Brian Bourgeois, M.D.
West Jefferson Medical
Gretna, LA
Occupational Medicine Doctor

Trevor Bardarson PT, OCS
ISR Physical Therapy LLC
Houma, LA
Certified FCE Expert

3:00 – 3:15 **BREAK**

3:15 – 5:00 **HOW DO I MANAGE EMPLOYEE USE OF CANNABIS, SYNTHETIC DRUGS AND WHAT DRUG TESTING DO I NEED?**

- What are the different types of drugs, synthetic and natural, that I may be exposed to from my employees in the workplace? What testing and reporting is required by the U.S. Coast Guard and U.S. Department of Transportation?
- Do I go beyond the "required" testing, and if so, does it help or hurt my company?
- What are all of the different panel tests and what do they test for? What is covered by insurance and what do I pay out of pocket for testing?
- What am I required to have in my workplace labor and employment policy, and in my TSMS, to ensure compliance with U.S. DOT laws and Subchapter M?
- Should I conduct testing in house or outsource it, and what are the pros and cons of each?
- How do I manage multi state operations and vessels or tows traversing multiple states, some of which allow drug use and possession? May I be more strict and under what conditions may I terminate an employee regardless of use or possession allowed in a state?
- How are my policies viewed in effecting insurance renewals and premiums?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Jason A. Culotta, Esq.
Jones Walker LLP
New, Orleans, LA
Labor Attorney

Patrick Mannion
Office of Drug & Alcohol Prevention & Investigation
U.S. Coast Guard Representative

Spencer Murphy
Canal Barge Company
New Orleans, LA
Company Health and Safety Representative

Angie Perez, PhD, CIH
CTEH, LLC
Portland, OR
Toxicologist

5:30 – 7:00 **NETWORKING RECEPTION**

WEDNESDAY SPEAKERS

KARL C. GONZALES is President of the Greater New Orleans Barge Fleeting Association, Inc. and Vice President of Operations for Cooper-Marine, a division of the COOPER GROUP of companies. Prior, Mr. Gonzales served as clerk to the Honorable Douglas A. Allen and the Honorable James M. Lockhart, Jr., Judges of the First Parish Court for the Parish of Jefferson, Louisiana. In 1981, Mr. Gonzales was hired as Vice President and thereafter elected as President of RLB Boat Company, Inc. and Mid-Gulf Transportation Company, Inc. both of Harvey, Louisiana. From November 1985 until August 2017, Mr. Gonzales was Vice President –Operations and later became Executive Vice President of Gulf South Marine Transportation, Inc., a local marine towing company, and also held those same positions with Gulf South Marine Brokers, Inc., a local marine brokerage company. Mr. Gonzales currently serves (appointed) on several maritime related committees, including the United States Coast Guard-Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC), United States Coast Guard-Sector New Orleans- Area Maritime Security Executive Committee (AMSC), and as a member of the United States Coast Guard-Sector New Orleans Port Coordination Team (PCT). He is a former Vice President of The Mariner's Club of the Port of New Orleans and is active in several other marine-related and charitable organizations.

ALAN J. SAVOIE, Seminar Co-Director and past president of the Greater New Orleans Barge Fleeting Association, is Director of Marketing and Business Development for Cooper/Consolidated, LLC. He has served in many capacities in the marine industry since 1977. Mr. Savoie is formerly co-owner of Marine Centre, Inc., Kathryn Rae Towing, Inc. and LSK Towing, Inc., all local towing companies. Mr. Savoie has served in numerous GNOBFA capacities over the years.

THOMAS G. GRANTHAM is Vice President of the Greater New Orleans Barge Fleeting Association, Seminar Co-Director, and Continuing Education Coordinator. Prior to joining the marine industry in 1990, he served six years in the United States Navy Nuclear Power Program. Employed by Capital Fleet in 1990, he served as vice president of Capital Fleet until the company was acquired by Ingram Barge in 2008. Mr. Grantham is now a manager of vessel engineering for Ingram vessels in the Gulf area. He is a licensed vessel operator and holds a tankerman endorsement issued by USCG. He is a member of East Baton Rouge Local Emergency Planning Committee, American Legion and Veterans of Foreign War organizations. Mr. Grantham has served on various GNOBFA committees and in different capacities since 1999.

MAURICE C. HEBERT, JR., ESQ., Seminar Moderator Emeritus, formerly an attorney with Liskow & Lewis, APLC, retired in 2004, but maintains his license to practice law and engage in special projects, mediation, and arbitration. He graduated from LSU in 1959 with a degree in Electrical Engineering. He is a professional and registered Electrical and Environmental Engineer, (Retired) in the State of Louisiana. He graduated from Loyola University School of Law in 1966. He served as a law clerk to U.S. District Judge Richard Putnam. Mr. Hebert is admitted to numerous state and federal courts, including the U.S. Supreme Court. Mr. Hebert has served on numerous marine educational boards for both industry and educational institutions. He is a member of the GNOBFA Advisory Board and was a member of the Board of Directors of the Louisiana Association of Waterways Operators and Shipyards (L.A.W.S.). He has been a speaker at numerous maritime and law related seminars, is the Co-Founder of the River and Marine Industry Seminar and has served as moderator of all of the prior River and Marine Industry Seminars.

MARC C. HEBERT, ESQ., Seminar Moderator, is a senior partner with Jones Walker and practices with the Maritime, Corporate, Litigation, and Government Relations groups. He is a member of the GNOBFA Seminar Committee, Greater New Orleans Port Safety Council Chairman 2011, 2016 to 2019 and currently

serves as Chair Ex-Officio, serves on the Southern Yacht Club Junior Sailing Activities Committee, serves as Legal Counsel to the Mississippi Valley Trade & Transport Council (Board Member and Vice Chair 2006 to September 2016), and is certified/trained in Marine Incident Investigation and Root Cause Analysis (SafeMARINER, LLC). From 1995 to 2002, he worked for the U.S. House of Representatives Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs and was appointed in 2019 by U.S. Secretary of Commerce Wilbur Ross to serve on the Louisiana District Export Council. He also served as an Adjunct Professor at the Loyola University New Orleans College of Law from 2002-2005. Mr. Hebert graduated from Tulane University in 1991 with a B.A. in Economics, received his J.D. from Loyola University School of Law in New Orleans in 1994, and earned his LL.M. in Environmental Law from The National Law Center, George Washington University in Washington, D.C. in 1996. He is admitted to practice in Louisiana and Virginia, the District of Columbia, Federal Court in the Southern District of Texas, and before the U.S. Court of International Trade.

REAR ADMIRAL DAVID C. BARATA serves as Commander, Eighth Coast Guard District and is responsible for Coast Guard operations spanning 26 states, including the Gulf of Mexico coastline from the Florida panhandle to United States border with Mexico, the adjacent offshore waters and outer continental shelf, and the inland waterways of the Mississippi, Ohio, Missouri, Illinois, and Tennessee River systems.

His previous Flag assignment was as Commander of the Coast Guard Personnel Service Center, where he was responsible for executing the Coast Guard's human resource policies. In this role, he led projects focused on recruiting, accessing, assigning, developing careers, maintaining well-being, compensating, separating, and retiring the nearly 45,000 members of the active duty and reserve military workforces.

RDML Barata's prior field assignments included serving as Commanding Officer of Activities Europe, as well as tours at Sector Jacksonville, Marine Safety Office Providence, and Marine Safety Office Miami where he served for over 13 years in various capacities conducting marine safety, Office in Charge of Marine Inspection/Captain of the Port (OCMI/COTP), prevention, and incident response/emergency management missions. RDML Barata also served as the plank owner Executive Officer of Maritime Safety and Security Team Boston (MSST 91110) and as Deck Watch Officer aboard USCGC SENECA (WMEC 906).

RDML Barata's staff assignments include Director, Inspections and Compliance (CG-5PC), Deputy Director, Marine Transportation Systems (CG-5PW), Chief, Office of Budget and Programs (CG-82), AC&I Coordinator and Program Reviewer (CG-821), and Senior Marine Safety/Prevention Assignment Officer at the former CG Personnel Command (CGPC OPM-2).

RDML Barata is a 1993 graduate of the U.S. Coast Guard Academy, New London, CT, where he earned a Bachelor of Science in Management. RDML Barata earned a Master of Arts in National Security and Strategic Studies from the Naval War College in Newport, RI, in 2014 and served as a Senior Military Fellow at the Center for a New American Security (CNAS) in Washington, DC, from 2014-2015.

RDML Barata's personal awards include the Legion of Merit (4), the Meritorious Service Medal (4), the Coast Guard Commendation Medal (2), the 9/11 Medal, the Armed Forces Service Medal, and the Coast Guard Achievement Medal. He was selected as the Navy League Southeastern MA/RI Junior Officer of the Year in 2001.

RDML Barata is a native of Jacksonville, Florida. He and his wife, Barbara have three children, James, Caroline, and Annie.

WEDNESDAY SPEAKERS

CHRIS ALLARD is a Chief Executive Officer at Metal Shark Boats. Mr. Allard is a Long Island, NY native and attended the premiere institution for Naval Architecture and Marine Engineering, Webb Institute in Glen Cove, NY. After graduating Webb, Mr. Allard joined American Marine Holdings (AMH), the parent company of Donzi and ProLine boats, first to oversee Engineering, but later built a successful Government line of business at AMH Government Services. In 2006, Mr. Allard partnered with Jimmy Gravois, owner of Gravois Aluminum Boats to acquire Metal Shark. He has grown into a thriving Government contractor, delivering more than $50M of boats annually to all branches of the US Armed Forces as well as many state, local and international law enforcement agencies.

REAR ADMIRAL WAYNE R. ARGUIN JR. serves as the Assistant Commandant for Prevention Policy, and is responsible for the development of national policy, standards, and programs promoting Marine Safety, Security and Environmental Stewardship. Three Directorates carry out the mission: Inspections and Compliance, Marine Transportation Systems, and Commercial Regulations and Standards. Programs include waterways management, navigation and boating safety, ports and facilities, merchant mariner credentialing, vessel documentation, marine casualty investigation, commercial vessel inspections, and port state control.

Rear Admiral Arguin is a 1992 graduate of the Coast Guard Academy, where he earned a Bachelor of Science degree in Naval Architecture and Marine Engineering and in 2001, he earned a Master of Science degree in Naval Architecture and Marine Engineering from the University of Michigan.

Prior to his current assignment, Rear Admiral Arguin served as the Director of Inspection and Compliance, also at Coast Guard Headquarters. His previous operational assignments include Sector Commander, Sector New Orleans. He also served as Executive Officer of Marine Safety Office Memphis, TN and Prevention Department Head at Sector Lower Mississippi River where he coordinated waterways management, vessel inspections, mariner licensing and marine casualty investigations on the Lower Mississippi River and its tributaries. In 1994, Captain Arguin earned his Marine Inspection qualifications at Marine Safety Office Hampton Roads and served as senior marine inspector performing commercial vessel and cruise ship inspections at Marine Safety Office Tampa, Florida. He was also assigned to USCGC HARRIET LANE (WMEC-903) as a student engineer and Damage Control Assistant (1992- 1994).

His staff assignments include Director of Emerging Policy and Executive Officer, Hull Division Chief and Salvage Engineering Response Team (SERT) Leader at the Coast Guard's Marine Safety Center. He was responsible for the evaluation and approval of vessel structures, stability, fire protection systems and coordinated salvage engineering support to the Coast Guard Captains of the Port (COTP) and Federal OnScene Coordinators (FOSC) in response to a variety of vessel casualties. His awards include the Defense Superior Service Medal, Defense Meritorious Service Medal, Coast Legion of Merit, Coast Guard Meritorious Service Medal (five awards), the Coast Guard Commendation Medal (three awards), the DHS Secretary's Exceptional Service Gold Medal, and the EPA Administrator's Silver Medal.

TREVOR BARDARSON PT, OCS graduated with a degree in Physical Therapy from the University Of Manitoba, Canada in 1994. He is a Board Certified Orthopedic Physical Therapy Specialist, is a Certified Strength and Conditioning Specialist, is a Certified Spine Specialist, is a Certified Functional Capacity Evaluator and is also a Certified Ergonomic Specialist. He is currently the Training Director for the WorkSaver FCE Protocol and is an instructor for the Certified Behavioral Based Ergonomic Specialist training program. Mr. Bardarson is the President of WorkSaver Employee Testing Systems and Clinic Director/Partner of ISR Physical Therapy LLC.

Mr. Bardarson has performed many thousands of functional capacity evaluations (FCEs). As a result he is recognized as an expert in physical therapy, functional testing and occupational health in federal, state and workers' compensation courts. Mr. Bardarson has also performed hundreds of ergonomic evaluations and physical demand validations including onshore and offshore environments.

As President of WorkSaver Employee Testing Systems, Mr. Bardarson coordinates WorkSaver Employee Testing Systems' administrative functions. He is well known for a broad depth of knowledge in health issues, especially as they pertain to orthopedic and neurological disorders, for his organization skills, excellent management style and most sincere dedication to providing WorkSaver Employee Testing Systems' clients and affiliates with the most excellent support and service available.

Mr. Bardarson coordinates WorkSaver services with industries, and directs his staff of nurses to conduct quality assurance reviews of all WorkSaver Fit-For-Duty evaluations and ADA-Compliant New Hire Evaluations. He is instrumental in making certain that all functional testing runs smoothly and efficiently. When required, he ensures that testing guidelines and policies are updated and followed by all WorkSaver clinics. He is also in charge of working with new client acquisitions and helping industries understand the proven benefits of WorkSaver) services.

BRIAN BOURGEOIS, M.D. is a graduate of the LSU School of Medicine. He was trained at LSU's Department of Surgery and is board certified General Surgeon. He has practiced general surgery and occupational / industrial medicine on the Westbank of New Orleans and Jefferson since 1999. Dr. Bourgeois is a board member of the Jefferson Parish Medical Society and the Louisiana State Medical Society. He is a licensed medical review officer (MRO) and a Fellow of the American College of Surgeons. He is also one of very few doctors in the state certified in the management of dive-related injuries and diver physicals. He is member of the ADCI Committee that created the current code of medical standards for divers. Dr. Bourgeois also actively trains and educates offshore medics and dive medical technicians.

JASON A. CULOTTA, ESQ. is a partner in Jones Walker's Labor & Employment Practice Group. Jason is an active member of both the trade secrets/non-competes and wage and hour litigation teams. Jason litigates complex commercial and employment matters that involve breach-of-contract claims, business torts, non-compete disputes, trade secret violations, fraud claims, fiduciary duty actions, defamation claims, invasion-of-privacy claims, wage-and-hour disputes, Title VII claims, and appellate advocacy. He regularly litigates these types of cases in state and federal court and has been on trial teams that have not only successfully obtained and fended off injunctions, but also prevailed on the merits at trial. Jason also is actively involved in pro bono matters and has represented indigent clients in criminal and immigration matters involving unaccompanied minors and Special Immigrant Juvenile Status.

PATRICK J. MANNION is a licensed Master Mariner in the United States Merchant Marine with greater than 20 years of experience in maritime operations, logistics and safety. His industry experience includes serving as CEO of two maritime companies, Director of Regulatory Compliance for the largest privately held passenger ferry operator in the Americas and as a consultant specializing in maritime safety.

In 2005 Mr. Mannion was selected to serve as Director of the United States Coast Guard Vessel Traffic Service for the Port of New York and New Jersey. He was responsible for ensuring navigational safety for all vessels operating in one of the largest and most iconic ports in the United States.

In 2010, Mr. Mannion was selected to serve as U.S. Coast Guard Regulatory Project Manager, creating federal regulations to promote maritime safety and security. As Alternate Designated Federal Officer to the National Offshore Safety Advisory Committee and the Towing Safety Advisory Committee he established strong partnerships between government and industry resulting in numerous improvements to maritime safety. As Executive Chair of the U.S. Coast Guard / Offshore Marine Services Association Partnership and of the U.S. Coast Guard / Association of Diving Contractors International Partnership, Mr. Mannion harnessed the expertise of industry to advance the mutual goals of commerce and maritime safety in the energy production and support industry.

In November 2013, Mr. Mannion was selected to serve as the U.S. Coast Guard Drug and Alcohol Prevention and Inspection Program Manager. His focus is to promote maritime and public safety by reducing the incidences of adverse drug and alcohol use while elevating the competency and safety of the maritime workforce.

Mr. Mannion is licensed by the U.S. Coast Guard to serve as Shipboard Medical Officer, Certificated Substance Abuse Free Environment Provider and a Substance Abuse Screening and Diagnosis Provider, Level 1 & 2. He is a qualified DOT Collector and Breath Alcohol Technician.

CAPTAIN ANDREW MEYERS is the Coast Guard's Chief of Port and Facility Compliance, where he oversees programs that advance the safety, security, and environmental stewardship of the Nation's ports and facilities. He also leads the Coast Guard's Cyber Risk Management Task Force for the marine transportation system spanning ports, waterways, onshore and offshore facilities, commercial vessels, and other maritime critical infrastructure. He is the U.S. government's Designated Federal Official for the National Maritime Security Advisory Committee and serves as the U.S. Head of Delegation on the International Maritime Organization's Facilitation Committee.

Captain Meyers is a career marine safety professional with over 24 years of service, primarily focused on commercial vessel inspections, facility inspections, waterways management, and aids to navigation. His operational assignments include tours in Kodiak, Alaska; Boston, Massachusetts; Savannah, Georgia; Morgan City, Louisiana; and Portland, Maine. He has also served in Headquarters assignments as a program manager for the Coast Guard's Port State Control program and as a strategic analyst on the Coast Guard Commandant's Advisory Group. His most recent assignment was as Executive Officer of the Coast Guard Navigation Center.

THOMAS KENT MORRISON, ESQ. is a partner with Phelps Dunbar, LLP having joined the firm in 1998 after obtaining his J.D. from Tulane University's School of Law. He holds an AV rating, is admitted to practice in all of the courts in Louisiana and regularly represents clients in jurisdictions throughout the Gulf South. Mr. Morrison previously served on the Board of Directors for the New Orleans Chapter of the Federal Bar Association and is a member of the FBA, the Maritime Law Association and the Southeastern Admiralty Law Institute. He practices in the areas of transportation, energy, maritime law, and general litigation handling cases involving commercial disputes, casualties, torts, cargo claims, collisions, personal injuries, property damage, and contractual defense and indemnity demands for maritime employers, vessel owners, longshore employers, energy companies, dock and terminal owners and their various underwriters. He also provides representation with respect to coverage issues involving a broad range of energy, marine, general liability, pollution, excess and umbrella insurance policies. Mr. Morrison has represented his clients both locally and nationally in state and federal courts in all aspects of litigation. He has considerable trial experience and has handled the resolution of innumerable cases through private mediation and court sponsored settlement conferences.

WEDNESDAY SPEAKERS

W. SPENCER MURPHY joined Canal Barge Company in May 2006 and was named Vice President of Risk Management in December 2010 and General Counsel in February 2014. He manages Canal Barge Company's legal work, claims handling, regulatory compliance, and external relations. Spencer is a past President of the Gulf Intracoastal Canal Association (GICA) and has also served on the Framework Development Team for the State of Louisiana's Coastal Restoration Master Plan. He currently serves on the Board of Directors of the Louisiana Association of Business and Industry (LABI) and is the President of the Louisiana Association of Waterway Operators and Shipyards (LAWS).

Prior to joining Canal Barge Company, Spencer was Contracts Director with Intermarine, LLC in New Orleans, where he was primarily responsible for the company's legal and insurance affairs. He also worked in the Admiralty Law section of the Phelps Dunbar law firm in New Orleans.

Spencer graduated from the University of Pennsylvania in 1993 with a Bachelor of Arts degree in American History and earned his law degree from Tulane University Law School, cum laude, in 1996, with a Certificate of Specialization in Admiralty & Maritime Law.

DR. ANGIE PEREZ is a Senior Toxicologist at CTEH, an emergency response and disaster recovery firm, and a Certified Industrial Hygienist (Cert # 12489) through the Board for Global EHS Credentialing. Dr. Perez earned her doctorate in Toxicology from Oregon State University and conducted postdoctoral work at the University of California, San Francisco, in the Department of Pharmaceutical Chemistry. She has over 19 years of experience in the field of toxicology, chemical exposure assessment, and human health risk assessment. Her focal research and field experience includes evaluation of exposures and potential health risks of air- and waterborne contaminants, evaluation of impairment with drugs and alcohol, and exposure and health risk assessment of poly- and perfluoroalkyl substances (PFAS). Dr. Perez is published on the topic of toxicology of recreational drugs, has presented as an invited speaker at national and state seminars more than a dozen times on the topic of cannabis impairment, and is active in recreational drug-related litigation matters. Dr. Perez directs the CTEH response office for the Pacific Northwest and she and her son are located in Portland, Oregon.

KRISTI A. POST, ESQ. is an attorney with Blake Jones Law Firm, L.L.C. in New Orleans, Louisiana. Her practice is primarily comprised of cases involving serious maritime injuries and fatalities, auto and commercial vehicular accidents, traumatic brain injuries, premises liability and Longshore and Harbor Workers Compensation Act cases in numerous state and federal courts as well as administrative agencies. Ms. Post has over 35 years of trial experience and has successfully litigated cases involving such diverse areas as the kidnapping of offshore workers by militant forces in Nigeria, casino gaming vessels, Hurricane Katrina insurance litigation, crane failures, aviation accidents, commercial diving accidents and one case involving a derrick barge capsizing and the dramatic rescue if its divers during a hurricane off the Yucutan Peninsula which became the subject of the novel All the Men in the Sea. She was also recently appointed as a member of the Claimants' Executive Committee in the SEACOR POWER liftboat case. Kristi is an Associate Professor of Trial Advocacy at Tulane Law School and is one of only 25 attorneys in the State of Louisiana board certified in civil trial law by the National Board of Trial Advocacy. She received her J.D. and LL.M. in Admiralty from Tulane Law School and is a member of the State Bar of Texas and the Louisiana State Bar Association.

WEDNESDAY SPEAKERS

GUERRIC S. D. L. RUSSEL, ESQ. is an attorney at Nicoletti Hornig & Sweeney. He has extensive nationwide experience in jury and nonjury trials in both federal and state courts, appeals and arbitrations. He represents corporations and individuals alike, including underwriters, vessel owners and operators, marinas, terminals, dock facilities, ports, shipyards and marine construction companies. Guerric's litigation practice focuses on maritime and commercial matters primarily in the areas of marine casualties, personal injury, property damage, limitation of liability, cargo damage, pollution, and products liability. Guerric also routinely advises clients on marine insurance coverage issues under hull, protection & indemnity, pollution, and commercial liability policies. In addition, Guerric is often retained to draft or revise insurance policies and a wide range of commercial contracts.

EMERGING TECHNOLOGY AND ARTIFICIAL INTELLIGENCE - HOW ARE THEY IMPACTING YOUR OPERATIONS AND THE MARINE TRANSPORTATION SYSTEM?

- What is AI? How is AI being used within the Marine Transportation System?
- What is meant by semi-autonomous, autonomous and remote vessel operations?
- Depending upon the use of AI and what programs and technology are being adopted by the industry, what must I consider and does that require modification of my TSMS?
- Does it increase or create new liabilities for my operations?
- Is there insurance to cover changes in operations that involve new technologies and AI?
- What about cyber risk and cyber security, how does it increase with new technologies used for vessel, fleeting and terminal operations?
- What type of new fuels would be used in the fleeting and towboat industries? How does USCG view these fuel users? What impacts do they have on my insurance and operations?
- At the end of the day, am I better off with a rowboat or towboat?

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Moderator:
Marc C. Hebert

Chris Allard
Chief Executive Officer
Metal Shark Boats
Industry Representative


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Rear Admiral Wayne R. Arguin
Assistant Commandant for Prevention Policy
U.S. Coast Guard Headquarters
Washington, D.C.
U.S. Coast Guard Representative


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Captain Andrew Meyers
Chief, Office of Port & Facility Compliance
U.S. Coast Guard Headquarters
Washington, D.C.
U.S. Coast Guard Representative

Coast Guard Activities Supporting MTS Cyber Risk Management

- The U.S. Coast Guard is the Nation's lead federal agency for safeguarding the MTS against a wide range of threats, including cyber. Our authorities and capabilities cut across threat vectors, allowing operational commanders to quickly evaluate risks, apply resources, and lead a coordinated and effective response. We are operationalizing our prevention and response approach to cyber at the port level. The approach primarily consists of:

- Regulations and Standards
  - Federal regulations **(**33 CFR 104, 105 & 106**)** require regulated vessels and facilities must address computer systems and networks in security assessments and plans. The Coast Guard and the International Maritime Organization have also provided additional guidance:
    - Guidance on Facility Security Assessments and Plans
    - Maritime Cybersecurity Assessment and Annex Guide (MCAAG)
    - Cyber Risk Management Work Instruction for U.S. vessels
    - International Maritime Organization Guidance on Cyber Risk Management and Safety Management Systems

- Compliance and Enforcement Activities
  - Coast Guard field units have validated that regulated U.S. vessels and facilities conducted vulnerability assessments on computer systems and networks, and that any vulnerabilities identified were addressed in mandated Vessel and Facility Security Plans.
  - The Coast Guard also worked with the International Maritime Organization to integrate cyber into required safety management systems, and verifies compliance with the International Safety Management Code during exams aboard foreign vessels operating in U.S. ports.

- Planning and Preparedness
  - Area Maritime Security Committees are the focal point for port-level coordination.
  - NVIC 09-02, Change 6, provides guidance on Area Maritime Security Committees and Areas Maritime Security Plans. It provides guidance on addressing cyber in Area Maritime Security Assessments and includes a template for a Cyber Incident Response Plan.

- Cyber Incident Reporting
  - 33 CFR 101.305 requires regulated vessels and facilities to report Transportation Security Incidents, Breaches of Security, and Suspicious Activity to the Coast Guard without delay.
  - CG-5P Policy Letter 08-16 provides additional guidance on these reporting requirements including specific examples of cyber incidents that must be reported.
  - Transportation Security Incidents must be reported to the local Captain of the Port without delay, with a follow-on notification to the National Response Center.
  - Breaches of Security and Suspicious Activity must be reported to the National Response Center without delay.

- Cyber Incident Response
  - Upon notification, Coast Guard Captains of the Port use existing authorities and dispatch local resources to stabilize a cyber incident and account for both physical and cyber risks.
  - The Coast Guard's Cyber Command's Cyber Protection Teams (CPTs) provide remote or on-scene technical expertise to better understand the potential vulnerabilities and consequences.
  - In addition to the CPTs, Coast Guard Cyber Command's Maritime Cyber Readiness Branch fuses marine safety and cyber expertise to track, investigate, and analyze cyber incidents within the MTS.
  - If an incident crosses jurisdictions or functional responsibilities, Captains of the Port use the existing Incident Command System and establish a Unified Command to lead the response.
  - Depending on the severity of the incident, the Coast Guard would collaborate as a Sector Risk Management Agency with the federal government's Unified Coordination Group in accordance with the National Cyber Incident Response Plan.

- Cyber Incident Recovery
  - The Coast Guard uses the same guidance to understand the impacts for significant cyber incidents that we use for hurricanes or other large-scale disruptions to the MTS.
  - COMDTINST16000.28B (Marine Transportation System Recovery Planning and Operations) provides overarching guidance for MTS recovery planning and operations.
  - NVIC 04-18 provides Area Maritime Security Committees with specific guidance for drafting MTS Recovery Plans.
  - Marine Transportation System Recovery Units (MTSRUs) are integrated into the Unified Command and are included in the Incident Management Handbook.
  - MTSRUs use the Common Access Reporting Tool to better track, understand and communicate MTS impacts at all levels of government.

- MTS Cyber Specialists

  - The Coast Guard has established new civilian MTS Cyber Specialists positions and is in the process of hiring them at every Area, District, and Captain of the Port Zone across the country.
  - These new positions create a dedicated staff to build and maintain port level cyber relationships, facilitate information sharing across industry and government, advise Coast Guard and Unified Command decision-makers, and plan cyber-related security exercises.

- Maritime Industry Cybersecurity Resource Center
  - The Coast Guard recently created the Coast Guard Maritime Industry Cybersecurity Resource Center website, a collaborative effort between the Coast Guard, Cybersecurity and Infrastructure Security Agency, and the Maritime Administration to ensure current maritime cyber threat information is available to the public and industry stakeholders. This site provides current information related to reporting cyber incidents, relevant policy and guidance, cyber related bulletins and alerts, and links to other useful sources.
    - Coast Guard Maritime Industry Cybersecurity Resource Website
    - Cyber Trends and Insights in the Marine Environment (CTIME)

"THE PAST, PRESENT AND FUTURE" OF MAINTENANCE AND CURE – WHAT ARE RIGHTS OF THE EMPLOYER AND ITS INSURER IN PAYING, OR NOT PAYING, M&C?

It's no longer just $40.00 a day, plus reasonable medicals…

- Am I obligated to voluntarily pay "Found" if Maintenance and Cure is legally owed? By the way, what is "Found?" Does my marine insurer cover this?
- What amount of maintenance is "legally owed" and how is it determined – does or should it be the same for each injured employee/seaman? How is it calculated? – can a seaman get it increased? Does the cost and expense for an internet, social media equipment, ability to communicate online with vendors count as an expense toward maintenance amount?
- Don't I have a right to investigate, factually and medically, whether Maintenance and Cure is even owed and before I start paying it?
- What do I do if my investigation disputes the facts and medical of the injured seaman and my lawyer says Maintenance and Cure is, in his/her opinion, not owed?
- What happens to my company and insurer if we decide not to pay Maintenance and Cure and the Court finds we were wrong – BAD THING? Punitive damages might be owed? What should my insurer tell me to do? Or, do I tell my insurer what I want to do? Should I make any decision before consulting with my insurer?
- There is no lawyer or lawsuit involved by the insured seaman – remember these practices, generally referred to as:
    - "Advance on Settlement"
    - "Partial Salary"
    - "Reduced Salary"
- What is the employer trying to accomplish with any of these practices? Must the insurer approve any of these practices used to recover back the sums paid to the seaman and most importantly, should taxes be withheld? Also, must maintenance still be paid – separate checks?
- What defenses do I have to Maintenance and Cure and what is that so-called "McCorpen" defense?" Suppose the injured employee lives with parents, is incarcerated, returns to sideline job with income, etc. – do I stop paying maintenance? What about cure?
- I have an IME medical done to the injured seaman and the findings of the IME clearly dispute the medical opinions of the seaman's doctors. Do I now terminate Maintenance and Cure? What if I am wrong? If I continue paying, can I file a cross-claim against the injured seaman to recover back the payments made should the jury agree with me?
- Where does "Punitive" damages come in? Does my insurance cover me for this? What are my insurers' opinions on all of the issues discussed above?

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Moderator:
Marc C. Hebert

Kristi A. Post, Esq.
Blake Jones Law Firm
New Orleans, LA
Plaintiff Attorney

Guerric S.D.L. Russell, Esq.
Nicoletti Hornig & Sweeney
New York, NY
Defense Attorney

THE "PAST, PRESENT AND FUTURE" OF MAINTENANCE AND CURE WHAT ARE RIGHTS OF THE EMPLOYER AND ITS INSURER IN PAYING, OR NOT PAYING, M&C?

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BLAKE JONES LAW FIRM, LLC
NEW ORLEANS, LOUISIANA

AND

GUERRIC S.D.L. RUSSELL, ESQ.
NICOLETTI HORNIG & SWEENEY
NEW YORK, NEW YORK

I. Brief History and Overview of Maintenance and Cure

Eleanor of Aquitaine first codified the doctrine of maintenance and cure in Article VI of the Rules of Oléron in 1152 A.D. These rules became the basis of the laws of the sea in England, France and other countries before making their way into American maritime law. In 1823, "[M]aintenance and cure, an ancient right in British admiralty law, was introduced into American maritime law by Justice Story in Harden v. Gordon." *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 831, 2012 AMC 660, 664 (Wash. 2012) (en banc), cert. denied, 133 S. Ct. 199 (2012) (citing *Harden v. Gordon*, 11 F. Cas. 480, 482-83 (C.C.D. Me. 1823) (No. 6,047)).

The initial explicit articulation of rights for American seafarers in the event of illness or injury, as stated in *The Osceola*, acknowledged available remedies for seafarers, include, maintenance and cure, the right to unearned wages until the voyage' end, and damages arising from a vessel's unseaworthiness. *The Osceola*, 189 U.S. 158, 175 (1903) (the law is settled along the proposition that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."). This paper will focus on the maintenance and cure remedy.

Maintenance consists of payments equivalent to the food and lodging seafarers received aboard the vessel, and is meant to replicate these necessities on land while the seafarer is recovering from injury or illness. *See*, *Messier v. Bouchard Transp.*, 688 F.3d 78, 81 (2d Cir. 2012), cert. denied, 133 S. Ct. 1586 (2013); *Petition of Oskar Tiedemann & Co.*, 367 F.2d 498, 505 (3d Cir. 1966) (holding maintenance is "a substitute for the free shipboard lodging and meals a seaman would have received but for his incapacitating injury."). Cure is the medical care that a seaman is entitled to receive to treat that illness or injury. *See*, *Caulfield v. AC&D Marine, Inc.,*

633 F.2d 1129 (5th Cir. 1981). "Under general maritime law, seamen are entitled to bring an action for 'maintenance and cure,' a remedy available to compensate seamen who fall ill or become injured during their term of employment." *Cabrera Espinal v. Royal Caribbean Cruises, Ltd.,* 253 F.3d 629, 630–31 (11th Cir.2001).

The seaman's right to maintenance and cure "is nearly unqualified, immune from contractual stipulations, does not depend on the fault of the employer, and is unaffected by employee contributory negligence." *Maint. Dredging I, LLC v. Billiot,* 2022 WL 5053415, *4 (E.D. La. 2022). The maintenance and cure obligation is, therefore, owed to a seaman regardless of fault. *See*, *Johnson v. Cenac Towing, Inc.,* 599 F.Supp.2d 721 (E.D. La. 2009). Maintenance and cure is the implied right of the seaman arising from his or her employment relationship with the vessel owner and is "independent of any other source of recovery for the seaman (e.g., recovery for Jones Act claims)." *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1013 (5th Cir. 1994). Thus, whether the seaman or employer was negligent is not at issue. *See*, *Brister v. A.W.I., Inc.*, 946 F.2d 350, 360 (5th Cir. 1991); *Jauch v. Nautical Services, Inc.*, 470 F.3d 207, 212 (5th Cir. 2006).

> Determining the maintenance award involves three steps:
>
> > First, the court must estimate two amounts: the plaintiff seaman's actual costs of food and lodging; and the reasonable cost of food and lodging for a single seaman in the locality of the plaintiff. In determining the reasonable costs of food and lodging, the court may consider evidence in the form of the seaman's actual costs, evidence of reasonable costs in the locality or region, union contracts stipulating a rate of maintenance or per diem payments for shoreside food or lodging while in the service of a vessel, and maintenance rates awarded in other cases for seamen in the same region.
> >
> > ...
> >
> > Second, the court must compare the seaman's actual expenses to reasonable expenses. If actual expenses exceed reasonable expenses, the court should award reasonable expenses. Otherwise, the court should award actual expenses. Thus, the

> general rule is that seamen are entitled to maintenance in the amount of their actual expenses on food and lodging up to the reasonable amount for their locality.
>
> Third, there is one exception to this rule that the court must consider. If the court concludes that the plaintiff's actual expenses were inadequate to provide him with reasonable food and lodging, the plaintiff is entitled to the amount that the court has determined is the reasonable cost of food and lodging. This insures that the plaintiff's inability to pay for food and lodging in the absence of maintenance payments does not prevent him from recovering enough to afford himself reasonable sustenance and shelter.

Hall v. Noble Drilling (U.S.), Inc., 242 F.3d 582, 590 (5th Cir. 2001).

The owner of a vessel has a duty to pay a seaman maintenance and cure until the seaman reaches maximum medical recovery a/k/a maximum medical improvement or maximum medical cure. *See*, *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962); *see also*, *Breese v. AWI, Inc.,* 823 F.2d 100 (5th Cir. 1987) (holding that a vessel owner has a duty to pay maintenance and cure until maximum medical improvement). The "cutoff point" of the obligation is "when the condition is cured or declared to be incurable or of a permanent character." *Ramirez v. Carolina Dream Inc.*, 760 F.3d 119, 123 (1st Cir. 2014) (quoting, Robert Force, Admiralty and Maritime Law 94 (2d ed. 2013)); *see also*, *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975) (noting the obligation continues until "incapacity is declared to be permanent"); *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979) (holding that maximum medical improvement is the date on which further treatment will result in no betterment of the seaman's condition); *Barto v. Shore Construction, L.L.C.*, 801 F.3d 465, 476 (5th Cir. 2015) (describing maximum medical cure as meaning "when it appears probable that further treatment will result in no betterment of the seaman's condition" or when the seaman's condition is deemed permanent.). The determination of permanency that terminates the right to maintenance and cure is a matter of medical, not legal, opinion. *See*, *Tullos v. Res. Drilling, Inc.*, 750 F.2d 380, 388 (5th Cir. 1985). Therefore, unequivocal medical determination of permanency is required before benefits can be terminated.

Treatment that is merely palliative in nature that does not actually better the condition of the seaman toward reaching maximum medical improvement is "insufficient to demonstrate an entitlement to continued maintenance and cure." *Alario v. Offshore Serv. Vessels, L.L.C.*, 477 Fed. Appx. 186, 188 (5th Cir. 2012); *Rashidi v. Am. President Lines,* 96 F.3d 124, 128 (5th Cir. 1996) (noting that the maintenance and cure duty does not extend to treatment which is only palliative in nature and "result in no betterment in the claimant's condition.").

The seaman has the initial burden of showing entitlement. *Davis v. Brunsman*, 516 F.Supp.3d 1185, 1196 (D. Or. 2021). "Once the seaman establishes his right to maintenance and cure, the burden of persuasion shifts to the shipowner to prove that the seaman has reached the point of maximum medical improvement." *Costa Crociere, S.p.A. v. Rose*, 939 F. Supp. 1538, 1548 (S.D. Fla. 1996). Where conflicting medical opinions exist, a vessel owner will likely not meet this burden. *See*, *Hedges v. Foss Maritime Co.*, 2015 WL 402809, *2 (W.D. Wash 2015) (citing, *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 388 (5th Cir. 1985)). "[D]oubts regarding a shipowner's liability for maintenance and cure should be resolved in favor of the seamen." *Padilla v. Maersk Line, Ltd.,* 721 F.3d 77, 81–82 (2d Cir.2013), *cert. denied,* 571 U.S. 1200 (2014) (citing *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962)).

II. Investigating the Maintenance and Cure Claim

Courts recognize that vessel owners are entitled to investigate and require corroboration of a maintenance and cure claim before making payments. *See*, *Seri v. Queen of Hearts Cruises, Inc.,* 2003 WL 21835736, *1 (S.D.N.Y. Aug. 6, 2003); *Richoux v. Jefferson Marine Towing, Inc.,* 2014 WL 47335, *2 (E.D. La. 2014); *Mier v. Wood Towing, L.L.C.,* 2010 WL 2195700, *2 (E.D. La. 2010); *MNM Boats, Inc., v. Johnson,* 248 F.3d 1139, *available at* 2001 WL 85860, *1 (5th Cir. 2001) ("Upon receiving a claim for maintenance and cure, the employer is entitled to investigate

and require corroboration of the claim before making payments."). To that end, it is reasonable for an employer to request evidence from the seaman and his counsel to substantiate the seaman's claim. *See, Ward v. Icicle Seafoods, Inc.,* 289 F. Appx. 209, 211 (9th Cir. 2008); *McWilliams v. Texaco, Inc.,* 781 F.2d 514, 519 (5th Cir. 1986) ("[w]here doubt exists . . . a vessel owner may request reasonable documentation from a seaman before it commences payment of maintenance that may prove both lengthy and expensive.").

III. Damages for Delaying or Failing to Pay Maintenance and Cure

It is well-accepted maritime rule that "a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable *only* for the amount of maintenance and cure." *Campbell v. Offshore Liftboats, LLC,* 2015 WL 1280543, *3 (E.D. La. 2015) (quoting *Morales v. Garijak, Inc.,* 829 F.2d 1355, 1358 (5th Cir. 1987), abrogated on other grounds by *Guevara,* 59 F.3d 1496, abrogated on other grounds by *Atlantic Sounding,* 129 S. Ct. 2561 (2009) (emphasis added)). "A failure to pay maintenance and cure is reasonable 'if a diligent investigation indicates that the seaman's claim is not legitimate or if the seaman does not submit medical reports to document his claim.'" *Campbell,* 2015 WL 1280543, *3 (quoting *Morales,* 829 F.2d at 1360). It is only if "the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages," or if "the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well." *Campbell*, 2015 WL 1280543, *3 (quoting *Morales,* 829 F.2d at 1360); *Mier v. Wood Towing, LLC*, 2010 WL 2195700, *2 (E.D. La 2010); *MNM Boats, Inc., v. Johnson,* 248 F.3d 1139 (5th Cir. 2001)(holding that if, after conducting the investigation, the employer unreasonably refuses to pay

maintenance and cure, then the employer is liable for maintenance and cure plus compensatory damages); *Morales,* 829 F.2d at 1358.

In *Campbell*, the plaintiff was injured on July 24, 2014, and his employer coordinated an appointment for him to see a medical provider. *Campbell v. Offshore Liftboats, LLC,* 2015 WL 1280543, *3 (E.D. La. 2015). The medical provider assessed the plaintiff and released him back to full duty, but the plaintiff never returned to work. *Id.* It was not until almost one month after the incident when the employer received a letter from the plaintiff's attorney demanding maintenance and cure and threatening punitive damages if it was not provided. *Id.* This was the first time that the employer was put on notice that the plaintiff did not intend to return to work and that he demanded maintenance and cure. *Id.* The employer began its investigation and about three weeks later, the employer paid the plaintiff "under protest" its calculation of a reasonable amount of maintenance ($35 per day) from the day after the incident. *Id.* The court held that the time that it took the employer to investigate the legitimacy of the plaintiff's claim was reasonable, that the $35 per day maintenance payment was reasonable, and that the employer had "no obligation to inquire about [the plaintiff]'s actual expenses" especially since he had not been provided proof of such. *Id.* at *3.

It is important to note that the vessel owner also has an obligation to investigate claims for maintenance and cure when presented by a seaman. The vessel owner's delay or failure to investigate could subject it to a punitive damages claim. *See*, *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 388 (5th Cir. 1985) (holding that a vessel owner bears the obligation to investigate a seaman's maintenance and cure claim and examine all medical evidence in determining whether maintenance and cure is owed.). "No bright line separates the type of conduct that properly grounds an award of punitive damages—a shipowner's willful and callous default in its

duty of investigating claims and providing maintenance and cure—from the type of conduct that does not support a punitive damages award." *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 90 (5th Cir. 1984). However, as we know, laxness in investigating a claim is one example of employer behavior having the potential to merit the imposition of punitive damages. *See e.g.*, *Tullos, supra*. at 388.

We first see an example of this type of laxness discussed in *Vaughan v. Atkinson* when the Supreme Court held that

> [i] n the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

369 U.S. 527, 530-31 (1962). In that case, a seaman was discharged upon termination of his voyage and a few days later presented to a hospital with an active case of tuberculosis. *Id.* at 528. The vessel owner's only investigation consisted of an interrogation of the Master and Chief Engineer, both of whom stated that the seaman had not complained of any illness during the four-month voyage. *Id.* No further effort was made to investigate the claim despite the fact that the Master had given the seaman a certificate to enter the hospital when he was discharged from the ship. *Id.*

In *Breese v. AWI, Inc.,* the Fifth Circuit found AWI's investigation of Breese's claim for maintenance and cure "impermissibly lax" and remanded the case to the district court for a determination of the appropriate amount of attorney's fees and punitive damages to be awarded Breese. 823 F.2d 100 (5th Cir. 1987). In that case, Breese suffered a heart attached aboard a workover barge owned by AWI and the company's safety director, whose job included

investigating compensation claims, visited Breese in the hospital, failed to request his medical records or speak to his physician. *Id.* at 101. Instead, he relied upon counsel for AWI who advised that MMI was generally reached upon discharge from the hospital and that Breese was not due maintenance after that time. *Id.*

There is no settled law that specifies how much time a vessel owner has to investigate a claim for maintenance and cure or what sort of conduct gives rise to damages for failure to investigate, but laxness in investigating a claim that would have been found to have merit has been found to meet the standard. *See*, *Holmes v. J. Ray McDermott & Co.,* 734 F.2d 1110, 1118 (5th Cir.1984), overruled by *Guevara,* 59 F.3d 1496 (1995). "The cases in which punitive damages or attorney's fees have been granted share the common element of a shipowner's default, either in failing to provide maintenance and cure or in failing to investigate an injured seaman's claim." *Harper v. Zapata Off-Shore Co.,* 741 F.2d 87, 89-90 (5th Cir. 1984).

The question of timing would certainly seem to go to the reasonableness, diligence, and timeliness of the vessel owner/employer's investigation; therefore, having policies and procedures in place for investigating such claims whether the investigation is performed in-house, by an adjuster, or outside counsel, is the prudent way to avoid penalties for laxness in investigating claims.

IV. The Seaman Should be Allowed to Select their own Medical Provider

A vessel owner has a duty to provide prompt and adequate medical care to its seamen. *See*, *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F .2d 138, 140 (5th Cir.1986) (citing, *DeZon v. American President Lines, Ltd.*, 318 U.S. 660, 667–68 (1943)). However, it cannot demand that an injured seaman see solely a doctor of the vessel owner/employer's choosing, as the seaman has the right to choose his or her own physician. *See*, *Turner v. Inland Tugs Co.*, 689 F.Supp. 612, 618–19 (5th

Cir. 1988). Allowing the seaman to select their own medical provider also has certain benefits to the vessel owner/employer. First, it disposes of any claim that the seaman was provided with inadequate care/cure. Further, it helps shield the vessel owner/employer from additional exposure because the vessel owner/employer could be vicarious liable for the negligence of a physician it chooses to treat its seaman. *See*, *Carter v. Bisso Marine, Co., Inc.*, 238 F.Supp.2d 778, 791 (E.D.La. 2002) (finding that a vessel owner can breach the duty to provide adequate medical care through its direct negligence in failing to provide prompt and qualified medical treatment for injured seamen and through the vessel owner's vicarious liability for the malpractice of the doctor it chooses).

V. Defenses to a Maintenance and Cure Claim

A. Lack of Seaman Status – It is well established under *Chandris, Inc. v. Latsis* that a Jones Act seaman, as coined in Admiralty, is a worker who satisfies the following two-part test: (1) must have a connection to a vessel in navigation (or identifiable fleet of vessels) that is substantial in both duration and nature; and (2) must contribute to the function of the vessel or to the accomplishment of its mission. 515 U.S. 347, 368 (1995). Should a worker fail to satisfy these criteria, they are not considered a seaman and, as a matter of law, cannot assert a claim for maintenance and cure benefits.

In *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 997 F.3d 564 (5th Cir. 2021) (en banc), the Fifth Circuit substantially revised the "nature" element of the Chandris test and found that exposure to perils of the sea "is not the sole or even the primary test." Now, there is a new, multi-factor test for determining this factor. The new test focuses on whether (1) the worker owes his allegiance to the vessel or to a shoreside employer, (2) the work is sea-based or involves ocean-going activity, and (3) the worker's assignment to the vessel in question is limited to the

performance of a discrete task after which his connection to the vessel ends, or if the assignment includes sailing with the vessel from port to port or location to location.

B. Lack of Proof – It logically flows, and intrinsic to any legal claim of right, is that one advocating seaman status has the initial burden of providing proof of his entitlement to maintenance and cure benefits, which includes proving that the injury claimed occurred, was aggravated, or manifested while in the service of the vessel. *See*, *Davis v. Brunsman,* 516 F.Supp.3d 1185 (D. Or. 2021); *Miller v. Lykes Bros-Ripley S.S. Co.*, 98 F.2d 185 (5th Cir. 1938). Absent this proof, which is both a procedural and a medical causation argument, the shipowner will defend itself on the basis that the burden of proof is not established.

C. Not in Service of the Vessel – The "in service of a vessel" requirement also operates as a shipowner's defense. Again, the burden of proof requires the seaman "at the time be 'in the service of the ship,' by which is meant that he must be generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders." *Farrell v. U.S.,* 336 U.S. 511, 516 (1949). The defense is easily raised but not easily met because it applies even if a seaman is injured or falls ill off-duty—for example, while on shore leave. *See*, *Warren v. United States,* 340 U.S. 523, 530 (1951).

D. Willful Misconduct – A seaman's willful misconduct when it causes their injury may serve as a defense to maintenance and cure benefits but does not amount to an absolute defense. *See, Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943); *Farrell v. U.S.,* 336 U.S. 511 (1949); *Warren v. United States*, 340 U.S. 523 (1951). This defense arises primarily where the seaman is injured due to intoxication. However, it should be noted that intoxication is not necessarily an act of willful misconduct and does not automatically preclude the seaman from recovering maintenance and cure. *See*, *Kathleen K. Fisheries, Inc. v. Blake*, 2005 A.M.C. 663,

2003 WL 24245932, *2 (W.D. Wash. 2003); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735-736, 63 S.Ct. 930 (1949); *Garay v. Carnival Cruise Line, Inc.*, 904 F.3d 1527, 1529 (11th Cir. 1990); *Bentley v. Albatross SS. Co.*, 203 F.2d 270, 273-274 (3d Cir. 1953). The intoxication must constitute misconduct or gross negligence on the part of the seaman. *Id*., *see also Warren v. United States,* 340 U.S. 523, 528 (1951) (finding that a seaman should not lose maintenance and cure unless the seaman causes his injuries with "positively vicious conduct – such as gross negligence or willful disobedience of orders."); Further, where the ship has a tacit policy of permitting drunkenness onboard, intoxication cannot constitute willful misconduct. *See*, *Garay*, 904 F.3d at 1532. Thus, to avoid maintenance and cure obligations for a seaman's injuries caused by intoxication, a vessel owner should make clear that intoxication is considered misconduct. *Id*.

E. The *McCorpen* Defense - A seaman who intentionally conceals a pre-existing medical condition and is subsequently injured while in the service of the vessel, may be denied maintenance and cure. The *McCorpen* defense, as it is aptly named, was established in accordance with the Fifth Circuit decision in *McCorpen v. Central Gulf S.S. Corp.* 396 F.2d 547, 549 (5th Cir. 1968). Notwithstanding that a seaman may seek recovery for a pre-existing injury or illness which is worsened, to establish a *McCorpen* defense to a seaman's claim for maintenance and cure, an employer must show that:

1. The intentionally misrepresented or concealed medical facts;

2. The non-disclosed facts were material to the decision to hire; and

3. A connection exists between the non-disclosed information and condition complained of.

Johnson v. Cenac Towing, Inc., 544 F.3d 296 (5th Cir. 2008).

F. Abandoning or Rejecting Treatment – Case law has carved out a defense where an employer may cease maintenance and cure benefits when a seaman abandons a course of medical treatment or rejects recommended medical aid. *See, Atlantic Sounding Co., Inc. v. Vickers,* 782 F.Supp.2d 280, 286 (S.D. Miss. 2011); *Coulter v. Ingram Pipeline, Inc.*, 511 F.2d 735, 737 (5th Cir. 1975) ("The general rule is well settled that a seaman's right to maintenance and cure is forfeited by a willful rejection of the recommended medical aid"); *Leocadio v. Lykes Bros. Steamship Co.*, 282 F.Supp. 573, 575 (E.D. La. 1968); *Murphy v. Am. Barge Line Co.*, 169 F.2d 61(3d Cir. 1948), *cert. denied* 335 U.S. 859 (1948). The defense may be utilized to cut off maintenance and cure benefits at the point of the seaman's abandonment, but not seemingly to avoid payment altogether by the shipowner.

G. Curative v. Palliative - Maintenance and cure is only owed until the seaman reaches maximum medical recovery (used interchangeable with 'care' and 'improvement'). *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962). This point of maximum medical recovery occurs "when it appears probable that further treatment will result in no betterment of the seaman's condition" or when the seaman's condition is deemed permanent. *Barto v. Shore Construction, L.L.C.*, 801 F.3d 465, 476 (5th Cir. 2015) (quoting, *Pelotto v. L&N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). Additionally, when a medical procedure only serves to relieve pain and suffering, there is no duty to provide care benefits *Id.* The District Court of Massachusetts stated the defense most succinctly stating, "When further treatment is merely palliative, rather than curative, a shipowner's obligation to pay maintenance and cure ends." *Silvia v. F/V Silver Fox LLC,* 988 F.Supp.2d 94, 99 (D. Mass. 2013).

H. Failure to Request Cure – It may seem as though a seaman's failure to request cure would relieve the vessel owner of their obligation; however, in *Gauthier v. Crosby Marine Service,*

Inc., the Fifth Circuit held that when a seaman purchases and pays for medical insurance and uses it for payment of medical care which would ordinarily be cure, "the shipowner is not entitled to a set-off from the maintenance and cure obligation moneys the seaman receives from his insurer." 752 F.2d 1085, 1090 (5th Cir. 1985). In *Aadland v. Boat Santa Rita II, Inc.*, a seaman paid for his medical care using health insurance through his wife and then sued the employer arguing failure to pay cure. 42 F.4th 34 (1st Cir. July 28, 2022). The district court entered judgment in favor of the vessel owner, but the First Circuit reversed in part, vacated in part, and remanded finding that although the seaman failed to request cure, the vessel owner had an affirmative duty to inform the seaman of their duty to provide cure and failed to do so. *Id.* at 55. The vessel owner argued that payment of the premiums by the seaman's wife and her employer were akin to a seaman receiving financial assistance from a parent and thus incurring no expense as in Johnson v. United States, 33 U.S. 46 (1948); however, the First Circuit did not agree that use of spousal insurance was the same as "a gift" from a parent and remanded to determine the financial relationship between the seaman and his spouse. *Id.* at 45. The vessel owner also claimed that its payment of COBRA premiums after the wife lost her job satisfied its cure obligation; however, the evidence showed that these payments were a loan to the seaman that would have to be repaid. *Id.* at 46. This aspect was also remanded to determine the nature of these premium payments. The First Circuit did agree that the seaman was only entitled to the $600,000.00 actually paid for the medical care as opposed to the $1,200,000.00 "sticker price" billed by the medical providers. *Id.* at 49-50. This is in accordance with the Fifth Circuit's decision in *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373 (5th Cir. 2012).

VI. Calculating Maintenance Rate

It is a well-established rule that "[a] seaman is entitled to the reasonable cost of food and lodging, *provided he has incurred the expense*." *Hall v. Noble Drilling (U.S.) Inc.,* 242 F.3d 582, 587 (5th Cir. 2001) (emphasis added). Further, courts have "consistently held that 'one who has not paid his own expenses, whether a minor living at the home of his parents or otherwise, cannot recover maintenance and cure from the ship owner.'" *Marine Drilling, Inc. v. Landry*, 302 F.3d 127, 128 (5th Cir. 1962). "[T]he shipowner is obligated to pay the seaman no more than the seaman actually spends to obtain reasonable food and lodging." *Hall,* 242 F.3d at 588. "If the seaman's food and lodging are both reasonable in quality *and free*, he is entitled to no maintenance from the shipowner." *Id.* (emphasis added); *see also Howard v. Offshore Liftboats, LLC*, 2015 WL 5944310, *4 (E.D. La. 2015). A seaman may recover for expenses that "he is obligated to pay or has promised to pay." *Hall,* 242 F.3d at 589, n.26 (citing *McCormick Shipping Corp. v. Duvalier*, 311 F.2d 933, 933 (5th Cir 1963) (per curiam)).

Generally, an individual's lodging can be calculated by determining the following expenses:

- monthly mortgage or rent – (mortgage payment allowed. *See*, *Bachir v. Transoceanic Cable Ship Co.*, 2002 WL 1870068 (S.D.N.Y. 2002)).
- any applicable insurance (homeowner's and flood)
- property taxes
- utilities such as electric, gas, water, sewerage
- maintenance costs such as lawn care
- food for the individual only

In *Bachir v. Transoceanic Cable Ship Co.,* the court found that plaintiff's submission adequately showed that his salary paid the full mortgage amount and that such amount was reasonable and so the full cost of the mortgage was allowed for maintenance. 2002 WL 1870068, *1 (S.D.N.Y. 2002). The court stated that "[t]o award plaintiff any less for a home he shares with his family would cause him to lose his home." *Id.* ; *see also Durfor v. K–Sea Transp. Corp.,* 2001 WL 856612, *5 (S.D.N.Y. July 30, 2001); *Hall*, 242 F.3d at 591 (awarding entire mortgage amount as maintenance when plaintiffs had "each individually promised (both to their banks and to their families) to pay their entire mortgage.").

Although the burden is "feather light," the seaman still must present *some* evidence that he incurred these expenses. In *Gillikin v. United States*, the court held that "there is no indication that plaintiff actually paid interest on the equity in his home to anyone or any institution." 764 F. Supp. 270, 272 (E.D.N.Y. 1991). Further, "[a]bsent an indication that plaintiff actually paid out any such amounts, he may not recover them as maintenance." *Id.* (citing *Johnson v. U.S.,* 333 U.S. 46, 50(1948); *Mahramas v. Am. Export Isbrandtsen Lines, Inc.,* 475 F.2d 165, 172 (2d Cir. 1973)).

In *Harper v. Zapata Off-Shore Co.,* the plaintiff lived at home with his wife and kids, but he failed to introduce any evidence that he incurred lodging expenses. 741 F.2d 87, 91 (5th Cir. 1984). The court held that "[b]ecause a seaman is not entitled to maintenance unless he incurs costs . . . a reasonable jury could not have found that reasonable maintenance was $40." *Id.*

Another situation arises when the seaman lives at home with friends or relatives. *See, e.g., Lopez v. Calumet River Fleeting, Inc.,* 2012 WL 1658110 (N.D. Ill. May 11, 2012 (discussed below); *McCormick Shipping Co. v. Duvalier*, 311 F.2d 933 (5th Cir. 1963) (discussed below); *Barnes v. Sea Hawaii Rafting, LLC*, 16 F. Supp. 3d 1171 (D. Haw. 2014) (discussed below); *Johnson v. United States,* 333 U.S. 46 (1948) (holding that plaintiff seaman who lived at home

with his parents did not incur any expense or liability for his care and support at the home of his parents).

In *Lopez v. Calumet River Fleeting, Inc.,* the injured seaman was living with a woman (the court does not discuss the relationship between the man and woman) and the mortgage and utility bills were all in her name. 2012 WL 1658110, *3 (N.D. Ill. May 11, 2012). The court concluded that the mortgage and utility expenses must be divided by two because the seaman was obligated to pay only half of those bills. *Id.* However, this determination was based on the written statement of the woman who expressly stated that the seaman was obligated to pay half of the bills*Id.* *3.

In *McCormick Shipping Co. v. Duvalier*, the plaintiff seaman lived with her cousin, but the court awarded maintenance. 311 F.2d 933 (5th Cir. 1963). In *McCormick*, the plaintiff testified that she expected to pay her cousin for the maintenance and care she received and her cousin testified that the plaintiff had promised to give her some money and that she expected her to do so. *Id.* at 934. Based on this testimony, the court held that "[w]e think there was an expressed intention of the appellee to make payment and an expectation of her cousin to receive it." *Id.* Further, the court held that it was "unnecessary to decide whether there was a legally enforceable obligation of the appellee to her cousin." *Id.*

In a more unique example where the plaintiff seaman was "couch surfing" at various friends' homes, the court still awarded maintenance. *See, Barnes v. Sea Hawaii Rafting, LLC*, 16 F.Supp.3d 1171 (D. Haw. 2014). Despite the fact that the plaintiff seaman incurred no costs while living on the charity of his friends for a year, the court awarded maintenance based on plaintiff's statement in an affidavit that he intends to repay the charity when he is able to do so. *Id.* at 1177. The parties presented evidence regarding the "reasonable" cost of food and lodging for the plaintiff

in his locality and ultimately it was decided that factual issues remained and the summary judgment motion was denied. *Id.* at 1178-82.

When calculating the reasonable cost of food for an injured seaman, courts have acknowledged that it can vary based on locale. *See, e.g., Diggs v. New York Marine Towing* 2008 WL 2916281, *4 (E.D.N.Y. 2008) (accepting as the reasonable estimate of the seaman's food costs, when seaman based the estimate on the "USDA food plan" and sought $289.50 per month, or $9.65 per day); *Bachir v. Transoceanic Cable Ship Co.,* 2002 WL 413918, at *5 (S.D.N.Y. 2002) (plaintiff presented evidence of his food expenses of $10 per day); *Rodriguez Alvarez v. Bahama Cruise Line, Inc.,* 898 F.2d 312, 314 & n.2 (2d Cir. 1990) (agreeing that $45 daily rate consisting of $30 per day for lodging and $15 per day for food in New York City was reasonable). One potential resource is the Cost of Living Index published by the Bureau of Labor Statistics.

A. What's Not Included in Maintenance?

- vehicle loans (including other family member vehicles, motorcycles, boats, RVs, and other recreational vehicles), insurance and maintenance – except as cure for transportation expenses related to medical care (typically, these are paid at the federal mileage rate for medical transportation) – per IRS the 2023/2024 rate is 21 cents per mile for medical transportation (https://www.irs.gov/tax-professionals/standard-mileage-rates)
- the cost of gasoline, oil, and insurance is not encompassed within the scope of maintenance, however, it may be included as an expense under cure if the standard mileage rate is not utilized. *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 644 (3rd Cir.1990) ("maintenance should not include Barnes' automobile expenses (gas, oil and insurance) or his toiletries"); *Smith v. Delaware Bay Launch Service, Inc.*, 972

F.Supp. 836, 849 (D. Del. 1997) ("maintenance clearly does not cover items such as ... trips to visit relatives" and further noting that maintenance and cure excludes all automobile expenses except those "incurred for the sole purpose of obtaining medical care [which] fall into the category of cure")

- telephone costs, internet, and various television channels – unless somehow required for medical care, communication with the employer, job searches or other unique situations
- tuition and other expenses for children
- clothing and medical care not related to the injury
- entertainment
- credit card and other debt obligations
- food for other family members or household residents

B. Collective Bargaining Agreement Maintenance Rates

Many seaman are members of unions who have collective bargaining agreements that encompass a set maintenance rate, usually one far lower than the seaman's actual food and lodging expenses. A collective bargaining agreement rate should be accepted. *See*, *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir. 2000); *Cabrera Espinal v. Royal Caribbean Cruises, Ltd.*, 253 F.3d 629 (11th Cir. 2001).

As the Ninth Circuit noted in *Gardiner v. Sea-Land Service, Inc.*, "Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace ... [T]his court will not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement and will 'choose the rule that will promote the enforcement of collective bargaining agreements.'" 786 F.2d 943, 948 (9th Cir. 1986). "The adequacy of the maintenance

rate should not be examined in isolation by the court because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract." *Baldassaro v. U.S.*, 64 F.3d 206, 213 (5th Cir. 1995) (quoting, *Gardiner,* 786 F.2d at 949).

C. Some Costs can be Pro-Rated for Other Household Members

Oftentimes, it is necessary to pro-rate certain costs included in maintenance payments, such as electricity, gas, water, trash removal, and food, among the members of the household. *See, Gillikin v. United States*, 764 F. Supp. 270, 272 (E.D.N.Y. 1991). However, pro-rating mortgage or rent payments is not the proper method. *Hall v. Noble Drilling (U.S.) Inc.,* 242 F.3d 582, 589 (5th Cir. 2001)..

Different from lodging payments, courts have allowed for the costs of heat, electricity and water to be prorated. *See, e.g., Gillikin v. United States*, 764 F. Supp. 270, 272 (E.D.N.Y. 1991); *Hall v. Noble Drilling (U.S.) Inc.,* 242 F.3d 582, 589 n. 31 (5th Cir. 2001). In *Hall*, the court held that to the extent the expense varies with the number of people in the household it can be prorated for purposes of maintenance. 242 F.3d at 589 n.31. In *Gillikin*, the court analyzed the proper amount of food expenses for the seaman to receive as maintenance. 764 F. Supp. at 272. Given that most households do not keep accounts of who eats how much, it would be impossible to determine exactly what amounts should be attributed to each person's consumption. *See id.* Thus, the court held that "[w]ithout a more exact measure, the most reliable means of distributing this cost is therefore simply to allocate the cost in equal portions to each member of the household." *Id*. In the *Gillikin* case, the plaintiff seaman lived with his wife and thus, the plaintiff was entitled to recover half of the household expenses as maintenance. *Id.*

VII. Strategies to Avoid Punitive and Compensatory (Pain and Suffering) Damages for Failure to Pay Maintenance and Cure

In the current state of Admiralty, punitive damages may be legally awarded upon a showing of the shipowner's wanton, willful, and outrageous conduct, including refusal to pay maintenance and cure. *Atlantic Sounding Co. v. Townsend,* 557 U.S. 404, 424 (2009). In *Atlantic Sounding Co.*, the United States Supreme Court recognized and gave credence to a seafarer's "right to choose among overlapping statutory and common-law remedies for injuries sustained by the denial of maintenance and cure", and, "[b]ecause punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law." *Id.* at 423-24; *see also The Duta Group v. Batterton,* 139 S.Ct. 2275, 2283 (June 24, 2019) (the Supreme Court discussed the ruling of *Atlantic Sounding Co.* stating "we allowed recovery of punitive damages, but we justified our departure from the statutory remedial scheme based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure.")). To state a claim for punitive damages based on a shipowner's failure to provide maintenance and cure, a seafarer must allege: (1) he is entitled to payments for maintenance and cure; (2) the ship owner did not satisfy its obligation to provide him with maintenance and cure; and (3) the ship owner's failure resulted from a willful and wanton disregard of its maintenance and cure obligation." *Williams v. Maersk Line, Ltd.,* 450 F.Supp.3d 242, 257 (E.D.N.Y. Mar. 31, 2020) (quoting, *Kalyna v. City of New York*, 2018 WL 1342488, *4 (E.D.N.Y. Feb. 28, 2018)). Therefore, punitive damages predicated on willful and wanton disregard of the maintenance and cure obligation persist as a viable remedy for seafarers and a consideration for the courts.

Circumstances leading to an imposition of punitive damages result when a shipowner unreasonably fails to pay maintenance and cure causing the aggravation of a seaman's

condition. *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1362-63 (5th Cir. 1987) (an inquiry into punitive damages under the circumstances is "whether the unreasonable failure to provide maintenance and cure aggravated the seaman's condition, and if so, the shipowner is then liable not only for the increased medical expenses and maintenance that may become necessary, but also for full tort damages that result."). It is the coupling of the unreasonable denial and egregious fault of the shipowner that leads to potential for punitive damages.

In addition to refusal to pay, courts place a heightened emphasis on the shipowner's good faith investigation of a seaman's maintenance and cure claim. *Williams v. Maersk Line, Ltd.,* 450 F.Supp.3d 242, 258 (E.D.N.Y. Mar. 31, 2020). Consequently, the failure of a shipowner to conduct any investigation into a seaman's maintenance and cure claim may give rise to the kind of "callous" or "willful and persistent" conduct contemplated in the award of punitive damages. *See, Tuyen Thanh Mai v. Am. Seafoods Co., LLC*, 249 P.3d 1030, 1037 (Wash. Ct. App. 2011). Conduct sufficient to establish a bad faith denial of a maintenance and cure claim includes: "(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." *Tullos v. Res. Drilling, Inc.*, 750 F.2d 380, 388 (5th Cir. 1985).

An injured seaman may also recover damages if the vessel owner's failure to pay maintenance and cure caused pain and suffering by prolonging or aggravating the initial injury. *See*, *Vaughan v. Atkinson*, 369 U.S. 527, 539 (1962) (Stewart, J., dissenting); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932); *Williams v. Kingston Shipping Co.*, 925 F.2d 721, 723 (4th Cir. 1991) (discussing availability of "money damages for any prolongation or aggravation of the physical injury"); accord, *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1190 (11th

Cir.1987) (per curiam) (pain and suffering damages awarded where failure to pay maintenance "aggravated Hines' condition, prolonged his pain and suffering, and lengthened the time required for him to reach maximum cure").

VIII. Reinstatement of Maintenance and Cure

There are limited circumstances in which a seaman's claim for maintenance and cure may be reinstated. An exception exists for reinstatement of maintenance and care once a disability is declared permanent, when after being declared permanently unfit for duty, a new medical development is available that might improve the seafarer's medical condition to the point of a cure. *See*, *Cox v. Dravo Corp.*, 517 F.2d 620, 626 (3d Cir. 1975). The Third Circuit declared, "The only exception [Farrell v. United States] recognizes is the possibility of recovering for curative treatment in a later proceeding and of maintenance while receiving such treatment. . . this reference is clearly to treatment of a curative nature such as a new drug or a new surgical technique, and not to the palliatives[.]"). *Id.* "Given this expansive interpretation, it is not surprising that, a seaman who has previously achieved MMI may reinstitute a demand for maintenance and cure where new curative medical treatments become available." *Stemmle v. Interlake Steamship, Co.*, 621 F.Supp.3d 326, 336 (E.D.N.Y. Aug. 8, 2022). Nevertheless, it merits emphasizing that the distinction between curative and palliative still persists, meaning maintenance and cure does not reattach when the new treatment is merely palliative.

In contrast, for example, in *Stemmle v. Interlake Steamship, Co.,* the vessel owner sought a declaratory judgment that a seaman, who had undergone a heart transplant after settling a maintenance and cure claim against the vessel owner, had achieved maximum medical improvement. 621 F.Supp.3d 326, 328 (E.D.N.Y. Aug. 8, 2022). Under the settlement agreement, the vessel owner was obligated to cover premiums for supplemental medical insurance for the

seaman until he reached maximum medical improvement. *Id.* at 335. This was despite the fact that the seaman needed anti-rejection medication for the rest of his life, and although his condition continued to improve, there were no further medical interventions available for his chronic heart failure. *Id.* The court declared that the seaman had achieved maximum medical improvement because his medical condition progressed to the point of stability nearly three years after the transplant, and his ongoing treatment resembled that of preventing a relapse in a chronic condition. *Id.* at 340.

IX. Maintenance and Cure for Pre-Existing Injuries

"[A] seaman may be entitled to maintenance and cure even for a preexisting medical condition that recurs or **becomes aggravated during his service**." *Messier v. Bouchard Transp.*, 688 F.3d 78, 82 (2d Cir. 2012) (emphasis added); s*ee also*, *Sammon v. Cent. Gulf S.S. Corp.,* 442 F.2d 1028, 1029 (2d Cir.1971); *compare Brahms v. Moore–McCormack Lines, Inc.,* 133 F.Supp. 283, 286 (S.D.N.Y. 1955) (denying maintenance and cure when seaman submitted evidence showing his injury preexisted his service and recurred afterward, but did not submit any evidence showing that illness existed during his service).

X. Recovery of Maintenance and Cure Payments from Third-Parties Responsible for the Seaman's Injury or Illness

A vessel owner is entitled to seek indemnity and contribution of its maintenance and cure payments from third-parties. This right exists even where the vessel owner/employer (and the third-parties) have settled the Jones Act seaman/liability claims. *See*, *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994)(holding that pretrial settlement of seaman's claims with all defendants did not preclude defendant employer's claim for indemnity and contribution for amounts paid in maintenance and cure from other settling defendants); *see also*, *Marcinowski v. McCormack Boys Corp.*, 160 F.Supp.2d 708, 717 (S.D.N.Y. 2001)("The shipowner's recovery

for maintenance and cure payments is not barred by the shipowner's settlement with an injured seaman"). Any recovery, however, would be reduced by the apportionment of negligence attributed to the vessel owner and/or seaman.


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OCCUPATIONAL MEDICINE AND FCE'S, HOW AND WHY ARE THEY IMPORTANT TO MY COMPANY AND MANAGING PERSONAL INJURY CLAIMS?

- What is "occupational medicine" and how does it differ from services provided by a typical hospital or urgent care clinic How do I use an OccMed facility and its doctors?
- What is the best way of working with my OccMed provider in pre-employment physicals as well as accidents or illnesses that occur on board my vessels, at my terminal or at my fleet?
- How is occupational medicine viewed by the insurance carrier and what benefits may it have with insurance renewals and premiums?
- How do I structure payments to my OccMed service provider for routine physicals versus incidents, and is this covered by my health and accident or marine insurance?
- How do OccMed providers manage reporting and filing of insurance claims?
- What pre-employment post-offer recommendations for physicals and tests are made by OccMed providers?
- What is a functional capacity evaluation - that is, an FCE? How is it viewed by the Judge or jury?
- What information is used to support it, and how is it viewed by the company and the insurers in valuing the case?
- How is an FCE used to impact the wage loss claim?

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RIVER & MARINE INDUSTRY SEMINAR

2024

OCCUPATIONAL MEDICINE AND FCE'S, HOW AND WHY ARE THEY IMPORTANT TO MY COMPANY AND MANAGING PERSONAL INJURY CLAIMS?

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I. IMPACT OF FUNCTIONAL CAPACITY EVALUATIONS ON LITIGATION

In maritime personal injury litigation, functional capacity evaluations (FCEs) are far less commonly obtained than independent medical examinations (IMEs) pursuant to Federal Rule of Civil Procedure 35, Louisiana Code of Civil Procedure Article 1464, or Texas Rule of Civil Procedure 204.1. Notwithstanding the foregoing, the impact of an FCE on a case in litigation may at times be as consequential (or more) as that of an IME. Among other things, an FCE may: (a) challenge credibility of a plaintiff's claimed injuries and subjective pain levels by establishing evidence of malingering or symptom magnification; (b) support the conclusions of other retained experts; and, (c) provide support for proposed recoverable damages models.

It is important to note, however, that litigants do not have an absolute right to obtain FCEs, and motions to compel FCEs are not freely granted by district courts in the Fifth Circuit or Louisiana or Texas state courts. In the following sections, we explore various ways in which FCEs may impact litigation as well as procedural considerations for obtaining an order compelling an FCE.

A. Evidence of Malingering or Confirmation of the Severity of Claimed Injuries

A fundamental assumption that underlies the reliability of any FCE is that the examinee participated in the evaluation with maximal effort. To determine as much, FCE examiners are trained to recognize various signs, including appropriate muscle recruitment, changes in movement velocities, consistency in cardiovascular changes during exercises, appropriate changes in biomechanics, and other evidence of high-effort behaviors. As reflected in the example below, an FCE examiner's interpretation of a claimant's effort is typically documented throughout various portions of the FCE Report:

[redacted]

FUNCTIONAL CAPACITY EVALUATION

EXAMINEE NAME:	[redacted]	**TEST DATE:**	[redacted]
SS #:	[redacted]	**EMPLOYER:**	[redacted]
DATE OF BIRTH:	[redacted]	**INSURANCE:**	[redacted]
REFERRED BY:	[redacted]	**CLAIM #:**	[redacted]
TOTAL TEST TIME:	3PM - 7PM		

PURPOSE OF ASSESSMENT:

[redacted] reports today for an FCE to determine his current functional abilities as an engineer for [redacted]

RELIABILITY AND CONSISTENCY OF EFFORT:

The results in this evaluation suggest that [redacted] gave a reliable effort.

RELIABILITY OF EFFORT

RELIABILITY OF FINDINGS:

Consistency of effort, symptom response and perceived function were correlated to determine the reliability of evaluation results.

Reliability of Effort	
Effort Determined from the Evaluation	Reliable

Evaluation of Effort	
Indications	**Result**
Were high effort behaviors observed during the evaluation?	Yes
Did movement velocity change appropriately?	Yes
Did biomechanics change appropriately?	Yes
Did muscle recruitment change appropriately?	Yes
Did CV indicate consistency?	Yes
Were grip testing results consistent?	Yes
Were horizontal strength changes appropriate?	Yes

Coefficient of Variation			
Area	**Number Possible**	**Number < 15%**	**% Consistent**
Left Side	8	8	100%
Right Side	8	8	100%
Bilateral	6	6	100%
Overall	22	22	100%

Evaluation of Symptom Reports	**Result**
Appropriate relationship between pain report and observed behavior?	Yes

Rating of Perceived Exertion (RPE)				
# Possible	**# Appropriate**	**% Appropriate**	**#Inappropriate**	**% Inappropriate**
5	3	60%	2	40%

CONCLUSIONS

FCE ANALYSIS/FINDINGS:

The following conclusions are provided based on the results of the testing/evaluation performed.

EXAMINEE EFFORT	☒ Good Effort *(appropriate change in heart rate)*

	☒ Pain Level/Perceived Exertion Correlate *(pain level reported correlates with changes in heart rate)*
PHYSICAL DEMAND LEVEL – Pre-Injury (Per MD Guidelines)	☒ Medium
CURRENT PHYSICAL DEMAND LEVEL – PER FCE	☒ Light
RETURN TO WORK STATUS – PER FCE	See Treating Doctor or Referring Doctor to determine need for restrictions or not.
PSYCHOLOGICAL FINDINGS – PER FCE	The client completed a survey for depression and anxiety where the patient index scores placed him in a range of minimal depression and minimal anxiety.
NOTES/OBSERVATIONS:	**The examinee arrived at his appointment on time and had a good attitude throughout the evaluation. His body mechanics were consistent with someone who experienced low back and shoulder pain. Functionally, any exercise that required him to bend at the waist was not able to be done due to provoking severe back pain. He would attempt the bending exercises but would need to stop before completion. Abduction of the left shoulder in ROM and exercises would provoke a catch in his shoulder. He would either touch the catch with his right hand or shift his body a little before being able to continue. After doing the shift, he was able to get full left shoulder ROM but with provoked pain as the evaluation continued. He was unable to perform the lifting exercise for shoulder or overhead heights.**

Evidence that an examinee provided consistent and reliable effort during an FCE but nevertheless exhibited an inability to perform certain exercises or achieved suboptimal results may be prosecuted as empirical proof of both injury and attendant limitations.

For example, using the results of the FCE report above, a claimant could argue that his subjective pain complaints were effectively validated by the FCE examiner's findings, as his effort was "consistent," and "reliable," with "body mechanics . . . consistent with someone who experienced low back and shoulder pain," and an inability "to perform the lifting exercise for shoulder or overhead heights." Those findings likely would be highlighted to validate his subjective complaints and resultant non-economic and economic losses.

Conversely, an FCE may be used by defendants in litigation to undermine or contradict a claimant's alleged injuries and subjective pain levels. For example, indications from FCE testing that a claimant failed to provide maximum effort could be offered as evidence that the claimant deliberately underperformed. thereby calling into question all of his/her complaints. Indeed, such evidence could be offered not only to impeach a claimant's alleged physical limitations and return to work assumptions, but also his/her credibility in general. Similarly, a claimant's ability to participate in an FCE without indicia of pain or at levels of physical demand or mobility greater than expected given subjective complaints of pain or reported capabilities could be offered as evidence of malingering or symptom magnification. Finally, an FCE can identify capabilities supporting a greater ability to return to work than either claimed or anticipated. As such, evidence can be used by other experts for purposes of performing the evaluations.

B. Support for the Conclusions of Other Experts

FCE results may also be used by other retained experts to further support their own conclusions. Expert discovery in maritime personal injury litigation typically follows a predictable pattern: a defendant will request that the plaintiff undergo an IME to further understand the alleged injuries and, using the IME physician's or healthcare provider's conclusions regarding the plaintiff's capabilities and work limitations, a vocational rehabilitation counselor will identify employment options for which the plaintiff qualifies. Finally, a consulting economist will calculate a claimant's economic losses based upon the foregoing. Frequently in such circumstances, an unresolved question remains: how reliable are the IME physician's or healthcare provider's conclusions regarding the plaintiff's capabilities and work limitations and, by extension, how reliable are the conclusions of the vocational rehabilitation counselor and consulting economists who relied on the IME physician's or healthcare provider's opinions?

An FCE can help to close, or at least narrow, that evidentiary gap by providing some empirical evidence to support the foregoing opinions. Even if controverted by a compelling FCE, or a challenge to the efficacy of a beneficial FCE, a beneficial FCE lends an additional layer of evidence and support to other experts' opinions.

By way of example, in a recent Jones Act case, a seaman alleged that he was injured while working on a vessel during a storm. Among other things, he complained of a right shoulder injury that ultimately required a rotator cuff repair and a distal clavicle excision. After completing physical therapy and recovering from the shoulder procedures, his treating orthopedic surgeon opined that he had reached maximum medical improvement (MMI), and that he should be able to work up to "medium duty work," ***including whatever restrictions were noted in an FCE*** that had been scheduled by his employer. Contrary to his orthopedic surgeon's opinion, however, the seaman claimed that the residual weakness in his shoulder prevented him from returning to his "high" physical demand job on an unrestricted basis.

As a consequence of those ongoing complaints, the defendants retained an orthopedic surgeon to complete an independent medical examination of the seaman's shoulder. The IME physician generally agreed with the seamen's treating provider, referenced the upcoming FCE, and noted as follows:

[redacted]

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ASSESSMENT:

[redacted] sustained a right shoulder acute rotator cuff tear 08/29/21 [redacted] then subsequently underwent an arthroscopic rotator cuff repair/subpectoral biceps tenodesis/distal clavicle excision 02/8/22. I believe his current complaints and injury were causally related to the work-related event in question. Clinically I believe he is doing well, but unfortunately, even with the best expertly done repair, which I believe was performed by Dr. [redacted], in some patients there can be chronic weakness that prevents returning to a unrestricted manual labor job. I agree with the assessment that he would be able to do a medium duty job with whatever restrictions the FCE will place on him. I believe he is currently at MMI. I believe with the vocational rehabilitation report regarding chronic Celebrex, occasional PT, a future MRI, occasional orthopedic follow up visits. I do not anticipate additional surgery in his future.

Relying on the IME physician's findings, a vocational rehabilitation counselor retained by defendant concluded that the seaman conservatively qualified for employment with "light" and/or "light-medium" physical demand levels without further treatment, including positions as a retail sales consultant, polisher, transit bus operator, route sales driver, and merchandiser.

The seaman consented to and underwent the FCE requested by his employer. Significantly, the FCE confirmed that he not only qualified for employment with a "medium" physical demand level, as opined by his treating physician and the IME physician retained by defendant, but that he also ***could assume a position with a "heavy physical demand level"*** with few restrictions.

The significance of the FCE in the aforementioned case cannot be overstated. Prior to the FCE, defendant found itself in a familiar position of having a favorable medical opinion regarding the claimant's physical capabilities while simultaneously facing expected testimony from the plaintiff that he was greatly limited in the type of employment in which he could engage as a consequence of residual shoulder weakness. The FCE effectively broke any stalemate that may have been created by the claimant's anticipated testimony, showing that no less than two medical professionals and one physical therapist agreed that, at a minimum, the claimant could return to work without any further treatment and qualified for medium physical demand level employment.

Importantly, and as further explained in the following section, the results of that FCE model significantly affected the damages that the seaman could rely upon at trial.

C. Impact on Recoverable Damages

The added credibility given by the FCE results to the defendant's expert reports in the above-referenced matter resulted in significant savings when mediating the seaman's claims. Prior to the FCE, the seaman's total claim (general and special damages) arguably equaled approximately $1.3 million, further broken down as follows:

Past Lost Wages	$175,000
Future Lost Wages	$750,000
General Damages	$300,000
Future Medicals	$75,000
TOTAL:	**$1.3 Million**

As indicated, in large measure the claim value was driven by lost earning capacity as a consequence of the seaman's claimed physical restrictions. Indeed, the quantum analysis of the seaman's claim was driven by an expert vocational rehabilitation counselor's conclusion that various light and light-medium physical demand positions offered earning potential in the $35,000 range. However, once armed with the FCE results showing the seaman could perform "heavy" work, it became apparent that the seaman arguably could return to work earning approximately $75,000 per year. In essence it thereby eliminated his future lost wage claim.

II. STANDARD FOR OBTAINING AN INDEPENDENT MEDICAL EXAMINATION

As significant and potentially useful as an FCE may be, parties in litigation do not have an absolute right to obtain one. While a defendant can request an FCE and a plaintiff can of course agree to undergo as much, in many cases the request is denied.

When a plaintiff does not consent to an FCE, a defendant may move for an order to compel the FCE pursuant to Fed. R. Civ. P. 35 if the case is pending in federal court, Louisiana Code of Civil Procedure Article 1464 if the case is pending in Louisiana state court, or Rule 204.1 of the Texas Rules of Civil Procedure if the case is pending in Texas state court. Regrettably, although there is a substantial body of law regarding motions to compel IMEs, it is much more limited as respects FCEs. In the sections that follow, we analyze available jurisprudence from Fifth Circuit district courts as well as Louisiana and Texas State courts to better understand the standards used by courts in deciding whether to compel FCEs. We also identify options that litigants may consider to maximize the likelihood of prevailing on a motion to compel an FCE.

A. Compelling an FCE in the Fifth Circuit

When the parties dispute the necessity of an examination, it is within the sound discretion of the trial court to decide the matter and, absent abuse of discretion, a district court's order will not be overturned. *Magee v. Pride Offshore, Inc.*, 2004 WL 224562 (E.D. La. 2/4/04); *N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 481 (5th Cir. 2018). Fifth Circuit district courts analyze motions to compel FCEs pursuant to Federal Rule of Civil Procedure 35(a), which provides:

> (1) *In General.* The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
>
> (2) *Motion and Notice; Contents of the Order*. The order:
>
> (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and
>
> (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

Thus, there is a two-part test for determining whether a motion will be granted. First, the physical or mental state of the party must be in controversy. *Schlagenhauf v. Holder*, 379 U.S. 104, 106 (1964). Second, the moving party must show good cause as to why the motion should be granted.

The first part of the test most often is easily met, as courts have universally found that a "plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy." *See Cook v. Bayou Tugs, Inc.*, No. CIV.A. 11-0112, 2011 WL 5930477, at *2 (E.D. La. Nov. 29, 2011). Conversely, "good cause" is more difficult to establish and "requires a showing of specific facts that demonstrate the need for the information sought and a lack of means for obtaining it elsewhere." *Schlagenhauf*, 379 U.S. at 118.

Fifth Circuit caselaw is explicitly clear that where a moving party has already made an examination in the past, courts will require a stronger showing of necessity before ordering "repeated" examinations. *Mathias v. Omega Protein, Inc.*, No. 10-2835, 2011 WL 1304000, at *3 (E.D. La. April 1, 2011) (citing § 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2234 at 475; *Monroe v. Cooper/T. Smith Stevedoring Co., Inc.*, 2008 WL 687196, at *2). To determine whether "second examinations" are appropriate, courts will typically analyze several factors, including (1) whether there are sperate injuries calling for examination by distinct medical specialties, (2) whether a physician requires the assistance of other consultants before he or she can render a diagnosis, (3) whether the first examination was inadequate or incomplete, and (4) whether a substantial time lag occurred between the initial examination and trial. *Mathias v. Omega Protein, Inc.*, 2011 WL 1304000, at *3 (citing *Moore v. Calavar Corp.*, 142 F.R.D. 134, 135 (W.D. La. 1992)).

Cook, 2011 WL 5930477, at *1 perfectly illustrates the foregoing legal standard. In *Cook*, a seaman filed suit against his employer after allegedly injuring his knee in a collision. The Seaman underwent surgery to repair his patellar ligament and, approximately two months after the surgery, his treating physician concluded that his knee would never be normal, and that he would have permanent restrictions. *Id.* at 1-2. On the basis of his treating physician's opinions, the seaman's expert vocational rehabilitation counselor concluded that the seaman would be unable to perform his prior work as a tugboat captain and would experience a significant loss to his wage-earning capacity. *Id*. at 2.

At the defendant's request, the plaintiff voluntarily underwent an IME. The IME physician concluded that although plaintiff had achieved MMI, he could not flex his knee more than ninety degrees and therefore would be restricted from climbing steep narrow steps, one of the requirements of being a tugboat captain. *Id*. at 2. The IME physician subsequently issued an updated report at the defendant's behest and opined that an FCE would help determine the seaman's ability to return to work. *Id*. Importantly, the IME physician stated that the functional capacity evaluation "would have to be ordered by his treating physician." *Id*.

The defendants moved for an order to compel the seaman to attend a functional capacity evaluation with a physical therapist. *Id*. Among other things, the defendants argued that the FCE was necessary to determine the seaman's functional capacity, whether the seaman's knee could be rehabilitated, whether the seaman could pass a pre-employment physical for the position of tugboat captain, and whether he could return to work at his prior level. *Id.*, at *2. Defendant further argued that the IME was no substitute for an FCE, and that only an FCE could determine whether the seaman could pass a pre-employment physical, meet the requirements for work as an inland push boat captain, and return to work with no loss of earning capacity. *Id*. at 3.

In opposition, the seaman characterized the requested FCE as a "second examination," arguing that he had already voluntarily attended an IME conducted by the defendant's chosen physician. *Cook*, 2011 WL 5930477, at *3. Furthermore, the seaman noted that the IME physician had not indicated that an FCE was necessary, only that it would "help" determine the seaman's capacity for work. *Id.*. Finally, the seaman argued that both his treating physician and defendant's IME physician had already determined that he would be restricted from performing the tasks of a tugboat captain. *Id*.

Citing Fed. R. Civ. P. 35, the Eastern District of Louisiana concluded that the seaman had placed his physical condition in controversy by alleging injury to his left knee and loss of function to perform as a captain due to the alleged negligence of the defendant. *Id*. at 4. Thus, the Eastern District concluded that part one of the two-part test for a Rule 35 examination had been met. *Id*.

However, the court ultimately denied the FCE after finding that the defendant could not satisfy the second part of the test, as the FCE constituted a "second examination" and defendant had not established a "stronger showing of necessity for an FCE." *Id.* First, the court noted that both defendant's IME physician and the seaman's treating physician had agreed that the seaman could not perform the physical requirements of a tugboat captain, even if the parties disagreed on the exact level of the seaman's residual impairment. *Id*.

The court also concluded that although "[o]ne of the purposes of Fed. R. Civ. P. 35" is to level the playing field when a party's physical . . . capacity to engage in gainful employment is at issue, there was "no playing field to level," as defendant had already physically examined the seaman, and the seaman had not retained an expert to perform an FCE that defendant needed to rebut. *Id.,* at *4 (citing *Bergeron v. Beverly Dredging, LLC, et al.*, No. 08-3753, 2009 WL 1140414, at *2 (E.D. La. April 27, 2009); *Miller v. Chet Morrison Contractors, L.L.C.*, No. 09-5457, 2010

WL 2292157, at *2 (E.D. La. June 2, 2010) (finding an FCE unnecessary because plaintiff had not retained his own expert to perform an FCE and only intended to use his treating physician as an expert at trial); *Fuller v. U.S.*, No. 00-2791, 2002 WL 287729, at *2 (E.D. La. Feb. 26, 2002) (upholding a decision denying a motion to compel an FCE where the government had already submitted plaintiff to examination by the government's expert)). *See also Spencer v. Hercules Offshore, Inc.*, No. CIV.A. 13-4706, 2014 WL 1681736, at *1 (E.D. La. Apr. 28, 2014) (affirming a magistrate judge's denial of defendant's motion to compel a functional capacity evaluation where plaintiff had already submitted to an independent medical examination and the examining physician had issued an opinion regarding the plaintiff's work capacity); *Bowie v. Am. Home Assur. Co.*, No. CIV.A. 05-1381-JJB-D, 2008 WL 2050991, at *1 (M.D. La. May 13, 2008) (denying a motion to compel an FCE for lack of good cause where an IME physician who twice examined the plaintiff had given no indication that he could not render a diagnosis without the aid of other consultants and there were no changes to the plaintiff's condition since the IME physicians' examinations).

Finally, the court concluded that none of the circumstances justifying a "second examination" of the seaman were present. Among other things, the court observed that defendant had not alleged that: there were separate injuries calling for examination by distinct medical specialties, defendant's IME physician did not require the assistance of another consultant before he could render a diagnosis, the IME physician's examination was not alleged to be inadequate or incomplete, and a substantial time lag had not occurred between the IME and the requested FCE. *Cook*, 2011 WL 5930477, at *4.

B. Compelling an FCE in Louisiana State Court

Motions to compel FCEs in Louisiana state court personal injury cases have produced few published opinions. Notwithstanding the foregoing, the few cases published offer useful guidance. First, the caselaw is abundantly clear that motions to compel FCEs are evaluated pursuant to the standard set forth by Louisiana Code of Civil Procedure Article 1464, which is titled "[o]rder for an additional medical opinion for physical or mental examination of persons," and provides in relevant part:

> A. When the mental or physical condition of a party, or of a person in the custody or under the legal control of party, is in controversy, the court in which the action is pending may order the party to submit to an additional medical opinion regarding physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. In addition, the court may order the party to submit to an additional medical opinion regarding an examination by a vocational rehabilitation expert or a licensed clinical psychologist who is not a physician, provided the party has given notice of intention to use such an expert. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
>
> B. Regardless of the number of defendants, a plaintiff shall not be ordered to submit to multiple examinations by multiple physicians within the same field of specialty for the same injury except for good cause shown.

Article 1464 limits the extensive discovery provided by Article 1422 by balancing considerations of "sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth." *Williams v. Smith*, 576 So.2d 448, 451 (La. 1991); *see also Lindsey v. Escude*, 179 So.2d 505, 508 (La. App. 3 Cir. 1965) ("a compulsory examination of an individual involves a sensitive question touching closely upon the constitutionally protected sanctity of the person."). Article 1464 seeks to achieve this balance by requiring more than "relevance" for an examination, and it grants courts the authority to compel a party to submit to an examination only when a plaintiff's condition is "in controversy" and "good cause" supports allowing the examination. *Hicks v. USAA Gen. Indem. Co.*, 339 So. 3d 1106, 1112 (La. 2022).

Importantly, the Louisiana Supreme Court has noted that when the source provision of Article 1464 was enacted, it was virtually identical to Federal Rule of Civil Procedure 35(a). *Williams*, 576 So.2d at 450. Accordingly, in interpreting Article 1464 motions to compel, Louisiana courts have relied upon federal court opinions interpreting Rule 35(a) as persuasive guides to understanding the intended meaning of Article 1464. *Id*. Thus, although published Louisiana opinions governing motions to compel FCEs may be rare, litigants may use Fifth Circuit opinions as persuasive authority while litigating in Louisiana.

However, published Louisiana opinions emphasize a clear distinction between Federal Rule of Civil Procedure 35(a) and Louisiana Code of Civil Procedure Article 1464 of which litigants must be acutely aware. Whereas Rule 35 is written broadly enough so as to permit examinations by "a suitably licensed or certified examiner," including for example physical therapists who often administer FCEs, Article 1464 only envisions an examination by "a physician," "a vocational rehabilitation expert," or "a licensed clinical psychologist who is not a physician."

For example, in *Latiolais v. Hudson Ins. Co.*, 162 So. 3d 1283 (La. App. 3 Cir. 4/30/15), the Louisiana Third Circuit Court of Appeals granted writs to review a district court's decision to compel a plaintiff to undergo an FCE by a physical therapist. Citing to *Williams*, 576 So.2d at 452, in which the Supreme Court of Louisiana limited examinations to those professionals specifically set forth in Article 1464, the Third Circuit observed that "[a] physical therapist is not one of the professionals permitted to conduct examinations pursuant to La. C.C.P. art. 1464." *Latiolais*, 162 So. 3d at 1284. Accordingly, the Third Circuit reversed the trial court's ruling ordering the FCE. *Latiolais*, 162 So. 3d at 1284. *See also Pitre v. Liberty Mut. Ins. Co.*, 2013-0605, 2013 WL 12121673 (La. App. 1 Cir. 4/22/13) (reversing a district court's ruling insofar as it ordered an FCE

of the plaintiff by a physical therapist); *Bethely v. Great W. Cas. Co.*, 2016-1503, 2017 WL 325252 (La. App. 1 Cir. 1/23/17) (denying defendant's writ requesting a functional capacity examination on the basis that "[a] physical therapist is not one of the individuals authorized by Louisiana Code of Civil Procedure Article 1464 to conduct a functional examination.")

C. Compelling an FCE in Texas State Court

As infrequently as motions to compel FCEs appear in published Louisiana caselaw, they appear rarer still in published Texas state court opinions. Notwithstanding the dearth in guidance, the similarities between Texas Rule of Civil Procedure 204.1 used by Texas courts when deciding whether to compel FCEs and Rule 35 used by federal courts should allow litigants in Texas state court to cite to Fifth Circuit jurisprudence as persuasive authority.

Pursuant to TEX. R. CIV. P. 204.1:

> (a) Motion. A party may — no later than 30 days before the end of any applicable discovery period — move for an order compelling another party to:
>
> (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or
>
> (2) produce for such examination a person in the other party's custody, conservatorship or legal control.
>
> * * *
>
> (c) Requirements for obtaining order. The court may issue an order for examination only for good cause shown and only in the following circumstances:
>
> (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
>
> (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

In evaluating motions to compel under TEX R. CIV. P. 204, Texas Courts examine whether the movant established: (1) good cause for the examination and (2) established that the plaintiff's physical condition was "in controversy." *See In re Advanced Powder Sols., Inc.*, 496 S.W.3d 838, 849 (Tex. App. 2016).

The purpose of Rule 204.1's good-cause requirement is to balance the movant's right to a fair trial and the plaintiff's right to privacy. *In re H.E.B. Grocery Company, L.P.*, 429 S.W.3d 300 (Tex. 2016). To show "good cause," a movant must satisfy the factors set forth by the Texas Supreme Court in *Coates v. Whittington*, 758 S.W.2d 749 (Tex. 1988). That is, a movant must show that: (1) an examination is relevant to the issues that are genuinely in controversy in the case, (2) a reasonable nexus exists between the condition in controversy and the examination sought, and (3) that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination. *Id*. at 753.

In addition to good cause, Rule 204.1 also requires that the physical or mental condition of a party be in controversy. TEX. R. CIV. P. 204.1(c)(1). "The 'good cause' and 'in controversy' requirements of Rule [204.1] are necessarily related." *Coates*, 758 S.W.2d at 752. Citing the United States Supreme Court's decision in *Schlaugenhauf*, 379 U.S. at 119, the Texas Supreme Court has noted that "a negligence plaintiff who asserts a mental or physical injury 'places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such an injury.'" Further, the Texas Supreme Court has also held that if a plaintiff intends to use expert medical testimony to prove his or her alleged condition, that condition is placed in controversy and the defendant would have good cause for an examination. *Coates*, 758 S.W.2d at 753.

In re Advanced Powder Sols., Inc., 496 S.W.3d 838 (Tex. App. 2016) is particularly instructive for its analysis and application of the Rule 204.1 standard. In that case, the plaintiff filed suit alleging that he suffered various injuries while working for the defedant. *Id*. at 843. When the district court denied the defendant's motion to compel the plaintiff to submit to physical examinations, including an FCE, the defendant challenged the district court's decision by filing a petition for writ of mandamus with the Texas First Court of Appeals. *Id*. After reviewing the applicable jurisprudence interpreting Rule 204.1, the Texas First Circuit Court of Appeals concluded that the defendant had failed to meet its burden to compel the FCE. *Id*. at 851.

As a threshold matter, the court concluded that the defendant had not sufficiently explained what the proposed examination involved, what information the examination would reveal, why the information could not be obtained through less intrusive means, or why it was necessary. *Id*.

Critically, the court noted that even if the defendant had shown that the FCE was relevant or that good cause existed, the court nevertheless could not compel the FCE because the defendant had failed to show the identity of the individual who would be performing the examination. *Id*. Specifically, the court noted that Rule 204.1 provides for motions to compel a party to "submit to a physical . . . examination ***by a qualified physician.***" *Id*. (emphasis added).

III. CONCLUSIONS AND RECOMMENDATIONS FOR MAXIMIZING A MOVANT'S CHANCES OF OBTAINING AN FCE

Although not as frequently obtained in litigation as IMEs, FCEs may be as impactful as any other expert report depending on the facts of each case. Arguably, under certain circumstances, an FCE may be even more effective at shifting case values than other expert reports. Indeed, this was our experience in the action from which the example discussed in Section I(c) herein was derived.

Notwithstanding the foregoing, FCEs may be difficult to compel as a consequence of applicable discovery standards that disfavor "repeat examinations" and seek to balance plaintiffs' interest in "privacy" and "sanctity of the body" against defendants' "judicial quest for truth." Based upon experience, the recommendation of an FCE by plaintiff's chosen physician provides the most successful mechanism for compelling an FCE if necessary.

Considering the foregoing, the following considerations may maximize a litigant's ability to obtain an FCE:

- Consider obtaining an FCE in the pre-litigation stages of a claim to gauge the status of a seaman's recovery and as a condition for the continued administration of maintenance and cure benefits;

- Consider at the outset of expert discovery whether it may be more beneficial to obtain an IME or an FCE;

- If the decision is made to pursue both an IME and an FCE, consider whether an IME physician or a vocational rehabilitation counselor should request an FCE as part of their overall evaluation.;

- If the decision is made to pursue both an IME and an FCE, be aware of potential arguments that the FCE constitutes a "second examination," and be prepared to establish a "stronger showing of necessity;"

- If the decision is made to obtain an IME, consider whether the IME physician needs the assistance of another expert to reach a conclusion regarding the injured seaman's capacity and, if so, ensure this is clearly stated in the IME report. Consider the following example:

Impression/Recommendations:

Right index finger FDS and FDP rupture, status post FDS finger with DIP fusion.

1. Patient's initial injury is causally related to the [redacted]. His treatment course thus far Has been appropriate and reasonable.

2. The patient has reached maximum medical improvement at this time. His assigned impairment rating is appropriate and correct according to the 6th edition Guides to the Evaluation of Permanent Impairment.

3. Patient could benefit from work conditioning and functional capacity evaluation at this time, as he has not worked in his normal job capacity for over 3 years. Pending the results of his FCE, more specific work duties could then be assigned.

Thank you for allowing me to take part in the care of your patient. Please contact me with any further Questions or concerns.

Sincerely,

[redacted] M.D
Board-Certified Orthopedic Surgeon
CAQ Hand and Microvascular Surgery

- If motion practice will be required, movants should be aware of the difficulties associated with compelling an FCE, and all pleadings associated with the motion to compel should be drafted with particular emphasis on laying out the factual background necessary for the court to conclude that good cause exists for the FCE, and that the plaintiff placed his or her physical condition in controversy;

- If plaintiff and defendant cannot agree on an FCE without the need for court intervention in Louisiana or Texas state court, ensure that an appropriate physician is retained and identified in all motion to compel pleadings to comply with the requirement of La. C.C.P. art. 1464 and TEX. R. CIV. P. 204.1 that a physician complete the examination.

OCCUPATIONAL MEDICINE AND FCE'S, HOW AND WHY ARE THEY IMPORTANT TO MY COMPANY AND MANAGING PERSONAL INJURY CLAIMS?

- What is "occupational medicine" and how does it differ from services provided by a typical hospital or urgent care clinic How do I use an OccMed facility and its doctors?
- What is the best way of working with my OccMed provider in pre-employment physicals as well as accidents or illnesses that occur on board my vessels, at my terminal or at my fleet?
- How is occupational medicine viewed by the insurance carrier and what benefits may it have with insurance renewals and premiums?
- How do I structure payments to my OccMed service provider for routine physicals versus incidents, and is this covered by my health and accident or marine insurance?
- How do OccMed providers manage reporting and filing of insurance claims?
- What pre-employment post-offer recommendations for physicals and tests are made by OccMed providers?
- What is a functional capacity evaluation - that is, an FCE? How is it viewed by the Judge or jury?
- What information is used to support it, and how is it viewed by the company and the insurers in valuing the case?
- How is an FCE used to impact the wage loss claim?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Brian Bourgeois, M.D.
West Jefferson Medical
Gretna, LA
Occupational Medicine Doctor

No significant spinal canal narrowing.
Mild right neural foraminal narrowing.
Moderate left neural foraminal narrowing.

L5-S1:
Grade 1-2 anterior spondylolisthesis.
Bilateral laminectomy defects.
Mild-moderate bilateral facet hypertrophy.
No significant spinal canal narrowing.
Moderate bilateral neural foraminal narrowing with mass effect on both exiting L5 nerve roots.

IMPRESSION:

Degenerative changes at L4-L5 and L5-S1, as described in the findings section.

Mild degenerative changes at L2-L3 and L3-L4.

Electronically Signed By: [redacted]

Signed by [redacted] 7:10 PM

L5-S1: Suspected small left foraminal disc extrusion measuring 5 x 5 mm (images 9-10, series 3) with suspected severe left neural foraminal narrowing and distinct effacement of the left neural foramen on T1 acquisition (image 10, series 4). Small disc bulge. No thecal sac narrowing.

IMPRESSION:
Suspected small left foraminal disc herniation at L5-S1 with resultant severe left neural foraminal narrowing and impingement of exiting left L5 nerve root. Consider full MRI lumbar spine for further characterization.

Electronically Signed [redacted]

Signed by [redacted]

[redacted] SPINE SCREENING WITHOUT CONTRAST

L3-L4: Normal

L4-L5: Circumferential disc bulge with right subarticular/foraminal disc protrusion measuring 1.2 x 1 x 0.8 cm with associated high intensity zone (images 4-5, series 3). Resultant impingement of the descending right L5 nerve root and abutment of the exiting right L4 nerve root with moderate right neural foraminal narrowing. No thecal sac narrowing.

L5-S1: Normal

IMPRESSION:
Isolated disc disease at L4-L5 including a right subarticular/foraminal disc herniation with associated right L5 nerve impingement and right L4 nerve abutment. Consider complete MRI lumbar spine for further evaluation.

Electronically S[redacted]

Signed by [redacted]

[redacted]


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Why an Occupational Medicine Doctor?

Brian Bourgeois, M.D.
West Jefferson Industrial Medicine
drb@wjimed.com

What is Occupational Medicine

- Industrial medicine
- Pre-employment
  -History and Exam
  -Testing (Resp. Fit, PFT, X-rays, urinalysis)
- Injury
  - Accurate history, previous problem
  - Definitive care
  - Management

Pre-employment

- Allowed to ask specific medical history
- Examine and test for specific risk areas
- Can make ‘medical’ recommendations and restrictions (ADA)
- Avoid placing the ‘wrong’ person in the ‘wrong position’
- Risk aversion
- Mitigate general health expenditure

Pre-employment Examinations

- Complete Medical History
  - Pre-existing problems
  - Medicine review
- Physical Examination (pertinent findings)
- OSHA required testing (PFT, Respirator fit, metals)
- Hearing conservation program
- Inhalation and exposure
- Drug screening

Interval Exams

- Many ‘personal’ medical conditions affect work performance and safety
  - Pain Medications
  - Methadone
  - Diabetes
  - Hypertension
  - Vision
- Medication Review/Fitness to Work Exam

Injury Management

- Immediate treatment by an objective source
- Doctor who is familiar with work environment and supervisors
- Doctor who is realistic about actual work
- Recordable
- Lost Time Accident
- Return to Work Exams

Recordable

- Need for a ‘pill’ vs. good first aid
- Prescription vs. OTC
- Knowledgeable regarding soft tissue injuries
- Wounds
- Early or frequent follow-up

Lost Time Accident

- Full duty, duty as tolerated, modified duty
- Prevention of prolonged recovery
- Prevention of liability claims

Return to Work Examinations

- Are they actually ‘recovered’?
- Will this become your problem
- Is there concern over medications
- Ability to perform at previous level


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Trevor Bardarson PT, OCS
ISR Physical Therapy LLC
Houma, LA
Certified FCE Expert

Fitness for Duty Evaluations. Ensuring a Safe and Healthy Workforce

Trevor Bardarson, PT; Stephen Frangos, MD; Yohama Caraballo-Arias MD;

ABSTRACT

Occupational Health physicians are required to make medical fitness for duty recommendations in a variety of workplaces. These recommendations are based on the practitioner's clinical training and experience; however, there is often insufficient objective information available about the workers' physical ability to perform those requirements. **Objectives:** to present a systematic approach to "fitness for duty" to determine whether employees are safely able to perform essential physical, psychological and cognitive job requirements without risk to self, others or the environment. **Design:** thorough knowledge of essential job requirements, the significance of the medical conditions, the likelihood of the occurrence of medical conditions, the resources available to manage the medical conditions and the urgency of the time needed to treat the condition. Functional Capacity Evaluations (FCE) objectively evaluates the ability of workers to perform the job-specific physical requirements. It is part of the overall Fitness for Duty process that includes job evaluation, medical exams, FCE testing and remedial action plans that are applied to medical fitness determinations. **Results:** Around 10,000 FCEs have been evaluated in the last 15 years in the ISR Institute, a key provider of FCE testing in the United States**. Conclusions**: Valid and reliable Fitness for Duty Evaluations are possible using this methodology.

INTRODUCTION

In a competitive global marketplace, employers must manage all aspects of their businesses including expenses related to the injured workers and their medical treatment, lost productivity of employees who are unable to return to work following an injury or the lost productivity of those employees who are not able to meet physical demands of their workplace with or without accommodation. In order to attempt to control these costs the Occupational Health Physician is required to determine the medical fitness for duty of employees in a variety of work settings. The Occupational Health Physician relies heavily on their clinical training and experience to make these determinations but often lack objective information about the demands of the work place and the actual physical capacities of the individual employee.

Programs to test job applicants' strength to perform a specific job were first reported by Chaffin et al[1] and Keyserling et al[2] who reported that the incidence of musculoskeletal injuries reduced as employees' isometric strength exceeded the requirements of the job. This led some

employers in the USA to adopt discriminatory hiring practices by setting artificially high applicant strength requirements that far exceeded the actual requirements of the job.

Providing additional framework and legal guidance for this issue, the United States Congress enacted the Americans with Disabilities Act (ADA) in 1990[3] (EEOC, 1990) and the ADA Amendments Act of 2008[4] which was promulgated January 1st, 2009. Equivalent legislation has also been enacted in the United Kingdom (The Disability Determination Act 1995 & Amended in 2005)[5], Australia (Disability Discrimination Act[6] of 1992), and Canada (Canadian Human Rights Act and Employment Equity Act 1985, Amended 2012[7]). Under the ADA, sweeping changes were mandated in the area of medical and functional abilities testing as it relates to hiring practices and medical fitness for work determinations (e.g. return to work evaluations following injury or illness). Medical examinations associated with screening programs for new hires and medical fitness for work determinations are required to be job-specific evaluations related to the essential functions of the job (a.k.a. the Bona Fide Occupational Qualifications).

In order to achieve the goals of cost reduction by ensuring a safe and healthy workforce while operating within the guidelines established by the ADA and equivalent legislation, a systematic approach is essential to objectively determine the employee's fitness for duty.

In order to ensure an effective program it should contain the following components;

1.) Physical demand validations – the onsite, objective collection of the physical requirements for the position.
2.) Creation of functional job descriptions – the legal foundation for the fitness for duty program.
3.) Ergonomic programs and interventions to improve the worker-workplace interface.
4.) Medical evaluations post offer, pre-employment.
5.) Medical evaluations post injury or illness
6.) Functional capacity evaluations (FCE) and testing post offer and post injury or illness.
7.) Remedial action plans to assist those who don't pass the medical or FCE evaluations.
8.) Job specific, periodic medical exams (medical surveillance)
9.) Ongoing support for strengthening and conditioning programs to maintain a healthy and fit workforce.

METHODS

The nine components listed above are required to develop a comprehensive and successful fitness for duty program. It is essential each component is evaluated for feasibility and application for the company in question. Budget constraints may make application of all components difficult and a company may prefer begin implementation in a gradient fashion. Indeed, all of the nine components are important for a successful fitness for duty program, but

certain components will have a heavier weighting than others. The ensuing discussion will expand on the nine components listed above;

1.) The physical demand validation – content validity

Objective information must be collected about the physical and cognitive demands of the workplace. This information is an essential step in the fitness for duty program. A physical demand questionnaire can be sent out to the workforce as an initial data sampling. However, to ensure accurate data collection, a trained ergonomic evaluator will be required to perform an onsite assessment of a representative sample of the various workplaces and should interview one or two employees from each job title listed. After the interview, an analysis of the actual work tasks should be conducted. The evaluator should detail the physical demands of the position and the analysis should include the weight of the material handled by the employee, pushing or pulling forces encountered, postural demands such as kneeling or trunk flexion and aerobically demanding activities such as stair climbing or ladder climbing. The validation is based on data derived from on-site job analyses using measurement tools, employee interviews and employee verification of data. This type of validation, referred to as "content validity," is viewed by the US Department of Labor as an acceptable form of validation.

Examples of the validation process. In the left photo, the ergonomic specialist is quantifying the pull force required to open the valve. In the right photo the weight of a used filter is measured.

2.) Functional Job Description

The objective information collected from the physical demand validation about the physical and cognitive demands of the workplace must be documented in the functional job description. **This information is the foundation of a company's fitness for duty program.** The information must be collected concisely and must document the essential minimal functional requirements to allow the work to be completed in a safe, timely and efficient manner. This information must be realistic and must reflect what is actually occurring in the workplace. The evaluator of the physical demands of the workplace must resist pressures to document only what is within published guidelines of the company as this will not allow a true representation of the physical demands of the workplace.

3.) Ergonomic Intervention Programs

Once the physical demands information is collected, ergonomic remedies may be implemented to reduce the physical demands in accordance with company policy. An ongoing ergonomic program will also allow the company to identify problematic areas within the variety of workplaces and suggest solutions to improve the worker-workplace interface. The ergonomic program will attempt to mediate the typical six ergonomic risk factors. These include;

a. Force
b. Repetition
c. Posture
d. Contact Stress
e. Work Environment
f. Vibration

The ergonomic analysis and recommendations will seek to mitigate the above described risk factors. A follow up assessment is essential to ensure the recommendations did not have unintended consequences and cause new ergonomic challenges.

4.) Medical evaluations post offer, pre-employment.

5.) Employers commonly do pre-placement/post offer medical evaluations. These evaluations are fit for purpose: office workers are routinely given only urine drug screens; whereas non-sedentary workers are given urine drug screens and comprehensive physician exams. When non-sedentary workers have significant physical requirements and working conditions included in their job requirements, there is a benefit to add job-specific FCE testing to the medical evaluation protocol.

6.) Medical evaluations post injury or illness

Employers have varying policies and practices regarding return to work. Some employers require a written release from the treating doctor for any injury / illness absence; others have a defined period (e.g. five or more last work days) that triggers the requirement for a written release from the treating doctor. The role of the occupational health provider is to evaluate the available medical information on the injury / illness and make a determination of fitness for duty before the individual can return to work.

7.) Functional capacity evaluations (FCE) and testing post offer and post injury or illness

The job specific functional capacity evaluation as described by APTA is an "evaluation protocol that is designed with emphasis on content validity to measure an evaluee's ability to perform the physical demands of a specific identified job and to determine whether there are any participation restrictions[8]." The functional capacity evaluation is used to objectively document the examinee's physical capacity to perform the minimal essential job specific requirements of the employment position. The FCE test, by its very nature, is a snapshot in time of the examinee's physical capacities and will include strength assessment, cardiovascular assessments and range of motion/body positioning assessments.

A well designed functional capacity evaluation testing program offers many potential benefits that include:

a. Establishment of a pre-injury baseline for each employee
b. Measurement of pre-existing impairments.
c. Evaluate the impact of any recent injury or illness on the employee's ability to return to work with or without accommodations
d. Determination if an employee can demonstrate the minimum physical capacities required to perform essential job demands safely.
e. Identification of medical problems that may become manifest only during physical exertion and not during a standard medical physical.
f. Assess cardiovascular ability utilizing a submaximal stress test as described by the American College of Sport Medicine[9]
g. Train employee's use of proper body mechanics during handling of materials.
h. Identification of physical fitness trends in applicant pools that may be addressed though corporate wellness programs.
i. Provide wellness feedback related to smoking cessation, improving aerobic fitness, flexibility and strength.
j. Improve the quality of the applicant pool (applicants with medical problems begin going elsewhere for employment.)

	
Baseline cardiovascular assessment	Dual inclinometry to obtain true lumbar spine range of motion

	
Lift strength assessment	Assessment of the employee's ability to carry a specifically weighted object for a specific distance.

8.) Remedial action plans to assist those who don't meet the essential functions of the job based on the results of the medical exam or the FCE.

If an individual does not meet one or more essential job requirements of the position, objective medical recommendations are provided to Human Resources and Management regarding medical fitness-for-duty and job-specific limitations. Human Resources and Management have the operational decision authority to accept or reject recommendations concerning whether the individual is medically fit for work, if job modification is required, or if a job search should be undertaken for a different job position for which the examinee is medically fit with the recommended limitations and restrictions. For his/her part, the examinee may benefit from work conditioning or work hardening programs designed to increase physical capacity to perform the essential functions of the job position. Work conditioning and work hardening may include cardiovascular training, muscle strengthening, flexibility training, simulated/actual work tasks, focused intervention, Employee Assistance Program (EAP) counseling, health and wellness professional counseling, and/or physical therapy intervention. Individuals who undergo work conditioning or work hardening must continue with these programs for a 2 - 4 month time frame prior to re-evaluation.

9.) Job specific, periodic medical exams (medical surveillance)

The "For Cause" procedure is implemented when an employee's action or failure to take action results in or has the potential to result in an adverse impact on himself or herself, on others, on the environment, or on the company's assets and reputation. For-cause evaluations should be initiated as a result of incidents that occur while the employee is on duty or when reasonable suspicion based on observable changes in performance or behavior develops. Compliance with the company's drug and alcohol policies is required.

10.) Ongoing support for strengthening and conditioning programs to maintain a healthy and fit workforce.

The ability for employees to access opportunities to pursue a healthier lifestyle is an integral component of maintaining a healthy workforce into the future. Incentives such as discounts on gym club memberships, reduction on health insurance costs for employees who follow a smoking cessation program or reduce body weight to an acceptable Body Mass Index are some examples. Fitness equipment at the work location will allow the employee opportunities to exercise on their time off for those employees who remain at the work location for extended periods of time.

Access to exercise equipment and fitness professionals will assist in maintaining a healthy workforce.

The nine components listed above are required to develop a comprehensive and successful fitness for duty program. The foundation for the entire program is the physical demand validation and functional job descriptions which accurately detail the minimal essential job specific requirements of each position. All further medical and functional evaluations utilize this information to make job placement and return to work decisions. A company that is considering implementing a fitness for duty program must complete this as a first step. As described by Wickstrom R. "Functional Job Analysis is the first and single most important initial step toward establishing content validity[10]". A second step would be the implementation of a functional capacity evaluation testing program to objectively document the functional abilities of the examinee and if they are capable of performing the required work tasks. This information is critical to assist the Occupational Health Physician in determining if an individual can be safely placed or return to a specific position or if accommodations are required.

RESULTS

The beneficial effects of fitness for duty testing have been documented in the literature. A small sampling of the research is reviewed below.

Frangos S, Bardarson T, Bunch R. *The Design and Value of a Medical Fitness-For-Duty Program,* Society of Petroleum Engineers, Nice France April 2008

Frangos et al conducted a review of the fitness for duty program at Chevron Corporation and published their finding in 2008.The paper states that in 2007, Chevron has conducted 621 tests

within ISR's network for 2007. Of the 621 test performed, 40 individuals were unable to begin working or return to the work force. This represents a 6.4% failure rate. Of the 40 failures, 19 did not return for further testing, 4 returned and failed a second time, and 13 resolved their medical and/or functional issue then returned for testing and passed. Overall, after including the results of the individuals who were retested, the failure rate was 4.3%. The total cost of the program conducted within ISR's network to Chevron from January 1st 2007 to October 19th, 2007 was $137,962.50. Based on a total estimated cost savings of $940,600.00 (without litigation), the program is currently demonstrating a 7 to 1 return on investment. In other words, for every dollar spent on the program, $7.00 was saved through a reduction in employee injury[11].

Bunch R, Kalkhan S. *Impact of Job Specific New Hire Functional Testing,* Society of Petroleum Engineers Abu Dhaubi April 2006

Bunch conducted an analysis of the impact of job specific new hire functional testing. This paper describes the effect of new-hire functional capacity testing on injury reduction and wellness in an oilfield services company after 2 years of program implementation. Data analysis revealed a 96% pass rate among a random sample population. A detailed investigation was conducted among the 4% of the sample who failed to meet the essential functional demands because of insufficient physical capacities or existing medical conditions. The results of the analysis of safe maximum lift capacities were used to develop ergonomic and behavioral-based intervention strategies to reduce the gap between the worker's physical capacities and the required job task demands. Estimates related to direct and indirect costs for each applicant who failed were analyzed and compared to the program administration cost. The return on investment was 13:1[12].

Harbin G, Olson J. Post offer, pre-placement testing in industry. *American Journal of Industrial Medicine*. 2005;47:296-307.

This two-part study by Harbin et al[13] was to determine if a pre-placement functional screen test could be used to predict the incidence of work injury and to evaluate the effectiveness of a pre-placement functional screen in reducing employment related costs. The first phase of the study included 1435 male and 1038 female working age subjects who were tested in the order they were hired during a 3-year period from 1989 to 1991 in a food manufacturing plant. Jobs at the plant were analyzed for physical demands and categorized into one of 5 Dictionary of Occupational Titles (DOT) job classifications ranging from sedentary to very heavy work[14]. The screen consisted of twenty different strength, anthropometric, fitness and lifting tests as outlined by the American Physical Therapy Association Functional Capacity Evaluation guideline[8]. The authors reported that the overall injury rate did not appear to decline, but severity of injury as measured by the cost of medical care reduced from $70,000 to $10,000 annually, and lost work days reduced from 700 to 7 annually. The authors concluded that strength tests alone cannot be used as a sole predictor of workplace injury, however the incidence rate of injury increases for subjects who cannot demonstrate the physical ability to perform the essential functions of a job. It was further concluded that a pre-placement physical

screen, which is matched to the essential job functions, is effective in reducing workers' compensation costs and lost work days and that the effectiveness increases for jobs that are more physically demanding.

Anderson C, Briggs J. A study on the effectiveness of ergonomically-based functional screening tests and their relationship to reducing workers' compensation injuries. *Work*. 2008;31(1):27-37.

This study by Anderson et al[15] was designed to evaluate if an ergonomically-based functional post offer screening program was effective in reducing workers' compensation costs for physically demanding jobs in 3 similar industries. All industries involved constant manual material handling of product weighing up to 60 lbs. A post offer test battery was designed for each job based on a job site analysis that documented the strength and cardiovascular endurance demands. Dynamic lifting and isometric exertion tests were used to compare subject's strength with job match cut off scores that were based on the respective job essential functions. Because an individual can only work at a percentage of their maximum aerobic capacity for an extended period of time, a cardiovascular step test was used to assess the subject's aerobic capacity and scored against the National Institute of Occupational Safety and Health's (NIOSH) guidelines for the percent capacity at which an individual can work for extended periods of time[16]. A predictive validation study was conducted comparing the injury rate and employment retention of 377 subjects who passed the test battery versus 91 subjects who failed the test battery criteria. New hires that passed the test battery had 47% less injuries than new hires who failed the test battery, significant at $\alpha < 0.001$.

Nassau D. The effects of pre-work functional screening on lowering an employer's injury rate, medical costs, and lost days. *Spine*. 1999;24(3):269-274.

Nassau[17] conducted a 3-stage retrospective longitudinal study to evaluate the effectiveness of a pre-work functional screen on lowering workers' compensation costs and work related injuries. A pre-work functional screen was developed to test applicants for their ability to perform the physical essential functions of 16 jobs requiring heavy work demands as defined by the Dictionary of Occupational Titles[14] at a regional hospital. There was a significant reduction, $P < 0.001$, in lost work days for screened (0.83) versus unscreened (3.83) subjects. Cost per musculoskeletal workers' compensation injury was significantly reduced for screened ($311) versus unscreened subjects ($1432). Nassau concluded that the pre-work functional screen was effective in lowering the severity of work related musculoskeletal injuries and workers' compensation costs.

Littelton M. Cost effectiveness of a pre-work screening program for the University of Chicago physical plant. *Work*. 2003; 21(3): 243-250.

A study was conducted by Littelton[18] to examine the effect of a post-offer pre-placement physical screen test on the frequency and severity of work related musculoskeletal injuries and overall workers' compensation costs. Subjects were 712 new hire employees grouped into 18 separate job classifications at the physical operations department for the University of Illinois Chicago between 3-1-98 and 2-28-01. Subject demographics were not disclosed. A job site analysis was performed by a physical or occupational therapist to identify the key essential job

functions and critical physical demands. Functional physical screens were developed for each job classification based on the Physical Work Performance Evaluation developed by Lechner et al[19]. Each physical screen consisted of 5 to 7 functional tasks with specific pass or fail criteria. Subjects were required to pass all functional tasks components of the screen in order to be eligible for employment. The authors concluded that the pre-placement physical screen was effective in reducing the incidence of injuries, mean cost per injury, and a cost benefit ratio of $18 saved for each dollar expended on the screening program. Although the cost reduction appeared profound, not all of the reduction may be accounted for by the physical screen. In 2001 there was a change in approach by the University for handling workers' compensation claims that may have deemed some cases non-compensable, where similar cases may have been compensable prior to 2001. The authors also excluded certain "outlier" high dollar workers' compensation cases from the experimental group, but not the control group which certainly would affect the cost difference between the groups.

Case Studies

As can be surmised from the above studies, the quantification of the impact of fitness for duty program and their impact on the workplace are a relatively new phenomenon. ISR Institute, a consultant company founded in 1991,that specializes in fitness for duty testing through two of its sister companies, Fitness for Duty LLC and WorkSaver Employee Testing Services LLC has provided two examples. Fitness for Duty LLC is a company formed to work exclusively with Chevron Corporation and has provided over 10,000 fitness for duty evaluations over the last 15 years. WorkSaver Employee Testing Services has provided over 750,000 port offer, pre-placement and fitness for duty evaluations for hundreds of companies since early 1991.

<u>Case #1: New Hire Test – Helicopter Pilot</u>

Testing conducted on 25 July 2007

51 year old male

Height 6 ft 2.5 inches

Weight 201 pounds

Applicant presents to the facility in no apparent distress. Past medical history includes gallbladder surgery (1992) and cataract surgery (2000). Client denies any other medical history both verbal and written. Physical Therapist musculoskeletal evaluation reveals a steppage gait (the patient lifts the knee high and slaps the foot to the ground on advancing to the involved side; this gait is typical of patients with weak or paralyzed dorsiflexor muscles), weakness in the upper extremities, diminished reflexes, significantly below average grip strength, and decreased balance and coordination. Client is unable to perform a heel-to-toe walk due to loss of balance, unable to maintain his balance when attempting to crouch and is unable to repetitively perform a finger-to-nose test for coordination. For the client's safety, the remainder of the functional testing was not conducted and the client was referred to a neurologist for further evaluation. September 4th, 2007 – client returns to different physical therapy clinic within ISR's network. He

verbally reports a vague hereditary neurological condition. He does not document anything on his intake paperwork regarding his previous test or recommendations. He is again found unable to work safely due to poor balance, lack of coordination and an inability to perform the rope swing test.

Risk Analysis – Very High Risk for a Major Aircraft Incident or Fall

This client was applying for a highly safety-sensitive position. In this position, he would be responsible for the safe operation of a helicopter and the transportation of people. The applicant presented with clinically significant omissions in his medical history. His inability to perform coordination activities created significant risk for an adverse incident while operating his aircraft. A direct cost analysis is difficult but an assumption on the potential personnel injury, property damages and litigation costs associated with this type of incident would be in excess of two million dollars. The client also demonstrated poor balance which increases his risk for a fall. Assuming the client might fall and sustain a significant injury, the following cost analysis is proposed:

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$4,000 - $17, 000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$25,000 - $125,000 with surgery, medical treatment and rehabilitation

$ 250,000 - $1,200,000 if litigation is involved

Case #2: Return to Work Test – Operations Specialist - Offshore

Initial testing conducted on 11 June 2007

29 year old male

Height 5 ft 8 inches

Weight 170 pounds

Employee injured his low back area in a non-work related motor vehicle accident on 12 April 2007. He was given a release to return to work from his treating physician. During the musculoskeletal evaluation, the client was noted to have unresolved low back pain. He had pain on several special tests and was unable to maintain a flexed position of the trunk for greater than 30 seconds due to pain. The remainder of the functional test was not performed for safety

reasons due to continuing symptoms. He was referred back to the treating physician. The employee returned for testing one month later after completing a structured physical therapy program. He no longer had symptoms of low back pain and was able to complete all functional tests in a safe manner. He returned to work without difficulty.

Risk Analysis – High Risk for a Lumbar Injury

Often the treating physician is unaware of the physical requirements of a specific job position and will simply rely on the verbal reports of the patient. As a result, an employee may be released to return to work too early with inappropriate limitations or restrictions such as the term "light duty". This creates a risk for an aggravation of an existing injury. This aggravation could easily be assumed as a direct result of the work environment, thereby creating a work related injury. Job specific functional testing based on validated physical requirements allows for a realistic and defensible test to determine an individual's ability to return to the work environment safely. If the individual had returned too soon, the following direct costs can be assumed.

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$2,500 - 17, 000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$34,000 - $125,000 with surgery, medical treatment, and rehabilitation (this assumes no complications)

$ 250,000 - $1,200,000 if litigation is involved

DISCUSSION

Fitness for Duty programs and evaluations has been well documented in the literature as a method for companies to control their workers compensation and medical costs as well as improve or maintain the productivity of their workforce. Properly matching the employee to the work tasks is vital in maintaining a healthy work force. Injuries can occur when there is a gap between the physical capacities of the employee and the physical demands of the job. Correctly matching the employee to the job is essential to prevent potential ergonomic injuries and can be achieved through job specific functional testing.

Medical Fitness-for-Duty programs demonstrate significant bottom line impacts: providing objective job descriptions, facilitating ergonomic and administrative interventions that evaluate the physical capacity to the job-specific requirements of the job position, promoting on-the-job-safety, and maximizing employee health and productivity. Further, these programs reduce OSHA recordable incidents, Workers' Compensation medical/benefit costs, lost work days, property loss and legal and liability costs.

Changes to governmental legislation such as the American with Disabilities Act and equivalent legislation in other countries will make this an evolving process as seen with the amendment made to these programs over the last 8 years. Additional longitudinal studies are recommended to determine the impact of the cardiovascular status of employees on their ability to perform their assigned work tasks and their risk for a negative cardiovascular event (Wittink, et al[20]). Further work can be performed to quantify the changes in workers compensation costs with the initiation or modifications of fitness for duty programs within companies.

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The Design and Value of a Medical Fitness-for-Duty Program

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This paper was prepared for presentation at the 2008 SPE International Conference on Health, Safety, and Environment in Oil and Gas Exploration and Production held in Nice, France, 15–17 April 2008.

Abstract

Medical providers make recommendations every day to employers regarding employee medical fitness. These recommendations are based on the practitioner's clinical training and experience; however, there is often insufficient objective information available about the workers' physical ability to perform those requirements, thereby reducing the effectiveness and efficacy of the medical providers' recommendations. Chevron has developed a process for more accurately assessing medical fitness-for-duty based on the objective and specific physical requirements of individual jobs. The process includes job evaluation, medical exams, functional capacity evaluations (FCE), remedial action plans, and program evaluation that are applied to medical fitness determinations. This process will be described, followed by results-to-date and lessons learned from the implementation of twelve programs from 1997 – 2007 at Chevron. Additionally, several case examples including an analysis of the risks and costs will be presented from the files of ISR Institute, one of Chevron's key vendors in its medical fitness-for-duty programs. Finally, the paper will present Chevron's global health strategy, focusing on the specific programs and processes for the implementation of globalized best practice standards for medical fitness for duty.

Definitions:

- Job evaluation - documentation of a job's physical requirements and working conditions
- Remedial action plans - recommended exercises and activities to enable an individual to pass the FCE; also includes consideration of work accommodations and / or alternate work
- Program evaluation - collection of date to assess program compliance, evaluate consistency of testing application and quality of provider services, documentation of testing outcomes and analysis of the potential financial impact on the company

Introduction

Companies recognize the connection between employee health and productivity. As a consequence, they are concerned about the impact of injury and absenteeism on worker productivity, company morale, the direct costs of health care benefits (e.g. medical treatment and short-term disability benefits), and the indirect costs of injury and absenteeism (e.g. replacement worker costs, recruitment and training of replacement workers). In an attempt to minimize the risks associated with employee health, many employers utilize a medical screening program for applicants.

Providing additional framework and legal guidance for this issue, the United States Congress enacted the Americans with Disabilities Act (ADA) in 1990 (EEOC, 1990). Equivalent legislation has also been enacted in the United Kingdom (Disability Determination Act), Australia (Commonwealth Racial Discrimination Act), and Canada (Canadian Human Rights Act and Employment Equity Act). Under the ADA, sweeping changes were mandated in the area of medical and functional abilities testing as it relates to hiring practices and medical fitness for work determinations (e.g. return to work evaluations following injury or illness). Medical examinations associated with screening programs for new hires and medical fitness for work determinations are required to be job-specific evaluations related to the essential functions of the job (a.k.a. the Bona Fide Occupational Qualifications).

Seeking to comply with the legal employment requirements, and to capture the benefits of employee health and productivity, Chevron Shipping Company began a comprehensive medical fitness for duty program for their seagoing employees in 1997. Based on validated job evaluations documented on Chevron Form GO-308 (Physical Requirements and Working Conditions), job-specific medical exams and FCE testing for post-offer/pre-placement (new hire), periodic (every two years) and return to work (after injury or illness absences) were implemented. .

Over the next ten years, eleven other Chevron Operating Companies and business units implemented similar programs by leveraging the experiences of the early adopters of these processes and sharing best practices. Consistent medical leadership of these programs by Corporate Health and Medical Services in partnership with vendors experienced in these technologies and their application, such as ISR Institute, have promoted a robust growth in these programs with significant business benefits. Since 1996, the following Chevron Operating Companies and Business units have developed and implemented fitness for duty programs: 1996 – Chevron Shipping; 1997 – Business Products and Services, CNAEP – Gulf of Mexico, and Hawaii Fire Brigade; 1998 – P&M Coal, North River Mine; 1999 – El Segundo Refinery and Pascagoula Refinery; 2001 - CNAEP – San Joaquin Valley, North America Downstream – Marketing and Salt Lake Refinery; 2003 – Global Lubricants, Willbridge and Louisville; and, 2007 – Mid-Continent/Alaska.

Chevron's Medical Fitness-for-Duty Programs – programs implemented 1997 - 2007

Chevron defines medical fitness-for-duty as a state of overall health that enables an employee to perform a job without risk to self, others, and environment. The program incorporates both physiological and psychosocial requirements of the job. Focus areas for assessing medical fitness-for-duty include comprehensive medical history, general emotional well-being, active range of motion, strength, endurance, visual-perception, coordination, cardiovascular, cognition, dexterity, and balance. Additionally for a more complete picture of the occupational setting, a functional capacity evaluation benchmarks the applicant/employee's present status and physical capability to perform the essential functions of a validated job position or job category. This information supplements the clinical assessment of the examining or treating physician. The physician uses clinical assessment and the results of the FCE testing together to provide the client company with objective medical recommendations regarding the examinee's medical suitability to perform the job requirements. When warranted, additional referral to other health specialists (a cardiologist or neuropsychologist) may be indicated.

It is critical to develop and consistently implement all aspects of a medical fitness-for-duty program to ensure success and the benefits of the program. Key implementation steps include:

- Assess the cost versus benefits of the program
- Establish a team to develop the medical fitness-for-duty program and oversee local implementation: line management, safety, human resources, labor and union relations
- Decide which job classifications will be included
- Develop a request-for-proposal and select vendors
- Perform job evaluations and validate job descriptions
- Design the testing protocols/FCE testing content
- Develop job specific physical conditioning programs
- Determine the medical exam content and periodicity
- Evaluate healthcare providers
- Review program materials previously developed and in use by other Chevron business units
- Develop administrative procedures
- Coordinate communication methods

To reinforce the importance of job analysis and validation, the following are critical considerations for properly documenting the specific physical requirements and working conditions of the job position:

- Create an accurate functional job description

  - Notify union of intentions
  - Questionnaires completed by employee and supervisor
  - Compile questionnaires and review with employee and supervisor
  - Observe employee work tasks and videotape tasks as needed for clarity and post-assessment review
  - Perform activity analysis and quantify physical, cognitive, and psychosocial demands
- Validate new job description:
  - Review new job description with union representative, employee, supervisor, and manager; subsequently, obtain commitment that job description is accurate
  - Have all members who review the job description sign off and approve its accuracy

Two other areas merit additional discussion: communicating recommendations based on the results of the FCE and directing the next steps for the examinee. The FCE test is, by its very nature, a snapshot in time; it objectively documents the examinee's physical capacity to perform the job specific requirements of the job position. If an individual does not meet one or more essential job requirements of the position, objective medical recommendations are provided to Human Resources and Management regarding medical fitness-for-duty and job-specific limitations. Human Resources and Management have the operational decision authority to accept or reject recommendations concerning whether the individual is medically fit for work, if job modification is required, or if a job search should be undertaken for a different job position for which the examinee is medically fit with the recommended limitations and restrictions. For his/her part, the examinee may benefit from work conditioning or work hardening programs designed to increase physical capacity to perform the essential functions of the job position. Work conditioning and work hardening may include cardiovascular training, muscle strengthening, flexibility training, simulated/actual work tasks, focused intervention, Employee Assistance Program (EAP) counseling, health and wellness professional counseling, and/or physical therapy intervention. Individuals who undergo work conditioning or work hardening must continue with these programs for a 2 - 4 month time frame prior to re-evaluation.

The job position of Chevron Emergency Response Team (ERT) member has been documented and validated at several refineries and chemical plants. After a description of the Physical Requirements and Working Conditions (GO-308) is developed and validated, a functional capacity test protocol is developed to assess the examinee's physical capabilities to perform the essential job tasks. Here is a brief description of the medical fitness-for-duty program developed by Chevron and ISR Institute for the members of the Emergency Response Team at the Chevron El Segundo Refinery. The medical fitness-for-duty program is multifaceted and includes a medical evaluation, a health and fitness assessment, physical fitness training and the field physical activity test. The medical evaluation complies with the legal requirements of NFPA 1582 (Standard on Medical Requirements for Fire Fighters) and includes medical history, physical exam, electrocardiogram (EKG), pulmonary

function test, blood work profile, and EKG-stress test. The health and fitness assessment includes a Health Risk Assessment and fitness screening consisting of analysis of body composition, aerobic capacity, muscular strength, muscular endurance and flexibility. Physical fitness training focuses on developing and maintaining a fitness program that assists the ERT member in maintaining health and fitness. Essential job functions are evaluated during the field physical activity test in which the examinees are required to complete the following tasks in 7.5 minutes while wearing firefighter (FF) coat, leather FF gloves, FF helmet full bunker gear and a Self-Contained Breathing Apparatus (SCBA). While performing the test, the member does not breathe air from the SCBA. The test includes:

- Stair Climb: pick up and carry a hose pack weighing approximately 25 pounds (100 feet of 1.75" hose) up and down three flights of stairs twice. Three points of contact during the stair climbing is recommended for safety.
- Hose Hoist: hoist a 50 foot section of 2.5" hose weighing approximately 36 pounds a distance of 25 feet
- Halyard Raise: pull halyard using a hand-over-hand method to raise a 50 foot section of 2 ½" hose weighing approximately 36 pounds without slippage
- Victim Rescue: grasp the 175 pound dummy and drag it a distance of 100 feet over a level surface
- Fire Extinguisher Carry: carry two 30-pound dry chemical extinguishers weighing 55 pounds a distance of 75 feet
- Hose Advance: carry and pull a 100 foot section of a charged 1.75" fire hose and nozzle a distance of 75 feet using an over-the-shoulder grip
- Ladder Climb: the ladder is extended to 50 feet at a 65 degree angle; each rung will be touched during the ascent and descent, climbing to the top rung before descending

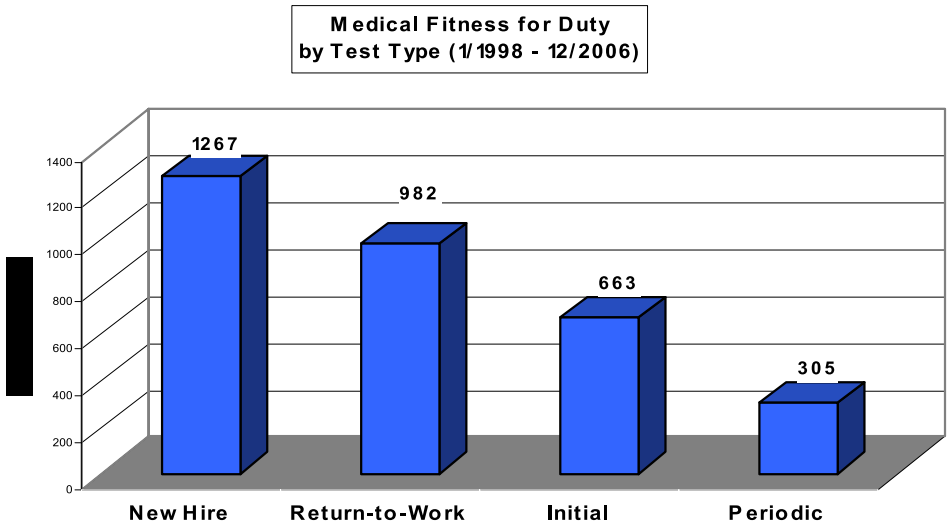
The ERT member job position may involve the rescue of individuals in life threatening situations and may place the responder in life threatening positions. Medical fitness-for-duty is essential. Functional assessment of validated essential job tasks not only meets the requirements under the ADA act but also ensures that only those individuals who can perform the tasks safely are chosen for this highly safety-sensitive position.

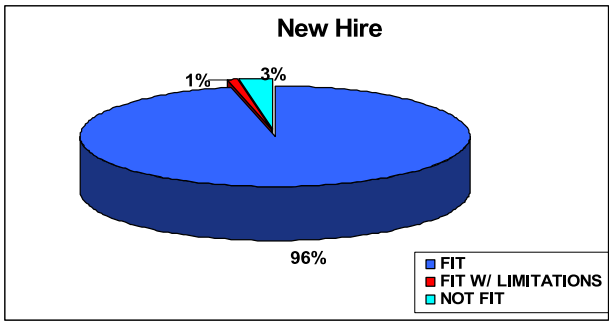
Chevron's Medical Fitness-for-Duty Programs – Results to Date

Data compiled from January 1998 to December 2006 are summarized in the graphs illustrated below. Over the eight years of data 3217 FCEs were conducted. Of these tests 225 individuals were found to be not fit for work. The percentage of individuals found to be not fit for work varied from 3% of tests to 9% of tests depending on the reasons for testing. The group noted to have the highest failure rate of 9% was the individuals returning to work after an injury or illness. The combined failure rate across all groups averaged 7%.

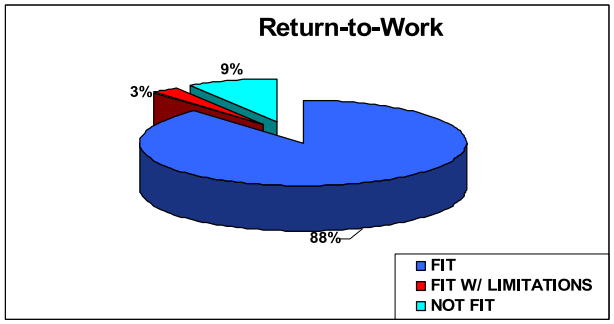
Chevron's Medical Fitness-for-Duty Programs, Functional Capacity Evaluation Outcomes (1/98 - 12/06)

Overall, from January 1998 through December 2006, Chevron job applicants and employees completed the following number of FCE tests with these results:

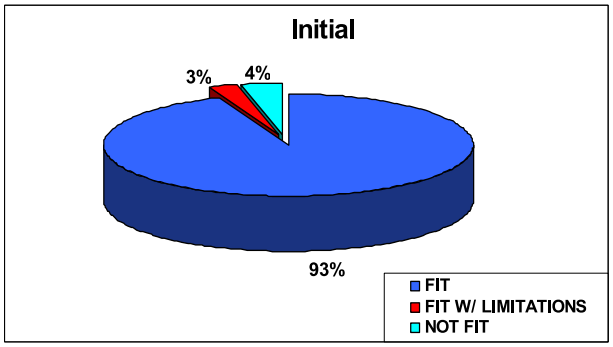




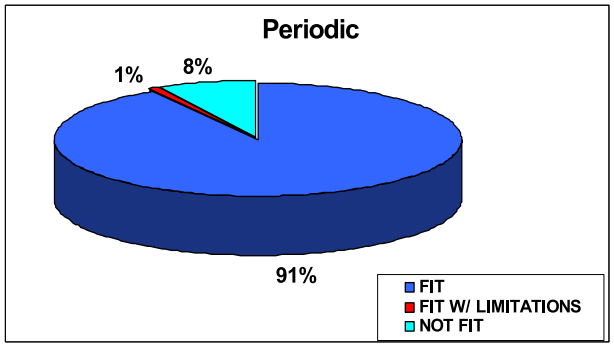
New Hires: 1223 fit for work, 44 not fit for work



Return to Work: 868 fit for work, 114 not fit for work.



Initial Assignment 622 fit for work, 41 not fit for work



Periodic: 279 fit for work 26 not fit for work.

To understand the significance and potential return-on-investment (ROI) represented by the above FCE outcomes, four Chevron case examples of FCE testing from the files at ISR Institute are presented:

Case #1: New Hire Test – Helicopter Pilot

Testing conducted on 25 July 2007

51 year old male

Height 6 ft 2.5 inches

Weight 201 pounds

Applicant presents to the facility in no apparent distress. Past medical history includes gallbladder surgery (1992) and cataract surgery (2000). Client denies any other medical history both verbal and written. Physical Therapist musculoskeletal evaluation reveals a steppage gait (the patient lifts the knee high and slaps the foot to the ground on advancing to the involved side; this gait is typical of patients with weak or paralyzed dorsiflexor muscles), weakness in the upper extremities, diminished reflexes, significantly below average grip strength, and decreased balance and coordination. Client is unable to perform a heel-to-toe walk due to loss of balance, unable to maintain his balance when attempting to crouch and is unable to repetitively perform a finger-to-nose test for coordination. For the client's safety, the remainder of the functional testing was not conducted and the client was referred to a neurologist for further evaluation. 4 September 2007 – client returns to different physical therapy clinic within ISR's network. He verbally reports a vague hereditary neurological condition. He does not document anything on his intake paperwork regarding his previous test or recommendations. He is again found unable to work safely due to poor balance, lack of coordination and an inability to perform the rope swing test.

Risk Analysis – Very High Risk for a Major Aircraft Incident or Fall

This client was applying for a highly safety-sensitive position. In this position, he would be responsible for the safe operation of a helicopter and the transportation of people. The applicant presented with clinically significant omissions in his medical history. His inability to perform coordination activities created significant risk for an adverse incident while operating his aircraft. A direct cost analysis is difficult but an assumption on the potential personnel injury, property damages and litigation costs associated with this type of incident would be in excess of two million dollars. The client also demonstrated poor balance which increases his risk for a fall. Assuming the client might fall and sustain a significant injury, the following cost analysis is proposed:

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$4,000 - $17, 000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$25,000 - $125,000 with surgery, medical treatment and rehabilitation

$ 250,000 - $1,200,000 if litigation is involved

Case #2: New Hire Test – Automation Trainee

Testing conducted on 10 May 2007

36 year old female

Height 5ft 3 inches

Weight 132 pounds

Client reported to the physical therapy clinic in no acute distress. Past medical history included an old ankle sprain, hypothyroidism, and abdominal surgery. Client was unable to meet the validated lift requirements for the position and was determined to be unable to work safely. She was instructed in a comprehensive conditioning program to improve her functional deficits. She returned for testing 3 months later and was able to meet all of the requirements for the position.

Risk Analysis – Moderate Risk for a Lumbar Injury

The inability to safely lift the weight of material handled creates 2 significant risks. The individual who was unable to safely lift the weight requirement would be at significant risk for a lumbar injury. The individual would effectively be expected to work beyond their safe ability. The second risk created adversely affects the co-workers of the individual since they will often assist the disabled individual in the heavier requirements by performing those tasks for them. This effectively increases the frequency of the lift requirements for the co-workers, placing them at risk for an injury.

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$6,000 - 17, 000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$34,000 - $125,000 with surgery, medical treatment and rehabilitation

$ 250,000 - $1,200,000 if litigation is involved

Case #3: Return to Work Test – Operations Specialist - Offshore

Initial testing conducted on 11 June 2007

29 year old male

Height 5 ft 8 inches

Weight 170 pounds

Employee injured his low back area in a non-work related motor vehicle accident on 12 April 2007. He was given a release to return to work from his treating physician. During the musculoskeletal evaluation, the client was noted to have

unresolved low back pain. He had pain on several special tests and was unable to maintain a flexed position of the trunk for greater than 30 seconds due to pain. The remainder of the functional test was not performed for safety reasons due to continuing symptoms. He was referred back to the treating physician. The employee returned for testing one month later after completing a structured physical therapy program. He no longer had symptoms of low back pain and was able to complete all functional tests in a safe manner. He returned to work without difficulty.

Risk Analysis – High Risk for a Lumbar Injury

Often the treating physician is unaware of the physical requirements of a specific job position and will simply rely on the verbal reports of the patient. As a result, an employee may be released to return to work too early with inappropriate limitations or restrictions such as the term “light duty”. This creates a risk for an aggravation of an existing injury. This aggravation could easily be assumed as a direct result of the work environment, thereby creating a work related injury. Job specific functional testing based on validated physical requirements allows for a realistic and defensible test to determine an individual’s ability to return to the work environment safely. If the individual had returned too soon, the following direct costs can be assumed.

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$2,500 - 17, 000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$34,000 - $125,000 with surgery, medical treatment, and rehabilitation (this assumes no complications)

$ 250,000 - $1,200,000 if litigation is involved

Case #4: Return to Work Test – Operations Specialist - Offshore

Initial testing conducted on 17 July 2007

52 year old male

Height 5 ft 8 inches

Weight 260 pounds

Employee reported to the physical therapy clinic following an arthroscopic knee surgery on 15 May 2007 and treatment for rotator cuff tendonitis. The employee presented with good resolution of his knee and shoulder problems. On initial evaluation his blood pressure was mildly elevated but within safety parameters for functional testing. He was able to complete all material handling safely but was unable to complete the stair climbing portion of the evaluation safely. His resting blood pressure was 142/96 mm Hg; the post test systolic blood pressure exceeded 208 mm Hg. He was referred back to his primary care physician for blood pressure management. He was instructed in a comprehensive aerobic exercise

program and had his anti-hypertensive medication adjusted. He returned for testing one month later and met all validated physical requirements safely. He returned to work without difficulty.

Risk Analysis – High Risk for Heart Attack or Stroke

Normal resting systolic blood pressure is below 120 mm Hg and is expected to rise with activity and return to near resting levels within minutes. However greater than 200 mm Hg represents hypertension at rest and increases an individual's risk for a cardiovascular incident. The offshore environment includes frequent stair climbing as well as significant heat and humidity in the Gulf of Mexico, significantly increases the cardiovascular risks for this employee. Risk complications with this type of hypertension include heart attack and stroke.

Estimated Direct Cost (Multiply by 1.5 X 2 times to add indirect costs)

$4,500 - 35,000 without surgery - includes medical visits, injections, medical diagnostics such as MRI, time off from work and physical therapy

$34,000 - $125,000 with surgery, medical treatment and rehabilitation (long-term care after a stroke increases these costs)

$ 250,000 - $1,200,000 if litigation is involved

For all four cases reviewed, essential likely costs for treatment of the various conceivable musculoskeletal and cardiovascular disorders identified during the Fitness-for-Duty process range from $4000.00 to $125,000.00 per incident (without litigation) based on average costs reported by insurance companies, hospitals and medical providers. (Lui, 1995, Louisiana Workers Compensation Fee Schedule, Durbin D, 1996, Texas Workers Compensation Fee Schedule, Reed 1997)

In 2007, Chevron has conducted 621 tests within ISR's network for 2007. Of the 621 test performed, 40 individuals were unable to begin working or return to the work force. This represents a 6.4% failure rate. Of the 40 failures, 19 did not return for further testing, 4 returned and failed a second time, and 13 resolved their medical and/or functional issue, returned for testing and passed. Overall, after including the results of the individuals who were retested, the failure rate was 4.3%.

The total cost of the program conducted within ISR's network to Chevron from January 1st 2007 to October 19th, 2007 was $137,962.50. Based on a total estimated cost savings of $940,600.00 (without litigation), the program is currently demonstrating a 7 to 1 return on investment.

Chevron's Medical Fitness-for-Duty Programs – Operational Excellence Fitness-for-Duty (FFD)

In the last three years, Chevron has developed a global health strategy, a key part of which is the development and implementation of a global standardized best practice in Fitness-for-Duty under the company's Operational Excellence (OE) strategy. The best practices and key learnings of the medical fitness for duty programs from the last ten years are being leveraged globally to maximize their benefits to the company as FFD is globally implemented over the next three years.

OE Fitness for Duty is designed to provide a global standardized process to determine whether employees are safely able to perform the physical, psychological and cognitive essential functions of their job without risk to self, others or the environment and are not impaired by drugs, alcohol or disabling medical conditions. FFD requires that Chevron business units to perform job evaluations for all jobs, develop job specific medical exams and FCE tests for new hires, job transfers (e.g. initial assignment of expatriate employees), for cause incidents, return to work evaluations after an injury or illness absence, and emergency responders. The FFD process requires updating or creating the GO-308 to help business units to measure and validate the physical requirements and working conditions of all jobs positions. The GO-308 is integral to the post-offer/pre-placement, job transfer or return to work after an injury or illness processes: the form will be reviewed by the hiring supervisor, in consultation with human resources and Health and Medical Services, to determine if applicants or employees may be required to complete a medical exam, or a medical exam and FCE, to assess their fitness for duty. The Post-Offer/Pre-Placement evaluates whether a prospective candidate is fit, fit with limitations, not fit, or not compliant (e.g. refuses to comply) with evaluation requests. The Job Transfer procedure applies to employees whose job transfer results in significant changes in their job duties (e.g. change in physical requirements, working conditions or transfer to a work location in a new country). The For Cause procedure is implemented when an employee's action or failure to take action results in or has the potential to result in an adverse impact on himself or herself, on others, on the environment, or on Chevron's assets and reputation. For-cause evaluations should be initiated as a result of incidents that occur while the employee is on duty or when reasonable suspicion based on observable changes in performance or behavior develops. Compliance with the company's drug and alcohol policies is required. The Return to Work procedure ensures an employee, following an occupational or non occupational injury or illness, meets the essential functions of the job and may return to work with or without accommodations. As previously discussed, the Emergency Responders procedure evaluates emergency responders to ensure that they are fit to perform their emergency response activities. These employees receive initial and periodic medical evaluations to ensure their ability to fulfill their job roles and responsibilities

One key tool in the implementation of Fitness-for-Duty is the FFD Community of Practice (CoP), a forum for assisting with the implementation and process sustainability. The CoP identifies and shares implementation best practices, tools and lessons learned, and it provides recommendations for continual improvement. The CoP will also assist in identifying the

global minimum standard for Fitness for Duty implementation so processes and practices will be deployed more consistently. Core members of the CoP are FFD process advisors at the corporate and operating company levels, and are assisted in their efforts by corporate, operating company and business unit process sponsors and Health and Medical Services representatives.

There are unique challenges to the global implementation of Fitness-for-Duty processes. There are country-specific and regional laws that regulate the content and frequency of medical evaluations, and some countries where drug testing is not feasible or practical. Fitness–for-Duty is a key health issue for business travelers and how they are prepared to travel safely and maintain their health in locations with significant public health threats (HIV/AIDS, malaria, tuberculosis and dengue to name a few). This is a significant challenge to Chevron's organizational capability since up to 12% of the workforce may be traveling at any given time away from their primary work location. In addition, expatriate employees and family members are another special population, numbering approximately 8,000. Initial assignment and periodic medical exams are keys to the health and fitness for duty of our expatriate population.

Conclusions

Properly matching the employee to the work tasks is vital in maintaining a healthy work force. Injuries can occur when there is a gap between the physical capacities of the employee and the physical demands of the job. Correctly matching the employee to the job is essential to prevent potential ergonomic injuries and can be achieved through job specific functional testing.

Medical Fitness-for-Duty programs demonstrate significant bottom line impacts: providing objective job descriptions, facilitating ergonomic and administrative interventions that evaluate the physical capacity to the job-specific requirements of the job position, promoting on-the-job-safety, and maximizing employee health and productivity. Further, these programs reduce OSHA recordable incidents, Workers' Compensation medical/benefit costs, lost work days, property loss and legal and liability costs. Chevron's Medical Fitness-for-Duty programs not only improve the bottom line in financial terms but more importantly protect the health and well-being of its work force, its "Human Energy."

Acknowledgements

It was a pleasure to collaborate with ISR Institute on this paper, in particular with Trevor Bardarson. My sincere thanks to my friends and colleagues at Chevron Health and Medical Services, especially those engaged in the development and implementation of the Chevron Medical Fitness for Duty programs over the last ten years and the current implementation of the OE Fitness for Duty process. Finally, thanks to the many hard working Chevron employees, medical clinics, FCE testing facilities and vendors who have successfully partnered to develop and implement our medical fitness for duty programs.

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WorkSaver Functional Capacity Evaluation
Cross References for Validity.

TESTS FOR NON-ORGANIC SIGNS
or
INAPPROPRIATE ILLNESS BEHAVIOR

Waddell Tests
(3 or more positive Waddell categories indicate inappropriate illness behavior*)

1. Simulation Tests:
- Axial Loading — Positive/ Negative
- Simulated Trunk Rotation: — Positive / Negative

2. Distraction:
- Sitting vs. Supine SLR Test — Positive/ Negative

3. Regional Disturbance
- Cogwheel or Non-myotomic weakness — Positive / Negative
- Nonanatomic Sx Distribution — Positive / Negative

4. Nonspecific Tenderness — Positive / Negative

5. Overreaction
- Excessive verbalization of pain — Positive/ Negative
- Overreacting facial expressions for pain — Positive / Negative
- Collapsing episodes — Positive / Negative
- Excessive sweating — Positive / Negative

Results: ___ / 5

* *Waddell G., McCulloch JA, Kummel E, Venner R, et al: Nonorganic physical signs in low back pain. Spine 1980 March/April; Vol: 5: Number 2: Page:117*

Psychometric Tests Suggestive of Non-organic Illness Behavior
06. Psychometric Test - Oswestry: Scores >80%: Positive / Negative
07. Psychometric Test - Pain Drawing - Non- Dermatomal Pattern: Positive / Negative
08. Psychometric Test - Dallas Pain: Factors III & IV > 80 %: Positive / Negative

Non-Organic Clinical Findings
09. Muscle tone and girth WNL despite report of prolonged disuse or non-weight bearing. Positive / Negative
10. Back paraspinal muscle guarding behavior relieved by relaxing abdominal muscles upon command Positive / Negative
11. Cervical rotation increases LBP Positive / Negative
12. Bowstring test result not consistent with report of sciatica Positive / Negative
13. Inappropriate Response To Vibration Test: Positive / Negative

14. Ankle Dorsiflexion Test While Sitting: Positive / Negative
15. Bilateral Straight Leg Raise vs Unilateral SLR Test: Positive / Negative
16. Passive Prone Knee Flexion Test: Positive / Negative
17. Function Improves When Observed While Distracted: Positive / Negative
18. Consistently Rates Pain at Level 8 Or Above Regardless of Activity: Positive / Negative
19. HR/BP changes do not correlate with report of sudden increased pain: Positive / Negative
20. Self-perceived Disability Not Consistent With Performance: Positive / Negative
21. Reported Disability Does Not Correlate With Measured Impairments: Positive / Negative
22. Hoover's Submaximal Effort Test: Positive / Negative

Symptom Behaviors Suggestive of Non-organic Illness Behavior

23. Pain At The Tip Of The Tailbone Positive / Negative
24. Entire Limb Pain Positive / Negative
25. Whole Leg Numbness Positive / Negative
26. Whole Leg Giving Way Positive / Negative
27. Complete Absence Of Spells With Very Little Pain In The Past Year Positive / Negative
28. Has Gone Recently to the ER for Pain Positive / Negative
29. Pain Has Remained the Same or Become Worse Since Injury Positive / Negative
30. Reports Severe Pain But Takes No Pain Medications: Positive / Negative
31. Intolerance of, or reaction to, many treatments: Positive / Negative

Overt Pain Behaviors

32. Guarding - abnormally stiff, interrupted or rigid movement while moving from one position to another: Positive / Negative
33. Bracing - a stationary position in which a fully extended limb supports and maintains an abnormal distribution of weight: Positive / Negative
34. Rubbing - any contact between hand and back, i.e. touching, rubbing or holding the painful area: Positive / Negative
35. Grimacing - obvious facial expression of pain that may include furrowed brow, narrowed eyes, tightened lips, corners of mouth pulled back and clenched teeth: Positive / Negative
36: Sighing - obvious exaggerated exhalation of air usually accompanied by the shoulders first rising and then falling. They may expand their cheeks first: Positive/ Negative

Total ____/36

Signs Suggestive Of: _____High Probability of Nonorganic Symptoms, Illness Behavior, Psychological Overlay. (10 or more positive)
_____ Questionable Nonorganic Symptoms (5 to 9 positive)
_____ Organic Symptoms (Less than 5 positive)

Functional Validity Cross References:

01. Non-biomechanical pattern of dynamic lifts Positive / Negative
02. Non-biomechanical correlation between dynamic horizontal lift and peak isometric (static) near arm lift force capacity. Positive / Negative
03. Non-biomechanical correlation between dynamic floor to knuckles lift capacity to peak static squat lift force capacity. Positive / Negative
04. Non-correlation of client's isometric strength to manual muscle testing. Positive/ Negative
05. Horizontal isometric arm lift validity* Positive/ Negative
06. High COVs during isometric lift testing: Positive / Negative
07. Submaximal isometric lift force curves: Positive / Negative
08. Fails to use power grip during isometric and/or dynamic lift, push or pull tests: Positive / Negative
09. Non-recruitment of accessory muscles during material handling tests: Positive / Negative
10. Inconsistent ROM limitations demonstrated in different tasks: Positive / Negative
11. Inconsistent strength during different functional tasks: Positive / Negative
12. Standard grip test does not correlate to MVE test Positive/ Negative
13. MVE grip force curves fail to form bell curve Positive / Negative
14. MVE grip test has 4 or more COVs $\geq$ 15% Positive / Negative
15. Positive Rapid Exchange Grip Test Positive / Negative
16. Tip pinch grip is equal to or greater than key pinch grip. Positive / Negative
17. Postural tolerance improves when distracted. Positive / Negative
18. Heart rate increase does not correlate to perceived exertion. Positive / Negative
19. Does not favor the effected extremity during functional testing Positive / Negative
20. Inability to produce a force $\geq$ 20% of body weight during the isometric push or pull test: Positive / Negative

(* Analysis of the isometric near arm lift versus the isometric far arm lift should reveal a physiologically appropriate near-to -far force ratio ($\geq$1: 2 but not greater than 1:3)

Total ____/20

Signs Suggestive Of:_____High Probability of Disability Magnification Behavior. (>5 positive)
_____ Questionable Self-Limiting Behavior (4 to 5 positive)
_____Consistent Effort (3 or less positive)


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Fitness for Duty Testing

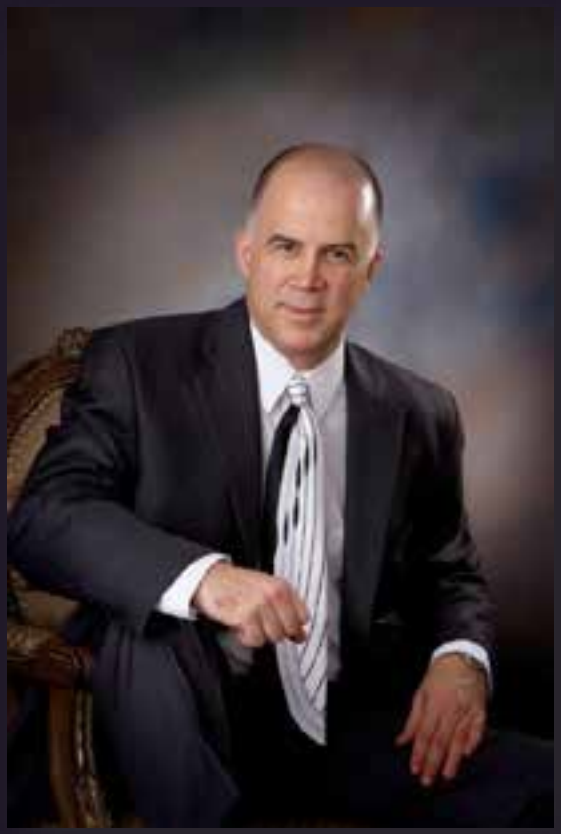
WorkSaver Functional Testing for New Employees and Return to Work

Richard W. Bunch, PhD, PT, CBES

Trevor Bardarson PT, OCS, CBES

WorkSaver Employee Testing Systems LLC

WorkSaver Employee Testing Systems, LLC



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President

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Certified Ergonomic Specialist

SPE SPE-111751

The Design and Value of a Medical Fitness for Duty Program

Stephen Frangos, MD / Chevron, Trevor Bardarson, PT / ISR Institute and Richard Bunch, PhD, PT/ISR Institute

Abstract

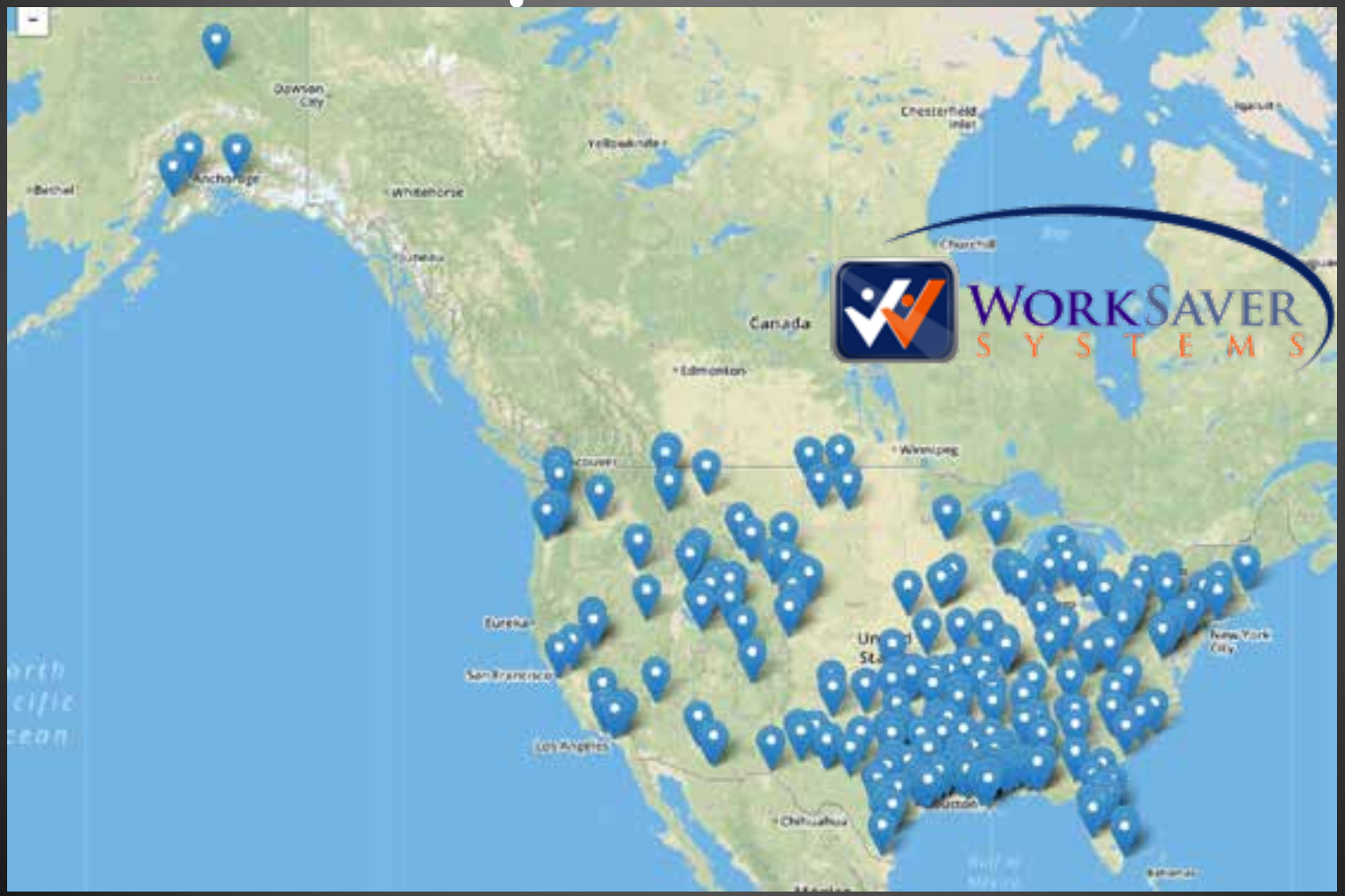
Medical providers make recommendations every day to employers regarding employee medical fitness issues. These recommendations are based on the practitioner's clinical training and experience; but, there is often insufficient objective information available about the workers' physical ability to perform those requirements, thereby reducing the effectiveness and efficacy of the medical providers' recommendations. At our multinational oil and gas company, we have developed a process for more accurately assessing medical fitness for duty based on the objective and specific physical requirements of

Houma, La Location

Administration and Quality Assurance Office


New Orleans (Harahan) Location
Training and Work Performance Center
ISR Physical Therapy
&
WorkSaver Systems
Human Performance
Center

WorkSaver Conducts ADA-Compliant Ị ew Hire and Return-to-Work (Fit-for-Duty) Evaluations on a Ị ation-Wide Basis

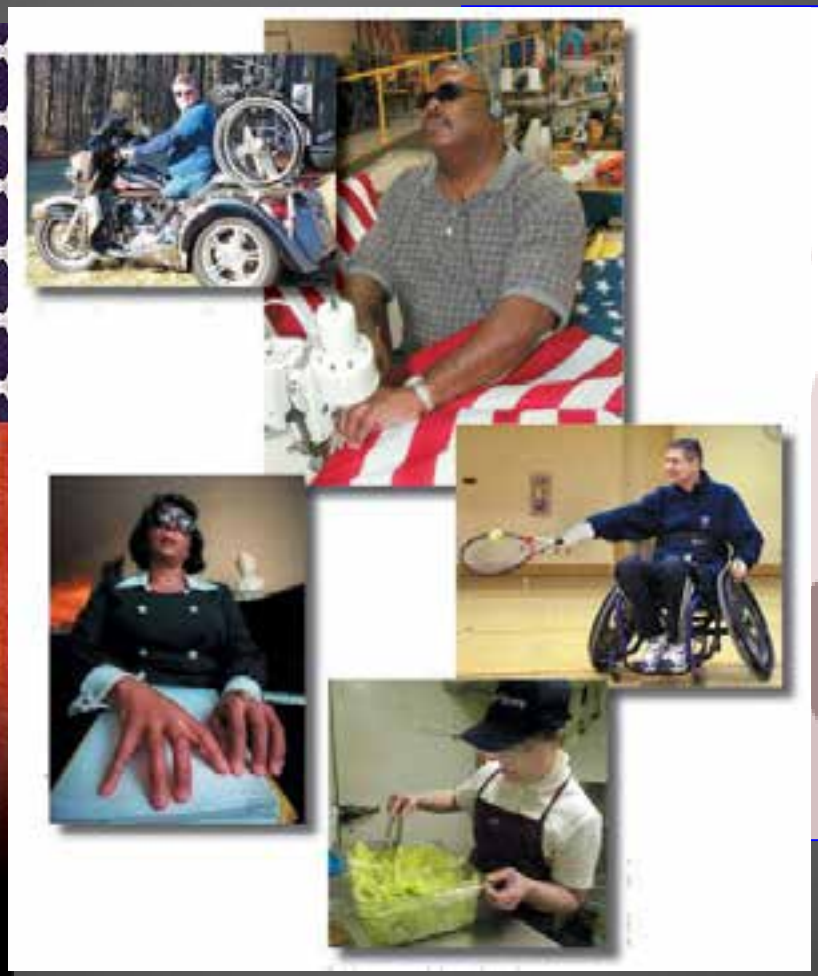


WorkSaver Functional Testing Systems Has Covered the Globe and Various Industries–

Types of WorkSaver Functional Tests

- New Hire –Post-Offer / Pre-Placement
- Return to Work Fit-for-Duty
- Fit for Duty for Cause

Designed for Regulatory and Legal Compliance to Avoid Hiring Discrimination



WorkSaver Quality Assurance Reviews

WorkSaver Quality Assurance Staff of Registered Nurses (RNs) provides detailed quality assurance reviews on each and every WorkSaver functional test in order to ensure legal compliance to EEOC and ADA regulations for your organization.

Step # 1

Validation of Functional Tests Content Validity

- WorkSaver test protocols simulate job tasks based on a validated functional job description.
- Establishes pass/fail criteria. Focuses on Abilities to Work Safely.

The Process begins with the Physical Demands Validations (PDV)

PDVs access Strength, Flexibility, Balance, Coordination & Cardio Demands

Physical Demand Validation

- Identifies essential physical demands of the job:
  - Cardiovascular demands (energy expenditure)
  - Postural Demands
  - Strength and Joint Motion Demands
  - Balance and Coordination Demands
  - Dexterity and Grip Strength Demands
  - Endurance Demands
  - Environmental and Visual Demands
  - Special Job Task Demands (e.g., respirator / confined space)
- Forms foundation for legal screening examinations of employees
- Uses only realistic, sensible data

Functional Job Description (FJD) – forms legal foundation for Fitness For Duty (FFD) testing

WORKSAVER SYSTEMS

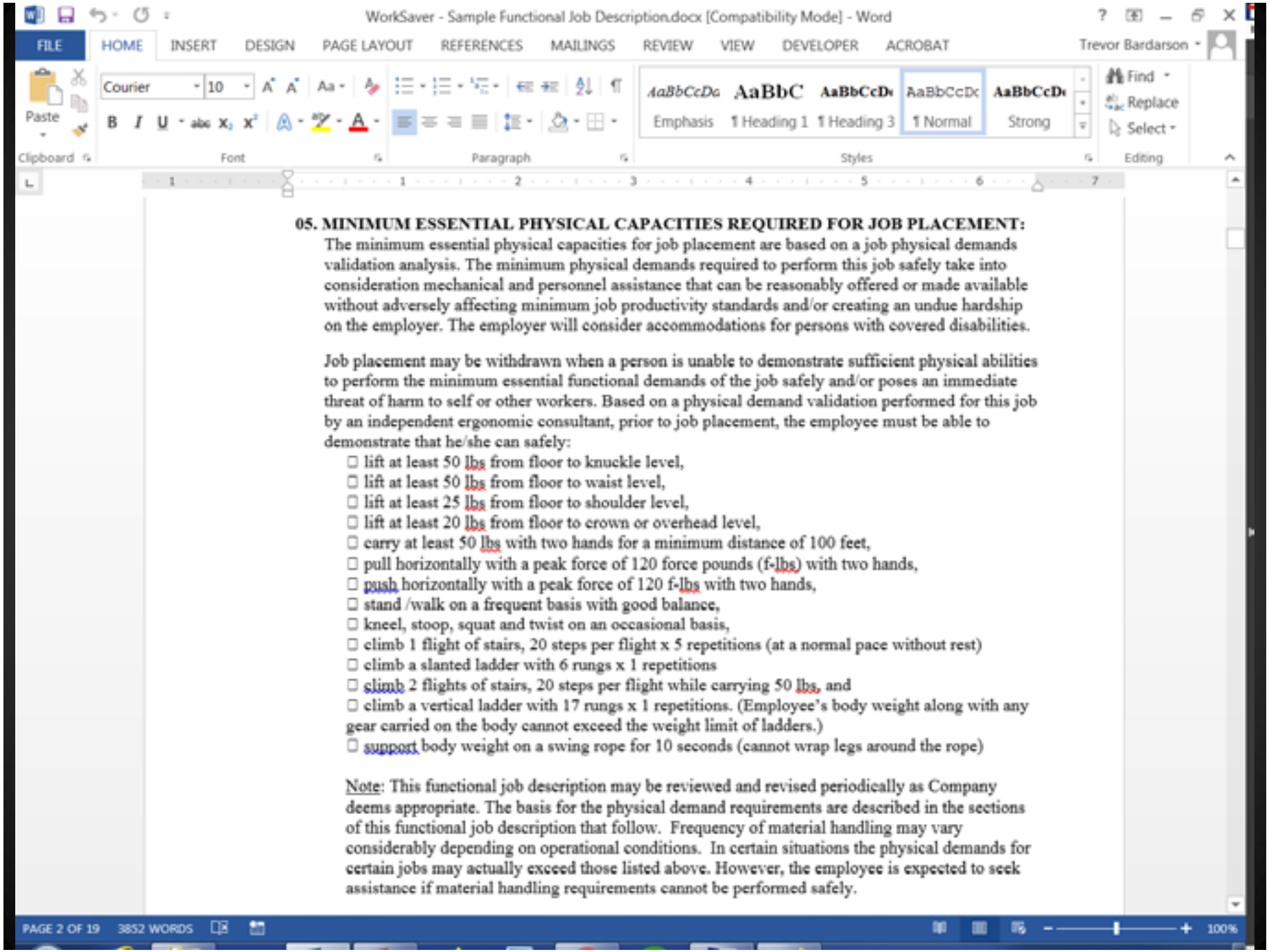
Production Technician
Validated Functional Job Description
June 21, 2013 (Revised March 1st, 2014)

To Candidate:
This job description describes in detail the physical and environmental demands required to perform the essential duties of a Production Technician.

The physical demands of this job are classified as medium using U.S. Department of Labor criteria. It is important that you are physically able to perform this job safely. After reviewing this functional job description, please sign this document on the last page and indicate whether you believe that you can or cannot perform the essential duties of this job safely. If you believe that you have a disability which may cause a workplace limitation to performing any functional job duties, you should contact Human Resources.

I. Physical Demand Requirements for Safe Job Performance

Specific physical demands described in this functional job description have been validated by on-site job analysis involving direct measurements. They are representative of the physical demands that must be met by an employee to successfully and safely perform the essential functions of this job. Although specific components of job demands are listed in detail in this document, the following information is a synopsis


WorkSaver - Sample Functional Job Description.docx [Compatibility Mode] - Word
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Trevor Bardarson
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Paragraph
Styles
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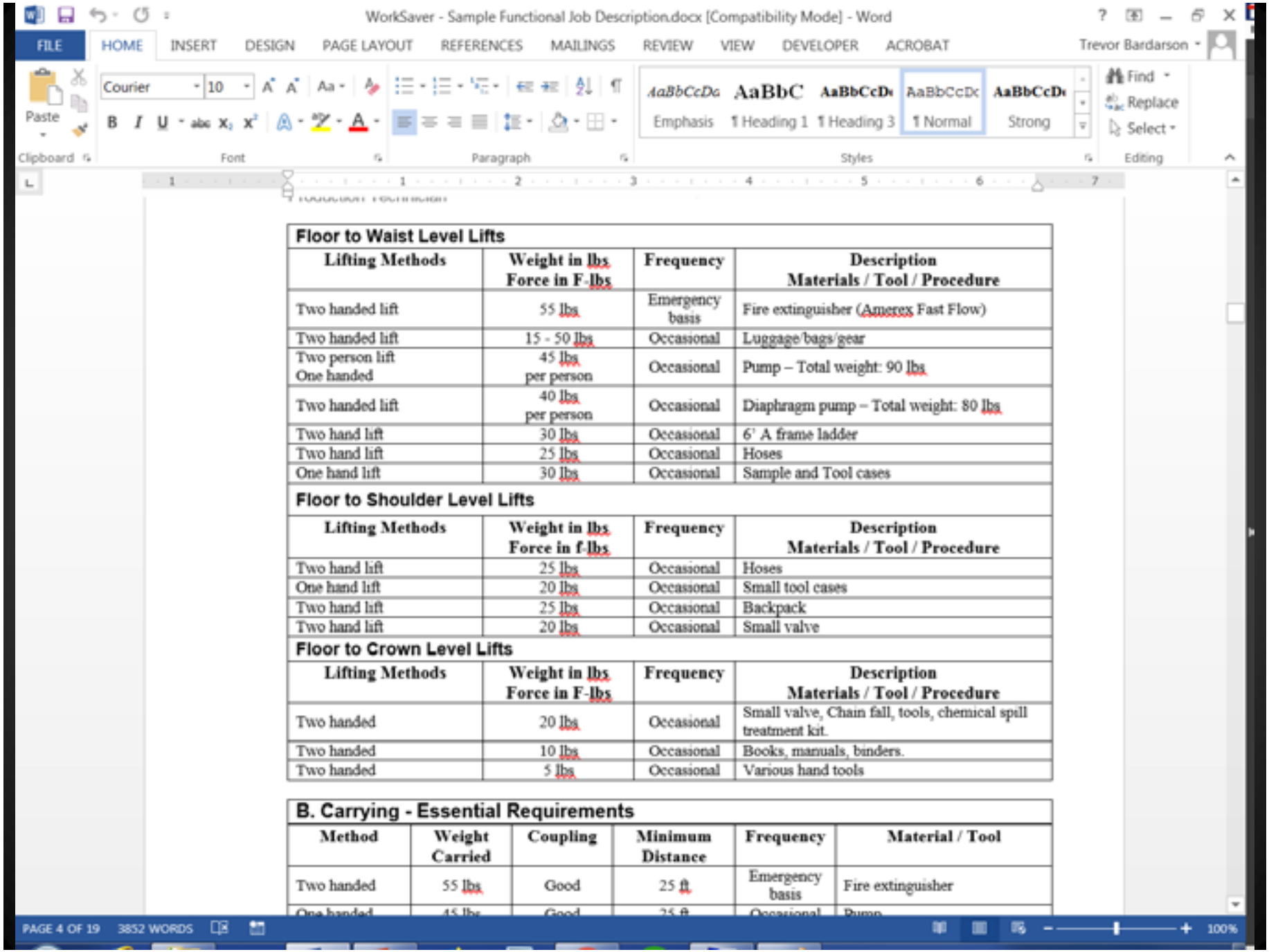
Heading 1
Heading 3
Normal
Strong
Find
Replace
Select
Editing
05. MINIMUM ESSENTIAL PHYSICAL CAPACITIES REQUIRED FOR JOB PLACEMENT:
The minimum essential physical capacities for job placement are based on a job physical demands validation analysis. The minimum physical demands required to perform this job safely take into consideration mechanical and personnel assistance that can be reasonably offered or made available without adversely affecting minimum job productivity standards and/or creating an undue hardship on the employer. The employer will consider accommodations for persons with covered disabilities.
Job placement may be withdrawn when a person is unable to demonstrate sufficient physical abilities to perform the minimum essential functional demands of the job safely and/or poses an immediate threat of harm to self or other workers. Based on a physical demand validation performed for this job by an independent ergonomic consultant, prior to job placement, the employee must be able to demonstrate that he/she can safely:
☐ lift at least 50 lbs from floor to knuckle level,
☐ lift at least 50 lbs from floor to waist level,
☐ lift at least 25 lbs from floor to shoulder level,
☐ lift at least 20 lbs from floor to crown or overhead level,
☐ carry at least 50 lbs with two hands for a minimum distance of 100 feet,
☐ pull horizontally with a peak force of 120 force pounds (f-lbs) with two hands,
☐ push horizontally with a peak force of 120 f-lbs with two hands,
☐ stand /walk on a frequent basis with good balance,
☐ kneel, stoop, squat and twist on an occasional basis,
☐ climb 1 flight of stairs, 20 steps per flight x 5 repetitions (at a normal pace without rest)
☐ climb a slanted ladder with 6 rungs x 1 repetitions
☐ climb 2 flights of stairs, 20 steps per flight while carrying 50 lbs, and
☐ climb a vertical ladder with 17 rungs x 1 repetitions. (Employee's body weight along with any gear carried on the body cannot exceed the weight limit of ladders.)
☐ support body weight on a swing rope for 10 seconds (cannot wrap legs around the rope)
Note: This functional job description may be reviewed and revised periodically as Company deems appropriate. The basis for the physical demand requirements are described in the sections of this functional job description that follow. Frequency of material handling may vary considerably depending on operational conditions. In certain situations the physical demands for certain jobs may actually exceed those listed above. However, the employee is expected to seek assistance if material handling requirements cannot be performed safely.
PAGE 2 OF 19
3852 WORDS
100%



Floor to Waist Level Lifts			
Lifting Methods	**Weight in lbs Force in F-lbs**	**Frequency**	**Description Materials / Tool / Procedure**
Two handed lift	55 lbs	Emergency basis	Fire extinguisher (Amerex Fast Flow)
Two handed lift	15 - 50 lbs	Occasional	Luggage/bags/gear
Two person lift One handed	45 lbs per person	Occasional	Pump – Total weight: 90 lbs
Two handed lift	40 lbs per person	Occasional	Diaphragm pump – Total weight: 80 lbs
Two hand lift	30 lbs	Occasional	6' A frame ladder
Two hand lift	25 lbs	Occasional	Hoses
One hand lift	30 lbs	Occasional	Sample and Tool cases
Floor to Shoulder Level Lifts			
Lifting Methods	**Weight in lbs Force in f-lbs**	**Frequency**	**Description Materials / Tool / Procedure**
Two hand lift	25 lbs	Occasional	Hoses
One hand lift	20 lbs	Occasional	Small tool cases
Two hand lift	25 lbs	Occasional	Backpack
Two hand lift	20 lbs	Occasional	Small valve
Floor to Crown Level Lifts			
Lifting Methods	**Weight in lbs Force in F-lbs**	**Frequency**	**Description Materials / Tool / Procedure**
Two handed	20 lbs	Occasional	Small valve, Chain fall, tools, chemical spill treatment kit.
Two handed	10 lbs	Occasional	Books, manuals, binders.
Two handed	5 lbs	Occasional	Various hand tools

B. Carrying - Essential Requirements					
Method	**Weight Carried**	**Coupling**	**Minimum Distance**	**Frequency**	**Material / Tool**
Two handed	55 lbs	Good	25 ft	Emergency basis	Fire extinguisher

WorkSaver - Sample Functional Job Description.docx [Compatibility Mode] - Word

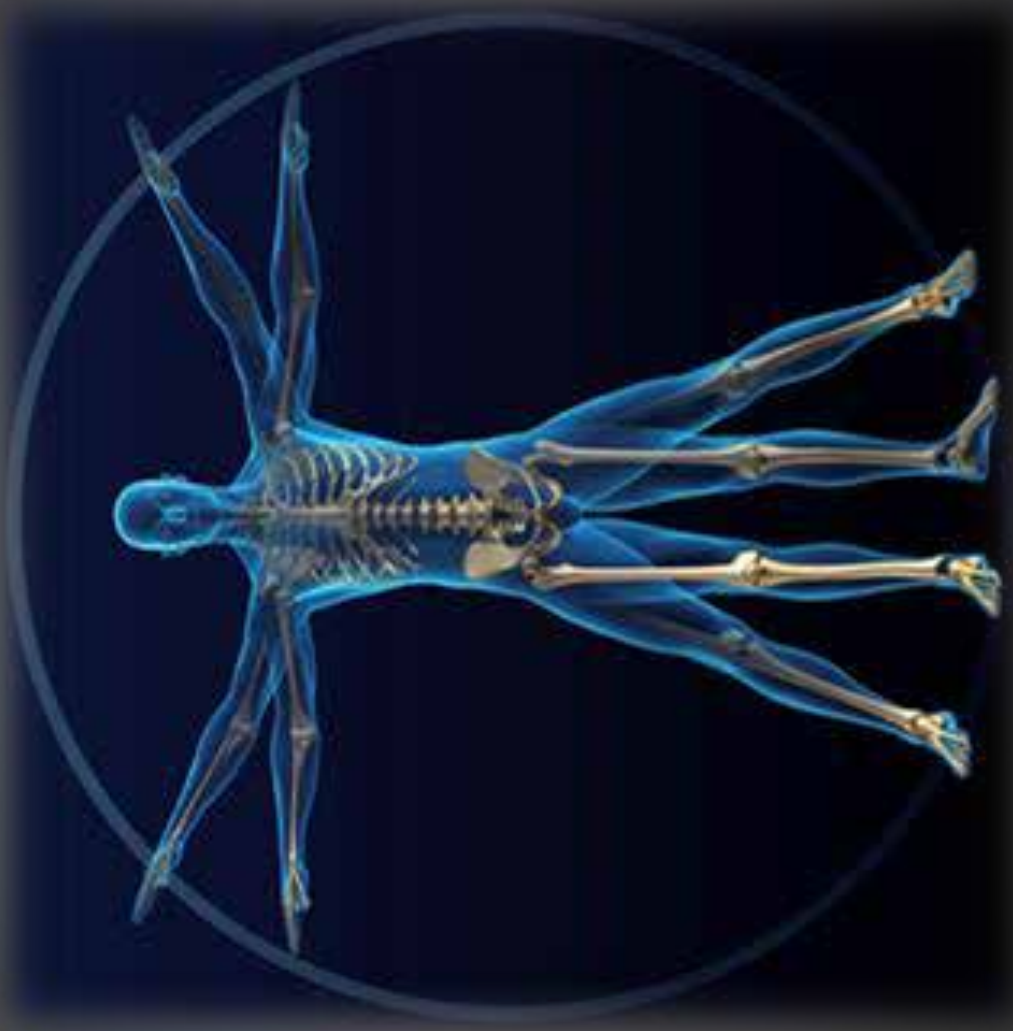
Production Technician

Employee must be able to work in tight or cramped spaces.

Employee must be able to simultaneously kneel, flex and twist the trunk while reaching to work with hoses.

Employees must be able to safely climb (ascend and descend) stairs using hand railings and vertical ladders.

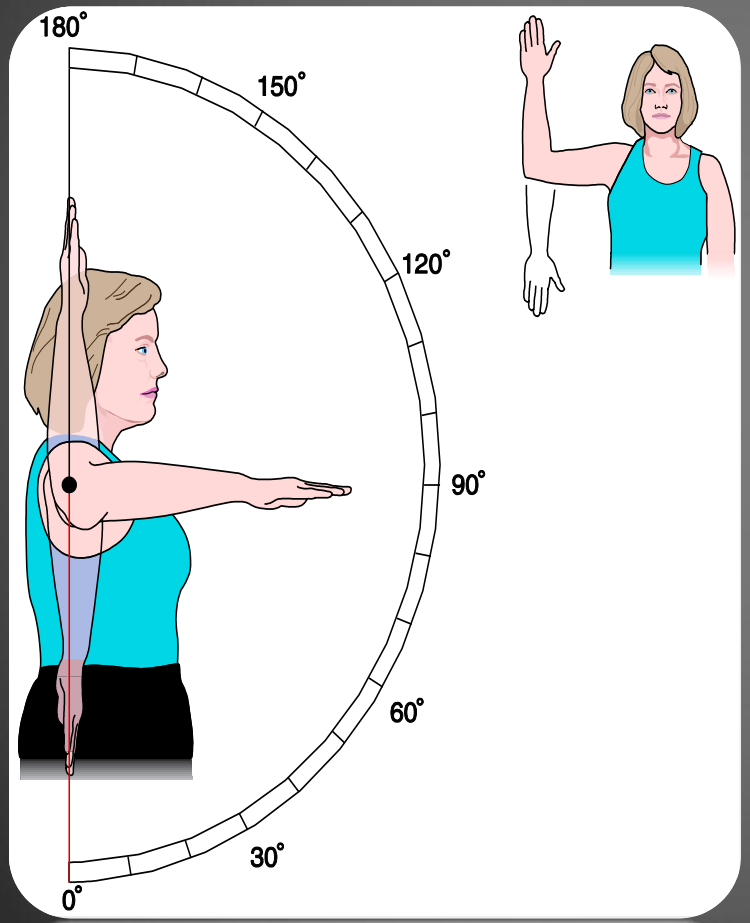
Step #2

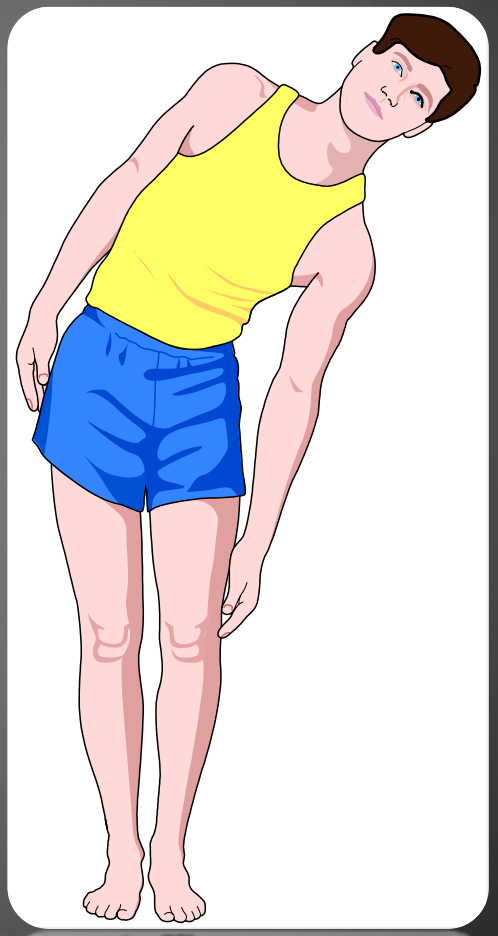


Functional Testing

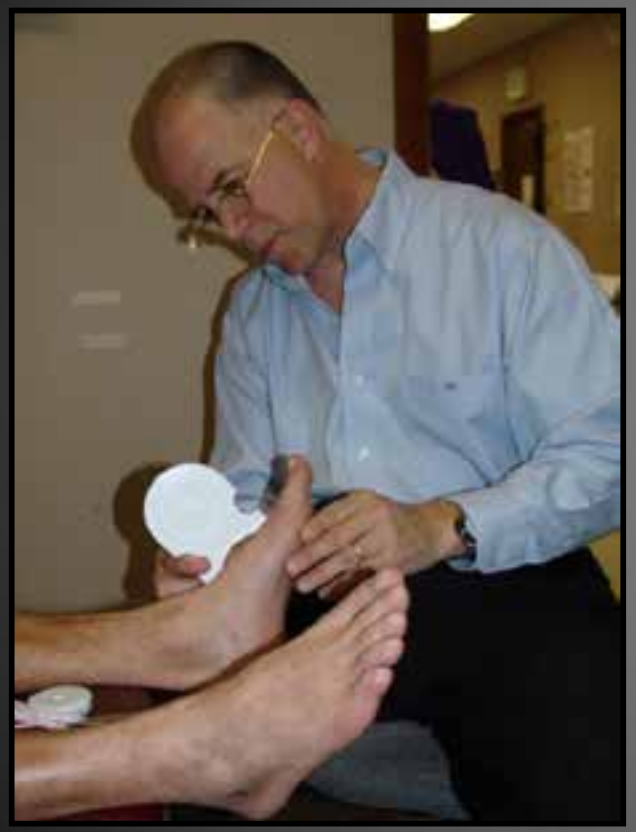
A Detailed Physical & Functional Assessment

The WorkSaver Physical Examination includes Biomechanical Assessments

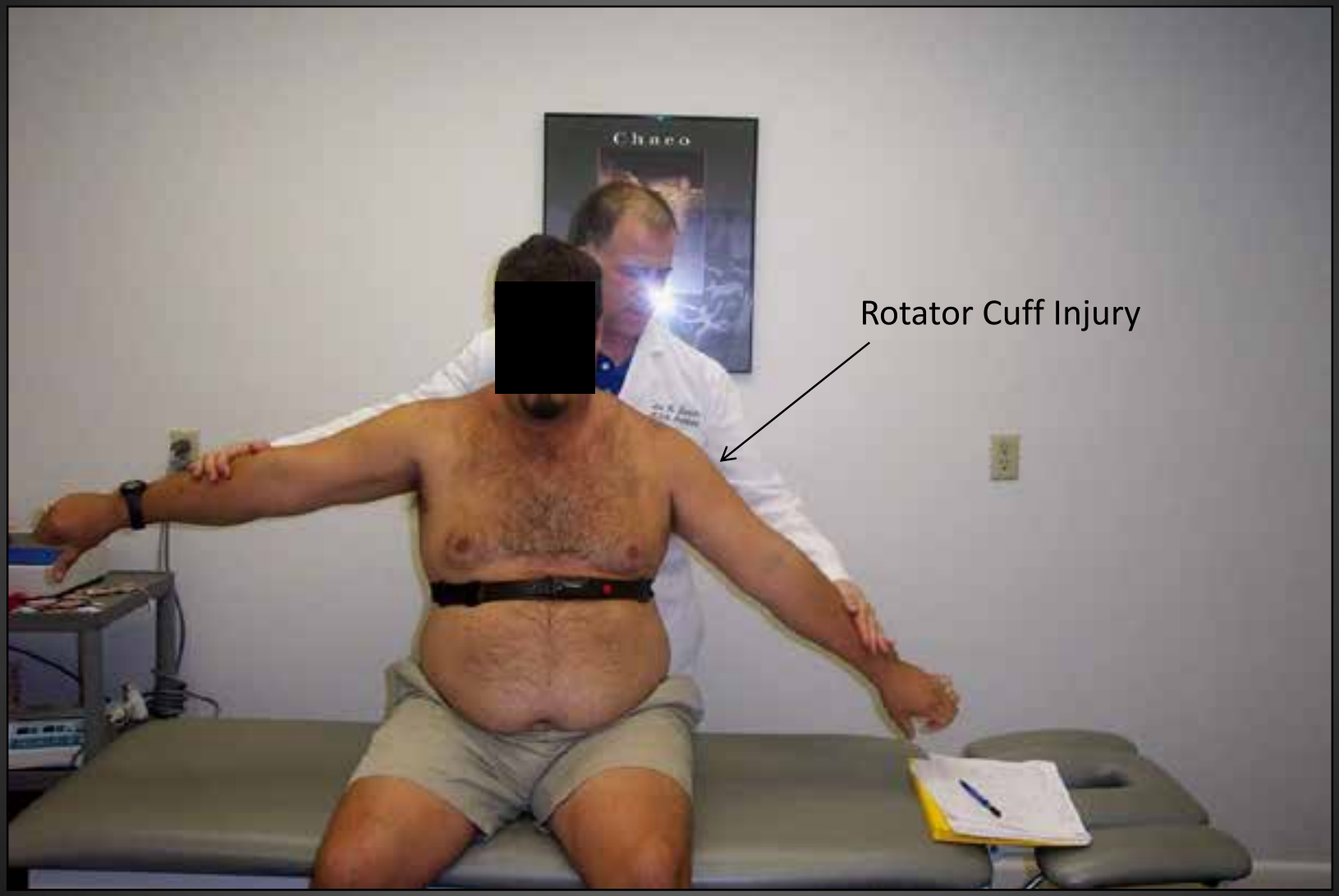




Measures Pre-Existing Impairments and Baseline Range of Motion



Identifies Pre-existing Conditions



Tests Function by Content Validity

Evaluates Aerobic Capacities

Evaluates Postural Tolerances

Assesses Capacities for Safe Lifting, Carrying, Pushing and Pulling

Outcomes of Functional Testing

- Client Met All Requirements
- Client Did Not Meet All Requirements unless their restrictions can be accommodated
- Medical Hold - Medical intervention is needed prior to beginning work.

Final Result

Same day notification of results.

Detailed, legally defensible report that accurately describes the individual's physical ability to work.

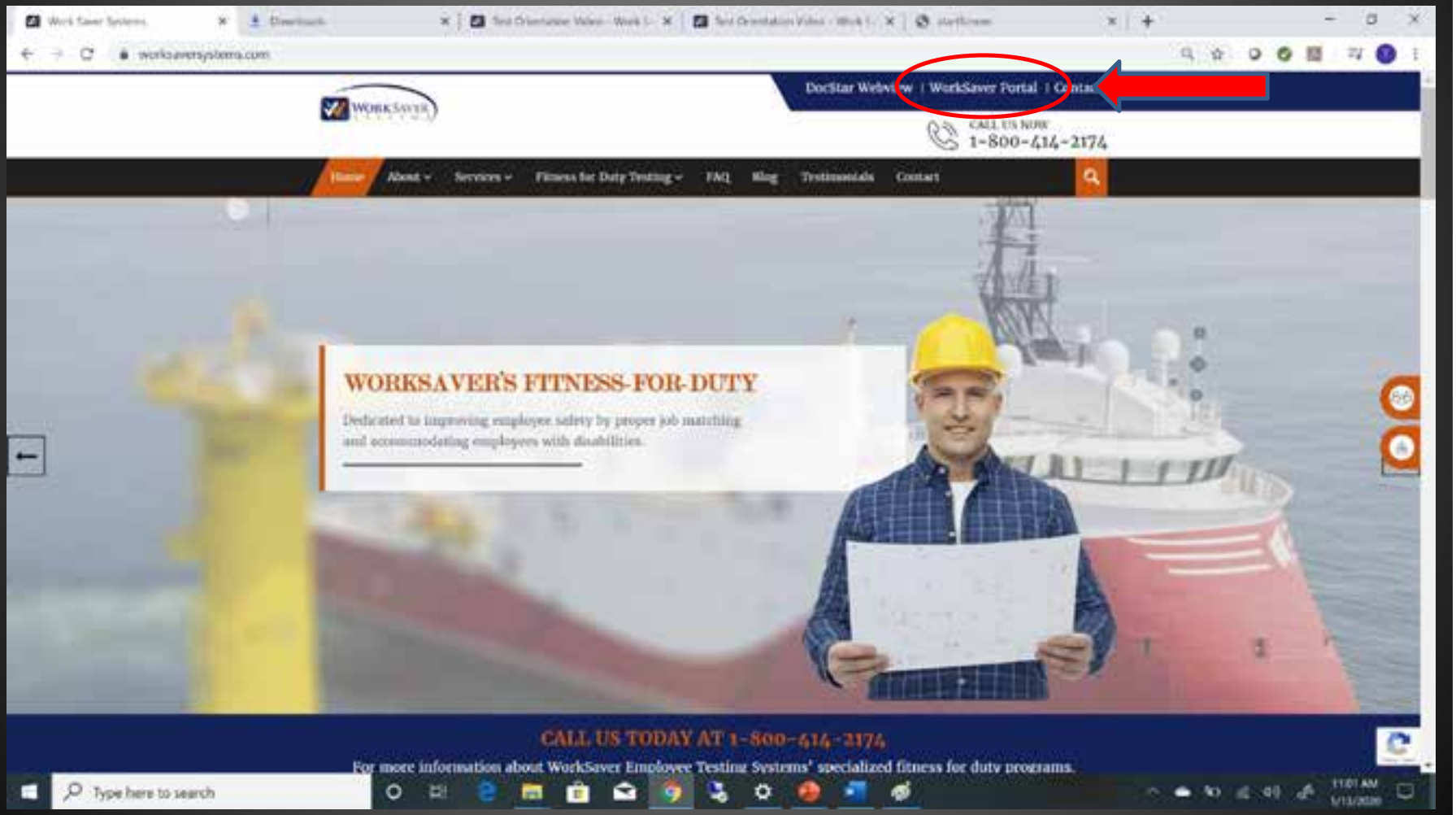
Undergoes Quality Assurance reviews

Stored electronically in WorkSaver's Software Program

Outcome Reviews for Client

- **Annual Statistical Report**
- **Estimated Return on Investment Report**

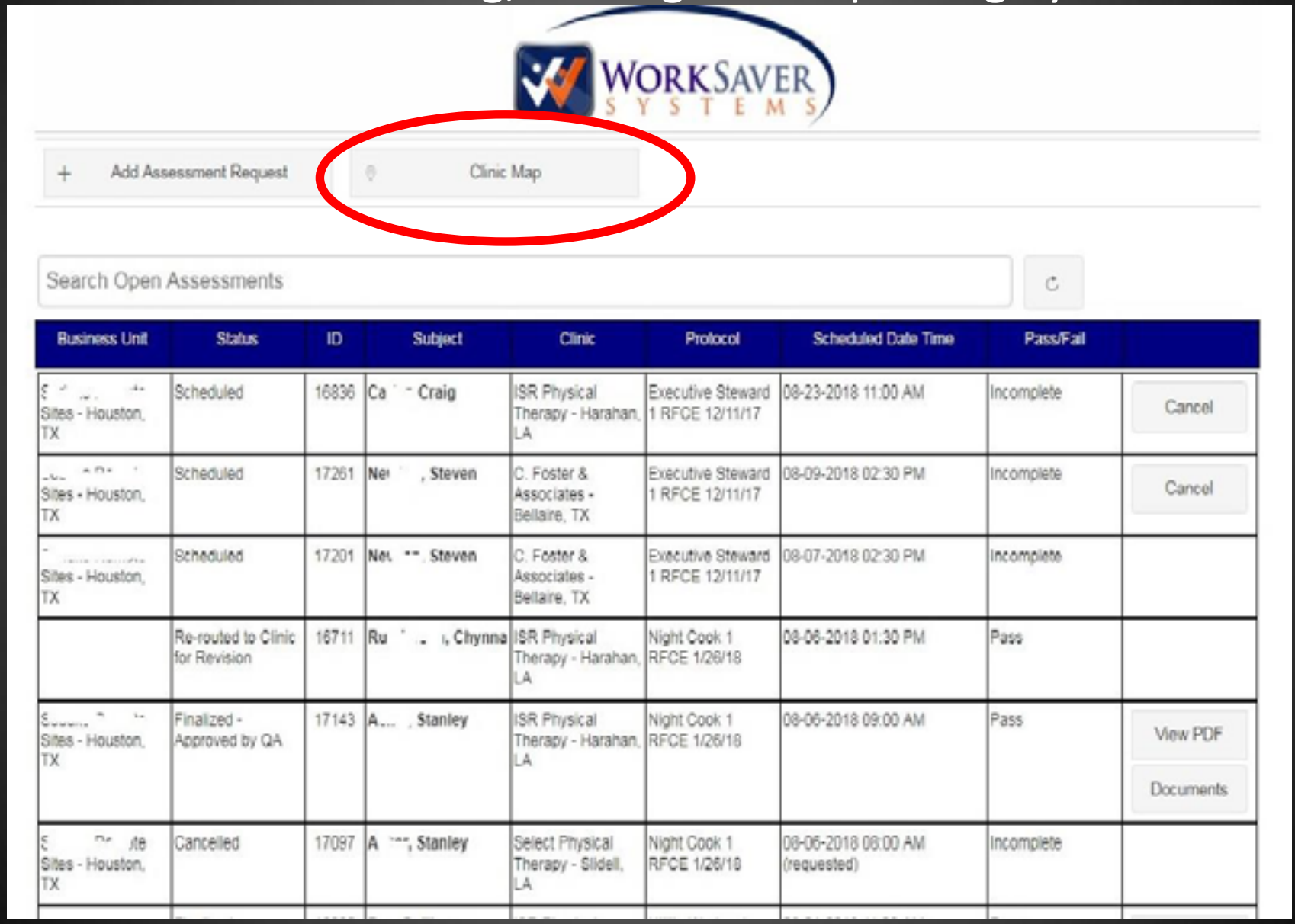
Online Scheduling, Testing and Reporting System



Online Scheduling, Testing and Reporting System

HIPAA Secure

Online Scheduling, Testing and Reporting System



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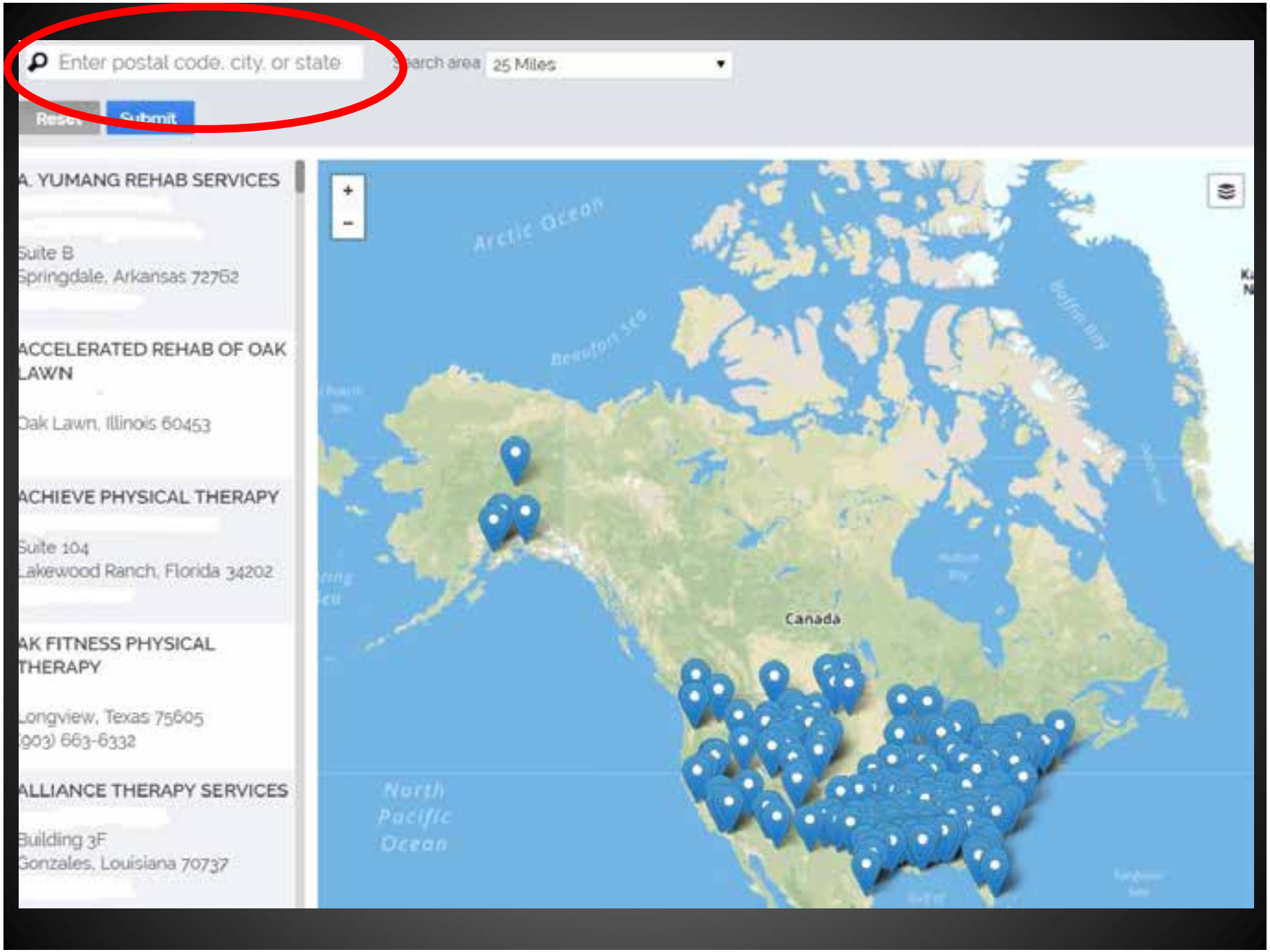
Sites - Houston, TX	Scheduled	17261	, Steven	C. Foster & Associates - Bellaire, TX	Executive Steward 1 RFCE 12/11/17	08-09-2018 02:30 PM	Incomplete	Cancel
Sites - Houston, TX	Scheduled	17201	Steven	C. Foster & Associates - Bellaire, TX	Executive Steward 1 RFCE 12/11/17	08-07-2018 02:30 PM	Incomplete	
	Re-routed to Clinic for Revision	16711	, Chynna	ISR Physical Therapy - Harahan, LA	Night Cook 1 RFCE 1/26/18	08-06-2018 01:30 PM	Pass	
Sites - Houston, TX	Finalized - Approved by QA	17143	Stanley	ISR Physical Therapy - Harahan, LA	Night Cook 1 RFCE 1/26/18	08-06-2018 09:00 AM	Pass	View PDF Documents
Sites - Houston, TX	Cancelled	17097	, Stanley	Select Physical Therapy - Slidell, LA	Night Cook 1 RFCE 1/26/18	08-06-2018 08:00 AM (requested)	Incomplete	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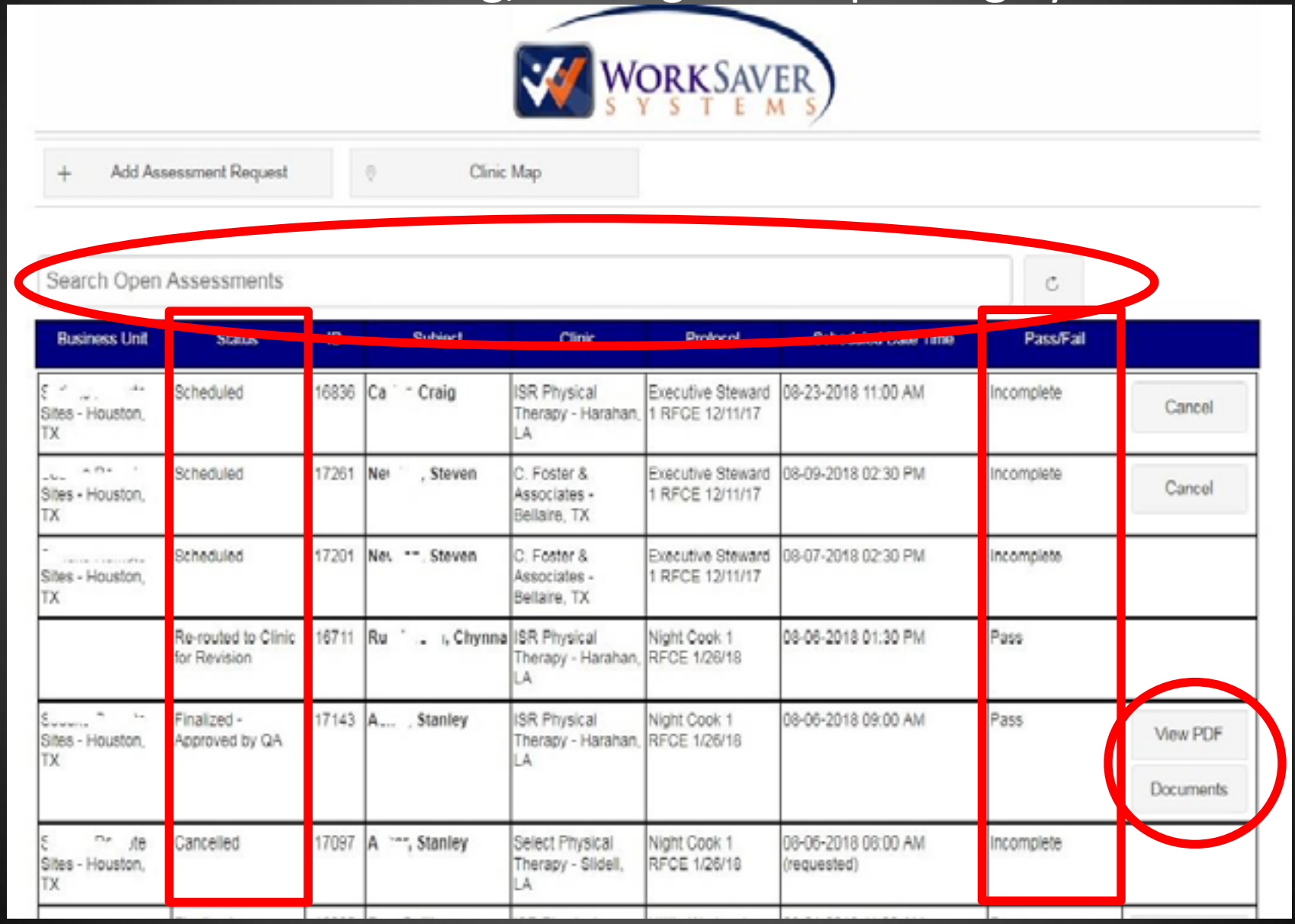
Arctic Ocean
Beaufort Sea
Canada
North Pacific Ocean

Online Scheduling, Testing and Reporting System



WorkSaver Advantages

- Decreases Lost Time and Injury Rates
- Decreases Employee Turnover
- Decreases Worker's Comp Cost
- Standardizes National Testing

Recap

WorkSaver Functional testing is a proven system that will:

Correctly determine if a person has the physical abilities to safely perform a job

Detect pre-existing medical problems

Reduce on-the-job injuries and improve productivity

Provide feedback on body mechanics and wellness

Questions?

Trevor Bardarson PT, OCS, CBES
(800) 414-2174
Dr.Bunch@WorkSaversystems.com

Trevor@worksaversystems.com

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PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Jason A. Culotta, Esq.
Jones Walker LLP
New, Orleans, LA
Labor Attorney

GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
RIVER & MARINE INDUSTRY SEMINAR
2024

HOW DO I MANAGE EMPLOYEE USE OF CANNABIS, SYNTHETIC DRUGS AND WHAT DRUG TESTING DO I NEED?

April 24, 2024

Jason A Culotta
Partner
Jones Walker LLP
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MARIJUANA IN THE MARINE INDUSTRY

The Controlled Substance Act ("CSA"), 21 U.S.C. §§ 811, *et seq*., categorizes and schedules marijuana a Schedule 1 narcotic unlawful to possess. Despite this federal prohibition, marijuana is legal in thirty-seven states, the District of Columbia, and four territories.[1] The annual sale of marijuana in these states is expected to reach $55B by 2027.[2] In 2023, California collected a billion dollars in tax revenue from marijuana sales.[3] Colorado used its hundreds of millions of dollars in marijuana taxes to cover shortfalls and fund state investment like education and mental health.[4] Even though it is still illegal under federal law, the huge tax revenues indicate state-authorized marijuana is here to stay. And it's incumbent on employers, including those in the maritime industry, to understand the effects marijuana has on the workplace and in the industry.

All marijuana laws are not created equal. Each state's law is different in which type of use is lawful (recreational or medicinal), the form of marijuana that is lawful (raw, tinctures, inhalants, etc.), and how the lawful use of marijuana affects the employment relationship. Federal laws also plays a significant role on how to deal with marijuana in the workplace. While federal law likely does not preempt state marijuana law entirely, certain federal drug testing laws likely preempt state medical marijuana law.

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[1] https://disa.com/marijuana-legality-by-state

[2] https://www.forbes.com/sites/irisdorbian/2023/10/02/global-legal-weed-market-could-soar-to-55-billion-in-five-years/?sh=21d546756630

[3] https://www.nbcsandiego.com/news/local/marijuana-state-tax-income-270m-last-quarter-is-on-the-rise/3369255/#:~:text=So%20far%20this%20year%2C%20Californias,the%20state%20were%20%24269.3%20million.

[4] https://www.marijuanamoment.net/legal-marijuana-states-have-generated-nearly-8-billion-in-tax-revenue-since-recreational-sales-launched-report-finds/

The United States Congress recognized the need for a drug and alcohol free transportation industry, and in 1991 passed the Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306 (the "Omnibus Act"), requiring DOT agencies to implement drug and alcohol testing programs. Pursuant to the Omnibus Act, the Federal Motor Carrier Safety Administration, the Federal Aviation Administration, the Federal Railroad Administration, and the Coast Guard implemented drug testing regulations that prohibit the use of marijuana by those individuals engaged in a safety sensitive position—i.e., commercial drivers, pilots, railroad workers, and maritime worker and crewmembers. *See* 49 C.F.R. § 40, *et seq*. These federal regulations directly regulate drug use by those types of employees, so there is a direct conflict between the state and federal law, such that the federal drug testing regulation preempts the state marijuana law.[5]

The Coast Guard Regulations were specifically implemented "to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment." 46 C.F.R. § 16.101. The regulations provide that marine employers must drug test all employees in safety-sensitive positions to ensure those individuals are free from illegal drugs. The regulations further define a safety sensitive position as any position aboard a vessel, including, but not limited to crewmembers, that requires the person filling that position to perform one or more safety sensitive duties or operation of a vessel on either a routine or emergency only basis. These regulations make clear marine employers do not need to accommodate medical marijuana usage by safety sensitive workers. But what happens if an office worker, like an accountant, seeks an

[5] *Noffsinger v. SSC Niantic Operating Co*., 273 F.Sup.3d 326 (D.Conn. 2017); Chance v. Kraft Heinz Foods Co., No. K18C-01-056 NEP, 2018 Del. Super. LEXIS 1773, 2018 WL 6655670 (Del.Super. December 17, 2018); Callaghan v. Darlington Fabrics Corp., Docket No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, 2017 WL 2321181 (R.I.Super. May 23, 2017); Smith v. Jensen Fabricating Eng'r, Inc., No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at *4 (Super. Ct. Mar. 4, 2019).

medical marijuana accommodation for her Chron's disease. Does the marine employer have to accommodate?

Our panel will explore how difficult it is to navigate these new and ever-changing marijuana waters. We will address the need for marine employers to understand the marijuana laws for each state in which they operate. We will discuss when marine employers should defer to and rely on federal law. We will discuss how marine employers can take steps to clearly define safety sensitive positions. And finally and most importantly, we will discuss how marine employers can draft drug testing policies that comply with both state and federal law.

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Marc C. Hebert

Patrick Mannion
Office of Drug and alcohol Prevention & Investigation
U.S. Coast Guard Representative


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Moderator:
Marc C. Hebert

Spencer Murphy
Canal Barge Company
New Orleans, LA
Company Health and Safety Representative


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Moderator:
Marc C. Hebert

Angie Perez, PhD, CIH
CTEH, LLC
Portland, OR
Toxicologist

PAPER TITLE: Cannabis consumption and accident risk.

AUTHOR:
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SESSION TITLE: HOW DO I MANAGE EMPLOYEE USE OF CANNABIS, SYNTHETIC DRUGS AND WHAT DRUG TESTING DO I NEED?

Wednesday, April 24, 2024; 15:15-17:00 CST

BIOGRAPHY:
I am toxicologist and Certified Industrial Hygienist (CIH) through the American Board of Industrial Hygiene (ABIH) with over 19 years of experience in the sampling and analysis, toxicology, exposure assessment, and risk assessment of chemicals. My educational background a Ph.D. in Toxicology in 2008 from Oregon State University, and postdoctoral research in Pharmaceutical Chemistry from 2008-2009 at the University of California, San Francisco. I am currently a Senior Toxicologist with CTEH, LLC, an emergency response and consulting firm that specializes in human health risk assessment of environmental, occupational, and consumer product settings.

My focal research and specialization areas include risk- and exposure assessment including quantitative exposure reconstruction for occupational and environmental hazards, toxicity evaluations, development and evaluation of experimental design and methodologies, and evaluation of general causation relationships between chemical exposure and illness or disease. I regularly contribute to the scientific, peer-reviewed literature with more than 50 published articles and abstracts on topics related to toxicology and industrial hygiene. I have studied the health effects of occupational and community exposures to per- and polyfluoroalkyl substances, volatile organic compounds, metals, and odor compounds. I additionally have studied the physiological effects in humans of prescription and illicit drugs and their relationship with impairing effects, risk of motor vehicle crash, or risk-taking behavior.

I. Introduction

Cannabis and cannabis products (often known as marijuana) are one of the most commonly used drugs in the United States and contain over 420 unique chemical compounds, including the primary psychoactive cannabinoid delta-9-tetrahydrocannabinol (THC) (Huestis, 2002, 2005). Typical routes of exposure to cannabis include ingestion and inhalation. Following entry into the body, THC interacts with cannabinoid receptors, including CB1 receptors in the brain and spinal cord and CB2 receptors in immune tissues (Huestis, 2002, 2005). The majority of THC is metabolized to the equipotent psychoactive metabolite, 11-OH-THC, and the inactive metabolite, THC-COOH, by hepatic microsomes in the liver, but THC is also metabolized in the heart, lung, brain, and intestine (Huestis, 2005). The psychoactive metabolite, 11-OH-THC, and the non-psychoactive metabolite, THCCOOH, are eliminated from the body via feces and urine, respectively (Huestis, 2002, 2005).

II. The physiological effects of cannabis use follow a dose-response relationship.

A dose-response relationship describes a change in effect caused by differing doses of, or exposure to, a given substance. Regarding cannabis ingestion, a dose-response function of a 'high' feeling and impairment have been presented in the literature. Physiological effects of cannabis use include alterations in space and time perception, cognition, memory, learning, endocrine function, and body temperature regulation (Huestis, 2002; WTSC, 2015). Feelings of euphoria and relaxation are reported, as well as mood alterations including paranoia and panic reactions (Huestis, 2005). In addition, increased heart rate, increased appetite, dry throat and mouth, decreased diastolic blood pressure, dilated pupils, and decreased accuracy in logical reasoning tasks have been noted after cannabis consumption (Bramness et al., 2010; Huestis, 2002; Hunault et al., 2008; Schwope et al., 2012; WTSC, 2015). The literature indicates that cannabis consumption results in delayed decision-making, diminished responsiveness to negative consequences, and increased risky behavior activity (Crane et al., 2013; Crean et al., 2011; D'Souza et al., 2008; Ramaekers et al., 2011; Wesley et al., 2011). Long-term cannabis use has been associated with impaired memory and attention and reduced cognitive flexibility (Crane et al., 2013; Lane et al., 2005; Solowij et al., 2002). More recently, cannabis users were shown to be at a greater risk of experiencing negative consequences, such as deficits in episodic memory, learning, recall, executive function, attention, motor skills, and language, in comparison to non-users (Gonzalez et al., 2015).

The primary physical effects following cannabis smoking include conjunctival injections, impairment of cognitive and psychomotor functions, increased heart rate, and a subjective "heavy body," "stoned," or "high" feeling (Agurell et al., 1986; Hunault et al., 2008). As such, the relations between THC plasma levels peaking approximately 15 minutes after smoking have been shown to be accompanied by an increased pulse rate (Galanter et al., 1972). While the plasma THC levels and the pulse rate rapidly decline, the subjective "high" feeling increases at a steady rate and is maintained for a longer period (Agurell et al., 1986; Galanter et al., 1972). Agurell et al. (1986) demonstrated a temporal dissociation between plasma concentrations and effects, indicated by lag-time in biochemical reaction and associated impairment potentially due to a slow penetration of THC through the blood-brain barrier. Lane et al. (2005) observed

that participants in a controlled study who were administered a high dose of THC showed a significant increase in risky choices between pre-dose and post-dose, compared to the controls.

A more recent study by Hunault et al. (2008), found that due to seed selection and advances in growing techniques, the production of high THC content cannabis has become prevalent. Subsequently, it was determined that when cannabis with higher THC concentrations up to 69 mg (23%) was smoked, there was a strong linear relationship between the THC dose, concentration of THC in serum, and an increase in test subject heart rate and subjective "high" feeling (Hunault et al., 2008). Additionally, it was found that with increasing doses of cannabis subjects became drowsier until 5 hours post-smoking (Hunault et al., 2008). A previous study by Hollister et al. (1981) attempted to correlate measured THC plasma concentrations to two clinical signs of THC intoxication, conjunctival injection and pulse rate, in addition to self-assessed degrees of intoxication. They found that after smoking THC, plasma concentrations peaked early after administration, while the peak high lagged behind the plasma concentrations by one to three hours (Hollister et al., 1981). They determined that following the distribution of THC in the body, plasma concentrations and the degree of a being "high" became linear (Hollister et al., 1981).

Weinstein et al. (2008) assessed the acute effects 13 mg and 17 mg THC doses on cognitive-motor skills, attention and motor coordination, time and distance perception, and risk decision-making abilities. Using a virtual maze task, the researchers found that the 17 mg THC dose significantly impaired test subject accuracy. Researchers also found that test subjects exposed to the 13 mg and 17 mg THC doses showed significant reductions in attention and mental flexibility using the "Wisconsin Card Sorting Task (WCST). However, it was demonstrated that subjects dosed with 17 mg experienced increased performance impairment than those dosed with 13 mg, indicating a dose-dependent response. Regarding risk-taking and decision-making, Weinstein et al. found that there was a significant increase in risk-taking behavior, and a percent reduction in choices of most likely outcome using a gambling task in subjects dosed with 17 mg THC. Lastly, the study indicated that those dose with 13 mg showed less attentional impairment than those dosed with 17 mg THC, thus suggesting a dose-response relationship (Weinstein et al., 2008).

III. Cannabis consumption, accident risk, and likelihood of accident culpability.

Overall, it has been established that exposure to cannabis at any concentration is associated with significantly elevated crash risk and risk of crash responsibility, including fatal accidents (Crouch et al., 1993; Gadegbeku et al., 2011; Laumon et al., 2005). Data from arrest records and traffic fatalities indicate that after alcohol, cannabis is the most frequently detected psychoactive substance associated with impaired driving (NHTSA, 2004; WTSC, 2015). In a crash risk study by the National Highway Traffic Safety Administration (NHTSA) of more than 9,000 drivers over a 20-month period, the unadjusted risk of involvement in vehicle accidents was approximately 1.25 greater in drivers who tested positive for Δ^9-THC, although this increase was lost when adjusted for age, gender, race/ethnicity, and alcohol use (Compton and Berning, 2015). However, two meta-analyses that controlled for confounding variables concluded that drivers under the influence of THC are approximately two times as likely to have a motor vehicle collision than unimpaired drivers (Asbridge et al., 2012; Li et al., 2012).

Specific to operation of a motorized vehicle, Berghaus et al. (1995) conducted a meta-analysis of published simulator driving, laboratory, and on-road studies and found an association between cannabis use and a decrease in attention, tracking, psychomotor skills, visual functions, and a delayed reaction time. Hartman and Huestis (2013) determined that cannabis smoking was associated with impaired driving behaviors such as increased lane weaving, and impaired cognitive function and ability to perform complex tasks. Twenty recreational cannabis users participated in a three-way cross-over study to determine the effect of cannabis on driving-related performance tasks (Ramaekers et al., 2006a). The subjects smoked doses of THC of 0, 250, and 500 μg/kg and conducted tests indicative of perceptual-motor control, motor impulsivity, and cognitive function. The proportion of observations that showed impairment increased with increasing serum THC concentrations for every task. THC serum concentrations ranging from 2 to 5 ng/mL showed impairment in critical tracking tasks and concentrations ranging from 5 to 10 ng/mL showed significant impairment in every performance test (Ramaekers et al., 2006a). The NHTSA reported that cannabis used impaired performance on driving simulator tasks on open and closed driving courses for approximately three hours after use (NHTSA, 2004). It was determined that there was a dose-repose relationship between THC dose and driving impairment. Specifically, cognitive and psychomotor tasks associated with driving performance were moderately impaired by low THC doses and severely impaired at high doses (NHTSA, 2004).

In addition to the increased risk of crash involvement in cases involving cannabis use, the risk of culpability for the crash has been shown to increase in a dose-response manner (Drummer et al., 2004; Grotenhermen et al., 2007; Hartman and Huestis, 2013; Li et al., 2012; Ramaekers et al., 2004). Drivers with THC levels > 5 ng/mL in plasma are 6.6 times more likely to be killed in a traffic accident than those with no detectable THC (Huestis, 2005). Additionally, an analysis of 10,748 driver fatality crashes in France indicated that those drivers who tested positive for THC had 3.32 greater odds (CI: 2.63, 4.18) of being responsible for a vehicle accident. Specifically, a significant dose-response effect was identified, in that the odds ratio of driver culpability increased from 2.18 (CI: 1.22, 3.89) for those with blood THC levels of < 1 ng/mL, to 4.72 (CI: 3.04, 7.33) for those with blood THC levels ≥ 5 ng/mL (Laumon et al., 2005). In a follow-up re-evaluation of this cohort, it was determined the cannabis-positive drivers were four times more likely to have made a "generalized failure" resulting in their fatal crash than the drivers without cannabis (van Elsande et al., 2012). Another study by Ramaekers et al. (2004) found that drivers involved in MVAs who tested positive for THC in their blood were three to seven times more likely to be culpable for an accident than drivers who did not test positive for drugs or alcohol (Ramaekers et al., 2004).

A study comparing the impact of cannabis use to alcohol use on driving impairment found that THC serum concentrations of 7-10 ng/mL were comparable to driving with a blood alcohol concentration of 0.05% (Grotenhermen et al., 2007). Analyzing previously published experimental studies, Kruger and Berghaus (1995) determined that plasma THC concentration of 11 ng/mL, or whole blood THC concentration of 6 ng/mL led to a similar decrease in driving performance as a blood alcohol concentration of 0.073 g/dL. A double-blind, placebo-controlled, three-way cross-over study established that under experimental conditions the lower and upper range of THC impairment occurred at serum THC concentrations of 2 and 5 ng/mL, respectively (Ramaekers et al., 2006b). In another study, the Norwegian Institute of Public Health analyzed blood samples taken from drivers suspected of driving under the

influence of non-alcoholic drugs, and found that drivers with blood THC levels greater than 3 ng/mL had an increased risk of being assessed as impaired (Khiabani et al., 2006). Specific to risk taking, THC use in young adults has been associated with diminished performance on reasoning tasks and an increase of total errors (Crane et al., 2013).

IV. Detection of cannabinoids in blood following an accident provide more information about potential impairment at the time of the accident than do urinary cannabinoid metabolite tests.

Testing for cannabinoids in blood following an accident provide more information about recent cannabis use and potential impairment than testing for cannabinoid metabolites in urine. In a study evaluating urine THC-COOH in volunteers who smoked cannabis products, after smoking a THC cigarette containing 3.55% THC, the range of THC-COOH concentrations in the first urine specimens ranged from 9 to 318 ng/mL and the last positive urine sample (>15 ng/mL THC-COOH by GC-MS) was detected after 88 hours (Huestis, Mitchell and Cone, 1996). However, it is important to note that drug tests do not necessarily indicate current use, as drug presence of the long-lived inactive metabolite THC-COOH can be detected in urine for a period of days to weeks after exposure (Bergamaschi et al., 2013). Huestis et al. (1992a) concluded that a plasma threshold concentration of 2-3 ng/ml THC is indicative of recent (i.e., within 6 hours) cannabis exposure in occasional smokers. After smoking one 6.8% THC cigarette, the median time for blood THC concentration to fall below 5 ng/ml was 1 hour for occasional smoker and 3.5 hours for frequent smokers (Desrosiers et al., 2014). According to the NHTSA (2004), THC and 11-OH-THC concentrations in blood and plasms are often below 5 ng/ml after 3 hours, though the dose was not specified. Several other studies performed controlled smoking experiments and found THC concentrations in blood, plasma, and serum falls to 5 ng/mL or less approximately 2 to 4 hours after smoking, but may stay above the limit of quantification in chronic cannabis users for weeks after smoking (Bergamaschi et al., 2013; Bosker et al., 2013; Desrosiers et al., 2014; Huestis et al., 1992a; Karschner et al., 2009; Lee et al., 2015; Ramaekers et al., 2009; Skopp and Pötsch, 2008; Toennes et al., 2008).

V. Conclusions

Consumption of THC-containing cannabis products is associated with altered behaviors such as impaired memory and attention and reduced cognitive flexibility. Studies in the peer-reviewed, scientific literature have demonstrated that consumption of THC-containing products leads to impaired driving abilities at serum concentrations as low as 6 ng THC/mL. Perceptual motor control, including critical tracking tasks, have been shown to be diminished at serum concentrations as low as 2 ng THC/mL. Testing for the psychoactive components of cannabinoids in blood provide more information about time of last cannabis use and potential impairment at the time of an accident than do urinary cannabis metabolite tests.

VI. References

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THURSDAY AGENDA

8:30 – 10:30 **WHAT CAN I DO TO DEFEAT THE DECKHAND WHO "TURNS INTO A CAPTAIN" FOR MAKING A WAGE LOSS CLAIM?**

AN INSIGHT INTO THE ETHICAL AND PROFESSIONALISM ISSUES IN PRESENTING AND ARGUING THE MOTION IN LIMINE.

This panel will specifically address issues arising under Rule 3.1. Meritorious Claims and Contentions, Rule 3.2. Expediting Litigation, Rule 3.3. Candor Toward the Tribunal, Rule 3.4. Fairness to Opposing Party and Counsel. Other similar topics arising will be addressed under the Louisiana State Bar Association Rules and Code of Professionalism. In this regard, subtopics will include but not be limited to the following:

- What is a Motion in Limine and when is it proper to bring one? When is it not proper to bring one? When is one brought in bad faith and who makes that determination? What are the consequences?
- What evidence must be shared among the parties presenting and attacking such a motion?
- What does it mean to have evidence that is irrelevant, unreliable, or more prejudicial than probative? How does the Judge make that determination?
- When is the evidence submitted by counsel submitted in "bad faith"? What makes that evidence inadmissible and why?

FORMAT:

- The Judge presents the motion and gives "ground rules" for arguing this Motion in Limine in the courtroom.
- The Defense and Plaintiff's Attorney's argue the motion.
- The Economist takes the stand and undergoes direct and cross examinations.
- The Judge rules and there is open discussion with Q&A from the panel and registrants.

Moderator:
The Honorable Kurt D. Engelhardt
US Court of Appeals for the Fifth Circuit

Panel Members:

Jeff Tillery, Esq.
Jones Walker, LLP
New Orleans, LA
Defense Attorney

Anthony Buzbee
The Buzbee Law Firm
Houston, TX
Plaintiff Attorney

John W. Theriot, CPA
Malcolm M. Dienes, L.L.C.
Metairie, LA
CPA/Economist

10:30 – 10:45 **BREAK**

10:45 – 12:15 **HOW DO I RESPOND TO HARASSMENT AND SEXUAL HARASSMENT CLAIMS? WHAT ARE THE NEW LAWS AND COAST GUARD REGULATIONS AND HOW DO THEY IMPACT MY COMPANY?**

- What is the U.S. Coast Guard policy and position on harassment and sexual harassment? What about US Department of Labor?
- What is MSIB-23, how is it applied and what is expected by the U.S. Coast Guard with respect to reporting?
- What do I absolutely have to have in my company policy to protect my company, and how is it best implemented and enforced? Does this carry over into my TSMS?
- Now that I am hiring women deckhands and pilots given changes in the workforce, what accommodations must I have, and what am I required by law to provide onboard my vessel?
- What about insurance to cover these types of claims? Are there endorsements on my policies that are needed, or they covered under my P&I policy, and does insurance differ from office onshore to offshore?
- If I'm sued for harassment or sexual harassment, what policies of coverage "kick in" and what reporting obligations do I have to my insurer?
- Last, do I use my regular old maritime lawyer or do I need a labor lawyer?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Dana S. Merkel, Esq.
Blank Rome LLP
Washington, D.C.
Defense Attorney

Captain Evelynn B. Samms
Chief, Office of Investigations and Casualty Analysis
United States Coast Guard
U.S. Coast Guard Representative

Jennifer Mehaffey
Senior Attorney/National Technical Advisor, Coast Guard Suspension and Revocation
National Center of Expertise (S&R NCOE)
National Maritime Center
U.S. Coast Guard

12:15 – 1:30 **LUNCH**

1:30 – 3:00 **THE *LIGHTNING* ROUND WITH THINGS YOU JUST NEED TO KNOW. READY, SET … GO!!**

FROM AROUND THE CIRCUITS – A MARITIME LAW UPDATE AND

- *Maritime Case Law Update*: A review of recent case law impacting how you conduct your business, what your insurance needs or requirements are, and what you need to know before going to court or to avoid litigation.

POINTS OF INTEREST YOU NEED TO KNOW!

- The "Subsequent Remedial Measures" Rule – There is a tremendous value of what evidence can be presented under this Rule in defense of a Plaintiff's claim of "Negligence or "Unseaworthiness" in maritime litigation. Here's how it works!
- What must a Plaintiff or Defendant consider in a personal injury lawsuit when the most important legal issue is the law of "Open and Obvious." Which side does it benefit in the case? Can this issue decide the case?
- I often work off of tugs or barges for my marine employers on land and on the inland rivers. However, I sometimes travel by vessel from shore to stationary platforms, either by tug or on a barge, to perform work on the platform. I might even do a chore or two on the vessel or tug while en route. While on a job in the Gulf, I had an accident on a platform. Can I qualify as a Jones Act Seaman to my employer? Suppose I was hurt on a drilling rig rather than a fixed platform – would that make a difference? How much "vessel" time must I spend, on the vessel, to be considered a Jones Act seaman?
- By the way, can damages be owed to a witness in a maritime accident under what is called a "Bystander Claim?" Does such a claim exist in maritime law?

CONTRACTS AND AGREEMENTS (C&A) IN TODAY'S MARITIME WORLD!

- What constitutes a binding "Contract" or "Agreement?" How do you draft a written C&A and reduce it to writing and make it binding between or among the Parties?"
- How might one modify the document in the future, if necessary?
- What clauses assure me that my attorney fees and costs would be recovered back should I prevail if there is litigation over the document?
- How do I make sure any litigation takes place in the Court and State of my choice?
- Do all C&As have to be in writing i.e., is an "oral" Contract or Agreement valid – if so, how does one prove there is or was an oral meeting of the minds?
- Are emails and cell phone text messages binding between or among Parties?
- Watch what you put in an "email" – because…
- As an example, can a "thumbs up" in a "text message" to the other side constitute acceptance of a binding C&A?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Raymond Waid, Esq.
Liskow
New Orleans, LA
Defense Attorney

The Honorable Andrew Edison
United States Magistrate Judge
Southern District of Texas
Galveston, TX
Federal Magistrate Judge

3:00 – 3:30 **BREAK**

3:30 – 5:00 **PART I: ALLISIONS, COLLISIONS AND SALVAGE OPERATIONS, WHAT DO THEY ALL HAVE IN COMMON**?

- What is a hull policy, how does it work, and what does it cover? What are the various endorsements I may need depending upon my operations?
- How does a seaworthiness declaration for my vessel or fleet and compliance with laws declaration come into play in maintaining my insurance and securing coverage in a claim?
- What do you mean by "port risk," and what does my insurer expect of me when I place a vessel on port risk?
- But if my tug was not in Pennsylvania, Oregon or Louisiana, how and when do those rules apply?
- When do I need a joint survey and what are the benefits of one?
- When may the Coast Guard or the Army Corp order salvage operations to take place if my vessel is sunk?
- What is a constructive total loss (CTL) and why is declaring one important?
- What does it mean to have a "no cure, no pay" salvage contract?
- Hang on, they need to pay me for a new dock/vessel, what am I depreciating? How is the replacement value calculated?
- What policies of coverage and endorsements are impacted by the above?

PART II: THE MARITIME LIEN AND VESSEL SEIZURE– TWO OF THE MOST POWERFUL PROCEDURES IN THE MARITIME INDUSTRY – CAN HELP OR HURT YOUR COMPANY!

- What is a "maritime lien?" What constitutes a valid "lien?" How is it perfected – i.e., placed, recorded, etc... on a vessel?
- What benefits does one get from placing a lien on a vessel? How is it removed once the lien is satisfied?
- When, how and why might one seize a Vessel? How is the seizure perfected and the courts get involved? How does it cost to seize a vessel?
- And the U.S. Marshal's Office – you can't do a seizure without their involvement!
- When the Vessel is seized – what happens next? How and why might I now release the Vessel? Do I get back the expenses I have incurred?
- And what about the Letter of Undertaking (LOU)? Can I demand one? Why do I need one? What does such a document look like? What should I expect to be "The Ending of the Dispute?"

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Samuel P. Blatchley, Esq.
Eckland & Blando
Boston, MA
Defense Attorney

Kyle J. Smith
Kyle Smith Surveying
Marine Surveyor

Andrew Brown
Ingram Barge Line
Industry Attorney/Representative

THURSDAY SPEAKERS

SAMUEL P. BLATCHLEY (Sam) is a partner at Eckland & Blando. Sam, a longstanding member of the New England maritime bar and Proctor in Admiralty, represents clients in litigation and transactional matters with a focus on admiralty and maritime, insurance, fisheries, and environmental law.

He represents vessel owners and operators, insurers, charterers, construction and dredging firms, bunker suppliers, freight forwarders, inland carriers, lenders, marina operators, marine surveyors, marine trades providers, fishing associations, stevedores, and terminal operators in maritime litigation, as well as in marine-related commercial and corporate transactions. He serves as outside general counsel to a marine insurer covering, Hull & Machinery and Protection & Indemnity risks.

Sam's practice covers an array of maritime disputes, including maritime collisions and casualties, charter party and marine services agreements, personal injury and death claims, Admiralty Rules B, C, and D actions, insurance coverage disputes, fisheries disputes and Administrative Procedure Act claims, Endangered Species Act claims, and Marine Mammal Protection Act claims.

Sam also handles maritime financing, purchase and charter, documentation, and registration matters in connection with both commercial vessels and private yachts. Prior to joining Eckland & Blando, Sam was a partner and Chair of the Admiralty and Maritime Group at a leading New England law firm and worked for an admiralty boutique firm.

Sam received his J.D. and Maritime Law Certificate from Tulane University Law School, where he was the Notes and Comments Editor of the Tulane Maritime Law Journal and received a CALI Award in marine insurance. Before law school, Sam graduated from the University of Wisconsin at Madison with a Bachelor of Arts in History, with honors, and Political Science, with distinction. While at the University of Wisconsin, Sam was inducted into Phi Beta Kappa.

Sam is admitted to practice in Massachusetts, Maine, New York, and Rhode Island. He is also admitted to the U.S. Court of Appeals for the First Circuit and D.C. Circuit, and the U.S. District Courts for the Districts of Connecticut, Rhode Island, District of Columbia, Eastern District of New York, Eastern District of Michigan, Western District of Michigan, Western District of Wisconsin, and Vermont. Sam was a member of the Ad-Hoc Subcommittee for the District of Rhode Island Local Rules Review Committee, which drafted the Local Admiralty Rules for the District of Rhode Island, effective as of January 15, 2013. Sam is designated as a Proctor in Admiralty by the Maritime Law Association of the United States, served as the Chairman of the Association's Practice and Procedure Committee, and currently serves as a member of its Board of Directors. He has been designated as a Massachusetts Super Lawyers Rising Star, Transportation and Maritime Law from 2013-2022, a Massachusetts Super Lawyer, Transportation and Maritime Law for 2023, and as one of the 2024 Best Lawyers in America® for Admiralty and Maritime Law.

ANDREW BROWN joined Ingram Barge Company in 2014 as Senior Corporate Counsel, after eight years in private practice at Hill Rivkins in New York, and Fowler Rodriguez in New Orleans and Houston. Since 2017, he has overseen Ingram's Legal and Claims departments, supporting his team's efforts on a wide variety of commercial transactions, claims and commercial litigations, and regulatory compliance matters. Andrew joined the executive team as Senior Vice President and General Counsel in 2022, and was recently promoted to Chief Legal Officer. In his current role Andrew works to provide actionable, business-focused legal advice to senior management and others throughout the organization. He also began overseeing the Company's Corporate Affairs Function in late 2023, which includes Ingram's government relations efforts and sustainability initiatives.

Andrew and his wife Laura (also a corporate attorney) have three kids under the age of 10, a rapidly disintegrating 18-year-old house in the Nashville suburbs, and have slowly learned to just embrace the routine chaos of their lives.

ANTHONY BUZBEE, ESQ. is the managing partner of The Buzbee Law Firm. The New York Times has described Tony Buzbee as "one of the most successful lawyers in the country."

Tony Buzbee graduated from Texas A&M University with a Bachelor's of Science degree in Psychology. After college, Mr. Buzbee entered the United States Marine Corps. In the Marines, he was the honor graduate in every special ops school he attended, to include Navy Dive School, Navy Combat Dive School, Amphibious Reconnaissance School, and Mountain Warfare School. Buzbee was an infantry officer. He also commanded Recon Company of the First Marine Regiment. Buzbee earned the rank of Captain, and for his Marine Corps service was awarded the Navy Commendation Medal.

After leaving the Marine Corps, Buzbee entered law school at the University of Houston Law Center. While there, Buzbee was the Managing Editor of the Houston Law Review and was elected Class Captain. Buzbee was also state and regional mock trial champion. Buzbee ultimately graduated Summa Cum Laude, second in his class.

Mr. Buzbee has tried multiple cases to verdict, obtaining more than $10 billion in verdicts and settlements over the course of his career. He is the subject of the book "Defining Moments," and has appeared on the cover of New York Times Magazine. In 2015, Mr. Buzbee was named "Attorney of the Year" by Texas Lawyer due to winning eight cases in a single year, including verdicts of $159 million; $41 million; $35 million; $39 million; $30 million; and $12 million, all while also representing Governor Rick Perry in his criminal case that Buzbee was ultimately able to get dismissed. Buzbee has the highest verdicts awarded in multiple courts across Texas.

Texas Monthly said of Buzbee: "Buzbee has made his name going after corporations, and he usually wins big."

The New York Times described Buzbee like this: "Mr. Buzbee is a big, mean, ambitious, tenacious, fire-breathing Texas trial lawyer. Really big. Poster boy big."

JUDGE ANDREW EDISON is a United States Magistrate Judge for the Southern District of Texas -- Galveston Division. He earned his undergraduate degree from Dartmouth College and his law degree from the University of Virginia School of Law. Prior to taking the bench in 2018, Judge Edison was a highly respected trial lawyer, appearing for the past 25 years in state courts, federal courts and arbitration panels across the country. He lectures frequently at various continuing legal education seminars and serves as an adjunct professor at the University of Houston Law Center, teaching Remedies and Trial Advocacy. Outside the law, Judge Edison is an avid sports fan and can often be found attending sports events all over the globe. Although he is not blessed with much athletic ability, Judge Edison has managed to run--and complete--five marathons, including the Boston Marathon.

JUDGE KURT D. ENGELHARDT was appointed by President Donald J. Trump to the United States Fifth Circuit Court of Appeals, based in New Orleans, on May 10, 2018. He was previously appointed by President George W. Bush to the United States District Court for the Eastern District of Louisiana on December 13, 2001, and became Chief Judge to that Court on October 1, 2015, serving until his appointment to the Fifth Circuit. He received a Bachelor of Arts in history in 1982 from Louisiana State University in Baton Rouge and

received his law degree from LSU in 1985. Prior to his appointment to the federal bench, Judge Engelhardt was a partner with the Metairie, Louisiana law firm of Hailey, McNamara, Hall, Larmann & Papale, where his practice included all aspects of commercial transactions and commercial litigation, including real estate, bankruptcy, insurance defense and coverage issues, RICO, contract disputes, and construction litigation, along with some practice in the areas of personal injury litigation and white collar criminal defense work. In 1995, Judge Engelhardt was appointed by the Governor to serve a four-year term on the nine-member Louisiana Judiciary Commission; in 1998, he was elected by his fellow commission members to serve as Chairman. His work on the Judiciary Commission has been cited for its excellence by the Louisiana Supreme Court. In 2004, Judge Engelhardt was appointed by United States Supreme Court Chief Justice Rehnquist to serve on the Judicial Conference Committee on Federal-State Jurisdiction, where he served two terms. He also served on the U.S. Fifth Circuit's Committee on Criminal Pattern Jury Instructions, charged with drafting and updating jury instructions for use throughout the Circuit. He is a member of several professional organizations including the Advisory Board of the New Orleans Chapter of The Federalist Society; The American Judicature Society; and previously the Board of Directors (and past president) of the New Orleans Chapter of the Federal Bar Association. On October 17, 2019, he was elected to membership in The American Law Institute. He is also a Board member and past president of the Cancer Association of Greater New Orleans.

JENNIFER MEHAFFEY represents the Coast Guard in suspension and revocation (S&R) administrative proceedings against a Mariner's MMC, as well as developing and implementing policy related to Coast Guard S&R activities. Prior to her position with the Coast Guard S&R NCOE, Jennifer was an attorney with the Coast Guard Offices of Regulations and Administrative Law and Maritime and International Law, Prevention Division. Jennifer also worked with the offshore energy sector as Chief of National Safety Enforcement Division with the Bureau of Safety and Environmental Enforcement (BSEE). Jennifer has a B.A. from Mount Holyoke College, a J.D. from Roger Williams University, and a Masters in Marine Affairs from the University of Rhode Island. She came to D.C.as a Sea Grant Fellow working with the Committee Marine Transportation System (CMTS). For hobbies, Jennifer rides her motorcycle and wanders aimlessly to interesting places as much as possible.

DANA S. MERKEL is a partner at Blank Rome LLP. Dana focuses her practice on domestic and international marine transportation and environmental issues for clients worldwide. Clients include ship owners, operators, and managers; offshore construction companies; shippers, charterers; and terminals. Major areas of practice include: Compliance counseling under a myriad of international conventions and U.S. and foreign regulations; Coastwise trade; Offshore construction, oil & gas, and wind farm development; Crew citizenship, including visa and entry issues; Defense of administrative, civil, and criminal enforcement actions; Internal investigations; Pollution response; Counseling on compliance and risk mitigation strategies; Development of administrative and legislative solutions to maritime and environmental compliance challenges; Vessel construction and flagging; and International trade and sanctions issues.

Dana's passion for the maritime industry began as a child growing up on Lake Superior, where she worked in marinas and on private yachts and small passenger vessels. She went on to graduate from the U.S. Merchant Marine Academy and worked through the International Organization of Masters, Mates, and Pilots ("MMP") as a Third Mate and Qualified Member of the Engine Department ("QMED") on a variety of vessel types, including container, dry bulk, tanker, ro-ro, ice breaker, and research vessels. Dana also worked ashore managing crude and product transportation for a major U.S. oil company.

Dana conducts customized training sessions for clients and assists in creating and implementing effective compliance programs. She also frequently writes and presents on issues impacting the maritime industry.

THURSDAY SPEAKERS

CAPTAIN EVELYNN B. SAMMS is a 2001 graduate of the Delaware State University, where she received a degree in Computer Science. Shortly after, she attended Coast Guard Officer Candidate School, where she commissioned as an Ensign and was assigned to Coast Guard Headquarters in the office of Systems and Logistic Information. She currently serves at Coast Guard Headquarters as the Chief of the Marine Investigations & Casualty Analysis Office.

Her previous operational assignments include Chief of Inspections at Coast Guard Sector North Carolina. She also served as the Chief of Prevention at Coast Guard Sector Maryland-National Capital Region and as the Marine Safety Assignment Officer at the Coast Guard Personnel Service. Additionally, at Coast Guard Headquarters, she previously served as the Chief of Enlisted Personnel Management (Advancements & Separations).

KYLE J. SMITH is President and Owner of Kyle Smith Marine Surveying, Inc., a New Orleans based marine surveying company. Mr. Smith has spent over 36 years in the maritime industry, specializing in a variety of fields including regulatory issues, United States Coast Guard inspection, bridge / dock fender system damage, vessel construction and repair, as well as cargo, barge condition / damage and container inspections. He has extensive experience as an expert witness and litigation consultant. Mr. Smith first began his career on the Mississippi River working in the family businesses, T. Smith & Sons, a stevedore company, as well as at Crescent Towing & Salvage, a tugboat company.

He attended Spring Hill College and then went on to sail in three America's Cup campaigns and Olympic Trials before returning to New Orleans to work for Breit Marine Surveying, Inc. After 10 years, Mr. Smith started Kyle Smith Marine Surveying, Inc., where he continues his maritime career. Kyle serves on the Board of Governors for The Propeller Club, Port of New Orleans. He is a member of The National Association of Marine Surveyors and the United States Coast Guard Auxiliary.

JOHN W. THERIOT, CPA, MACCT, Cr.FA is managing partner of Malcolm M. Dienes, LLC. John received his Bachelor of Science in Accounting from Nicholls State University in 1983, and he received his Masters in Accounting from Tulane University in 2004. John began his career in public accounting upon graduating from Nicholls in 1983 as a staff accountant at MMD. He is now the managing partner of the firm and has over 30 years of experience in the field of public accounting.

John is a Certified Public Accountant, Certified Forensic Accountant, and Certified in Financial Forensics. He is a member of the American Institute of Certified Public Accountants, the Louisiana Society of Certified Public Accountants, and the American College of Forensic Examiners.

John has obtained extensive experience in the subjects of Accounting and Taxation during his career at MMD. John also has extensive litigation support experience in various industries and litigation settings including providing testimony in more than 150 cases. He has been hired by various courts as a "special master" on accounting related matters.

JEFFERSON R. TILLERY, ESQ. is a partner in Jones Walker LLP's Maritime Practice Group and co-leader of the maritime litigation, arbitration, and dispute resolution team.

For more than 35 years, Jeff has advised and represented clients in maritime personal injury and collision matters, emergency and casualty response investigations, commercial litigation, longshore matters, and marine insurance coverage disputes. Throughout his career, Jeff has represented clients all over the Southern Gulf Coast and abroad and has appeared on their behalf in Louisiana and Texas state courts and federal courts, serving as lead counsel, in complex marine multi-party casualty cases, including many under the Oil Pollution Act.

Jeff is a regular speaker on marine industry podcasts and at maritime seminars throughout the country. His presentations cover a range of maritime topics, including collisions, offshore casualties, the ramifications of recent court decisions on the industry, and the application of a host of federal and state laws and regulations, including the Jones Act and the Longshoremen and Harbor Workers Compensation Act.

Mr. Tillery served as an instructor of maritime law at the University of New Orleans, Paralegal Institute for 12 years. He earned his law degree from Louisiana State University in 1986 where he was a member of the Louisiana Law Review and graduated Order of the Coif. He is an active member of the legal community through organizations such as the Maritime Law Association, the Louisiana State Bar Association, New Orleans Bar Association and The Bar Association of The Fifth Federal Circuit.

RAYMOND WAID, ESQ. is a Shareholder at Liskow in New Orleans. He is a maritime lawyer and veteran-naval officer focused on helping companies in the marine and energy sector. Vessel owners, operators and others involved in the marine and energy sector rely on Ray's advice and aggressive advocacy. They turn to him because he has the unique experience of operating a vessel at sea combined with a successful and diverse practice devoted to admiralty and maritime law, including both litigation and contracts.

Ray's experience is vital in the high-pressure environment immediately after marine casualties, when companies need a lawyer to quickly identify the legal issues, know what questions to ask, and what actions to take in order to put companies in the best position. This same experience makes him a highly effective advocate in marine and energy cases involving personal injury, property damage, and economic loss. As a full-time maritime lawyer, he has successfully handled the gambit of cases, including collision, allision, cargo, pollution, salvage, and injury cases

WHAT CAN I DO TO DEFEAT THE DECKHAND WHO "TURNS INTO A CAPTAIN" FOR MAKING A WAGE LOSS CLAIM?

AN INSIGHT INTO THE ETHICAL AND PROFESSIONALISM ISSUES IN PRESENTING AND ARGUING THE MOTION IN LIMINE.

This panel will specifically address issues arising under Rule 3.1. Meritorious Claims and Contentions, Rule 3.2. Expediting Litigation, Rule 3.3. Candor Toward the Tribunal, Rule 3.4. Fairness to Opposing Party and Counsel. Other similar topics arising will be addressed under the Louisiana State Bar Association Rules and Code of Professionalism. In this regard, subtopics will include but not be limited to the following:

- What is a Motion in Limine and when is it proper to bring one? When is it not proper to bring one? When is one brought in bad faith and who makes that determination? What are the consequences?
- What evidence must be shared among the parties presenting and attacking such a motion?
- What does it mean to have evidence that is irrelevant, unreliable, or more prejudicial than probative? How does the Judge make that determination?
- When is the evidence submitted by counsel submitted in "bad faith"? What makes that evidence inadmissible and why?

FORMAT:

- The Judge presents the motion and gives "ground rules" for arguing this Motion in Limine in the courtroom.
- The Defense and Plaintiff's Attorney's argue the motion.
- The Economist takes the stand and undergoes direct and cross examinations.
- The Judge rules and there is open discussion with Q&A from the panel and registrants.

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
The Honorable Kurt D. Engelhardt
US Court of Appeals for the Fifth Circuit

Jeff Tillery, Esq.
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Defense Attorney

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The Buzbee Law Firm
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Plaintiff Attorney

John W. Theriot, CPA
Malcolm M. Dienes, L.L.C.
Metairie, LA
CPA/Economist

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF CHARLES & SONS, LLC, AS THE OWNER OF THE M/V CHARLES PETITIONING FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY	ADMIRALTY CIVIL ACTION NUMBER: JUDGE ENGELHARDT

MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EVIDENCE OF SPECULATIVE EARNINGS

NOW INTO COURT, through undersigned counsel, comes Charles & Sons, LLC ("Charles"), as owner of the M/V CHARLES, and as Limitation Petitioner in this matter, which respectfully moves this Honorable Court for an Order *in Limine* excluding evidence and testimony of speculative earnings from Claimant, Thibodaux ("Claimant").

Claimant seeks to introduce evidence and testimony that he would have been promoted to a higher wage earning position within Charles if he had not allegedly suffered an injury on July 3, 2019. In that regard, he retained John Theriot to perform an economic-loss calculation for trial.[1] In direct contravention with the mandates of *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) (*en banc*) (hereinafter "*Culver II*"), and its progeny, Theriot calculated Claimant's alleged economic loss based upon speculative earnings that have absolutely no evidentiary basis. *Culver II* dictates that the calculation of lost wages begins with the gross earnings of the injured party ***at the time of the injury***. Despite this clear directive, Theriot calculated Claimant's alleged lost income using purely conjectural earnings unsupported by the evidence.

The uncontroverted evidence establishes that any such testimony and evidence is purely speculative and improper. The law is clear that "an award for damages cannot stand when the

[1] **Exhibit A**, Expert Report of John Theriot.

evidence to support it is speculative or purely conjectural."[2] Likewise, "possibility alone cannot serve as the basis of recovery. While certainty of proof is not required in civil cases, probability is, and less than that is unacceptably speculative."[3] As such, Charles respectfully requests that this Court exclude all evidence and testimony of Claimant's speculative earnings, including the proposed testimony of Claimant's expert, John Theriot.[4]

Charles previously filed this motion *in limine* on February 24, 2021, but the Court dismissed the motion, without prejudice, on September 30, 2021, "to be refiled by [Charles] once a new trial date is set."[5] Charles is refiling that same motion *in limine* at this time, pursuant to the Court's order, as a new trial date has been set in this matter.

WHEREFORE, for the reasons noted herein and as fully set forth in the accompanying Memorandum in Support, Charles & Sons, LLC, prays that its Motion *in Limine* be granted and that any testimony or evidence, in any form, of potential higher wage earnings be prohibited from the trial of this matter.

[*Signatures on following page.*]

[2] *Masinter v. Tenneco Oil Co.*, 929 F.2d 191, 194 (5th Cir. 1991).

[3] *Gilmore v. WWL-TV, Inc.*, C.A. No. 01-3606, 2002 U.S. Dist. LEXIS 24026 (E.D. La. Dec. 12, 2002).

[4] Charles also respectfully requests that John Theriot not be afforded an opportunity to revise his report. As noted in the accompanying Memorandum in Support, Claimant defied the mandates of *Culver II* in an attempt to artificially inflate his alleged economic loss. As such, Claimant should not be allowed to correct this erroneous report.

[5] R. Doc. 27.

Respectfully submitted:

/s/ Jefferson R. Tillery
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Attorney for Charles & Sons, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by filing the same in this Court's CM/ECF system this 17th day of November, 2021.

/s/ Jefferson R. Tillery

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	ADMIRALTY CIVIL ACTION
IN THE MATTER OF CHARLES & SONS, LLC, AS THE OWNER OF THE M/V CHARLES, PETITIONING FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY	NUMBER: JUDGE ENGELHARDT

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EVIDENCE OF SPECULATIVE EARNINGS

MAY IT PLEASE THE COURT:

Charles & Sons, LLC ("Charles"), as owner of the M/V CHARLES, and as Limitation Petitioner in this matter, respectfully submits this Memorandum in Support of its Motion *in Limine* to Exclude Testimony and Evidence of Speculative Earnings.

SUMMARY OF ARGUMENT

This is a classic case of a seaman inflating his wage-loss claim by contending that the lost income stream should be calculated based upon a job position that the seaman never occupied and based upon the "possibility" that the seaman might be promoted to a higher paying position in the future. The case law is clear that a seaman must show that he was on track and took sufficient concrete steps to achieve the higher paying position such that he would have more likely than not obtained that position; it cannot be based upon mere "possibility" and speculation.[1]

Charles seeks to exclude any and all speculative evidence or testimony that Claimant, Michael Thibodaux ("Claimant"), would have been promoted to a higher wage earning position—specifically, a tankerman—within Charles. Any such proposed evidence and testimony is purely

[1] *See Lewis v. SEACOR Marine, Inc.*, C.A. No. 02-116, 2002 U.S. Dist. LEXIS 29401, at *1 (E.D. La. Oct. 23, 2002) (Engelhardt, J.); *Gilmore v. WWL-TV, Inc.*, C.A. No. 01-3606, 2002 U.S. Dist. LEXIS 24026 (E.D. La. Dec. 12, 2002).

speculative, improper, and should be excluded from the jury trial of this matter. There exists absolutely no evidentiary basis to support a claim that Claimant's wages would have increased or that he would have been promoted.

Claimant, an entry-level deckhand, earned $200.00 per day at the time of his alleged accident. Yet, in an attempt to artificially inflate his alleged losses, Claimant intends to introduce evidence and testimony that he ***could have*** earned higher wages. Specifically, Claimant intends to introduce the report and testimony of John Theriot ("Theriot"), an expert CPA who calculated Claimant's alleged economic loss. In his report, Theriot calculates Claimant's economic loss based upon the following daily rates of pay: (1) $200.00 per day from date of incident through June 6, 2020; (2) $240.00 from June 7, 2020 through June 6, 2021; and (3) $350.00 per day from June 7, 2021 through the balance of his work-life expectancy.[2] These rates are based on Theriot's assumption that Claimant would receive an increase in wages as a deckhand by June 7, 2020, and that he would become a tankerman by June 7, 2021.[3] The net effect artificially increases Claimant's past and future lost wages. Essentially, Claimant intends to introduce evidence that if he had not suffered his alleged injury—which is denied—he would have been promoted to a higher-earning position within Charles, thereby increasing his alleged future economic loss. However, there is simply no evidence that Claimant would have ever been promoted to a higher earning position or that he would become a tankerman; any such purported argument amounts to pure speculation.

As stated in *Culver II*, the law is clear that when calculating lost wages, the calculation begins with the gross earnings of the injured party ***at the time of the accident***.[4] Theriot's

[2] **Exhibit A**, Expert Report of John Theriot, at pp. 1–2.

[3] *Id.* at p. 2.

[4] *See* 722 F.2d 114.

calculations utilizing a speculative gross-earnings base are unreliable, inadmissible, and violate the well-established principles of *Culver II* and its progeny. Accordingly, this Court should prohibit Theriot from testifying at trial regarding his calculations based upon purely speculative earnings. Likewise, any testimony or evidence of speculative higher earnings is improper, irrelevant, would mislead the jury, unfairly prejudice Charles, confuse the issues, and waste time.[5] Accordingly, this Court should exclude any and all evidence of speculative higher earnings in its entirety from the trial of this matter.

FACTUAL AND PROCEDURAL BACKGROUND

I. Claimant's Alleged Incident

Claimant alleges he sustained injuries in an accident occurring on July 3, 2019. Charles employed Claimant as a deckhand aboard the M/V CHARLES (hereinafter "Vessel"), a tow boat owned and operated by Charles. At the time of the alleged accident, the Vessel was operating on the Mississippi River in Jefferson Parish, Louisiana. While removing face wires during the shifting of a barge from the Vessel to another boat—the M/V SAFETY TEAM— Claimant avers that the Vessel shifted, resulting in Claimant's hand being caught between the face wire and the cavil located on the bow of the Vessel. The injuries sustained necessitated the partial amputation of two of the Claimant's fingers. In the pending litigation, Claimant has made claims for, *inter alia*, past and future wage loss.[6] It is the computation of the past and future wage loss claims that is the subject of this Motion *in Limine*.

II. Claimant's Prior Work History and Employment with Charles

[5] *See* FED. R. EVID. 401 & 403.

[6] *See* R. Doc. 1.

As noted above, at the time of the incident, Charles employed Claimant as a deckhand. As a new deckhand, Claimant earned $200.00 per day.[7] (Each new deckhand at Charles received a base wage of $200.00 per day.[8]) Thereafter, a deckhand at Charles could receive a pay increase to $240.00 if a captain informed management that they had a "good man."[9] And if the individual became a tankerman, he would earn $350.00 per day.[10]

Prior to his employment with Charles, the Claimant had no prior job history and had only graduated high school in 2019.[11] And, as a natural result thereof, Claimant's employment with Charles was his first foray into the maritime industry.

Prior to the alleged incident, Claimant had only completed a single, two-week hitch on the Vessel.[12] As of the date of the incident on July 3, 2019, Claimant had only just begun his second hitch as a deckhand in the maritime industry.[13]

III. Tankerman License Requirements

To become a tankerman, an individual needs to have significant on-the-job experience in addition to documenting the completion of certain, specific tasks.[14] First and foremost, "service as a Deckhand on a towing vessel such as M/V CHARLES is not a formal path, or requirement, for

[7] **Exhibit B**, Rule 30(b)(6) Deposition of Charles & Sons, LLC, at p. 83:1–13.

[8] *Id.*

[9] *Id.* at p. 83:14–22.

[10] *Id.* at p. 83:23–84:1.

[11] **Exhibit C**, Deposition of Michael Thibodaux, at pp. 7:18–8:14.

[12] *Id.* at p. 15:5–11.

[13] *See id.* at p. 8:2–14, p. 15:5–11.

[14] **Exhibit D**, Deposition of Charlie Wilson, p. 54:10–16.

Tankerman certification."[15] Accordingly, simply being a deckhand does not begin the process for becoming a tankerman.[16]

"In order to become a Tankerman, as per 46 CFR Part 13 Subpart C, Mr. Thibodaux would have needed to formally document his experience on specific tank vessels, including:

1. Hold, or be approved for, a Merchant Mariner Credential (MMC) with Medical Certificate;

2. 60 days service on a tank vessel (barge) certified to carry dangerous liquids or liquefied gas; or 180 days closely related service directly involved with tank barges;

3. Completion of a United States Coast Guard-approved Tankerman – PIC training course;

4. Completion of a United States Coast Guard- approved Marine Firefighting training course; and

5. 10 documented transfers of cargo under the supervision of a Tankerman – PIC, including:

    a. 5 Loadings and 5 Discharges, with

    b. 2 Commencements and 2 Completions of loadings, and

    c. 2 Commencements and 2 Completions of discharge."[17]

Finally, "[i]n addition to the above, the applicant for a Tankerman endorsement must have completed formal training regarding cargo transfer procedures, as detailed within 46 CFR 13.127."[18]

[15] **Exhibit E**, Expert Report of Marc Fazioli, p. 10.

[16] *See id.*

[17] *Id.*

[18] *Id.*

Accordingly, "it takes a long time" to work your way up to become a tankerman.[19] For instance, it took another witness in this case—Charles Wilson, who was a member of the crew of the Vessel—four to five years before he became a tankerman.[20]

Besides general statements he could have become a tankerman in the future, Claimant has offered absolutely no evidence that he would have received either a raise as a deckhand or his tankerman's license. Claimant cannot rest his economic-loss calculations on mere possibility and aspiration.

IV. Theriot's Improper Economic Loss Calculations

Claimant retained Theriot to provide a calculation of Claimant's economic loss allegedly caused by his July 3, 2019 incident.[21] In calculating Claimant's economic losses, Theriot begins with false figures regarding Claimant's daily rate of pay. Specifically, on pages 1 and 2 of his report, Theriot notes that Claimant's counsel outlined the following employment profile for Mr. Thibodaux:[22]

– Beginning Deckhand.....	$200.00/day; 14 "on"-7 "off," $48,666.67 per annum (from date of hire – 6/06/2019 for + 1.0 year);
– Lead Deckhand	$240.00/day; 14 "on"-7 "off" $58,400.00 per annum (from 6/07/2020 for +1.0 year through 6/06/2021); and
– Tankerman	$350.00/day; 14 "on"-7 "off" $85,166.67 per annum (from 6/07/2021 through balance of work-life expectancy)

[19] **Exhibit D**, Deposition of Charles Wilson, p. 55:1–7.

[20] *Id.* at p. 55:1–7.

[21] **Exhibit A**, Expert Report of Theriot, at p. 1.

[22] *Id.* at pp. 1–2.

As noted herein, Claimant's daily rate of pay at the time of his alleged accident was $200.00, ***not*** $240.00 or $350.00.[23] In other words, Claimant instructed Theriot to utilize increases of $40.00 and $150.00 in Claimant's daily rate of pay with no explanation and no evidence of same. By utilizing these inflated rates of pay, Theriot calculates that Claimant has sustained the following losses:

- $83,385.00 in past losses;
- Assuming Claimant is unable to return to work, $2,590,178.00 in future losses; and
- Assuming Claimant can return to work earning $10.90 per hour, $1,877,461.00 in future losses.[24]

These calculations are stark in contrast to the calculations of Charles' economist—Joe Smith — who, utilizing the proper wage rate of $200.00 per day, finds that Claimant has only suffered $79,381 in lost past wages at the time of trial and between $90,191–$358,457 in lost future wages.[25]

To support these incorrect and improper economic-loss calculations, Claimant will argue at trial that, although he had only completed a single hitch as a deckhand, he ***would have*** stayed at Charles but for his alleged accident. And further, that he ***would have*** gained the experience and undergone the rigorous training to become a tankerman. Notwithstanding, Claimant's speculation and conjecture is no basis for an economic-loss calculation. Aside from aspirations and hopes, there is simply no evidence that Claimant ***would have been*** promoted, that he demonstrated proficiency in any areas related to being a deckhand, or that he ***would have*** even stayed with

[23] *See* **Exhibit B**, Rule 30(b)(6) Deposition of Charles & Sons, LLC, at p. 83:1–13.

[24] **Exhibit A**, Expert Report of Theriot, at pp. 2–3.

[25] **Exhibit F**, Expert Report of Joe Smith.

Charles. For these reasons, Theriot's wage loss calculations are improper, unreliable, and should be excluded from the jury trial of this matter.

LAW AND ARGUMENT

I. *Daubert* Standard

Rule 702 of the Federal Rules of Evidence governs the admissibility of proffered expert testimony. Rule 702 provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[26]

"The Supreme Court's landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, provides the analytical framework for determining whether expert testimony is admissible under Rule 702 of the Federal Rules of Evidence." [27] Under *Daubert*, the Court acts as a gate-keeper and conducts a preliminary assessment to "determine whether the expert testimony is both reliable and relevant."[28] When the admissibility of expert testimony is challenged under *Daubert*, the proponent of the evidence bears the burden of proving that the testimony is both relevant and reliable.[29] Here, Claimant bears the burden of establishing both relevancy and reliability.

II. *Culver II* and its progeny establish the proper calculation of lost wages.

[26] FED. R. EVID. 702. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 588 (1993); *United States v. Hitt*, 473 F.3d 146, 158 (5th Cir. 2006).

[27] *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243 (5th Cir. 2002) (citing *Daubert*, 509 U.S. 579).

[28] *Burleson v. Tex. Dep't of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

[29] *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *Mathis v. Exxon Corp.*, 302 F.3d 448, 460–61 (5th Cir. 2002) (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). *See also Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012).

When properly pleaded and proven, under the General Maritime Law, a seaman may recover past lost earnings and for the loss of future earning capacity. In the seminal case of *Culver II*, the U.S. Fifth Circuit established the method for calculating lost wages in maritime cases.[30] In *Culver II*, the Fifth Circuit fixed a four-step process for determining lost wages: (1) estimate the loss of work life or expected remaining work-like of the plaintiff; (2) calculate the lost income stream; (3) compute the total lost income stream; and (4) discount the total to present value.[31] This is known as the "below-market-discount method."

When calculating lost wages, the calculation of the lost income stream "begins with the gross earnings of the injured party ***at the time of the injury***."[32] Nonetheless, because the court "cannot ignore the reality of inflation," in *Culver II*, the court established the method by which to determine the effect of inflation on a seaman's future earnings.[33] In evaluating the issue, the Fifth Circuit definitively held that, absent a stipulation to the contrary, the method to be used in adjusting damage awards to account for inflation would be the below-market-discount method. The court explained:

> In the below-market-discount method, the fact-finder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below-market discount rate. This discount rate represents the estimated market interest rate, adjusted for the effect of any income tax, and the offset by the estimated rate of general future price inflation.[34]

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[30] 722 F.2d 114.

[31] *Id*. at 117. *See also Nelson v. Cooper T. Smith Stevedoring Co.*, C.A. No. 12-2890, 2013 U.S. Dist. LEXIS 123876 (E.D. La. Aug. 28, 2013) (Vance, J.).

[32] *Id.* at 117 (emphasis added). *See Martinez v. Offshore Specialty Fabricators, Inc.*, 481 F. App'x 942, 950 (5th Cir. 2012) (reaffirming that lost wages should be calculated based upon the plaintiff's gross earnings at the time of injury); *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 587-88 (5th Cir. 1988) ("*Culver II* requires the court to use the plaintiff's gross earnings at the time of the injury.").

[33] *Id*. at 118–22.

[34] *Id*. at 118 (emphasis added).

Culver II makes clear that other evidence about the price of inflation is inadmissible. Nonetheless, the Fifth Circuit also explained that evidence concerning the likelihood that the earnings of an injured worker would increase "due to personal merit, increased experience and other individual and societal factors" can still be considered, ***if appropriate***.[35]

Culver II sought to prevent the average injury case from becoming a graduate seminar on economic forecasting by excluding from evidence earnings that are "so speculative that they cannot be accurately determined."[36] With respect to future earnings,"[t]he paramount concern of a court awarding damages for lost future earnings is to provide the victim with a sum of money that will, in fact, replace the money that he ***would have earned***." [37] Thus, courts "commonly exclude many relevant factors from consideration on the basis that they are ***so speculative*** that they cannot accurately be determined."[38] Likewise, "an award for damages cannot stand when the evidence to support it is speculative or purely conjectural."[39] Accordingly, ***evidence of increases in earnings cannot be speculative***.

The Fifth Circuit addressed lost earnings in *Martinez v. Offshore Specialty Fabricators, Inc*.[40] In this case, a seaman allegedly suffered injuries while working as a mechanic aboard a derrick barge.[41] The seaman filed suit against his employer asserting claims under the Jones Act and General Maritime Law, including claims for loss of future earnings. At trial, the plaintiff

[35] *Id*. at 122.

[36] *Id.* at 120.

[37] *Id.* at 120 (emphasis added.)

[38] *Id*.

[39] *Masinter v. Tenneco Oil Co.*, 929 F.2d 191, 194 (5th Cir. 1991).

[40] 481 F. App'x 942 (5th Cir. 2012).

[41] *Id*. at 943

presented evidence that he earned approximately $48,000 in the year preceding his injury, although his income for the five years preceding the alleged accident averaged only $5,673.60 per annum.[42]

After a bench trial, the district court found the Jones Act employer liable and used $48,000 as the annual income base to calculate the seaman's lost wages.[43] On appeal, the employer argued that the average of the seaman's wages over his entire work history, or some other period, should form the basis of the wage rate, asserting that this approach comports with the principle set forth in *Culver II*.[44] Analyzing the applicable law, the Fifth Circuit rejected the employer's contention holding that the "calculation of lost income 'begins with the gross earnings of the injured party ***at the time of the injury***.'"[45] Of particular note, the Fifth Circuit reiterated "that awards for lost wages cannot be based on speculation or conjecture."[46]

III. Theriot's calculations based upon speculative earnings should be excluded from the jury trial of this matter.

Taken together, *Culver II* and *Martinez* firmly establish that a seaman's earnings ***at the time of the injury*** must be utilized to calculate lost earnings. Moreover, the calculation of lost earnings may not be based upon purely speculative and conjectural evidence. It has become a recent trend in maritime law for an allegedly injured seaman to inflate his economic loss by contending that but for his injury, the seaman would have been promoted or would have went on to achieve higher earnings—exactly what Claimant attempts to argue in this case. Nonetheless, as *Culver II* and its progeny dictate, any such speculation or theory must fail in the absence of sufficient concrete evidence. Evidence that is completely lacking in this case.

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[42] *Id*. at 945.

[43] *Id*. at 949.

[44] *Id.*

[45] *Id*. (emphasis in original) (quoting *Culver II*).

[46] *Id*. at 950. (citing *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 587-88 (5th Cir. 1988)).

Despite the clear mandates of *Culver II*, Theriot's calculations begin with pure speculation that Claimant would receive higher wages as a deckhand by June 7, 2020, and thereby receive a wage increase to $240.00 per day.[47] Theriot further assumes that Claimant would become a tankerman by June 7, 2021, and thereby further increase his wages to $350.00 per day.[48] The end result artificially inflates Claimant's alleged economic loss by at least $1.5 million.[49] These calculations clearly do not begin with Claimant's gross earnings ***at the time of the injury*** and amount to no more than a veiled attempt to increase the damages available in this case. As such, on its face, Theriot's report, testimony, and wage-loss calculations violate the well-established principles of *Culver II*. Even further, there exists no evidentiary basis to support Theriot's improper calculations, which amount to pure speculation and conjecture with regard to Claimant's possible wage increases.

Although a court can consider evidence concerning the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience, and other individual and societal factors, Claimant must set forth sufficient evidence to show—beyond mere speculation and conjecture—that he would have achieved a wage increase each year.[50]

In *Lewis v. SEACOR Marine, Inc.*, the court granted a motion *in limine* to exclude any speculative testimony of "a possibility that the [seaman] might have been promoted to captain."[51] In this case, prior to his alleged accident, the seaman served as a deckhand aboard a vessel owned and operated by the defendant. The defendant hired the seaman as a deckhand on September 24,

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[47] **Exhibit A**, Expert Report of Theriot, at p. 2.

[48] *Id.*

[49] *See id. See also* **Exhibit F**, Expert Report of Joe Smith.

[50] *Martinez*, 481 F. App'x at 949 ("[A]n award for damages cannot stand when the evidence to support it is speculative or purely conjectural.") (internal citations omitted).

[51] C.A. No. 02-116, 2002 U.S. Dist. LEXIS 29401, at *1 (E.D. La. Oct. 23, 2002) (Engelhardt, J.).

2001 and two months later on or about November 5, 2001, the seaman suffered an injury to his back, shoulder, and arm when rough seas washed unsecured cargo to the aft deck and this cargo struck the seaman.[52]

In calculating his alleged economic loss, the seaman argued that his future lost earnings should be based upon a captain's salary. The defendant contended that any testimony relating to a captain's salary "is pure conjecture, excludable as rank speculation."[53] In response, the seaman contended that he attended a training school provided by the defendant and that he "enjoyed his work as a deckhand the entire month preceding the accident."[54] In other words, the seaman simply claimed he aspired to become a captain.

Analyzing the facts and evidence, the court noted that there existed no evidence that the seaman took any "concrete steps" to becoming a captain, nor was there any evidence that the seaman descended from a long line of seafaring captains and that he "harbored dreams of attaining that position as a youth."[55] Moreover, the court focused on the fact that he had only worked as a deckhand for one month. Even further, the court particularly focused upon the seaman's prior work history. Prior to his employment in the maritime industry, the seaman worked in the following industries: (1) during high school he farmed and raised cattle; (2) from 1995 to 1997 he worked as a wood cutting machine operator at a lumber yard; (3) from 1999 to 2000 he worked as a pool hall manager; and (4) between July and August 2001 he worked as an alternator tester. Considering the

[52] *Id*. at *3.

[53] *Id*. at *2.

[54] *Id*. at *2.

[55] *Id*.

foregoing, the court found the seaman's "dabbling" in other industries belied any assertion that the seaman would have achieved the status of captain.[56]

Taking into account the seaman's short tenure with the defendant and his prior work history, the court concluded that earnings based upon a captain's salary without additional evidence of concrete steps constituted pure speculation and conjecture. The court explained:

> Although the case law makes it clear that absolute certainty is impossible, considerations of reliability and relevance require that any economic analysis be ensconced with some resemblance to reality. For any trier of fact to assume [the seaman] would remain gainfully employed in the maritime industry for the rest of his working life with rapid promotion and age increasing commensurate to captain's salary ignores the reality.[57]

The "possibility" of a captain's salary alone could not serve as a basis of recovery. "While certainty of proof is not required in civil cases, probability is, and less than that is unacceptably speculative."[58] Because any testimony or evidence of economic loss calculated by utilizing a captain's salary "would only foster jury confusion, waste trial time, and call for a verdict which is simply not in the universe of rational awards based on the evidence of the [seaman's] work history," the court excluded such evidence from trial, including the testimony of Claimant's proposed economic expert.[59]

As noted herein, Claimant had only completed a single hitch as a deckhand prior to his alleged incident. He had no prior experience in any job, and thus, no prior experience in the maritime industry. There is no evidence that he was undergoing tankerman-specific training or that he had begun any of the formal processes to become a tankerman.[60] Simply put, Claimant was a

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[56] *Id*. at *4.

[57] *Id*. at *5.

[58] *Id*. at *6.

[59] *Id*. at *6–7.

[60] *See* **Exhibit E**, Expert Report of Marc Fazioli, pp. 10–11.

simple deckhand who was just beginning to gain basic knowledge of the marine industry. He was nowhere near ready to begin tankerman training. The law is clear—Claimant's hopes or future plans cannot serve as a foundation or basis for his alleged economic loss.

In *Gilmore v. WWL-TV, Inc.*, a New Orleans Saints' "Saintsation" sought economic damages based upon the earnings of a New York City ballerina.[61] She asserted that becoming a dancer was a lifelong dream and that the accident forming the basis of the litigation prevented her from achieving this dream. In rejecting this speculative argument, the district court explained:

> [P]ossibility alone cannot serve as the basis of recovery. While certainty of proof is not required in civil cases, probability is, and less than that is unacceptably speculative. The questioned projection would only foster jury confusion, waste trial time, and call for a verdict which is simply not in the universe of rational awards based on the evidence of the plaintiff's work history.[62]

The plaintiff sought to introduce evidence and expert testimony that but for her injury she would have become a ballerina in New York City and earn a salary as one until the age of seventy. Nonetheless, "the evidence disclosed to the Court . . . provide[d] no reasonable basis for a loss of future earnings award based on the assumption that [plaintiff] would in fact become a professional dancer in New York and earn a salary doing so until age 70."[63] "[A] plaintiff must present evidence (more than a simple assumption) that proves that a loss of earning capacity has, in fact, been sustained."[64] In excluding the evidence and testimony relating to a ballerina's earnings, the court explained:

> There is no suggestion or innuendo that the plaintiff was ever swayed by any offer to actually go to New York in pursuit of such a career or took any concrete steps toward picking up roots and transplanting herself in the dance venue of New York City. There is no evidence that suggests that the plaintiff was ever compensated

[61] C.A. No. 01-3606, 2002 U.S. Dist. LEXIS 24026 (E.D. La. Dec. 12, 2002).

[62] *Id.* at *9 (emphasis added).

[63] *Id.* at *10.

[64] *Id.* at *13.

> with a salary for either performing ballet/dance or teaching ballet/dance except for her experience working seasonally as a Saintsation. No matter how sincere, ***such aspiration alone*** does not provide a sufficient factual basis.[65]

Lewis and *Gilmore* are instructive and directly on point with this case. Here, it is undisputed that Claimant was allegedly injured while employed as an entry-level deckhand. Significantly, there exists no evidence Claimant took any "concrete steps" to being promoted to a lead deckhand, and certainly no evidence of "concrete steps" to becoming a tankerman. At the time of his injury, the Claimant could not even perform certain, basic deckhand duties.[66] There is no evidence he spoke to anyone regarding becoming a tankerman or that he even investigated what steps were required to become a tankerman. And certainly, there is no evidence he had begun the specialized training to become a tankerman. Likewise, there exists no evidence that Claimant would have advanced or that he demonstrated sufficient proficiency to become either a lead deckhand or a tankerman.

Courts within the Eastern District consistently refuse to allow speculative evidence of higher earnings.[67] Likewise, courts also refuse to even permit discovery of such information. In *Walker v. Pioneer Production Services*, the district court refused to allow a rigger to discover evidence of the compensation rates of an engineer, a higher earning position.[68] In this case, the

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[65] *Id.* at *16-17 (emphasis added).

[66] **Exhibit D**, Deposition of Charles Wilson, p. 56:3–9.

[67] *See Scardina v. Maersk Line, LTD*, C.A. No. 00-1512, 2002 U.S. Dist. LEXIS 13468, at *8-9 (E.D. La. July 15, 2002) (Livaudais, J.) (granting a motion *in limine* and excluding Theriot from testifying to speculative and conjectural economic loss calculations at a jury trial); *Lomax v. Marquette Transp.*, C.A. No. 16-17825, 2019 U.S. Dist. LEXIS 941 (E.D. La. Jan. 3, 2019) (Milazzo, J.) (holding that "a finding that Claimant would have received a promotion to pilot is too speculative to support a higher award of lost wages and, instead [the court] base[d] Claimant's award of lost earnings on his salary as a tankerman."). *See also Mayne v. Omega Protein, Inc.*, 370 F. App'x 510, 517 (5th Cir. 2010) (finding that Theriot's calculations based upon an assumption provided by the plaintiff's attorney with regard to annualized earnings were improper and amounted to speculation); *Pallis v. United States*, 369 F. App'x 538 (5th Cir. 2010) (affirming district court's decision refusing to consider speculative evidence of higher earnings based upon an advancement theory).

[68] C.A. No. 15-0645, 2016 U.S. Dist. LEXIS 42414 (E.D. La. Mar. 30, 2016).

plaintiff worked as a rigger and sought information relating to engineer compensation rates pursuant to discovery requests. The defendant objected and the plaintiff filed a motion to compel. In denying the motion to compel, the district court noted that the information sought was ***irrelevant***, because the plaintiff had nothing more than a "Letter of Recommendation" to support his claim for damages based on an engineer's earnings. This Letter of Recommendation documented the plaintiff's desire to become an engineer and detailed some of his training relating to engineer work.[69]

Nonetheless, in denying the motion to compel, the district court noted, "[t]his Court does not believe that expressing an interest, harboring an ambition, having designs to obtain training or being of sound body and mind," will, without more, "***ever be sufficient evidence to prove a claim for loss of earnings capacity***."[70] Any such "aspirations" did not qualify as "concrete steps" required to justify deviation from the well-established rule of *Culver II* and *Martinez*. The court also recognized that allowing such rankly speculative evidence to come in through discovery would infect the entire proceeding by allowing irrelevant evidence to creep into lost earnings valuations.[71]

The law is clear that the calculation of lost income begins with the gross earnings of the plaintiff ***at the time of the injury***.[72] As such, Claimant's alleged economic loss, if any, should be calculated using his earnings at the time of the injury—not speculative and conjectural higher

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[69] *Id*. at *5–6.

[70] *Id*. at *14 (citing *Gilmore*, 2002 U.S. Dist. LEXIS 24026).

[71] *Id*. at *10-11. *See e.g.*, *Goode v. Herman Miller*, 811 F.2d 866, 871 (5th Cir. 1988) (holding that under Louisiana law, mere proof something is possible is of little probative value as to an ultimate issue of fact, unless it can be established with reasonable certainty that all other alternatives are impossible); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985) (holding that possibility alone cannot serve as the basis for recovery, for mere possibility does not satisfy the preponderance of the evidence standard).

[72] *Culver II*, at 117; *Martinez v. Offshore Specialty Fabricators, Inc.*, 481 F. App'x 942, 950 (5th Cir. 2012).

earnings. Theriot's wage loss calculations run afoul of this well-established mandate and should be excluded from the trial of this matter.[73] Furthermore, evidence or testimony regarding higher earnings at Charles is simply irrelevant and should be excluded from the trial of this matter. As such, any and all evidence of speculative higher earnings should be excluded in its entirety from the trial of this matter.

Charles also respectfully requests that Claimant not be afforded an opportunity to correct these glaring insufficiencies in Theriot's report. Claimant's deadline to disclose expert reports has passed, and he should not be permitted leave to revise his report to correct the speculative and unsupported calculations contained therein.[74]

CONCLUSION

The law is clear that a mere "aspiration" without more concrete steps taken to make fulfillment of that aspiration "probable" is insufficient to calculate lost earnings using anything other than Claimant's wages at the time of the incident. Here, Claimant cannot produce any evidence that it was probable he would become a lead deckhand or a tankerman, or otherwise advance to any higher earning positions. Rather, the evidence overwhelmingly points to the contrary. As such, both *Culver II* and *Martinez* dictate that Claimant's earnings base must be and should be that of an entry-level deckhand earning $200.00 per day. Any other evidence and testimony to the contrary, including the proposed testimony of Theriot, would be improperly based

[73] *See Lawrence v. Great Lakes Dredge & Dock Co., LLC*, C.A. No. 17-9775, 2018 U.S. Dist. LEXIS 90722 (E.D. La. May 31, 2018) (Africk, J.) (excluding expert testimony on the basis that economist improperly calculated the Claimant's gross earnings).

[74] R. Doc. 13, p. 1. *See also* FED. R. CIV. P. 37(c)(1). *See also Adriatic Marine, LLC v. Harrington*, C.A. No. 19-2440, 2020 U.S. Dist. LEXIS 26514, at *17-18 (E.D. La. Feb. 13, 2020) (Vitter, J.) (declining to allow personal injury claimant to supplement or correct miscalculations and improper wage loss calculations contained in Theriot's report).

on rank speculation. Accordingly, Charles respectfully requests that any and all testimony relating to speculative higher earnings be excluded from the trial of this matter.

Respectfully submitted:

/s/ Jefferson R. Tillery
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Attorney for Charles & Sons, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by filing the same in this Court's CM/ECF system this 17th day of November, 2021.

/s/ Jefferson R. Tillery

February 18, 2021

Tony Buzbee, Esq.
The Buzbee Law Firm
JP Morgan Chase Tower
600 Travis Street, Suite 7500
Houston, Texas 77002

RE: Michael Thibodeaux v Charles & Sons, LLC; United States District Court for the Eastern District of Louisiana; Judge Engelhardt

Dear Mr. Buzbee:

At your request, we have prepared a preliminary analysis of the economic loss in the above referenced case.

The essential features of a study of economic wage losses are the quantification of the reduction in earnings, the calculation of the past losses, and the application of financial discounting to future losses. The losses are measured as the difference between the earnings Mr. Thibodeaux would have received if the harmful event had not occurred and the assumed earnings Mr. Thibodeaux might now receive due to the injury.

Quantification of the Reduction in Earnings

Prior to the injury, Mr. Thibodeaux worked as a deckhand. Based on the vocational evaluation report of Karen Smith, M.S. dated December 2, 2020, we present the following pre-injury earnings capacity scenario:

- $48,667 annually before reduction for taxes working as a deckhand until 6/7/2020, then
- $58,400 annually before reduction for taxes working as a lead deckhand until 6/7/2021, then
- $85,167 annually before reduction for taxes working as a tankerman through the remainder of his work life expectancy.

Post-Injury Return to Work Assumptions

In order to determine future losses, this report will make certain assumptions as to Mr. Thibodeaux's earnings capacity after trial. Based on the vocational evaluation report of Karen Smith, M.S. dated December 2, 2020, the assumptions are as follows:

- Mr. Thibodeaux will have no future earnings capacity.
- Mr. Thibodeaux's injury will reduce his earnings capacity to $22,672 annually before reduction for taxes.

Past Losses

Past losses are the total economic earnings Mr. Thibodeaux should have received between the injury date and the trial date. These losses are reduced by any actual earnings received to determine a net past loss. As additional information becomes available, this report will be adjusted.

Future Losses

A damages study calculates a lump sum total needed at the time of trial to replace the future lost income. The calculation applies an appropriate discount rate to the future lost income over a set period of time. The result is a lump sum payment that, if invested in a relatively safe investment such as U.S. Treasury Bonds, would provide an income stream equal to their loss.

There are several methods available to calculate the present value of future losses, but in a certain type of litigation (known as Culver II)[1] the courts have instructed us to use the below market discount rate method. This rate is calculated by reducing the discount rate by an inflation rate. The below market discount rate used in this report is 0.50%.

Fringe Benefits

Typically, in jobs that are full-time, certain fringe benefits are paid on behalf of the employee. According to the U. S. Department of Labor, Bureau of Labor Statistics, Employee Benefits in the United States – March 2020, retirement benefits were available to 77% of full-time private industry workers in the United States, and medical care benefits were available to 85% of full-time private industry workers in the United States. Therefore, if Mr. Thibodeaux is able to return to full-time employment, he will most likely retain such benefits. However, if the accident has caused Mr. Thibodeaux to lose fringe benefits, then those benefits must be calculated in this report. As this information becomes available, this report will be adjusted.

The conclusions are stated on the following pages.

With kindest regards, we remain,

Very truly yours,

Malcolm M. Dienes, L.L.C.
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Personal Injury Economic Damages Report
Report produced on: February 18, 2021

Case Information

Plaintiff's Name:	**Michael Thibodeaux**

Date of injury:	**07/03/19**
Trial date:	**05/10/21**
Plaintiff's sex:	**Male**
Plaintiff's birth date:	**10/08/00**
Age at trial:	**20.59**
Work life expectancy[2] (as of trial date):	**36.88**
Life expectancy[3] (as of trial date):	**52.47**
Discount rate (adjusted for inflation)	**0.50%**

Damages Summary

Pre-Injury Earnings Base $48,667 Annually until 6/7/20, then $58,400 Annually until 6/7/21, then $85,167 Annually for remainder of work life expectancy
Return to work assumption: Total Disability

(The calculated amounts are after the reduction of taxes)

Type of Damage	Past Loss	Future Loss
Loss of Earnings	$ 83,385	$ 2,590,178
Total	$ 83,385	$ 2,590,178
Grand Total		**$ 2,673,563**

Pre-Injury Earnings Base $48,667 Annually until 6/7/20, then $58,400 Annually until 6/7/21, then $85,167 Annually for remainder of work life expectancy
Return to work assumption: $22,672 Annually

(The calculated amounts are after the reduction of taxes)

Type of Damage	Past Loss	Future Loss
Loss of Earnings	$ 83,385	$ 1,877,461
Total	$ 83,385	$ 1,877,461
Grand Total		**$ 1,960,846**

1 *Culver v. Slater Boat Co*., 722 F..2d 114 (5th Cir. 1983).
2 Skoog, Gary R., James E. Ciecka and Kurt V. Krueger, "The Markov Process Model of Labor Force Activity 2012-17: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Standard Errors," Journal of Forensic Economics 28(1-2), 2019.
3 Life expectancy calculated from tables from "National Center for Health Statistics," United States Life Tables 2017, Volume 68, Number 7, June 24, 2019.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHARLES & SONS, LLC AS THE OWNER OF THE M/V CHARLES PETITIONING FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY	CIVIL ACTION NO.: JUDGE ENGELHARDT

CLAIMANT, THIBODAUX'S MEMORANDUM IN OPPOSITION TO CHARLES & SON'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE OF SPECULATIVE EARNINGS

Claimant, THIBODAUX, respectfully submits this Memorandum in Opposition to defendant, **CHARLES & SONS, LLC's,** (hereinafter "Charles") Motion in Limine to Exclude Testimony and Evidence of Speculative Earnings. For the reasons below, defendant, Charles' Motion should be **DENIED**.

FACTUAL BACKGROUND

This matter arises out of a serious maritime accident which occurred on July 3, 2019, wherein claimant, Thibodaux, was seriously and gravely injured while working aboard the M/V CHARLES, a vessel owned and operated by Charles. More specifically, while attempting to lift a face wire over a cavel, the M/V CHARLES suddenly shifted, trapping Michael Thibodaux's fingers on his left hand between the wire and the deck of the barge. As a consequence of subject accident, Mr. Thibodaux was forced to undergo a major surgery in the form of an amputation of petitioner's left pinky and ring fingers.

LAW AND ARGUMENT

Contrary to the assertions of Charles, there is ample evidence in the record to support John Theriot's assumption that plaintiff's earnings would have increased over time had he not been injured on July 3, 2019. More specifically, there is ample evidence in the record to support the assumption that Mr. Thibodaux's wages as a deckhand would have increased and that he

eventually would have made it to the position of tankerman had he not been injured. In fact, the evidence supporting Theriot's assumption in his calculations came directly from the deposition testimony of Charles's corporate representative, J. Charles and other long-time employees of Charles.

For the Court's ease of reference, the following exhibits are attached hereto in support of plaintiff's position on the issues presented herein:

Exhibit A: Deposition excerpts from the 30(b)(6) deposition of Charles & Sons, LLC, through its designated representative J. Charles.

Exhibit B: Deposition excerpts from the deposition of Captain John Joseph.

Exhibit C: Deposition excerpts from the deposition of Charlie Wilson.

Exhibit D: Deposition excerpts from the deposition of Michael Thibodaux.

EVIDENCE ON RECORD

Claimant's contention that his future earning capacity should be calculated upon a tankerman's wages, finds ample support in the record and is established through the deposition testimony of J. Charles, Captain John Joseph, and Charlie Wilson. The most compelling testimony regarding Mr. Thibodaux's future earning capacity was given by Charles' corporate representative J. Charles.

A. Deposition of J. Charles

J. Charles is a manager for Charles.[1] Mr. Charles has been in the push boat business since 1973.[2] When he began working in the maritime industry, Mr. Charles was only a deckhand for a couple of weeks before receiving a promotion to tankerman.[3] Mr. Charles has been working in

[1] See Exhibit A, pg. 7, ln. 9-10.
[2] See Exhibit A, pg. 9, ln. 14-16.
[3] See Exhibit A, pg. 9, ln. 17-25; pg. 10, ln. 1-5.

the office at Charles since the early 80's,[4] although he occasionally still works on the push boats.[5] According to Mr. Charles, **a tankerman is essentially the same thing as a deckhand**.[6]

When asked specifically about Mr. Thibodaux, Mr. Charles stated that, "Everything about Mr. Thibodaux was good-great attitude, great person, great everything."[7] Moreover, Mr. Charles stated that he heard Mr. Thibodaux was a "good deckhand" and that he, "…had a lot of faith in Mr. Thibodaux, I really do."[8] According to Mr. Charles, Michael Thibodaux could perform all his duties as a deckhand"[9]

The most compelling testimony, for purposes of the present Motion, given by Mr. Charles, was in response to the question whether but/for the accident, Mr. Thibodaux would have eventually advanced up the ladder to become a tankerman. In response to this query, Mr. Charles stated, unequivocally, "**Probably—probably quickly.**"[10]

B. Deposition of John Joseph

John Joseph was the captain on duty the night of the subject accident[11] and during Mr. Thibodaux's first hitch,[12] however, Charlie Wilson primarily trained Mr. Thibodaux.[13] Captain Joseph has been working as a captain for Charles for over three years.[14] Prior to coming to work with Charles, Captain Joseph worked for Marquette for a year as a relief captain,[15] and had worked for Ingram as a mate and steersman for 25 years prior to that.[16]

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[4] See Exhibit A, pg. 11, ln. 12-14.
[5] See Exhibit A, pg. 11, ln. 19-21.
[6] See Exhibit A, pg. 10, ln. 8-15 (emphasis added).
[7] See Exhibit A, pg. 31, ln. 7-9.
[8] See Exhibit A, pg. 56, ln. 7-8.
[9] See Exhibit A, pg. 56, ln. 12-15.
[10] See Exhibit A, pg. 86, ln. 2-5 (emphasis added).
[11] See Exhibit B, pg. 14, ln. 23-24.
[12] See Exhibit B, pg. 14, ln. 23-24.
[13] See Exhibit B, pg. 14, ln. 25; pg. 15, ln.1)
[14] See Exhibit B, pg. 7, ln. 7-10.
[15] See Exhibit B, pg. 7, ln. 11-16.
[16] See Exhibit B, pg. 7, ln. 7-10.

According to Captain Joseph, Mr. Thibodaux had done good as a deckhand on his first hitch,[17] and showed improvement at the beginning of his second hitch.[18] Captain Joseph also testified that Charles is a tankerman company, so **he expected that Mr. Thibodaux would have eventually become a tankerman**.[19] Captain Joseph is of the opinion that **had Michael Thibodaux not been injured, he would have become a tankerman**.[20]

C. Deposition of Charlie Wilson

Charlie Wilson has been working for Charles since the end of 2005, after Hurricane Katrina.[21] While he began his career at Charles as a deckhand, Mr. Wilson has been a tankerman for over 10 years.[22] According to Mr. Wilson, a tankerman and a deckhand are essentially the same thing except that a tankerman has some extra duties that a deckhand does not.[23] Mr. Wilson worked with and trained Michael Thibodaux for three weeks prior to the subject accident.[24] Mr. Wilson is also of the opinion that **had Michael Thibodaux not gotten injured, he would have eventually become a tankerman**.[25]

A. Loss of earning capacity defined.

"Under the Jones Act and General Maritime Law, [a plaintiff] is entitled to damages for future loss of earning capacity caused by Defendants' negligence and/or the unseaworthiness of the vessel."[26] "Impaired earning capacity damages are "intended to compensate the worker for the

[17] See Exhibit B, pg. 15, ln. 20-22.
[18] See Exhibit B, pg. 17, ln. 7-8.
[19] See Exhibit B, pg. 22, ln. 25; pg. 23, ln. 1-3 (emphasis added).
[20] See Exhibit B, pg. 23, ln. 4-7 (emphasis added).
[21] See Exhibit C, pg. 14, ln. 6-10.
[22] See Exhibit C, pg. 16, ln. 7-10.
[23] See Exhibit C, pg. 18, ln. 5-14.
[24] See Exhibit C, pg. 24, ln. 8-10.
[25] See Exhibit C, pg. 58, ln. 2-4 (emphasis added).
[26] *In re M&M Wireline & Offshore Servs., LLC*, CIVIL ACTION No. 15-4999 SECTION: "G"(5), at *8-10 (E.D. La. Jan. 24, 2017) (citing *Michel v. Total Transp*., *Inc*., 957 F.2d 186, 192 (5th Cir. 1992) (affirming district court's award for lost future earnings and earning capacity); *Simmons v. Transocean Offshore Deepwater Drilling*, *Inc*., 551 F. Supp. 2d 471, 477 (E.D. La. 2008) (Fallon, J.) (citing *Nichols v. Weeks Marine*, *Inc*., 513 F.Supp.2d 627, 637 (E.D.La. 2007) (Fallon, J.); *Johnson v. Cenac Towing*, *Inc*., 468 F.Supp.2d 815, 835 (E.D.La. 2006) (Vance, J.)).

diminution in that stream of income" based on a worker's partial or total disability."[27] "There is no certain way of calculating the length and extent of a plaintiff's loss of future earnings."[28] "In general, courts typically look to a wide range of factors to determine loss of earning capacity, including a plaintiff's pre-injury physical condition and earning capacity,[29] the extent to which plaintiff's post-injury condition disadvantages him or her in the work force,[30] actual post-accident wage losses,[31] *potential future wage increases*,[32] and the extent of the plaintiff's remaining working life,[33] while also adjusting for factors such as their present value and applicable taxes."[34] Loss of earning capacity must be estimated based on the injured person's ability to earn money, and not on what he actually earned before the injury.[35]

To determine lost future earnings, the Court must "…estimate the loss of work life resulting from the injury or death, calculate the lost income stream, compute the total damage, and discount that amount to its present value."[36] "Calculation of the lost income stream beings with gross earnings of the injured party at the time of injury."[37] "The base figure used to calculate future wage loss is the difference between what a person could have earned 'but for' the accident and

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[27] Id. (citing Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983); see also 1 Admiralty & Mar. Law § 6-18 (5th ed.)).
[28] Id. (citing Jones, 462 U.S. at 533; 1 Admiralty & Mar. Law § 6-18 (5th ed.)).
[29] Id. (citing Levine v. Zapata Protein (USA), Inc., 961 F. Supp. 942, 945-46 (E.D. La. 1996)).
[30] Id (citing Barocco v. Ennis Inc. of Colorado, No. 02-1450, 2003 WL 1342973, at *1 (E.D. La. Mar. 19, 2003) (Vance, J.), aff'd sub nom. Barocco v. Ennis Inc., 100 F. App'x 965 (5th Cir. 2004)).
[31] Id. (citing Blaauw v. Superior Offshore Int'l, LLC, No. 06-1380, 2008 WL 4224808, at *14 (W.D. La. Sept. 10, 2008) (citing Thomas J. Schoenbaum, Admiralty and Maritime Law, § 5-15.1 (4th ed. 2004); Johnson v. Cenac Towing, Inc. 468 F.Supp.2d 815, 834 (E.D.La. 2006)).
[32] Id (citing Jones, 462 U.S. at 533) (emphasis added).
[33] Id (citing Barocco, 2003 WL 1342973, at *1)).
[34] Id. (citing Madore v. Ingram Tank Ships, Inc., 732 F.2d 475, 478-79 (5th Cir. 1984); 1 Admiralty & Mar. Law § 6-18 (5th ed.); see also Michel v. Total Transp., Inc., 957 F.2d 186, 192 (5th Cir. 1992); Culver v. Slater Boat Co., 722 F.2d 114, 117 (5th Cir. 1983)).
[35] Id. (citing Jones, 462 U.S. at 533; Thompson v. Amerada Hess Corp., No. 96-3265, 1998 WL 274260, at *5 (E.D. La. May 26, 1998) (Vance, J.); see also Barocco, 2003 WL 1342973, at *1)).
[36] *Barrios v. Centaur, LLC*, CIVIL ATION NO. 17-585 *14 (E.D.L.A. Feb. 1, 2019) (citing *Mayne v. Omega Protein, Inc*., 370 F App'x 510, 517 (5th Cir. 2010)).
[37] Id.

what he is able to earn upon returning to work in his partially disabled state."[38] "Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors" is admissible to show future lost earnings.[39]

The expert report and testimony of John Theriot are admissible.

In *Miller v. Marine Spill Response Corporation*,[40] the District Court considered whether plaintiff's economist, Theriot, could properly testify regarding calculations of future lost earnings to an age beyond the statistical average.[41] The testimony of Theriot did not opine that plaintiff's work-life expectancy would have surpassed 3.17 years (statistical average), the testimony only provided a calculation of the future lost earnings in the event the factfinder concluded that plaintiff would work beyond the statistical average.[42] The Court noted that:

> "[…] calculations of future lost earnings beyond the statistical average may proceed at trial where plaintiff expresses an intention to introduce suitable evidence at trial and where the record might conceivably support introduction of such evidence."[43]

In holding that the expert testimony was proper, the Court stated:

> "Assuming it is not entirely based on "self-serving" evidence of plaintiff's own intentions regarding retirement and that a proper evidentiary foundation is established at trial, Theriot will be permitted to testify regarding Miller's future lost wages beyond the average work-life expectancy and Clean-Co may cross examine Theriot with respect to the same."[44]

In this case, the expert testimony and reports of plaintiff's economist, John Theriot, do not opine as to the probability of plaintiff becoming a tankerman. However, his report makes

[38] Id. (citing *Masinter v. Tenneco Oil Co*., 867 F.2d 892, 899 (5th Cir. 1989) *mandate recalled & modified on other grounds*, 934 F.2d 67 (5th Cir. 1991)).
[39] Id. at *15 (citing *Culver v. Slater Boat Co.*, 722 F.2d 114, 122 (5th Cir. 1983)).
[40] 2016 WL 3965169 (E.D. La. 2016)
[41] *Id.* at *3.
[42] *Id.*
[43] *Id.*
[44] *Id.* at *4.

calculations based upon the possibility of the factfinder determining that plaintiff indeed would have been a tankerman, the probability of which is firmly established through Charles' testimony in the record. Therefore, Theriot's report and testimony mimic the exact nature and character of the expert testimony offered and admitted in *Miller.*[45]

In *Barrios v. Centaur, LLC*, the Eastern District of Louisiana allowed Theriot to testify as to plaintiff's future lost wages on the premise that plaintiff, due to his age and abilities, would have received incremental promotions through the remainder of his work life.[46] In its Findings of Fact and Conclusions of Law, the Court observed that, "Given Plaintiff's age and abilities, this Court finds that it is more likely than not he would have received incremental promotions throughout the remainder of his working life."[47] The Court then concluded that "[I]f Plaintiff is unable to return to work for the remainder of his working life, this Court agrees with Theriot's calculation that the present value of his future lost wages would be $1,665,636.00."[48]

In order to establish the probability he would have become a tankerman, plaintiff intends to offer copious amounts of non "self-serving" evidence, beyond his own intention to one day become a tankerman, that is both suitable and admissible. As noted herein, that **evidence consists of statements by Charles and its employees regarding the probability that plaintiff probably would have worked his way up to tankerman had he not been injured**.[49] Therefore, because plaintiff will establish this probability through non "self-serving" testimony, Theriot should be allowed to testify to plaintiff's future lost wages *if* he were to have become a tankerman. Ultimately, the jury should be able to determine the probability of plaintiff becoming a tankerman

[45] 2016 WL 3965169 *3 (E.D. La. 2016).
[46] CIVIL ATION NO. 17-585 *8 (E.D.L.A. Feb. 1, 2019).
[47] Id.
[48] Id.
[49] *See* Exhibits A, B, & C.

based upon the non "self-serving" evidence in the record and make their future lost wage computation accordingly.

B. Case law cited by defendant is factually distinguishable.

Defendant cites to *Gilmore v. WWL-TV*,[50] in support of the proposition that, "No matter how sincere, such [a plaintiff's future employment] aspirations **alone** does not provide a sufficient factual basis to support an expert opinion regarding money to be earned in such a speculative future."[51] In *Gilmore*, the only evidence in support of the probability that plaintiff would earn the wages of a professional ballerina in New York, was her testimony that she aspired to do the same.[52] In addition to the lack of testimony regarding the probability plaintiff would become a professional ballerina in New York, the Court made light of the fact that plaintiff, living in Chalmette, Louisiana, had made no "concrete steps" towards uprooting to New York and becoming a professional dancer.[53]

This case is distinguishable from *Gilmore* in that plaintiff has more than his mere speculative desires to establish the probability that he would become a tankerman. In fact, as noted above, that evidence consists of **statements made by Charles and its employees regarding the probability of plaintiff becoming a tankerman**.[54] In fact, Mr. Charles stated that Mr. Thibodaux would have "probably" become a tankerman "quickly" had he not been injured.[55] This case is also distinguishable from *Gilmore*, in that plaintiff did take concrete steps towards becoming a tankerman in that he obtained employment with Charles as a deckhand, worked aboard the M/V

[50] 2002 WL 31819135 (E.D. La. 2002).
[51] *Id.* at *5 (Emphasis Added).
[52] *Id.*
[53] *Id.* at *5.
[54] *See* Exhibits A, B, & C.
[55] See Exhibit A, pg. 86, ln. 1-4.

CHARLES, and showed that he had the potential to work his way up to tankerman had he not been injured, **as evidenced by the testimony of Charles and its employees**.[56]

The evidence supporting the probability that plaintiff would have become a tankerman, rises well beyond the level of conjecture and rank speculation present in *Gilmore*. Furthermore, plaintiff moving from deckhand to tankerman aboard the M/V CHARLES was not the "quantum leap" that the Court in *Gilmore* confronted, wherein plaintiff desired to uproot from Chalmette, Louisiana as a legal assistant to dancing professionally as a ballerina in New York City.[57] The Court in Gilmore states that "…possibility alone cannot serve as the basis of recovery. While certainty of proof is not required in civil cases, probability is, and less than that is unacceptably speculative."[58] However, in this case, the *probability* of Mr. Thibodaux working his way up to tankerman has clearly been established through Mr. Charles' admission that plaintiff would have "probably" made it to tankerman "quickly" had he not been injured.[59] Moreover, as a manager of Charles, the namesake of the vessel on which Mr. Thibodaux was injured, and a thirty year veteran of the push boat industry, it is very likely that Mr. Charles would have either made the decision to move Mr. Thibodaux up to tankerman or would have had a substantial say in the matter. Therefore, his statement that Mr. Thibodaux would have "probably" made it to tankerman "quickly" had he not been injured, carries substantial weight.

The defendant also cites to *Lewis v. Seacor Marine, Inc*.,[60] in support of its position. In that case, plaintiff sought future lost earnings based upon a captain's salary.[61] In support of his contention, the plaintiff's **only** evidence was his desire to become a captain, the fact he attended

[56] See Exhibits A, B, & C.
[57] 2002 WL 31819135 *15 (E.D. La. 2002).
[58] 2002 WL 31819135 *15 (E.D. La. 2002).
[59] See Exhibit A, pg. 86, ln. 1-4.
[60] 2002 WL 34359733 (E.D. La. 2002).
[61] *Id.* at *1.

SEACOR university, and that he enjoyed the month he worked as a deckhand.[62] In excluding any evidence of plaintiff earning a captain's wages, the Court examined the plaintiff's work history, noting that he had dabbled in various (non-maritime) industries and was completely out of work for periods of time.[63]

This case is factually distinguishable from *Lewis*, in that plaintiff has sufficient non "self-serving" evidence to establish the probability that he would have become a tankerman. Again, plaintiff's evidence consists of **statements made by Charles and its' employees** regarding the probability of him becoming a tankerman.[64] These **admissions are both material and admissible** evidence to prove the probability of plaintiff becoming a tankerman. It is of no surprise that defendant completely failed to consider and/or mention this evidence in its Motion in Limine. This type of evidence was not present in any of the cases cited by defendant in support of its Motion and is the **determinative factor** in allowing Mr. Thibodaux to present the question of future tankerman's wages to the jury.

As far as his work history is concerned, considering he had graduated high school just prior to the accident, the only job Mr. Thibodaux ever held was his position as a deckhand with Charles.[65] This is obviously very different from the sporadic employment history of the plaintiff in *Lewis*.[66] Moreover, the evidence in this matter shows that Mr. Thibodaux was highly motivated and was making good improvements as a deckhand by his second hitch.[67] It would be a grave injustice to allow Charles and its employees to consistently admit that Mr. Thibodaux would have eventually become a tankerman but/for this accident, then not allow Theriot to opine as to future

[62] *Id.*
[63] *Id.* at *2.
[64] *See* Exhibits A, B, & C.
[65] See Exhibit D, pg. 8, ln. 9-11.
[66] 2002 WL 34359733 *2 (E.D. La. 2002).
[67] See Exhibits A, B, & C.

lost wages at a tankerman's rate, all because this was plaintiff's first job out of high school. As an athlete who played multiple sports in high school,[68] it is obvious that plaintiff was a highly motivated individual and probably would have continued to work his way up to a tankerman had he not been injured.

Charles also cites to *Walker v. Pioneer Prod. Servs*.[69] in support of its Motion in Limine. However, this case is factually distinguishable in several respects. First, the plaintiff in *Walker*, a rigger, sought earnings information for an engineer position from a company who he had never worked for, taken any steps towards working for, or expressed any interest in working for.[70] Here, the earnings information used by Theriot regrading a tankerman's wages, was obtained through the deposition testimony of Charles and its employees.[71] Moreover, plaintiff worked for Charles as a deckhand and overwhelmingly the deposition testimony of Charles and its employees established that Mr. Thibodaux probably would have become a tankerman had he not been injured.[72] Finally, the Court in *Walker* give credence to the fact that the plaintiff's criminal record would have probably prevented him from obtaining the necessary Coast Guard credentials to become an engineer, an issue which is not present in this case as Mr. Thibodaux has no criminal record.[73] As such, this case is clearly distinguishable from the facts in Walker.

Charles argues that per the deposition testimony of its employee, Charlie Wilson, that a promotion from deckhand to tankerman "…takes a long time," as it took Mr. Wilson four to five years to become a tankerman.[74] However, it was revealed in Mr. Wilson's deposition that he in

[68] See Exhibit D, pg. 13, ln. 4-7.
[69] 2016 U.S. Dist. LEXIS 42414.
[70] Id. *7.
[71] See Exhibits A, B, & C.
[72] See Exhibits A, B, & C.
[73] 2016 U.S. Dist. LEXIS 42414 *10.
[74] See Exhibit C, pg. 55, ln. 1-7.

fact suffers from dyslexia,[75] a learning disability.[76] This likely accounts for the extended length of time it took Mr. Wilson to obtain his tankerman license. However, Mr. Thibodaux does not suffer any such learning disability[77] and according to the deposition testimony of Mr. Charles, Mr. Thibodaux "probably" would have moved up from deckhand to tankerman "quickly."[78] Moreover, Mr. Thibodaux is no stranger to obtaining licensures, as he was able to obtain his BCL/CPL license to render first aid while in high school.[79] Therefore, Theriot's projection of Mr. Thibodaux reaching the level of tankerman two years from the date of accident was a conservative estimate considering the testimony of Mr. Charles.

C. As its 30(b)(6) representative, Mr. Charles' Testimony Regarding Michael Thibodaux's future earning capacity is binding upon the corporation.

"In a Rule 30(b)(6) deposition, there is no distinction between the corporate representative and the corporation."[80] "The Rule 30(b)(6) designee doe not give his personal opinion. Rather, he presents the corporation's 'position' on the topic."[81] "The designee testifies on behalf of the corporation and holds it accountable accordingly."[82] As such, a corporate representative designated under Rule 30(b)(6) provides "binding answers on behalf of the corporation.[83]

"When a corporation produces an employee pursuant to a Rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect

[75] See Exhibit C, pg. 9, ln. 14-15.
[76] See Exhibit C, pg. 7, ln. 10-11.
[77] See Exhibit D, pg. 8, ln. 15-16.
[78] See Exhibit A, pg. 86, ln. 1-4.
[79] See Exhibit D, pg. 9, ln. 1-25.
[80] *Hyde v. Tools*, 107 F.Supp.2d 992, (E.D. La. 2000) (citing *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D. N.C. 1996)(noting that in a Rule 30(b)(6) deposition the corporation appears vicariously through its designee).
[81] Id.
[82] Id. (*citing Starlight Int.'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999)(holding that a corporation has a duty under Rule 30(b)(6) to provide someone who is knowledgeable in order to provide "binding answers on behalf of the corporation.")
[83] Id.

to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions."[84]

Numerous district courts have held that a party cannot adduce additional evidence to rebut testimony of its Rule 30(b)(6) witness when the opposing party has relied on the Rule 30(b)(6) testimony, and there is no explanation for the difference.[85] A 30(b)(6) deposition is not a irrebuttable judicial admission, but the party still may not retract prior testimony with impunity and courts can disregard inconsistent testimony then the movant has relied on prior testimony.[86] Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition and that an eleventh hour alteration is inconsistent with Rule 30(b)(6).[87]

In his 30(b)(6) deposition, J. Charles was presented as Charles's representative and therefore could speak on its behalf. During the deposition, J. Charles, as representative of Charles, opined that *he believed Mr. Thibodaux would have moved up to tankerman quickly*.[88] Because Charles presented J. Charles as their corporate representative and he opined on Mr. Thibodaux's upward mobility with the company, which was well within his competency to offer an opinion, Charles should be prohibited from offering any new or additional evidence contradictory to Charles' position on claimant's future earning capacity.

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[84] *Brazos River Auth. V. GE Ionics, Inc*., 469 F.3d at 433 (5th Cir. 2006) (citing Lapenna v. Upjohn Co., 110 F.R.D 15, 25 (E.D.Pa. 1986) (citing 4 J. MOORE, J. LUCAS G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 25.l56[3], at 142-43 (2d. ed. 1984)); *Resolution Trust Corp v. S Union*, 985 F.2d 196, 197 (5th Cir. 1993) ("When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent.")
[85] *Imperial Trading v. Travelers Prop. Casualty Co. of A*., CA No. 06-4262 (E.D. La. Jul. 24, 2009) (citing Hyde v. Stanley Tools, 107 F.Supp.2d 992, 993 (E.D. La. 2000), aff'd 31 Fed. Appx. 151 (5th Cir. 2001) (per curiam) (unpublished); *State Farm Mut. Auto Inc. Co. v. New Horizont, Inc.* 250 F.R.D. 203, 212-13 (E.D. Pa. 2008).
[86] Id. (citing *State Farm Mut. Auto Inc. Co. v. New Horizont, Inc.* 250 F.R.D. 203, 212-13 (E.D. Pa. 2008).
[87] Id. (citing *Rainey v. Am. Forest and Paper Ass'n, Inc*., 26 F.Supp. 2d 82, 94-95 (D.D.C. 1998)).
[88] See Exhibit A, pg. 86, ln. 2-5 (emphasis added).

Charles provides no excuse or reason for the sudden and dramatic "eleventh hour" reversal on its position. Moreover, plaintiff's experts relied upon J. Charles's admissions when formulating their reports. Because claimant has detrimentally relied upon J. Charles's opinion and Charles has provided no reasonable excuse or explanation as to why it now has changed its position, plaintiff's economics expert, John Theriot, should be permitted to calculate Mr. Thibodaux's future earning capacity based upon a Tankerman's earnings.

CONCLUSION

The ultimate questions regarding Mr. Thibodaux's last earning capacity is one for the jury to decide, and Theriot certainly should be permitted to testify to the amount of plaintiff's lost wages if he were to become a tankerman. As noted above, there is an abundance of non "self-serving" and admissible evidence to establish a sufficient probability that plaintiff would have eventually become a tankerman at Charles. More specifically, Charles and its employees, which represent over fifty years combined experience in the maritime industry, admitted that Mr. Thibodaux would have made it to the rank of tankerman had he not been injured. Moreover, the proposed promotion from deckhand to tankerman is in stark contrast to the case law cited by Charles, wherein the plaintiffs sought to achieve captains' wages from a deckhand position on nothing more than mere aspirations and desires to achieve same. Such a "quantum leap" is not proposed in this case. Ultimately, the fact finder should be able to receive and weigh the evidence regarding this probability and make their future lost wage computation accordingly. Therefore, plaintiff respectfully requests that the Court **DENY** Defendant's Motion in Limine to Exclude Testimony and Evidence of Speculative Earnings.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2024, a copy of the above and foregoing document was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Anthony G. Buzbee
Anthony G. Buzbee

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF CHARLES & SONS, LLC, AS THE OWNER OF THE M/V CHARLES, PETITIONING FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY	ADMIRALTY CIVIL ACTION NUMBER: JUDGE ENGELHARDT

REPLY MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EVIDENCE OF SPECULATIVE EARNINGS

MAY IT PLEASE THE COURT:

In his opposition memorandum, the Claimant, Michael Thibodaux ("Claimant"), fails to provide this Court with evidence of actual "concrete steps" that he took to become a tankerman, and he otherwise fails to provide this Court with actual evidence that he would have become a tankerman but for his alleged accident. Accordingly, he failed to raise a factual question for the trier of fact to consider regarding whether he would have become a tankerman in the future. And thus, Charles & Sons, LLC's ("Charles") Motion *in Limine* to Exclude Testimony and Evidence of Speculative Earnings (R. Doc. 30) should be granted.

Instead, Claimant attempts to rely on general statements made by Charles personnel regarding Claimant's attitude and improvements over his short stint of employment, as well as equivocal statements that Claimant "could" or "would" become a tankerman at some indefinite point in the future. But, under the prevailing jurisprudence—outlined in Charles' original memorandum in support (R. Doc. 30-1)—this is simply not enough to permit the Claimant and his economist expert, John Theriot, to present evidence to the jury regarding tankerman's wages in order to attempt to unjustifiably increase Claimant's lost future wages calculations and damages. Accordingly, for the reasons outlined in Charles' original motion and memorandum in support, as

well as the additional reasons outlined below, the Court should grant Charles' motion *in limine* and exclude any and all testimony from the trial in this matter relating to speculative higher earnings for Claimant, including tankerman's wages.

I. Claimant bears the burden of establishing the reliability of the testimony from his experts.

As the party offering the expert testimony, Claimant bears the burden of establishing the reliability of the testimony by a preponderance of the evidence.[1] The Claimant cannot rely on testimony from his economist, John Theriot, that is based merely on subjective belief or unsupported speculation.[2] However, that is exactly what Claimant is attempting to do via his opposition. Claimants relies entirely on general and equivocal statements from Charles' personnel, rather than actual actions or concrete steps taken by him towards becoming a tankerman.

In support of his opposition, the Claimant cites to the *Miller v. Marine Spill Response Corporation* case, which involved whether John Theriot's opinion could be based on a work-life expectancy that exceeded the statistical average.[3] The Court allowed Theriot to render his expert testimony mainly because concrete facts existed that could support a finding by the jury that the plaintiff could have worked beyond the typical work-life expectancy, including the fact that the plaintiff had reached retirement age and not only continued to work, but also obtained additional training and certifications.[4] Here, no such concrete evidence exists. Claimant rests his entire argument in opposition on equivocal statement from Charles personnel (e.g., "probably") that he would eventually become a tankerman, with no basis in either fact or law. The following cannot

[1] *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

[2] *Daubert v. Merell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 590 (1993)

[3] *See* No. 15-1049, 2016 U.S. Dist. LEXIS 96669 (E.D. La. July 25, 2016).

[4] *See id.* at *9–10.

be disputed as it concerns Claimant at the time of his alleged accident: (1) the Claimant had not undergone any tankerman-specific training; and (2) the Claimant had not otherwise begun any of the formal processes to become a tankerman, including failing to complete a single load or discharge.[5] Claimant was nowhere near ready to begin tankerman training, and thus, he should not be entitled to present evidence of tankerman's wages to the jury in support of his lost future wages calculation.

II. Claimant failed to rebut, or even contradict, the expert testimony from Marc Fazioli regarding the steps necessary to become a tankerman and his opinion concerning the potential for Claimant to become a tankerman in the future.

Claimant entirely ignores the expert opinion from Marc Fazioli regarding the requisite steps to become a tankerman. Frankly, Claimant must ignore the actual requirements to become a tankerman, because it is clear that there is no evidence, whatsoever, that he even took the first step towards becoming a tankerman. As stated by Mr. Fazioli in his report, "service as a Deckhand on a towing vessel such as [the] M/V CHARLES **is not a formal path, or requirement, for Tankerman certification**."[6] Accordingly, merely becoming a deckhand was **not** a concrete step toward becoming a tankerman, particularly in light of the fact that the Claimant failed to take any other requisite steps towards accomplishing the goal.[7] Moreover, Claimant provided no countervailing evidence or expert testimony concerning Mr. Fazioli's ultimate expert opinion:

> We are finally of the opinion that Mr. Thibodaux had not apparently commenced any formal training, required experience, or even one documented observation of a tank barge cargo evolution during his employment with Charles & Sons, LLC.
>
> Consequently, as of 3rd July 2019, we would not consider Mr. Thibodaux to be "in training" for a Tankerman – PIC position, which is a separate and distinct maritime

[5] *See* **R. Doc. 30-6**, Expert Report of Marc Fazioli, pp. 10–11.

[6] *Id.* at p. 10 (emphasis added).

[7] *See id.* at pp. 10–12.

> job classification compared to . . . an uncredentialed Deckhand such as Mr. Thibodaux.[8]

The lack of any substantive disagreement with either Mr. Fazioli's report or the fact that Claimant had not engaged in even the initial step towards becoming a tankerman provide further support for Charles' motion *in limine*.

III. The Testimony from Charles' Corporate Representative Does Not Provide Concrete Support for the Claimant's Position.

Finally, the Claimant argues that the testimony from Charles' corporate representative provides concrete support for his position that he was on his way to becoming a tankerman. However, a review of the full exchange reveals that is simply not the case:

> Q. Okay. If Mr. Thibodaux had not been injured, you see no reason why he would not have reached the level of tankerman, do you?
>
> A. Probably -- probably quick.
>
> Q. Okay.
>
> A. **But he didn't get there**.[9]

All that testimony says is that Charles thought that the Claimant would eventually become a tankerman, and that it would likely happen as quickly as possible. Nevertheless, "**he didn't get there**."[10] As discussed above and outlined in the expert report of Marc Fazioli, to even become a tankerman, the Claimant would have needed to take numerous steps toward that goal. Yet, there is no evidence, whatsoever, that the Claimant took a single step toward that goal. The statements from Charles' corporate representative provide no evidence that Claimant took any "concrete

[8] *Id.* at p. 13.

[9] R. Doc. 31-1, Excerpts from Rule 30(b)(6) Deposition of Charles & Sons, p. 8.

[10] *Id.*

steps" toward becoming a tankerman. Therefore, any assertion that Claimant would have become a tankerman in the future is "based on speculation or conjecture."[11]

IV. Conclusion

As stated in Charles' motion *in limine*, the law is clear that a mere "aspiration" without more concrete steps taken to make fulfillment of that aspiration "probable" is insufficient to calculate lost earnings using anything other than Claimant's wages at the time of the incident. Here, Claimant cannot produce any evidence that it was probable he would become a tankerman, or even a lead deckhand. Rather, the evidence overwhelmingly points to the contrary. Accordingly, Charles respectfully requests that the Court grant its motion *in limine* and that any and all testimony relating to speculative higher earnings be excluded from the trial of this matter.

[*Signatures on following page.*]

[11] *Martinez v. Offshore Specialty Fabricators, Inc.*, 481 F. App'x 942, 950 (5th Cir. 2012) (citing *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 587–88 (5th Cir. 1988)).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record by filing the same in this Court's CM/ECF system this 1st day of December, 2021.

/s/ Jefferson R. Tillery


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WHAT CAN I DO TO DEFEAT THE DECKHAND WHO "TURNS INTO A CAPTAIN" FOR MAKING A WAGE LOSS CLAIM?

AN INSIGHT INTO THE ETHICAL AND PROFESSIONALISM ISSUES IN PRESENTING AND ARGUING THE MOTION IN LIMINE.

This panel will specifically address issues arising under Rule 3.1. Meritorious Claims and Contentions, Rule 3.2. Expediting Litigation, Rule 3.3. Candor Toward the Tribunal, Rule 3.4. Fairness to Opposing Party and Counsel. Other similar topics arising will be addressed under the Louisiana State Bar Association Rules and Code of Professionalism. In this regard, subtopics will include but not be limited to the following:

- What is a Motion in Limine and when is it proper to bring one? When is it not proper to bring one? When is one brought in bad faith and who makes that determination? What are the consequences?
- What evidence must be shared among the parties presenting and attacking such a motion?
- What does it mean to have evidence that is irrelevant, unreliable, or more prejudicial than probative? How does the Judge make that determination?
- When is the evidence submitted by counsel submitted in "bad faith"? What makes that evidence inadmissible and why?

FORMAT:

- The Judge presents the motion and gives "ground rules" for arguing this Motion in Limine in the courtroom.
- The Defense and Plaintiff's Attorney's argue the motion.
- The Economist takes the stand and undergoes direct and cross examinations.
- The Judge rules and there is open discussion with Q&A from the panel and registrants.

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
The Honorable Kurt D. Engelhardt
US Court of Appeals for the Fifth Circuit

Dana S. Merkel, Esq.
Blank Rome LLP
Washington, D.C.
Defense Attorney


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HOW DO I RESPOND TO HARASSMENT AND SEXUAL HARASSMENT CLAIMS? WHAT ARE THE NEW LAWS AND COAST GUARD REGULATIONS AND HOW DO THEY IMPACT MY COMPANY?

- What is the U.S. Coast Guard policy and position on harassment and sexual harassment? What about US Department of Labor?
- What is MSIB-23, how is it applied and what is expected by the U.S. Coast Guard with respect to reporting?
- What do I absolutely have to have in my company policy to protect my company, and how is it best implemented and enforced? Does this carry over into my TSMS?
- Now that I am hiring women deckhands and pilots given changes in the workforce, what accommodations must I have, and what am I required by law to provide onboard my vessel?
- What about insurance to cover these types of claims? Are there endorsements on my policies that are needed, or they covered under my P&I policy, and does insurance differ from office onshore to offshore?
- If I'm sued for harassment or sexual harassment, what policies of coverage "kick in" and what reporting obligations do I have to my insurer?
- Last, do I use my regular old maritime lawyer or do I need a labor lawyer?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Captain Evelynn B. Samms
Chief, Office of Investigations
and Casualty Analysis
United States Coast Guard
U.S. Coast Guard Representative

Jennifer Mehaffey
Senior Attorney, National Technical Advisor,
Coast Guard Suspension and Revocation
National Center of Expertise (S&R NCOE)
National Maritime Center
U.S. Coast Guard

Sexual Assault and Sexual Harassment (SASH) in the Merchant Marine – Reporting and New Requirements

CHANGES UNDER THE 2023 NDAA

46 U.S.C. § 10104 - Requirement to report sexual offenses

- The responsible entity of a vessel shall report* to the Commandant any complaint or incident of harassment, sexual harassment, or sexual assault in violation of employer policy or law, of which such entity is made aware.
- The "responsible entity" is defined as the owner, master, or managing operator documented vessel engaged in commercial service or the employer of a seafarer on such a vessel.

*A responsible entity of a vessel who knowingly fails to report is liable to the United States Government for a civil penalty of not more than $50,000.

CHANGES UNDER THE 2023 NDAA

46 U.S. Code § 10104 - Requirement to report sexual offenses

Reporting Procedures.—

- Reports shall be made immediately after the responsible entity of a vessel gains knowledge of a sexual assault or sexual harassment incident by the fastest telecommunication channel available to —
  - A single entity in the Coast Guard designated by the Commandant to receive such reports; and
  - The appropriate officer or agency of the government of the country in whose waters the incident occurs.

MSIB 01-23

Reporting Sexual Misconduct on U.S. Vessels

Recent changes to the law now require the responsible entity of a vessel, defined as the owner, master, or managing operator, to report any complaint or incident of harassment, sexual harassment, or sexual assault to the Coast Guard that violates company policy. To help facilitate reporting, the Coast Guard has consolidated reporting for all types of sexual misconduct and established multiple reporting options as detailed in the attached graphic. The reporting options include a *CGIS Tips App, and/or the email address CGISTIPS@uscg.mil* which can be used by all reporting sources, including bystanders and survivors, who have access to a smart phone or the internet. The reports, which can be anonymous or for attribution, are received and reviewed by the Coast Guard Investigative Service (CGIS). An investigation will be initiated for all reports received and someone will provide follow-up communications with all reporting sources who provide contact information. The Coast Guard also maintains a 24/7 watch, which can field reports of sexual misconduct via the National Command Center (NCC) phone number at 202-372-2100. CGIS will leverage all available resources to immediately initiate a criminal investigation for a sexual crime occurring on a U.S. flagged vessel anywhere in the world. The Coast Guard will respond to any reports of sexual misconduct with trained investigators and will hold offenders accountable through criminal prosecution and/or actions against U.S. Coast Guard issued merchant mariner credentials (MMCs).

If the responsible entity in charge of a U.S. flagged vessel makes a report, including providing detailed contact information for further follow-up, of a sexual misconduct incident through CGIS Tips, via the CGIS email at CGISTIPS@uscg.mil, or the NCC's phone line the report will satisfy the reporting requirements of 46 U.S. Code § 10104(a).

CHANGES UNDER THE 2023 NDAA

46 U.S. Code § 10104 - Requirement to report sexual offenses

Company After-action Summary:

A responsible entity of a vessel that makes a report under subsection (a) shall—

- Submit to the Commandant a document with detailed information to describe the actions taken by such entity after becoming aware of the sexual assault or sexual harassment incident, including the results of any investigation into the complaint or incident and any action taken against the offending individual; and
- Make such submission not later than 10 days after such entity made the report under subsection (a).

CHANGES UNDER THE 2023 NDAA

46 U.S.C. § 3203 - Requirement to report sexual offenses

Safety Management System (SMS):

- Requires investigatory audit of SMS mandatory reporting and authorizes suspension and revocation of Safety Management documents/certificates for knowingly or repeated failures to comply with § 10104.
- Adds rulemaking requirement to establish response and reporting procedures & training regarding prevention, bystander intervention, reporting, response, investigation.

REPORTING RESOURCES

Marine Safety Information Bulletin

Commandant
U.S. Coast Guard
Inspections and Compliance Directorate
2703 Martin Luther King Jr Ave SE, STOP 7501
Washington, DC 20593-7501

MSIB Number: 1-23
Date: February 9, 2023
E-Mail: cgistips@uscg.mil

Reporting Sexual Misconduct on U.S. Vessels

Sexual misconduct that occurs onboard U.S. flagged vessels harms mariners, interrupts safe operations, and often leads to accidents, lost careers, and a lifetime of trauma for the survivors who endure the abuse. The Coast Guard is committed to investigating and pursuing appropriate enforcement actions for all reports of sexual misconduct on U.S. flagged vessels. This MSIB supersedes the Assistant Commandant for Prevention Policy's MSIB 11-21 "Reporting Sexual Assaults on U.S. Vessels" issued on December 16, 2021.

REPORT SEXUAL MISCONDUCT AT SEA

U.S. Coast Guard National Command Center
(202) 372-2100

U.S. Coast Guard Investigative Service (CGIS)
WWW.USCG.MIL/CGIS

Email: CGISTIPS@uscg.mil


Sexual Misconduct Reporting and Investigation Process
REPORT
CALL
EMAIL
CGIS REVIEW/ INVESTIGATION
S&R NCOE NOTIFIED
Sexual assault and sexual harassment have no place in the maritime industry and the Coast Guard is committed to investigating all reports. Mariners and aspiring mariners have the right to work in an environment free from the fear of being sexually assaulted or sexually harassed.
REPORTING INFORMATION
202-372-2100
CGISTIPS@uscg.mil
KEY
CGIS: Coast Guard Investigative Service
DOJ: Department of Justice
S&R: Suspension and Revocation
NCOE: National Center of Expertise
ALJ: Administrative Law Judge
MMC: Merchant Mariner Credential

U.S. COAST GUARD INVESTIGATIVE SERVICE (CGIS)

KEEPING THE MARITIME COMMUNITY SAFE
The Coast Guard Investigative Service (CGIS) relies on you to provide tips about suspected crimes affecting the maritime community.

CGIS TIPS

KEEPING THE MARITIME COMMUNITY SAFE
The Coast Guard Investigative Service (CGIS) relies on you to provide tips about suspected crimes affecting the maritime community.

That's why CGIS has launched CGIS Tips, a web-based and mobile means to submit tips anonymously to CGIS criminal investigators.

What kind of things can I report?

Any federal crime committed on or affecting the maritime community to include:

- Criminal Violations to include: Domestic Violence, Child Abuse, **Sexual Assault or Abuse. Sexual Harassment**, Homicide, Aggravated Assault, Cyber Crime, Illegal Drug Use, Fraud/Waste & Abuse of Government Funds, Threatening Behavior, Lost or Stolen Government Property, etc.
- Polluting the oceans, rivers, bays and other navigable waters; illegal fishing, maritime smuggling of weapons, narcotics, money, or humans, Merchant Mariner Credential Fraud; TWIC abuse/fraud, etc.

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Suspension and Revocation (46 U.S.C. Chapter 77)

S&R Procedure (46 U.S.C. § § 7702, 7703)

- Coast Guard has jurisdiction over the Merchant Mariner Credential (MMC)
- S&R hearings conducted in accordance with Administrative Procedure Act (APA), Administrative Procedures (5 U.S.C § § 551-559)
- Temporary suspension procedures ~45 days
- 30 days to appeal an ALJ decision to Commandant
- Establish bases for drug testing (periodic, random, reasonable cause and post accident)

Bases for S&R (46 U.S.C. 7703, 7704, 7704a)

Holder of an MMC

- Sexual assault / sexual harassment
- Drug use / Drug law conviction
- Conviction of offense that would prevent the issuance of MMC
- National Driver Registry Act (NDRA) conviction
- Incompetence
- Security Risk

Acting under the authority of MMC

- Violation of law or regulation that is intended to promote marine safety or to protect navigable waters
- Misconduct or negligence

CHANGES UNDER THE 2023 NDAA

46 U.S.C. § 7511. Convicted sex offender as grounds for denial

- Sexual abuse. MMC shall be denied to an individual who has been convicted of a sexual offense prohibited under-- (1) chapter 109A of title 18 (except for subsection (b) of section 2244 of title 18); or (2) a substantially similar offense under State, local, or Tribal law.
- Abusive sexual contact. MMC may be denied to an individual who within 5 years before applying for the license, certificate, or document, has been convicted of a sexual offense prohibited under subsection (b) of section 2244 of title 18, or a substantially similar offense under State, local, or Tribal law.

Reference: CG-MMC Policy Letter No. 03-23 dated May 23, 2023

CHANGES UNDER THE 2023 NDAA

§ 7704a. Sexual harassment or sexual assault as grounds for suspension or revocation

Sexual Harassment.-If it is shown at a hearing within 5 years before the beginning of the suspension and revocation proceedings, is the subject of an official finding of sexual harassment, then the license, certificate of registry, or merchant mariner's document may be suspended or revoked.

Sexual Assault.-If it is shown at a hearing within 10 years before the beginning of the suspension and revocation proceedings, is the subject of an official finding of sexual assault, then the license, certificate of registry, or merchant mariner's document shall be revoked.

Official Finding.

- a legal proceeding or agency finding or decision; or
- a determination after an investigation by the Coast Guard that, by a preponderance of the evidence, the individual committed sexual harassment or sexual assault.

Administrative law judge review.

- Coast guard investigation: shall be reviewed and affirmed by an administrative law judge

QUESTIONS?

CGIS TIPS

In January of 2024, a bartender employed on a cruise vessel called his marine employer's HR department and reported the following:

- He had been assigned as a bartender on one of the company's U.S. flagged cruise vessels from February-June 2021. For 2 weeks prior to boarding, the entire crew was quarantined in a hotel under COVID restrictions.
- While in the hotel, the Captain of the vessel on which he was assigned began sending the bartender sexually suggestive texts.
- Once onboard the vessel, the Captain verbally expressed his desire for a sexual relationship with the bartender.
- The Captain rubbed the bartenders shoulders on several occasions. The bartender never gave permission for the Captain to rub his shoulders.
- 6 weeks into his assignment, the bartender communicated to the Captain he wanted him to stop his behavior. The Captain responded by telling the bartender he was just kidding and to not make a big deal out of it or he would have the bartender removed from the vessel.
- Bartender stated the Captain talked about him negatively to other crew members after their discussion.
- The bartender said he never told anyone about the incident until now because he was scared and did not want to lose his job. However, he had recently read an article about sexual assault and sexual harassment in the maritime industry and decided to speak up.

What is the marine employer / cruise vessel owner required to do?

What is helpful information to forward to the Coast Guard?

Answers

Reporting is required under 10104

Immediately report what the bartender said to HR to Coast Guard / preferably via CGTIPS or the NCC. But can also report to local CG. Initial Report must include (per Sec. 10104(b)(2))

  - Reporter name
  - Vessel info
  - Time / date / location of
  - Brief descript of incident
- No later than 10 days after initial report - forward to the Coast Guard:
  - a document with detailed information to describe the actions taken by marine employer / cruise vessel owner after becoming aware of the incident, including the results of any investigation into the complaint or incident and any action taken against the offending individual.

Helpful information to include with 10104 report

- physical evidence – including videos, text messages, pictures, etc.
- interviews with witnesses' other crew members
- results of the investigation – any employment action(s) taken
- employee history


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THE *LIGHTNING* ROUND WITH THINGS YOU JUST NEED TO KNOW. READY, SET … GO!!

FROM AROUND THE CIRCUITS – A MARITIME LAW UPDATE AND

- *Maritime Case Law Update*: A review of recent case law impacting how you conduct your business, what your insurance needs or requirements are, and what you need to know before going to court or to avoid litigation.

POINTS OF INTEREST YOU NEED TO KNOW!

- The "Subsequent Remedial Measures" Rule – There is a tremendous value of what evidence can be presented under this Rule in defense of a Plaintiff's claim of "Negligence or "Unseaworthiness" in maritime litigation. Here's how it works!
- What must a Plaintiff or Defendant consider in a personal injury lawsuit when the most important legal issue is the law of "Open and Obvious." Which side does it benefit in the case? Can this issue decide the case?
- I often work off of tugs or barges for my marine employers on land and on the inland rivers. However, I sometimes travel by vessel from shore to stationary platforms, either by tug or on a barge, to perform work on the platform. I might even do a chore or two on the vessel or tug while en route. While on a job in the Gulf, I had an accident on a platform. Can I qualify as a Jones Act Seaman to my employer? Suppose I was hurt on a drilling rig rather than a fixed platform – would that make a difference? How much "vessel" time must I spend, on the vessel, to be considered a Jones Act seaman?
- By the way, can damages be owed to a witness in a maritime accident under what is called a "Bystander Claim?" Does such a claim exist in maritime law?

CONTRACTS AND AGREEMENTS (C&A) IN TODAY'S MARITIME WORLD!

- What constitutes a binding "Contract" or "Agreement?" How do you draft a written C&A and reduce it to writing and make it binding between or among the Parties?"
- How might one modify the document in the future, if necessary?
- What clauses assure me that my attorney fees and costs would be recovered back should I prevail if there is litigation over the document?
- How do I make sure any litigation takes place in the Court and State of my choice?
- Do all C&As have to be in writing i.e., is an "oral" Contract or Agreement valid – if so, how does one prove there is or was an oral meeting of the minds?
- Are emails and cell phone text messages binding between or among Parties?
- Watch what you put in an "email" – because…
- As an example, can a "thumbs up" in a "text message" to the other side constitute acceptance of a binding C&A?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

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New Orleans, LA
Defense Attorney

GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
RIVER & MARINE INDUSTRY SEMINAR
2024

RECENT DEVELOPMENTS IN THE LAW OF MARITIME PERSONAL INJURY
(2022 - 2024)

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I. JURISDICTION AND REMOVAL

***Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023).**

The U.S. Supreme Court recently issued a decision in *Mallory v. Norfolk Southern Railway Co.* holding that a Pennsylvania statute requiring corporations to "consent" to suit in Pennsylvania courts in order to register to do business in Pennsylvania does not violate the Due Process Clause of the U.S. Constitution. The majority opinion acknowledges a consent-based theory of general personal jurisdiction that threatens to limit jurisdiction-based defenses for corporate federal defendants.

For almost a decade prior to the Court's decision in *Mallory*, federal courts generally followed the Court's guidance in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), only exercising general personal jurisdiction over out-of-state corporate defendants that had their principal place of business or incorporation in the forum state. *Mallory* significantly limits the utility of *Daimler* for corporate defendants, particularly if other states adopt similar registration regimes.

In *Mallory*, the plaintiff, Robert Mallory ("Mallory"), brought a FELA action against his former employer, Norfolk Southern Railway Co. ("Norfolk"), in Pennsylvania state court to recover for injuries purportedly caused by workplace exposure to carcinogens. Mallory resided in Virginia, and his alleged injuries occurred in Ohio and Virginia. Nonetheless, Mallory argued that, by virtue of its registration to do business in Pennsylvania, Norfolk consented to Pennsylvania's exercise of personal jurisdiction. This argument was premised on a Pennsylvania statute requiring out-of-state companies that register to do business in Pennsylvania to agree to appear in its courts on "any cause of action" asserted against them. Norfolk contended that Pennsylvania's exercise of personal jurisdiction over it would violate the Due Process Clause of the Fourteenth Amendment to the Constitution.

The Pennsylvania Supreme Court agreed with Norfolk and invalidated the Pennsylvania law on the ground that it violates the Due Process Clause. However, the U.S. Supreme Court vacated and remanded the decision, holding that the Pennsylvania statute requiring non-resident companies to consent to suit in Pennsylvania courts in order to do business in Pennsylvania does not violate the Due Process Clause. Moreover, it held that such "consent"

broadly confers personal jurisdiction in Pennsylvania to seek redress against an out-of-state corporation for conduct that occurred elsewhere.

The *Mallory* decision represents a significant departure from previous understandings of the limitations imposed on courts' exercise of personal jurisdiction by the Due Process Clause. Before *Mallory*, the test set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), permitted courts to exercise general personal jurisdiction over a non-resident corporation only when it had established sufficient contacts with the forum state. The *Mallory* majority, however, ruled that the contacts-based test established in *International Shoe* only applies in the absence of consent. Accordingly, *Mallory* clarified the existence of an additional, consent-based theory of personal jurisdiction. When a corporation has consented to suit in a particular jurisdiction, under *Mallory*, the contacts-based test need not be satisfied.

Notably, Justice Samuel Alito wrote a separate concurrence questioning whether the Pennsylvania statute violates the Dormant Commerce Clause of the Constitution, which "prohibits state laws that unduly restrict interstate commerce." This argument will likely be addressed on remand.

***Marquette Transportation Co. v. Simon*, No. 14-21-00729-CV, 2022 WL 17587999 (Tex. App. Dec. 13, 2022).**

Plaintiff Gerald Simon suffered a stroke while working aboard a vessel owned and operated by Marquette Transportation Company, LLC and Marquette Transportation Company Gulf-Inland, LLC (collectively, "Marquette"). Simon filed suit against Marquette asserting claims for Jones Act negligence, unseaworthiness, and maintenance and cure.

Marquette moved the trial court for a special appearance to challenge the court's personal jurisdiction over Marquette. In support of its argument, Marquette attached a declaration from the claims manager testifying that the Marquette companies were Delaware limited liability companies with principal places of businesses outside Texas and that the incident occurred in Louisiana waters. Simon countered by pointing out various contacts Marquette held in Texas. For instance, Marquette maintains an office in La Porte, Texas, employees in the La Porte office were responsible for vessel safety training, and Marquette allegedly failed to pay him maintenance and

cure from the La Porte office. Based on these allegations, the trial court denied the motion on the ground that specific personal jurisdiction was present.

Marquette thereafter appealed the denial to the Court of Appeals of Texas for the 14th District. On appeal, Marquette argued that the operative facts of the litigation were not substantially connected to its contacts in Texas because the incident occurred when the vessel was on the intracoastal waterway in Louisiana. However, the Court of Appeals disagreed, holding that the location of a crewmember's injury outside of Texas is not dispositive of whether Marquette is subject to specific personal jurisdiction in Texas.

Because Marquette could not substantively counter Simon's detailed allegations concerning the company's specific jurisdictional engagements in Texas, the Court of Appeals upheld the district court's decision to reject Marquette's special appearance objection.

***Paxton v. Georgia Power Co.*, No. 4:22-CV-00081, 2022 WL 17834062 (M.D. Ga. Dec. 21, 2022).**

Georgia Power Company ("Georgia Power"), which owns and operates Oliver Dam — a hydroelectric generation facility on the Chattahoochee River straddling the Georgia and Alabama borders — was sued in Georgia state court in connection with the death of commercial diver, Alex Reed Paxton. Paxton drowned after getting trapped by a pipe within Georgia Power's infrastructure while working at the dam.

Georgia Power removed the case to federal court in Georgia on the grounds of federal question jurisdiction, federal officer removal, admiralty jurisdiction, and diversity jurisdiction. The plaintiffs, Paxton's parents, filed a motion to remand, which the court initially denied based on the presence of federal officer jurisdiction. In the initial order denying remand, the court did not address whether federal question or admiralty jurisdiction provided the court with the authority to retain the action.

The plaintiffs sought reconsideration of the court's denial of the motion, or, in the alternative, leave to file an interlocutory appeal. Plaintiffs' motion prompted the court to further evaluate the bases of federal question and admiralty jurisdiction before deciding whether to certify the issue on appeal. With respect to federal question jurisdiction, the court held that the existence of Georgia Power's Federal Energy Regulatory Commission (FERC) license

and federal governmental regulations "necessarily raise" federal issues. Thus, federal question jurisdiction was established.

However, determining the applicability of admiralty jurisdiction proved more complex. The court first analyzed whether the tort occurred on navigable waters (the location requirement) and gave weight to evidence that Oliver Dam is located on the part of the Chattahoochee River that is used for a variety of maritime commercial activities, including private marinas and fuel stations. Further, Georgia Power's FERC license specifically required Oliver Dam to "be designed to permit the construction of locks thereat, if the interests of navigation so demand" and required Georgia Power to "furnish rights-of-way for such facilities and water in such amounts as may be necessary for navigation." Based on these points, the court found that the location requirement was satisfied.

Second, the court considered whether there was a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement). The court ruled that Paxton's death, while tragic, is not the type of incident that poses "more than a fanciful risk to maritime commerce." Although commercial diving is substantially related to maritime activity, the failure of the disruptive impact on maritime activity prong defeats the existence of admiralty jurisdiction.

Ultimately, the court perceived the plaintiffs as unable to meet the stringent prerequisites for such a review and hence refused to certify the appeal while also denying the remand motion for interlocutory scrutiny.

VII. SEAMAN STATUS

***Johnson v. Cooper T. Smith Stevedoring Co., Inc.*,74 F.4th 268 (5th Cir. 2023).**

In *Johnson*, the Fifth Circuit affirmed a summary judgment ruling that the plaintiff was not a Jones Act seaman. However, the decision turned on the plaintiff's failure to produce sufficient evidence to survive summary judgment, rather than a determination on a well-developed record that the plaintiff was not a seaman. Therefore, *Johnson* offers little guidance as to who is and who is not a seaman but does provide guidance with respect to the nature of evidence needed to support a claim for seaman status.

Defendant Cooper T. Smith Stevedoring ("Cooper") operated a facility on the Mississippi River where bulk cargo from barges was transferred to oceangoing vessels. These operations occurred mid-stream in the river, some (unspecified) distance from shore. Cooper owned the M/V AMERICA, which would transfer cargo from laden barges to an awaiting oceangoing vessel. Cooper did not own the barges or oceangoing vessels.

Lester Johnson worked on-and-off for Cooper for 20 years. He performed various jobs, including operating a front-end loader, flagging cranes, and loading barges. On the night in question, Johnson rode a crewboat from Cooper's dock to the AMERICA. Johnson then boarded a cargo barge where he used a front-end loader to move soybean grain in the barge's hold into the AMERICA's awaiting crane bucket. After his work was complete, Johnson climbed out of the hold to the deck of the barge where he slipped on loose grain and fell 13 feet to the deck of the AMERICA.

Claiming he was a member of the AMERICA's crew, Johnson sued Cooper under the Jones Act. The parties did not dispute, and the Fifth Circuit found, that Johnson satisfied the first part of the seaman status test (*i.e.*, contributing to the mission of the vessel). As to the duration of his connection to the AMERICA, Johnson relied on his deposition where he testified that (1) he worked for Cooper for more than 20 years and (2) he took a crew boat provided by Cooper from the dock to the AMERICA on the night in question. This evidence failed to create a triable issue because the fact that Johnson worked for Cooper for 20 years did not, without more, show that he had a connection with the AMERICA that was substantial in duration. Likewise, the fact that Johnson was transported by crewboat to the AMERICA on the night

he was injured and happened to be on a vessel when he was injured provided only a limited "snapshot" of Johnson's purported connection to the AMERICA. In *Chandris, Inc. v. Latsis*, the Supreme Court rejected such an approach and instead required a "more enduring relationship" with the vessel. 515 U.S. 347, 363 (1995). Johnson also cited a declaration from Cooper's Director of Maintenance which showed that workers like Johnson performed their work on vessels midstream and that Cooper used the AMERICA in connection with these activities. This evidence was also insufficient because:

> the declaration is silent as to the duration of the connection that longshoremen like Johnson had with the AMERICA. . . . [W]e simply do not know and cannot infer based on this record how often he reported to or worked on, around, in service of, or in connection with the AMERICA; there is a gap in the summary-judgment evidence that dooms his claim to seaman status.

In other words, Johnson failed to produce evidence that showed he spent at least 30% of his employment time with Cooper working "on, around, in service of, or in connection with" the AMERICA.

Because Johnson failed to meet the "duration" prong of the seaman status test, the court concluded he was not a seaman without having to address the "nature" prong of the seaman status test.

COMMENTS ON *JOHNSON*:

VII. The facts of *Johnson* are very similar to those of *Meaux v. Cooper T. Consolidated, LLC*, *et al.*, 601 F. Supp. 3d 38 (E.D. La. May 3, 2022) (Ashe, J.). *Meaux* initially held on summary judgment that the plaintiff was a seaman but concluded otherwise following trial (in which the plaintiff did not participate). Specifically, *Meaux* determined that the plaintiff met the duration prong, but failed the nature prong. Because of the way *Johnson* was decided, it remains an 6uestionn whether *Meaux* was correctly decided.

2. Nevertheless, *Johnson* contains some language that seems to support *Meaux*'s conclusion that the **duration** prong was met where the plaintiff spent nearly all of his employment time in the service of a vessel, even if he was not physically located on it. In *Meaux*, the defendant argued that the plaintiff could not meet the duration prong because he spent very little time actually

on the M/V BAYOU SPECIAL (defendant's crane barge that loaded and unloaded third-party vessels, similar to the role fulfilled by the AMERICA); rather, he was usually positioned on the third-party vessels that were being loaded or unloaded. *Meaux* rejected this attempt to graft a strict physical location onto the duration prong, relying on a quote from *Chandris*: "[a] worker who spends less than about 30 percent of his time ***in the service of a vessel in navigation*** should not qualify as a seaman under the Jones Act." *Meaux*, 601 F.3d at 50 (E.D. La. Sept. 10, 2020) (emphasis added). *Johnson* similarly appears to reject a strict locality requirement when it states, "we simply do not know . . . how often he reported to or worked on, ***around, in service of, or in connection with*** the AMERICA." 74 F.4th at 274 (emphasis added). Again, *Johnson* turned on "a gap in the summary-judgment evidence"; *Johnson* does not categorically hold that workers like Jonathon Meaux do not meet the duration prong.

3. *Meaux* initially held that the nature prong was satisfied, but ultimately concluded following trial that the nature prong was not satisfied. Both times Judge Ashe commented that the decision was a "close call." *Meaux* appears to be in tension with *Blanda v. Cooper/T. Smith Corp.*, 599 F. Supp. 3d 385 (M.D. La. Apr. 20, 2022) (deGravelles, J.), particularly with respect to *Sanchez*'s "seagoing activity" factor. Because *Johnson* did not address the "nature" prong, it remains an open question in the Fifth Circuit whether workers similar to those in *Johnson*, *Meaux*, and *Blanda* (although *Blanda* may be distinguishable) satisfy the "nature prong," and the "seagoing activity" factor in particular.

4. *Johnson* makes clear that "perils of the sea" is still a factor to be considered alongside the three other *Sanchez* inquiries when determining the nature element. *See* 74 F.4th at 273. Post-*Sanchez*, we consider four factors:

> (1) ***the worker's exposure to 'perils of the sea,' meaning the hazards of a maritime working environment***; (2) whether 'the worker owe[s] his [or her] allegiance to the vessel, rather than simply to a shoreside employer'; (3) if his or her work is 'sea-based or involve[s] seagoing activity'; and (4) whether 'the worker's assignment to a vessel [is] limited to performance of a discrete task after which the worker's connection to the vessel end[s],' or whether he or she stays with the vessel. *Id.* (emphasis added) (modifications in original)).

5. Some post-*Sanchez* district court decisions have pondered whether

Sanchez set forth a multi-factor balancing test or a test with four mandatory elements. *Johnson* contains dicta that suggests the former. Specifically, the court uses the word "element" when referring to the parts of the *Chandris* test—and these are undeniably mandatory elements—but describes *Sanchez* as setting forth "factors." *Id.* The Fifth Circuit held that:

> [t]he second part of the [*Chandris*] test—whether the worker has a substantial connection to a vessel—has two ***elements*** . . . . For the duration ***element,*** the 'rule of thumb for the ordinary case' is that "[a] worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. Recently, in *Sanchez v. Smart Fabricators*, the en banc court refined this Circuit's test for the nature ***element***. Post-*Sanchez*, we consider four ***factors*** when deciding whether a worker's connection to a vessel is substantial in nature . . . ." (emphasis added)).

6. There is an open question as to whether "perils of the sea" is on equal footing with the three other *Sanchez* factors or is of lesser importance. *Johnson* gives no indication that "sea perils" is per se entitled to less weight than any other factor, and in fact lists it first among the four factors. Thus, *Johnson* indicates (in dicta) that "perils of the sea" is on equal footing with the other *Sanchez* factors.

***In re Ingram Barge Co., L.L.C.*, No. 22-30577, 2023 WL 6123107 (5th Cir. 2023).**

The claimant, Gregory Ratcliff ("Ratcliff"), was employed as a barge cleaner by T.T. Barge Cleaning Mile 183, L.L.C. ("T.T. Barge"), a company in the business of cleaning and repairing barges. Ingram Barge Company LLC ("Ingram") hired T.T. Barge to clean barge IB976. The IB976's last cargo was caustic soda, and Ingram made T.T. Barge aware the barge was being sent to the T.T. Barge facility to be cleaned of caustic soda residue. Ratcliff was a member of the team tasked with cleaning the barge. Ratcliff alleged that he suffered a significant back injury which resulted in surgery as well as catastrophic chemical burns to his arm, leg groin, abdomen, and esophagus from exposure to the caustic soda while cleaning Ingram's barge.

Ratcliff originally filed his petition for damages against Ingram and T.T. Barge in Louisiana state court and alleged he was a Jones Act seaman. Ingram timely filed a limitation action in the United States District Court for the Middle District of Louisiana.

T.T. Barge moved for summary judgment as to Ratcliff's seaman status, which the district court granted. *See Matter of Ingram Barge Co. LLC*, CV 20-00313-BAJ-SDJ, 2022 WL 1524984 (M.D. La. May 13, 2022). Ingram moved for summary judgment as to all of Ratcliff's negligence claims against Ingram. The district court granted Ingram's summary judgment motion and dismissed the entire limitation action and all claims against Ingram with prejudice. *See Matter of Ingram Barge Co. LLC*, CV 20-00313-BAJ-SDJ, 2022 WL 3273276 (M.D. La. Aug. 10, 2022). Ratcliff appealed the two summary judgment rulings.

Ratcliff's first assignment of error was the district court's determination that T.T. Barge's cleaning barge did not qualify as a "vessel" under the Jones Act, impacting Ratcliff's ability to claim seaman status and consequently the remedies available to him under the law.

T.T. Barge and Ingram argued the cleaning barge functioned more like a dock or work platform, as it is semi-permanently attached to land, rarely moved, and not primarily intended for maritime transportation. Ratcliff, on the other hand, contended that the barge does move on water and satisfies the conditions to be considered a vessel because a reasonable observer would note that it is designed to a practical degree for transporting people or things over water, based on the definitions provided in Supreme Court rulings in *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) and *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 497 (2005).

In reviewing the district court's rulings, the Fifth Circuit noted that determining what qualifies as a "vessel" is complex and relied heavily on *Lozman* and *Stewart*, which focused on whether a watercraft was practically capable of maritime transportation and whether a reasonable observer would consider it designed to a practical degree for transporting people or things over water. Applying these standards, the Court disagreed with Ratcliff's argument, emphasizing that T.T. Barge's cleaning barge was not regularly used for transportation over water and is more or less permanently attached to the land. Therefore, it did not satisfy the conditions to be termed as a "vessel" under the Jones Act.

Furthermore, the Court rejected Ratcliff's argument regarding the standard of review of summary judgment rulings. Ratcliff maintained that the question of the barge's vessel status should be decided by a jury, not through summary judgment. However, the Court pointed to precedent that allows for summary judgment in cases where facts and the law "support only one conclusion." The Court affirmed the district court's decision, stating that the

uncontroverted facts and law point unmistakably to the conclusion that the cleaning barge does not qualify as a vessel under the Jones Act.

Ratcliff's second assignment of error was the district court's denial of his status as a seaman under the Jones Act. To qualify as a seaman, a worker must fulfill two conditions set out in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 373 (1995), (1) contributing to the vessel's function or mission and (2) having a substantial connection to a vessel in terms of both duration and nature. This separates sea-based maritime employees from land-based workers with transient vessel connections.

Ratcliff argued that even if the T.T. Barge cleaning barge did not qualify as a vessel, he nonetheless qualified as a Jones Act seaman based on his connection to Ingram's barges. Ratcliff claimed he met the criteria set forth in *Chandris* regarding contributing to the vessel's function and spending substantial time on it. However, based on three factors derived from *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 997 F.3d 564, 568 (5th Cir. 2021) (en banc) to determine a "substantial connection," the Court found that Ratcliff did not satisfy the requirements.

The first *Sanchez* factor explores the worker's allegiance, either to the vessel or a shoreside employer. The court noted that Ratcliff owed his allegiance to his shoreside employer, T.T. Barge, and not the vessel, thus failing this criterion. The second *Sanchez* factor assesses whether the work is sea-based or involves a seagoing activity. Although Ratcliff argued that his work was seagoing because it exposed him to the perils of the sea, the Court held that his work activities were neither sea-based nor seagoing, largely because the barges were always moored when he was working on them and he did not undertake duties related to moving vessels. The third *Sanchez* factor investigates whether the work is confined to a discrete task or involves sailing from port to port. The court observed that Ratcliff's work was limited to discrete cleaning tasks on the barges, and he did not sail from one location to another as part of his duties. The Court ultimately concluded that Ratcliff did not satisfy the substantial connection requirement, particularly regarding the nature of the connection, thereby affirming the district court's summary judgment that Ratcliff was not a seaman under the Jones Act.

***Cole v. Oceaneering Int'l, Inc.*, No. CV 21-1348, 2023 WL 3092729 (E.D. La. Apr. 26, 2023), *opinion vacated in part on reconsideration*, No. CV 21-1348, 2023 WL 4459017 (E.D. La. July 11, 2023).**

This case concerns a plaintiff that had both a direct employer and a borrowing employer. The court concluded that when a plaintiff brings a Jones Act claim against a borrowing employer, not his direct employer, only the plaintiff's employment history with the borrowing employer (the alleged Jones Act employer) is relevant when determining the "duration" prong of the *Chandris* test, not his longer history with his direct employer.

Daryl Cole was employed as a crane operator by Huisman North American Services, LLC ("Huisman") for over three years, from November 1, 2017, to February 21, 2021. During that time, Huisman would assign Cole to operate cranes on various vessels owned by Huisman's customers. From December 11, 2020, to February 21, 2021, Huisman assigned Cole to operate the crane on the M/V OCEAN PATRIOT, a 240-foot saturation diving support vessel. The OCEAN PATRIOT was owned and operated by Oceaneering International, Inc. ("Oceaneering"). On February 18, 2021, Cole suffered a stroke while on the OCEAN PATRIOT, but the ship's onboard medic misdiagnosed his condition as seasickness and an abscess in his mouth. Consequently, Cole was not evacuated to a hospital until February 21.

Cole sued Oceaneering under the Jones Act, claiming it was vicariously liable for the negligence of the medic. Notably, Cole did not bring a Jones Act claim against Huisman. The parties filed cross-motions on the issue of seaman status. The key issue was whether Cole satisfied the "duration" part of the *Chandris* test—specifically, whether Cole's entire three-year employment with Huisman should be considered for purposes of calculating the 30% rule of thumb or only the three months he was assigned to the OCEAN PATRIOT.

On April 26, 2023, the court determined that Cole's entire three-year employment with Huisman was the relevant period for purposes of the *Chandris* test. Viewed through that lens, Cole spent less than 5% of his employment time in the service of the OCEAN PATRIOT. Consequently, the court held that Cole lacked a substantial temporal connection to the OCEAN PATRIOT and was not a seaman.

On July 11, 2023, the court issued several more rulings in the case, two of which are relevant here. First, the court held that Cole was a "borrowed

servant" of Oceaneering. Second, the court granted Cole's motion for reconsideration of the April 26th ruling and determined that "the Court must apply the *Chandris* substantial connection test in the context of Cole's employment with his alleged Jones Act employer, Oceaneering**,** and ***not*** his nearly three-year employment with his direct employer, Huisman." (emphasis added). Cole's three-year employment would be relevant to his Jones Act claim against Huisman, if he had asserted such a claim. However, Cole claimed that only Oceaneering was his Jones Act employer, and, as noted, the court held that Oceaneering was Cole's borrowing employer. Thus, the court limited the scope of duration analysis to the three-month period that Cole worked for Oceaneering. Because Cole spent 100% of this time working on Oceaneering's vessel, and because he contributed to the mission and function of Oceaneering's vessel, the Court determined that Cole was a seaman.

VII. MAINTENANCE AND CURE

Certain Underwriters at Lloyds, London v. Cox Operating LLC, 83 F.4th 998 (5th Cir. 2023).

In this case, the Fifth Circuit addressed whether the limitation to the subrogation waiver in a protection and indemnity ("P&I") policy precluded the insurer's recovery of maintenance and cure benefits paid. The Jones Act seaman brought this lawsuit against Select Oilfield Services, LLC ("Select"), his employer, and Cox Operating LLC ("Cox"), the operator of the offshore platform where he sustained injuries on the job.

Pursuant to a Master Services Agreement, Select had agreed to defend and indemnify Cox for "all losses of every kind and character arising out of bodily injury, illness, death, property damage…" regardless of fault. Select procured general liability coverage and P&I coverage that included Cox as an additional assured and contained waivers of subrogation in Cox's favor. The P&I policy was written by Certain Underwriters at Lloyds, London ("Lloyds"). The P&I policy covered "all such loss and/or damage and/or expense as the [a]ssured shall as owners of the vessel named herein have become liable to pay," including "hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel." Lloyds agreed to "waive all rights of subrogation against any parties so released" but added that "no party shall be deemed an [a]dditional [a]ssured or favoured with a waiver of subrogation on any vessel insured hereunder which is not actually engaged or involved in the intended operations at the time of loss[.]"

Lloyds paid maintenance and cure benefits to the seaman and then filed an intervenor complaint against Cox seeking recovery of those benefits. Lloyd's argued that the limitation clause in the waiver of subrogation provision applied because the injury happened on Cox's—not Select's—platform. Cox filed a motion for summary judgment, asserting that Lloyds had waived its subrogation rights and thus had no right to recover from Cox through subrogation. The district court granted the motion, finding that Select was in fact "involved in the intended operations of the parties at the time Jones was injured." Lloyds appealed, asserting that the district court erred because the injury was not covered by the P&I policy and that the seaman's claim fell within the limitation clause of Lloyds' waiver of subrogation rights.

The Fifth Circuit affirmed the district court, holding that (1) the seaman's claim fell within the P&I policy and (2) the limitation of Lloyds' waiver of subrogation did not apply. Due to the absence of general maritime law addressing these issues, the Court applied Louisiana contract law, which requires that the policy language be read in conjunction with the preceding paragraphs. On the first issue, the Court held that "Select's duty to provide Jones with maintenance and cure exists regardless of fault because Jones' injuries were sustained while he was in "service of his ship," the M/V SELECT 102. The Court emphasized that Select had waived its right to seek maintenance and cure reimbursement from Cox under the indemnity provision of the Master Services Agreement, and that, under Louisiana law, a subrogated insurer can have no greater rights than those possessed by its subrogor. Regarding the second issue, the Court found that the limitation of the waiver of subrogation did not apply because the M/V SELECT 102 was involved in the operations intended by Cox and Select when the seaman was injured. The Court pointed out that M/V SELECT 102 was engaged in its "intended operations" as defined under the MSA and that the seaman was serving Cox as captain of the vessel.

***Flowers v. Magnolia Marine Transport Co.*, No. 22-cv-1209, 2023 WL 5831714 (E.D. La. Sept. 8, 2023).**

Judge Barbier granted in part a motion for partial summary judgment dismissing certain elements of plaintiff's maintenance and cure claim under *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968). The Plaintiff, Jamal Flowers, underwent a pre-employment physical before hiring on with the defendant in 2021, where he represented he had not ever injured his neck, back, arm or any other part of his body. However, Flowers had previously been in two car accidents in 2017 and 2020, for which he was treated for neck, back, and left shoulder injuries. He was also involved in a 2020 workplace forklift incident where he sprained his cervical spine, his left shoulder and had a head contusion. Judge Barbier found Flowers had intentionally concealed his prior injuries by marking "n" (for "no") on the form which asked about prior injuries to his back, neck, arm, or other body parts. While Flowers argued that those were "minor" injuries, he also testified that he was aware it was important for his employer to understand his medical history and to be honest about that history. Regarding the materiality element, Flowers argued that it was not met because his employer performed an MRI and there was a question about whether the failure to disclose was actually material since the MRI showed no issues. Judge Barbier reasoned that such a

conclusory was not sufficient to overcome summary judgment, particularly where, as here, the employer offered evidence that it would have required additional testing or consultation had the prior injuries been disclosed. Finally, because there was no question that Flower's concealed prior injuries involved the same body parts (neck, back and shoulder) as his current complaints, the causal connection element was satisfied. The court denied the *McCorpen* motion, however, as to the plaintiff's claimed psychological injuries because there was insufficient evidence he had previously treated for a similar injury. The court concluded that Flowers forfeited his right to maintenance and cure for the back, neck and shoulder injurIes.

***Al Qari v. American Steamship Co.*, 2023 WL 5660045 (E.D. Mich. Aug. 31, 2023)**

In this case, the Eastern District of Michigan examined the extent of the cure obligation owed to a Jones Act seaman. Hussein Al Qari alleged that he was seriously injured when he slipped and fell aboard defendant American Steamship Company's ("American") vessel. Al Qari filed suit, asserting Jones Act negligence and unseaworthiness and sought maintenance and cure benefits.

American began providing maintenance and cure benefits to Al Qari shortly after the incident, appointing a remote nurse to provide nurse case management service and care coordination to Al Qari. This nurse worked with Al Qari until he retained counsel, who appointed a more expensive, in-person nurse to provide the same type of services. The new nurse began submitting invoices to American for her services. Al Qari and American filed separate motions for summary judgment. American's motion for summary judgment pertained to all of Al Qari's claims.

With regard to maintenance and cure, the Court held that the nurse care management services selected by Al Qari's personally-chosen nurse care manager do not fall within the scope of cure under general maritime law. The Court explained that the nurse care manager "did not examine Plaintiff, prescribe him medication, or provide any medical treatment," so her duties did not constitute medical treatment or care. The Court pointed out that even if these services were within the scope of cure, American had already satisfied its obligations by providing the remote nurse care manager free of charge to Al Qari. The Court granted American's motion for summary judgment, dismissing all of Al Qari's claims.

***Moran v. Signet Mar. Corp.*, No. CV H-21-4214, 2023 WL 2971768 (S.D. Tex. Apr. 17, 2023).**

Charles Moran, a captain employed by Signet Maritime Corporation ("Signet"), tripped and fell on his way to get a haircut before a 28-day hitch, breaking his ankle. He filed suit in state court seeking maintenance and cure, damages for wrongful discharge, unearned wages, and punitive damages for refusal to pay maintenance and cure. The suit was removed to federal court on the basis of diversity jurisdiction. Defendant removed the suit asserting that the claim was for maintenance and cure and not a claim for damages based on the Jones Act. As diversity and jurisdictional amount were met, the suit could be removed. Prior to trial, Judge Lee Rosenthal dismissed the claim for punitive damages, finding no evidence that the employer was callous in failing to pay maintenance and cure.

The case proceeded to trial before a jury, which determined that Moran's injuries were sustained in the service of the vessel and that he was not wrongfully terminated. After the jury returned its verdict, the court held a one-day trial to determine the amount of maintenance and cure as well as what elements could be recovered.

<u>*Maintenance*</u>

a. *Groceries*: Moran claimed maintenance for groceries at $150 per week for himself and his brother with whom he lived. The judge noted that the USDA Food Chart considered $376.70 a month to be reasonable for a man of his age and circumstances. The court awarded $75 per week for Moran, not including his brother.

b. *Lodging*: The parties did not dispute the amount of $1,621.06 per month when he lived on a boat, before it was repossessed. Moran established his permanent residence at his brother's home after his boat was repossessed. The court found this amount to be reasonable.

c. *Other Expenses*: He also sought to recover expenses for his truck, cell-phone service, and internet service. The court was not persuaded that maintenance covers such expenses.

Cure:

Moran sought cure for treatment to his ankle, shoulder, and back. He was awarded cure for the ankle but not for the shoulder and back, as he did not report those injuries until months after the fall.

Mileage:

The court awarded mileage at the IRS rate of $.16 per mile for 2021 and $.18 per mile for 2022. However, the court did not award mileage for visits to physicians in Texas prior to his return to Louisiana after the accident.

Offset to Medical Expenses:

Moran received short and long-term disability benefits from MetLife. Signet attempted to offset these payments with its maintenance and cure obligation. As Signet failed to prove that these payments were made to indemnify the employee against Signet's liability, the offset was denied.

Unearned Wages:

The court awarded Moran $16,300 in unearned wages.

Prejudgment Interest:

The court awarded prejudgment interest from the time suit was filed.

***Parker Drilling Offshore USA, LLC v. Painter*, No. 6:22-CV-05808, 2023 WL 5273788 (W.D. La. Aug. 2, 2023), *report and recommendation adopted*, No. 6:22-CV-05808, 2023 WL 5255932 (W.D. La. Aug. 15, 2023).**

Craig Painter, who was employed by Parker Drilling Offshore USA, LLC ("Parker Drilling") to work on its RIG 55B that was docked at a shipyard in Amelia, Louisiana, allegedly injured his back and knee when he slipped while cleaning tanks. Parker Drilling began paying maintenance and cure to Painter, but it stopped paying and filed this declaratory judgment action against Painter in federal court in the Western District of Louisiana, claiming that Painter denied any back and knee injuries and prior drug use during his pre-employment physical examination. Parker Drilling sought a declaration that it did not owe maintenance and cure based on a *McCorpen* willful concealment defense. Two months later, Painter filed suit against Parker

Drilling in the Louisiana state court in Iberia Parish, bringing claims under the Jones Act and under the general maritime law (unseaworthiness and maintenance and cure), and alternatively under Section 5(b) of the LHWCA. The same day, he moved to dismiss Parker Drilling's federal suit based on the *Trejo* factors enunciated by the Fifth Circuit to consider when there is a motion to dismiss a federal declaratory judgment action.

In response, Parker Drilling recognized the authority for dismissal of preemptive employer suits, but it argued that courts had granted declaratory relief to employers "when faced with viable *McCorpen* defenses." Magistrate Judge Ayo distinguished those cases, however, because the employee had filed a counterclaim or a federal suit, and the court did not have to apply the *Trejo* factors in those cases. As application of the *Trejo* factors favored dismissal, Magistrate Judge Ayo recommended dismissal of the federal suit, and Chief Judge Doughty agreed with the recommendation and dismissed the case without prejudice on August 14, 2023.

***Clark v. Offshore Marine Contractors, Inc.*, 2023 WL 5608013 (E.D. La. Aug. 30, 2023)**

In this recent case, Judge Barbier dismissed a seaman's claims for maintenance and cure benefits, holding that the *McCorpen* defense was satisfied. The seaman, Jamal Clark, alleged that he suffered extensive physical and psychological injuries while aboard the M/V MICHAEL EYMARD during Hurricane Ida. Clark filed suit against his Jones Act employer, Offshore Marine Contractors ("Offshore") for damages and maintenance and cure benefits. Offshore filed a motion for summary judgment arguing that maintenance and cure benefits were not owed because Clark had lied on his pre-employment questionnaire.

A Jones Act employer/vessel owner nearly always has the obligation to provide maintenance and cure benefits to any Jones Act seaman if they suffer injuries or fall ill in the service of a vessel. However, this right is not absolute. Maintenance and cure is not owed if the seaman "knowingly or fraudulently concealed his condition from the vessel owner at the time he was employed." *Jauch v. Nautical Servs*., 470 F.3d 207 (5th Cir. 2006). This defense is known as the *McCorpen* defense, as promulgated in the Fifth Circuit case *McCorpen v. Cent. Gulf S. S. Corp.*, 396 F.2d 547 (5th Cir. 1968). To successfully invoke this defense, the Jones Act employer must demonstrate 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 causal link exists between the withheld information and the injury that is the subject of the complaint."

Judge Barbier held that all three elements of the *McCorpen* defense were satisfied and dismissed Clark's maintenance and cure claims as to his neck and lower back. Judge Barbier pointed out that Clark had selected "NO" to questions about his medical history and prior employment when he in fact had sustained a lower back injury at a previous employer and a prior neck injury while working at Offshore. The Court held that these intentionally-concealed facts were material to Offshore's decision to hire Clark, as it was Offshore's policy to not hire individuals with preexisting neck or back injuries. Lastly, the Court found that the preexisting injuries to Clark's neck and lower back were nearly identical in nature to the injuries allegedly sustained during Hurricane Ida.

IV. JONES ACT LIABILITY

***Ingram Barge Co. v. Caillou Island Towing Co., Inc.*, 622 F. Supp. 3d 240 (E.D. Aug. 18, 2022).**

In this case, the United States District Court for the Eastern District of Louisiana held "that a Jones Act employer cannot be allowed to maintain a cause of action for damages against its seaman based on fraud in retaliation or response to a seaman's suit for maintenance and cure or damages." *Id.* at 253-53. This decision conflicts with another E.D. La. decision, *Crowe v. Marquette Transp. Co. Gulf-Inland, LLC*, No. 14-1130, 2015 WL 13529959 (E.D. La. May 5, 2015) (Engelhardt, J.) (decision only available on PACER), but it accords with *Domo v. Galliano Tugs, Inc.*, 2011 WL 6817824, *1 (E.D. La. Dec. 28, 2011) (Berrigan, J.), *aff'd Sub. nom*, *Dolmo v. Tugs*, 479 F. App'x 6[56] (5th Cir 2012).

Cecil Brashear was employed by Caillou Island Towing Company ("Caillou Island") as a seaman on the push boat LA BELLE. Brashear was allegedly thrown from his bunk and injured when the LA BELLE's tow collided with another vessel. Brashear sued Caillou Island under the Jones Act and general maritime law. Caillou Island brought a counterclaim for fraud, asserting Brashear was not injured in the collision; rather, he sustained his injuries about a month before the collision while at home. Caillou Island sought recovery for past maintenance and cure payments, attorneys' fees and expenses, increased insurance premiums, and harm to its reputation and business. The court granted Brashear's Rule 12(b)(6) motion and dismissed Caillou Island's counterclaim.

The court relied primarily on *Boudreaux v. TransOcean Deepwater, Inc.*, 721 F.3d 7[23] (5th Cir. 2013), where the Fifth Circuit held that a Jones Act employer who establishes a *McCorpen* defense to a maintenance and cure claim is not entitled to restitution for benefits already paid to the seaman. *Boudreaux* explained that the law already authorizes an employer to investigate a maintenance and cure claim before paying, establishes the *McCorpen* defense, and enables an employer to deduct past payments from any Jones Act damages award a seaman may receive. However, turning the employer's *McCorpen* defense into an affirmative right of recovery "would stand as a serious impediment to the seaman's economic recovery, and its threat would have a powerful *in terrorem* effect in settlement negotiations." *Id.* at 727.

Here, the court observed that "*Boudreaux*'s broader teaching is that courts should proceed with great caution before 'creating a right of action never before recognized in maritime law' given the existing scheme that carefully balances the interests of seamen against those of their employers." *Ingram Barge*, 622 F. Supp. 3d at 250. Echoing *Boudreaux*, the court reasoned that under current law the vessel owner who prevails at trial as a result of no negligence, no causation, etc., pays nothing, and this approach has held for decades. The court expressed concern that recognizing Caillou Island's counterclaim would only serve as a threat to a seaman who brings a Jones Act claim, as seamen are typically judgment proof. And, given that Jones Act employers dispute the extent, nature, and cause of a seamen's injuries "[i]n nearly every case," the court predicted that a fraud counterclaim, if recognized, would be asserted with similar frequency. The court refused to "open the floodgates" to such litigation, which would effectively "chip away" at the Jones Act's purpose of promoting maritime safety and national commerce (seaman would be discouraged from pursing their statutory rights and employers would consequently have diminished economic incentive to ensure safe conditions on their vessels).

The court rejected Caillou Island's argument that *Boudreaux* is inconsistent with *Withhart v. Otto Candies, LLC*, 431 F.3d 8[40] (5th Cir. 2005), where the Fifth Circuit held that a Jones Act employer could sue its seaman-employee for property damage under a negligence theory.

***Sims v. Inland Marine Servs., Inc.*, No. 5:22-CV-00040-TBR, 2022 WL 3570359 (W.D. Ky. Aug. 18, 2022)**

In *Sims*, the United States District Court for the Western District of Kentucky analyzed whether a Kentucky COVID-19 statute operates as a defense to a Jones Act negligence claim where a seaman contracted, and subsequently died from the virus. The statute provided "immunity or limit[ed] liability for claims for injury, death, damages or loss arising from or relating to the Coronavirus/Covid-19."

The plaintiffs moved to strike the defense under Federal Rule of Civil Procedure 12(f), arguing that "[t]he Jones Act supersedes the application of the statutes of the several states" and that "[s]tate law is not controlling in determining the incidents of an employee's right to recover damages against his employer." Defendants countered that state law supplements federal

maritime law "where there is no existing maritime rule which governs the plaintiff's alleged basis of liability."

The court ultimately concluded that application of the state statutes in relation to the Jones Act is appropriate given that the Jones Act and general maritime law are silent on the scope of liability when a seaman contracts and dies from COVID-19. Therefore, the court allowed the defense to proceed to further discovery.

***In re Adriatic Marine, LLC*, No. CV 20-1488, 2022 WL 3027825 (E.D. La. Aug. 1, 2022).**

While unloading cargo from the M/V CARIBOU to the Horn Mountain spar platform in the Gulf of Mexico, a deckhand allegedly suffered injuries to his knee, left shoulder, cervical spine, and lumbar spine. Following the incident, the vessel owner/Jones Act employer filed a limitation action in the United States District Court for the Eastern District of Louisiana. The deckhand thereafter filed a claim in the limitation action alleging causes of action for Jones Act negligence, unseaworthiness, and maintenance and cure. In relation to his claim, the deckhand alleged he was entitled to recover actual damages, exemplary damages as allowed by law, maintenance and cure benefits, past and future impairment, past and future disfigurement, past and future loss of enjoyment of life, past and future pain and suffering, and mental anguish, among other types of damages.

The petitioner-in-limitation moved for summary judgment to dismiss the seaman's claims to certain non-pecuniary damages, such as past and future loss of enjoyment of life and past and future mental anguish, contending that such damages were not recoverable as a matter of law pursuant to *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1990). The district court granted the motion for partial summary judgment and dismissed the deckhand's claims for loss of enjoyment of life and mental anguish.

V. LHWCA

***In re Ingram Barge Co., L.L.C.*, No. 22-30577, 2023 WL 6123107 (5th Cir. 2023).**

The claimant, Gregory Ratcliff ("Ratcliff"), was employed as a barge cleaner by T.T. Barge Cleaning Mile 183, L.L.C. ("T.T. Barge"), a company in the business of cleaning and repairing barges. Ingram Barge Company LLC ("Ingram") hired T.T. Barge to clean barge IB976. The IB976's last cargo was caustic soda, and Ingram made T.T. Barge aware the barge was being sent to the T.T. Barge facility to be cleaned of caustic soda residue. Ratcliff was a member of the team tasked with cleaning the barge. Ratcliff alleged that he suffered a significant back injury which resulted in surgery as well as catastrophic chemical burns to his arm, leg groin, abdomen, and esophagus from exposure to the caustic soda while cleaning Ingram's barge.

Ratcliff originally filed his petition for damages against Ingram and T.T. Barge in Louisiana state court and alleged he was a Jones Act seaman. Ingram timely filed a limitation action in the United States District Court for the Middle District of Louisiana.

Ingram moved for summary judgment as to all of Ratcliff's negligence claims against Ingram. The district court granted Ingram's summary judgment motion and dismissed the entire limitation action and all claims against Ingram with prejudice. *See Matter of Ingram Barge Co. LLC*, CV 20-00313-BAJ-SDJ, 2022 WL 3273276 (M.D. La. Aug. 10, 2022). Ratcliff appealed the summary judgment ruling.

Ratcliff challenged the district court's ruling that Ingram fulfilled its obligations under the turnover duty provision of the LHWCA's Section 905(b) to ensure safety and warn of latent or hidden dangers during stevedoring operations. Ratcliff's argument focused on the presence of frozen caustic soda on the ceiling of a barge, which he claimed represented a latent danger that Ingram did not adequately warn about. The turnover duty embodies two primary obligations: to hand over the ship and its tools in a condition safe enough for stevedoring activities and to warn the stevedore of hidden or latent dangers known or reasonably known to the vessel owner.

However, the Court affirmed the dismissal of Ratcliff's Section 905(b) claim on the basis that the danger posed by the caustic soda on the ceiling was "open and obvious," relying heavily on the testimony of Ratcliff and others present during the cleaning operation. The testimony confirmed that the individuals were aware of the substance on the ceiling — noticing it about an

hour and a half before the incident and even taking precautions to avoid it. In light of this, the Court ruled that the condition of the caustic soda did not require Ingram to issue a warning, as it did not fall under the hidden or latent dangers that are covered by the turnover duty; rather, it was a danger that was both open and reasonably anticipated by a competent stevedore.

Ratcliff emphasized his surprise upon discovering the danger of caustic soda on the ceiling of the barge, but the Court concluded that his surprise does not alter the fact that the caustic soda was open and obvious. Even though Ratcliff was new to working with caustic soda and lacked proper personal protective equipment, the Court viewed those details as irrelevant in determining the openness and obviousness of the danger.

Ratcliff also claimed that Ingram breached industry standards, which required them to send a representative to inspect the barge and conduct a safety analysis to identify latent dangers. The Court rejected this argument, reiterating that the openness of the danger negates the turnover duty to warn.

Lastly, Ratcliff argued that Ingram's failure to provide a first aid kit on the barge violated a distinct aspect of the turnover duty concerning the obligation to ensure the vessel was reasonably safe for operations. However, the Court found no evidence to connect this failure to any industry standard or to Ingram's duty under the specific circumstances, and hence, it did not raise a genuine issue of material fact.

Based on the foregoing, the Court affirmed the district court's order granting summary judgment and dismissing Ratcliff's claims against Ingram.

***Barrosse v. Huntington Ingalls, Inc.*, 7[0] F.4th 3[15] (5th Cir. 2023).**

Ronald Barrosse was employed as an electrician at Avondale Shipyard ("Avondale") (now Huntington Ingalls) from 1969 to 1977. In 2020, he was diagnosed with mesothelioma and thereafter filed a tort lawsuit under state law against Avondale, claiming that he was negligently exposed to asbestos. Despite not having sought benefits under the LHWCA, Barrosse found himself unable to leverage a claim against Avondale through the Louisiana Workers' Compensation Act (LWCA) since his primary period of asbestos exposure predated the 1975 amendment that included mesothelioma in the list of covered diseases.

The deciding issue was whether Barrosse's state law tort claim could

stand, or if it was overridden by the provisions of the LHWCA. The Fifth Circuit ruled that the LHWCA did not preempt the state law and allowed Barrosse's claim to proceed. The Court drew upon prior rulings by the U.S. Supreme Court, emphasizing that despite the seemingly clear mandate of the LHWCA encouraging the preemption of the state law, the Supreme Court had historically held that total preemption was not the legislative intent. This stance was reinforced through a series of "twilight zone" cases, wherein the Supreme Court upheld the non-preemptive role of the LHWCA over state law, even inclusive of state tort law, despite strong opposing opinions.

Respecting this historical legal context, the Fifth Circuit affirmed that the non-preemptive authority of the LHWCA validated Barrosse's right to pursue his tort claim against Avondale. However, the Court underscored that its judgment was circumscribed to a narrow scope, relevant to maritime workers in Louisiana who find themselves injured in specific circumstances, delineated as the "twilight zone," and who have not claimed LHWCA compensation for injuries that are not covered by the relevant version of the LHWCA.

VI. GENERAL MARITIME LAW

***In re Intrepid Marine Towing & Salvage, Inc.*, No. 8:21-CV-420, 2022 WL 17495990 (M.D. Fla. Dec. 8, 2022), *reconsideration denied*, No. 8:21-CV-420, 2023 WL 5408993 (M.D. Fla. Aug. 22, 2023).**

On June 14, 2020, a vessel operated by Captain Curtis Snyder of Intrepid Marine Towing & Salvage, Inc. ("Intrepid") was involved in a collision with another vessel carrying passengers Nicholas Cachussie, Adrienne Cachussie, and Cheryl Watkins. Following the incident, the passengers' lawyer communicated with Intrepid through a letter dated June 17, 2020, advising of their legal representation concerning the injuries and losses sustained from the collision. The letter sought details on insurance coverage and requested evidence preservation while signaling that the claimants would "pursue all available legal remedies" if evidence was spoliated. This correspondence was followed by another letter informing Intrepid's insurance company of the legal representation.

However, it was not until February 22, 2021, that Intrepid initiated a limitation action in a Florida federal court. The claimants contested Intrepid's right to bring the action, asserting it was instituted beyond the six-month period stipulated for filing after receiving a written notice of the claim. The magistrate judge granted summary judgment in favor of the claimants, as he perceived the initial letter as a reasonable indication of a potential claim surpassing the vessel's worth.

Intrepid objected to the magistrate judge's report and recommendation, highlighting the absence of a definitive claim or a specific demanded amount in the letter, thus not recognizing it as an official claim notice. Despite this, the district judge adopted the magistrate judge's ruling, acknowledging the preliminary correspondence as adequate notice, and ruled that the limitation action was indeed filed late.

The standard for determining the adequacy of notice in the Eleventh Circuit under 46 U.S.C. § 30511(a) has been derived from the case of *Orion Marine Construction, Inc. v. Carroll*, 918 F.3d 1323, 132[5] (11th Cir. 2019), known as the "*Doxsee/McCarthy*" test. This test requires a claimant to inform the shipowner, in writing, of the "reasonable possibility" that the claim might exceed the vessel's value. The test does not necessitate a specific demand for

damages but requires the writing to evince the potential for claims surpassing the vessel's worth.

The court noted the magistrate judge's reliance on *Paradise Divers, Inc. v. Upmal*, 402 F.3d 108[7] (11th Cir. 2005), which applied the *Doxsee/McCarthy* test. The magistrate judge determined that the letter sent to the Petitioner sufficed as a notice because it indicated potential claims from a violent collision, placed blame on the Petitioner for the incident, inquired about the Petitioner's insurance coverage (signifying the potential high value of the claim), and demanded evidence preservation.

On conducting a *de novo* review, the court concluded that the letter did indeed meet the requirement of informing about a "reasonable possibility" of a claim surpassing the $42,500 stipulated value of the vessel. This conclusion was based on the same factors analyzed by the magistrate judge. This is clearly a fact specific inquiry, and the low value of the vessel played a role in the ultimate decision. It remains to be seen whether a similar letter would be construed as "notice" with respect to more valuable vessel.

VII. PUNITIVE DAMAGES

***Griffin v. REC Marine Logistics, LLC, et al.*, 2023 WL 8828675 (E.D. La. Dec. 21, 2023).**

In this recent case, a jury awarded $1.5 million in punitive damages to the plaintiff, a Jones Act seaman, due to the defendant's refusal to provide maintenance and cure benefits. This matter arose from injuries to plaintiff's shoulder, back, and neck allegedly sustained during a personnel basket transfer aboard the M/V DUSTIN DANOS. Plaintiff sued his employer and the vessel operator, REC Marine, for negligence and maintenance and cure, as well as the vessel owner, Offshore Transport, for unseaworthiness. Additionally, plaintiff sought punitive damages against REC Marine for willful failure to provide maintenance and cure. The parties agreed that a jury would determine issues of liability and damages, and if damages were awarded, the Court would decide whether liability could be limited via the Limitation of Liability Act. There were several post-trial motions challenging the jury's verdict of $10,000 in maintenance and cure benefits; $1.5 million in punitive damages; and compensatory damages of $1.7 million.

Following trial, REC Marine filed a motion for judgment as a matter of law, asserting that the punitive damages award should be vacated because there was no evidence that REC Marine acted in a willful, wanton, or arbitrary way in denying maintenance and cure. The Court denied this motion, holding that "a reasonable juror could find that the evidence at trial warranted punitive damages against REC Marine." The Court pointed to evidence that "REC Marine delayed investigating the incident, [ ] did not meaningfully investigate the incident, [ ] and continued to deny maintenance and cure unreasonably."

Among the other post-trial motions was a motion for remittitur of the $1.5 million punitive damages award, which the Court granted. The Court looked at three "guideposts" that help to determine the reasonableness of punitive damages. These guideposts included (1) the ratio of punitive to compensatory damages; (2) "the degree of reprehensibility of the tortious conduct," and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." The Court determined that the ratio here was excessive but declined to disturb the jury's finding that punitive damages were warranted. Regarding the third guidepost, the Court found that the discrepancy between the $1.5 million award and similar awards within the Fifth Circuit was "vast." Nevertheless, the Court decided to take an

"especially deferential" approach to the jury verdict, reducing the punitive damages award to a ratio of 9:1, or $90,000.

***Pritt v. John Crane Inc.*, No. CV 20-12270, 2023 WL 4471825 (D. Mass. July 11, 2023).**

Arnold L. Pritt and his spouse Ruth A. Pritt commenced a lawsuit in Massachusetts state court, claiming Arnold was exposed to asbestos products of the defendants while he worked for the Navy in various settings, including shipyards and vessels. Defendants removed the case to federal court in Massachusetts. Arnold died during the pendency of the case, and Ruth continued the claim. Ruth requested to amend her complaint, which was opposed by Defendant John Crane, Inc. ("John Crane"), citing restrictions under the Jones Act and the Death on the High Seas Act (DOHSA). Defendant sought to prevent plaintiff from adding a claim for survival remedies, loss of consortium and society, and punitive damages for wrongful death.

The plaintiff argued that neither the Jones Act nor DOHSA were applicable because John Crane was not Arnold's employer and Arnold's exposure to asbestos could not be distinctly categorized as having occurred either on the high seas or in territorial waters alone. The court agreed with the plaintiff and allowed her to pursue punitive damages and loss of consortium under general maritime law. It also affirmed her right to a claim under the Massachusetts wrongful death statute.

The court noted the plaintiff did not allege causes of action under the Jones Act, DOSHA, or general maritime law for unseaworthiness. In doing so, the court distinguished the applicability of *Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2278 (2019) (punitive damages unavailable for general maritime law unseaworthiness claims), the Jones Act, and DOSHA.

The defendant further contended that a survival action could not be acknowledged under general maritime law. But the court, clarifying the nature of Arnold's "indivisible injury" which spanned both high seas and territorial waters, dismissed the relevance of DOHSA limitations, and noted the inability of either party to pinpoint the exact time and place of asbestos exposure, which rendered the prohibition on survival actions in DOSHA cases pursuant to *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998) inapplicable.

Expanding on the survival action subject under the general maritime law, the court disregarded the defendant's reference to the Supreme Court's alleged non-recognition of such actions in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The court posited that the Supreme Court did not create a steadfast rule regarding a general maritime right of survival action. Therefore, the court decide to adopt the rationale from the Eighth Circuit Court in *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972) emphasizing the logical discrepancy in permitting punitive and loss of consortium damages while denying survival damages.

***Matter of Aries Marine Corp.*, No. CV 19-10850, 2023 WL 346306 (E.D. La. Jan. 20, 2023).**

This dispute arose from an incident that occurred on November 18, 2018, involving the liftboat RAM XVIII, owned and operated by Aries Marine Corporation ("Aries"). The incident took place in the Gulf of Mexico, where the vessel was deployed to support work on a platform in the West Delta 68-U region.

The disagreement revolved around the preload process that the vessel underwent before starting its operations. Aries maintained that it adhered to a specific preload process designed to ensure the stability of the vessel on the seabed, involving adding weight to the boat, lifting it, and leaning it on one leg at a time. This process supposedly took place between 2 PM on November 16 and 3 AM on November 17.

The claimants, however, argued that Aries did not properly adhere to the preload process due to the use of cranes during the preloading, in violation of Aries' policies. Claimants also argued the vessel was not lifted to the necessary height as required by Aries' policies. The claimants alternatively argued it was possible that the preloading was never done, as the vessel was elevated to a height of 50 feet to allow workers to board from a walkway.

Regardless of the discrepancies in the accounts of the preload process, claimants and petitioner agreed that the vessel and the crew worked without any issues on November 17. Issues began in the early hours of November 18 when the vessel began to list, triggering the vessel's tilt alarm. Despite the captain's efforts to stabilize the boat, it sank. All occupants were safely evacuated.

Following the sinking of RAM XVIII, Aries filed a petition seeking exoneration or limitation of liability, and seven workers on the rig filed claims in the limitation action. The claimants also filed separate complaints against Fugro USA Marine, Inc. ("Fugro") and Fieldwood Energy LLC ("Fieldwood"), and those cases were consolidated with the limitation action.

Aries sought summary judgment for exoneration from any liability as a matter of law for all claims, or alternatively, to limit its liability to the post-incident value of the vessel and any pending freight while also seeking dismissal of any claims for punitive damages.

The court determined there was a factual dispute as to whether the captain of the liftboat performed a preload to confirm that the vessel's leg pads were securely positioned on firm ground, ensuring they would not break through the seabed. If this was not done as the claimants argued, the court acknowledged that omission could be considered negligence while the vessel was under active control and could be considered a "substantial factor in the injury" and thus constitute a breach of a *Scindia* duty. (*Scindia Stream Navigation Co. v. De Los Santos*, 451 U.S. 156, 170 (1981) (a vessel owner's duties under § 905(b) are limited to: (1) the "turnover duty," which requires the vessel owner to turn over a reasonably safe ship, (2) the "active control duty," which requires the vessel owner to protect against hazards under the active control of the vessel, and (3) the "duty to intervene," which requires that the vessel owner intervene when it "knows of a serious hazard and the stevedore improvidently decides to ignore that risk.")).

Addressing the limitation aspect, the court pointed out that when it comes to seagoing vessels, any knowledge or awareness the captain has at the start of the voyage is attributed to the vessel's owner. Aries did not argue against being categorized as a seagoing vessel, especially since the incident happened on the Outer Continental Shelf, over 12 nautical miles from shore. Consequently, if the captain displayed negligence prior to the journey, the responsibility would fall on the vessel's owner.

Further, the court presented evidence suggesting the owner might have appointed an inadequately trained captain for the vessel. Given this, the court denied summary judgment concerning the limitation of liability.

The vessel's owner also sought to have the punitive damage claims, filed under Section 905(b) of the LHWCA, dismissed. Aries argued that such

damages can only be claimed by a longshore worker injured in state territorial waters from a third-party wrongdoer, and it also cited a lack of proof for deliberate harmful conduct. However, the court highlighted that the Fifth Circuit has yet to determine if punitive damages can be claimed under Section 905(b) but noted that several district courts have allowed punitive damages to be claimed under Section 905(b). Therefore, the court refrained from granting summary judgment on the punitive damage claim.

VIII. INDEMNITY AND INSURANCE

***Brown v. Yaring's of Texas, Inc.*, No. 21-CV-00355, 2022 WL 17404888 (S.D. Ala. Dec. 1, 2022).**

During Memorial Day weekend of 2020, Kylie Brown, along with several others, embarked on a boat trip aboard the 30-foot jet boat M/V EAGLE II. The boat was owned and operated by Yaring's of Texas ("Yaring's"), and departed from Hudson Marina in Orange Beach, Alabama. At the time of the incident, there were 16 passengers and two crew members aboard the EAGLE II. While exiting Perdido Pass, the vessel encountered an unusually high wave and descended abruptly. The boat returned to the dock due to a passenger complaining of back pain. Once back at the dock, nine of the passengers decided to disembark and seven decided to continue the voyage. Notably, at least two of the passengers reported back discomfort but left without seeking medical care. However, the captain of the vessel did not know that any of the passengers were injured such that would necessitate a report of the incident to the U.S. Coast Guard.

Yaring's marine activities were insured by Atlantic Specialty Insurance Company ("ASIC") since 2018. For the 2020 policy renewal, Yaring's conveyed to its broker that the EAGLE II could carry 12 passengers. However, a lapse in coverage occurred on April 11, prompting the insurer to request a no-loss declaration to renew the coverage from May 22. Although Yaring's did not supply the letter, ASIC, due to an oversight, initiated coverage on May 26, effective from May 22. The application left out information about any losses, vessel details, and passenger numbers. Despite this, the policy mentioned the EAGLE II with a capacity of 12 passengers.

Following these events, Brown and several fellow passengers filed a lawsuit in Alabama federal court against Yaring's. In response, Yaring's filed a third-party complaint against ASIC, because ASIC had refused coverage due to Yaring's alleged violation of the passenger limit stipulation in the insurance policy. ASIC sought summary judgment, justifying its denial of coverage because Yaring's had exceeded the passenger limit and had not disclosed the May 23 incident, contravening the principle of utmost good faith (*uberrimae fidei*). Yaring's countered that the principle was not applicable to its policy because it contradicted other terms.

The court rejected Yaring's position, ruling that the policy did not conflict with the principle of *uberrimae fidei*, even if misrepresentations were unintended. Yaring's further contended that ASIC gave up the right to reference *uberrimae fidei* because they initially only mentioned the passenger limit violation. The plaintiffs highlighted Alabama law, which states that an insurer cannot deny a claim for one reason and later introduce another. The court, however, clarified that this principle does not apply to marine insurance contracts. According to the court, ASIC had not given up the defense based on material misrepresentation just because it was not its initial defense. Because reasonable minds could differ as to the materiality of the non-disclosure, the court denied summary judgment.


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THE *LIGHTNING* ROUND WITH THINGS YOU JUST NEED TO KNOW. READY, SET … GO!!

FROM AROUND THE CIRCUITS – A MARITIME LAW UPDATE AND

- *Maritime Case Law Update*: A review of recent case law impacting how you conduct your business, what your insurance needs or requirements are, and what you need to know before going to court or to avoid litigation.

POINTS OF INTEREST YOU NEED TO KNOW!

- The "Subsequent Remedial Measures" Rule – There is a tremendous value of what evidence can be presented under this Rule in defense of a Plaintiff's claim of "Negligence or "Unseaworthiness" in maritime litigation. Here's how it works!
- What must a Plaintiff or Defendant consider in a personal injury lawsuit when the most important legal issue is the law of "Open and Obvious." Which side does it benefit in the case? Can this issue decide the case?
- I often work off of tugs or barges for my marine employers on land and on the inland rivers. However, I sometimes travel by vessel from shore to stationary platforms, either by tug or on a barge, to perform work on the platform. I might even do a chore or two on the vessel or tug while en route. While on a job in the Gulf, I had an accident on a platform. Can I qualify as a Jones Act Seaman to my employer? Suppose I was hurt on a drilling rig rather than a fixed platform – would that make a difference? How much "vessel" time must I spend, on the vessel, to be considered a Jones Act seaman?
- By the way, can damages be owed to a witness in a maritime accident under what is called a "Bystander Claim?" Does such a claim exist in maritime law?

CONTRACTS AND AGREEMENTS (C&A) IN TODAY'S MARITIME WORLD!

- What constitutes a binding "Contract" or "Agreement?" How do you draft a written C&A and reduce it to writing and make it binding between or among the Parties?"
- How might one modify the document in the future, if necessary?
- What clauses assure me that my attorney fees and costs would be recovered back should I prevail if there is litigation over the document?
- How do I make sure any litigation takes place in the Court and State of my choice?
- Do all C&As have to be in writing i.e., is an "oral" Contract or Agreement valid – if so, how does one prove there is or was an oral meeting of the minds?
- Are emails and cell phone text messages binding between or among Parties?
- Watch what you put in an "email" – because…
- As an example, can a "thumbs up" in a "text message" to the other side constitute acceptance of a binding C&A?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

The Honorable Andrew Edison
United States Magistrate Judge
Southern District of Texas
Galveston, TX
Federal Magistrate Judge


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PART I: ALLISIONS, COLLISIONS AND SALVAGE OPERATIONS, WHAT DO THEY ALL HAVE IN COMMON?

- What is a hull policy, how does it work, and what does it cover? What are the various endorsements I may need depending upon my operations?
- How does a seaworthiness declaration for my vessel or fleet and compliance with laws declaration come into play in maintaining my insurance and securing coverage in a claim?
- What do you mean by "port risk," and what does my insurer expect of me when I place a vessel on port risk?
- But if my tug was not in Pennsylvania, Oregon or Louisiana, how and when do those rules apply?
- When do I need a joint survey and what are the benefits of one?
- When may the Coast Guard or the Army Corp order salvage operations to take place if my vessel is sunk?
- What is a constructive total loss (CTL) and why is declaring one important?
- What does it mean to have a "no cure, no pay" salvage contract?
- Hang on, they need to pay me for a new dock/vessel, what am I depreciating? How is the replacement value calculated?
- What policies of coverage and endorsements are impacted by the above?

PART II: THE MARITIME LIEN AND VESSEL SEIZURE– TWO OF THE MOST POWERFUL PROCEDURES IN THE MARITIME INDUSTRY – CAN HELP OR HURT YOUR COMPANY!

- What is a "maritime lien?" What constitutes a valid "lien?" How is it perfected – i.e., placed, recorded, etc... on a vessel?
- What benefits does one get from placing a lien on a vessel? How is it removed once the lien is satisfied?
- When, how and why might one seize a Vessel? How is the seizure perfected and the courts get involved? How does it cost to seize a vessel?
- And the U.S. Marshal's Office – you can't do a seizure without their involvement!
- When the Vessel is seized – what happens next? How and why might I now release the Vessel? Do I get back the expenses I have incurred?
- And what about the Letter of Undertaking (LOU)? Can I demand one? Why do I need one? What does such a document look like?
- What should I expect to be "The Ending of the Dispute?"

PRESENTED AT THE
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2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Samuel P. Blatchley, Esq.
Eckland & Blando
Boston, MA
Defense Attorney

Kyle J. Smith
Kyle Smith Surveying
Marine Surveyor

Andrew Brown
Ingram Barge Line
Industry Attorney/Representative

Samuel P. Blatchley, Andrew Brown, and Kyle Smith
Thursday, April 25, 2024
1.5 Hour CLE

Part I: Allisions, Collisions, and Salvage Operations: What Do They All Have in Common?

1. What is a Hull Policy, how does it work, and what does it cover? What are the various endorsements I may need depending on my operations?

Hull insurance on a commercial vessel generally insures the shipowner against physical loss, or damage to the vessel for "covered perils" enumerated in the policy. Hull insurance also provide coverages for salvage costs and general average resulting from "covered perils."[1] For pleasure craft, hull insurance may cover "all risks" of loss, not just covered perils.[2] Generally, recovery under a hull policy is limited to the "agreed value" of the vessel, which is provided in the policy's written terms.

Common perils insured include perils of the sea; fire; violent theft; jettison; piracy; arrest by governments and people; barratry; war; salvage; general average; collision; and explosions. The burden of proving the loss was caused by a peril insured against is on the assured. [3]

However, the perils clause may also include certain other perils, including "pirates, rovers, and assailing thieves," "takings at sea," "arrests, restraints, and detainments of kings and princes," "letters of mart and counter-mart," "surprisals," "men of war," and "enemies." however, coverage for these perils is often subsequently excluded by the insertion of a "free of capture and seizure" (FC&S) clause. The FC&S clause eliminates these perils from coverage. Consequently, in the event that coverage for the above specified perils is required by a vessel owner, it will be necessary to obtain separate "war risks" insurance.[4]

However, "perils of the seas" represents the majority of claims under a hull policy, and therefore generates the most controversies regarding coverage. In determining coverage, it should be noted that a "peril of the seas" is not simply an occurrence at sea. Instead, the event must be "fortuitous" in character.[5]

Moreover, the loss must be due to an exceptional event associated with the sea, as routine or ordinary occurrences at sea are not covered. For examples, storms and extraordinary action of the winds and waves are sea perils, as are stranding and collision (even when they arise from the negligence of the master or crew.) However, the ordinary action of the winds and waves—natural decay or wear and tear—is not a peril of the seas.[9] If a vessel capsizes or sinks in calm weather

[1] *See* Robert T. Lemon II, Allocation of Marine Risks: An Overview of the Marine Insurance Package, 81 Tulane L. Rev. 1467 (2007).
[2] *See* § 19:10. Hull insurance, 2 Admiralty & Mar. Law § 19:10 (6th ed.)
[3] *See* § 19:17. Perils insured against, 2 Admiralty & Mar. Law § 19:17 (6th ed.)
[4] *See* Lemon, *supra* Note 1, at 1469-70.
[5] § 19:17. Perils insured against, 2 Admiralty & Mar. Law § 19:17 (6th ed.)

without explanation, a presumption arises that she was unseaworthy; but if a seaworthy vessel is involved in a mystery sinking in moderate weather, there is a rebuttable presumption she met her doom by a peril of the seas.[6]

Depending on a vessel owner's operations, various further coverage that is ordinarily excepted from coverage may prove beneficial. This includes coverage provided under a "Running Down Clause." While damage resulting for collision may be covered in a hull policy, collision liability is not always recoverable. A "Running Down Clause" may protect the owner of the vessel against legal liability resulting from collision. However, the coverage provided extends only to property, and not to personal injury, wreck removal, pollution, and other claims, the balance of coverage for which would be provided by P&I insurance.[7]

Further, an "Inchmaree" clause may provide valuable coverage for consequential damages resulting from physical damage to the vessel, and may provide coverage in an array of circumstances, including (1) accidents in loading, discharging, or handling cargo or bunkers; (2) explosions aboard the ship; (3) breakdown of generators, bursting of boilers, breakage of shafts, or any latent defect in the ship's machinery or hull; (4) negligence of master, officers, crew, or pilots; and (5) negligence of charterers.[8] However, it should be noted that an Inchmaree Clause only provides coverage for **consequential damages**, and would not cover, for example, the bursting of the boiler or broken shaft itself.[9]

2. How does a seaworthiness declaration for my vessel or fleet and compliance with laws declaration come into play in maintaining my insurance and securing coverage for a claim?

While the warranty of seaworthiness may be included in a hull policy as an express provision, there also exist two implied warranties of seaworthiness in a hull insurance policy under Federal Maritime Law. The first is the absolute warranty of seaworthiness of the vessel at the inception of the policy.

Following, during the Policy's term, there exists a modified, negative warranty, under which the insured promises not to knowingly send a vessel to sea in an unseaworthy condition. The rationale behind the implied warranty is based upon the underwriter's right to a baseline standard of suitability of the vessel for the voyage it will be undertaking. Further, an express "seaworthiness admitted" clause in the policy is relevant to the absolute warranty of seaworthiness but is not to be construed as a waiver of the seaworthiness continuing obligation.[10]

Further, some policies contain express warranties that the operator will comply with all applicable laws and regulations governing the use of the covered vessel. Under the laws of many states, including New York and Louisiana, breach of an express warranty may void coverage *ab*

[6] § 19:17. Perils insured against, 2 Admiralty & Mar. Law § 19:17 (6th ed.)
[7] *See id.*
[8] *See* Lemon at 1470.
[9] *Id.*
[10] § 19:16. The warranty of seaworthiness, 2 Admiralty & Mar. Law § 19:16 (6th ed.)

initio.[11] Accordingly, in the event that a policy contains a warranty regarding compliance with laws, it is incumbent upon the vessel owner to ensure strict compliance. For example, recently, in *Great Lakes Ins. SE v. Chartered Yachts Miami LLC*, the Southern District of Florida held that, under New York law, a vessel owner's failure to strictly comply with Coast Guard regulations pertaining to the inspection and certification of the vessel's life rafts resulting in the voiding of the Policy at issue, even though the lack of current certification of the life raft was wholly unrelated to the loss at issue.[12]

3. What do you mean by "port risk," and what does my insurer expect of me when I play a vessel on "port risk"?

A "Port Risk" policy is a marine insurance policy designed to cover a vessel for specific risks while it is lying in port and is usually obtained while the vessel is preparing to return to service or undergoing repairs. Depending on the policy's specific terms, navigation of the vessel may be permitted within port limits, but in a "Port Risk Ashore" policy, coverage may only be provided when the vessel is out of the water and no coverage may be provided for navigation, even within the confines of a specific port. Generally, the policy language will dictate what movement of the vessel is permitted, and many policies allow shifting of the vessel, in tow or otherwise, within the specific confines of a named port.

In insuring vessels on "Port Risk," the location of the vessel is paramount to the determination of the risk. If a vessel is moved outside of the limits of the designated port or otherwise undertakes movement not permitted by the policy's terms, coverage may be voided.[13] A vessel owner should therefore take great care in familiarizing itself with the specific navigational and operational limits enumerated in the port risk policy and ensure that no operations exceed the scope of what is allowed.

4. But what if my tug was not in Pennsylvania, Oregon, or Louisiana? How and when do those rules apply?

The *Pennsylvania*, *Oregon*, and *Louisiana* Rules are presumptions of liability in maritime cases, and have nothing to do with the location of the vessel at the time of a casualty. Specifically, the *Pennsylvania* Rule sets forth a causation presumption that "a vessel in violation of a statutory rule designed to prevent collisions bears the burden of showing 'not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not* have been.' "[14] Some Courts have further expanded the *Pennsylvania* Rule's application from collisions to other maritime incidents. For example, a court in the Eastern District of Louisiana recently applied the *Pennsylvania* Rule to a violation of 33 C.F.R. § 165.803, the regulation governing fleeter mooring requirements.[15] The court in *Turn Services* explained that "for *The Pennsylvania* Rule to apply, a party must demonstrate three elements: '(1) proof by preponderance of evidence of violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve

[11] Stony Brook Marine Transp. Corp. v. Wilton, No. 94-CV-5880 (JS), 1997 WL 538913, at *11 (E.D.N.Y. Apr. 21, 1997); Thanh Long P'ship v. Highlands Ins. Co., 32 F.3d 189, 194 (5th Cir. 1994).

[12] Great Lakes Ins. SE v. Chartered Yachts Miami LLC, No. 20-25046-CV, 2023 WL 5625729, at *9 (S.D. Fla. June 7, 2023)

[13] *See* Bristol S. S. Corp. v. London Assur., 404 F. Supp. 749, 752 (S.D.N.Y. 1975)

[14] *In re Mid-South Towing Co.*, 418 F.3d 526, 531 n.5 (5th Cir. 2005)

[15] *Turn Services, LLC v. Gulf South Marine Transportation, Inc.*, 2023 WL 180028, at *8 (E.D. La. Jan. 13, 2023).

marine safety or navigation; (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent.' "[16]The court then found that those three elements were satisfied and applied the Rule.[17]

Similarly, the *Oregon* Rule and the *Louisiana* Rule are maritime law presumptions that address vessel allisions. The *Oregon* Rule establishes a presumption of fault upon a moving vessel that allides with a properly moored vessel or other structure.[18] The *Oregon* Rule is further distinguished from the *Pennsylvania* Rule because the *Oregon* Rule is a presumption of fault more "akin to the common law doctrine of *res ipsa loquitor*" while the *Pennsylvania* Rule is a presumption of causation.[19] Similarly, the *Louisiana* Rule "creates a rebuttable presumption that in collisions or allisions involving a drifting vessel, the drifting vessel is at fault."[20] Courts treat these two presumptions "similarly, looking to the law on one to inform decisions on the other."[21]

To rebut the foregoing presumptions, a party "can demonstrate (1) that the allision was the fault of the stationary object; (2) that the moving vessel acted with reasonable care; or (3) that the allision was an unavoidable accident.... Each independent argument, if sustained, is sufficient to defeat liability."[22]

Even though each of these presumptions are somewhat "ancient", they are all in play and widely invoked in maritime litigation. Further, while the *Pennsylvania*, *Oregon*, and *Louisiana* Rules each shift the burden of proof to the offending vessel, the non-offending vessel should nevertheless conduct a thorough investigation to make its best case.

5. When do I need a joint survey and what are the benefits of one?

Generally, a joint survey is helpful where there is a collision, allision, or salvage incident. A common scenario leading to a joint survey occurs when a contractual indemnity clause between affected parties is implicated, such that there is no question of fault allocation and the only issue is the extent of damage caused by the incident.

Engaging in a joint survey offers advantages such as the preservation of evidence, establishment of common ground, and the reduction of potential areas of disagreement.

6. When may the Coast Guard or the Army Corps of Engineers order salvage operations to take place if my vessel is sunk?

The primary responsibility for keeping navigable waterways free from obstruction rests with the United States Army Corps of Engineers ("Corps of Engineers") and the United States Coast Guard ("Coast Guard").[23] However, the question above deals less with the issue of salvage operations, and more with the issue of wreck removal.

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[16] *Id.* (quoting *In re Marquette Transportation Co.*, LLC, 292 F. Supp. 3d 719, 729 (E.D. La. 2018) (Fallon, J.)).
[17] *Id.* at *8-9, see also Matter of Magnolia Fleet, LLC, No. 2:22-CV-00504, 2023 WL 6121983, at *4 (E.D. La. Sept. 19, 2023)
[18] *The Oregon*, 158 U.S. 186, 192 (1895); *In re Mid-South Towing Co.*, 418 F.3d at 531 n.5
[19] *See id.*
[20] *Combo Maritime Inc. v. U.S. United Bulk Terminal, LLC*, 615 F.3d 599, 602 (5th Cir. 2010); *The Louisiana*, 70 U.S. 164, 173 (1865).
[21] *Combo Maritime,* 615 F.3d at 605 (citing *Fischer v. S/Y NERAIDA*, 508 F.3d 586, 593 (11th Cir. 2007)).
[22] *Id.* at 605 (quoting *S/Y NERAIDA*, 508 F.3d at 493).
[23] 33 C.F.R. §245.10.

Under Section 409 of the Wreck Act, primary responsibility for removal of wrecks or other obstructions lies with the owner, lessee, or operator. However, where an obstruction presents a hazard to navigation which warrants removal, the Army Corps District Engineer will attempt to identify the owner or other responsible party and vigorously pursue removal by that party before undertaking removal by the Corps.[24]

Nevertheless, Section 409 of the Wreck Act requires the vessel owner lessee, or operator of a sunken vessel to "immediately mark it with a buoy or beacon during the day and ... a light at night, and to maintain such marks until sunken craft is removed or abandoned." Section 409 also imposes a duty on the owner, lessee, or operator of the sunken vessel that has been determined to be a hazard to navigation to "commence immediate removal... [and] prosecute such removal diligently." Accordingly, it is not necessarily the Coast Guard and Corps of Engineers who "order" the removal of a wreck via salvage operations, as those actions are required by the Wreck Act, although such an order may be and routinely is made. However, in determining whether the mandatory removal provisions of Section 409 apply, the vessel must first be determined to be a "hazard to navigation." The determination of whether a sunken vessel presents a "hazard" is undertaken by the Corps in consultation with the Coast Guard, and may include evaluation of several factors, including, *inter alia*, location of the obstruction in relation to the navigable channel and other navigational traffic patterns; navigational difficulty in the vicinity of the obstruction; clearance or depth of water over the obstruction, fluctuation of water level, and other hydraulic characteristics in the vicinity; the type and density of commercial and recreational vessel traffic, or other marine activity, in the vicinity of the obstruction, any physical characteristics of the obstruction, including cargo, if any; possible movement of the obstruction; and location of the obstruction in relation to existing aids to navigation. [25] Often the determination that a sunken vessel is a hazard to navigation is accompanied by an order to remove.

If the owner, lessee, or operator fails to remove the vessel immediately and diligently, the vessel will be considered abandoned and subject to removal by the United States.[26] Further, in the event the vessel owner, lessee or operator fails to remove the vessel as proscribed, they may be liable to pay criminal fines and civil penalties for violation of Section 409. In addition, the United States may assert certain claims against the vessel owner for failure to properly remove a wreck, including *in personam* injunctive and declaratory relief, as well as monetary damages for the cost of removal.[27]

However, costs associated with removals of wrecks that are done at the direction of the Coast Guard and/or Corps of Engineers may be deemed "compulsory by law" within the meaning of a vessel owner's P&I policy. In the hull insurance context, a sue and labor clause may provide coverage for the cost to salvage the insured vessel and to prevent further loss. Certain specific actions undertaken by an insured relative to a vessel's sinking may alternately be covered under a hull policy and/or excluded under a P&I policy, depending on whether the action was taken to

[24] 33 U.S.C. §409, et seq., see also 33 C.F.R. §245.10(b).
[25] 33 C.F.R. § 245.20
[26] *Id.*
[27] *See* 33 U.S.C. 411, 412, *see also* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

mitigate loss of the insured vessel or to prevent losses to third parties.[28] As such, the purpose of the specific action in salvaging the vessel and/or removing the wreck, including whether such actions were undertaken at the direction of the Corps/Coast Guard, may affect determinations of coverage.

7. What is a constructive total loss (CTL) and why is declaring one important?

A constructive or technical total loss is one in which the loss, although not actually total, is of such a character that the insured is entitled to treat it as total by abandonment, usually where the ship or cargo is damaged more than 50% of its value or the cost of repairs or rescue exceeds the ship's value.[29]

In such a case where repair is not economically practicable, and the market value of the vessel is the ceiling of recovery.[30]

The declaration of a vessel as a "constructive total loss" may affect recovery in certain scenarios, as damages for loss of use may not be awarded when the vessel is a constructive total loss.[31] When a damaged vessel is not a total loss, the owner is generally entitled to recover the reasonable cost of repairs necessary to restore it to its pre-casualty condition and may possibly recover loss of use damages.[32]

Another version of constructive total loss is the rule that when a shipowner is the insured, and the cost of repairs would exceed the repaired value of the ship, the owner may "abandon" the vessel to the insurer as if it were a total loss, and the insurer preserves the right to recoup what it can by a sale or other disposition of the vessel.[33] Allocation of the risk of physical damage to the ship between the insurance underwriter of a wrecked vessel and the shipowner lies at the heart of this doctrine.

Conversely, the owners of a vessel are generally bound by a provision of a hull and machinery policy that a constructive total loss may not be recovered unless the expense of recovering and repairing the vessel would exceed the agreed value.[34] The fact that some costs could be payable under the sue and labor clause of a marine insurance policy does not prevent their consideration as a "recovery or repair" cost for purposes of a constructive total loss calculation.[35] Further, towing charges incurred at the time that a damaged vessel was already salvaged and docked are not a "recovery" or "repair" expense for purposes of a constructive total loss calculation.[36]

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[28] *See, e.g., Am. Home Assur. Co. v. Fore River Dock & Dredge, Inc.*, 321 F. Supp. 2d 209, 220 (D. Mass. 2004).

[29] *See Ryan Walsh Stevedoring Co. v. James Marine Services, Inc.,* 792 F.2d 489, 491 (5th Cir.1986)

[30] *See Pizani v. M/V Cotton Blossom,* 669 F.2d 1084, 1088 (5th Cir.1982) (quoting *Freeport Sulphur Co. v. S/S Hermosa,* 526 F.2d 300, 304 (5th Cir.1976); *O'Brien Bros. v. The Helen B. Moran,* 160 F.2d 502, 505 (2d Cir.1947).

[31] *Ryan Walsh Stevedoring,* 792 F.2d at 491.

[32] *See The Tug June S v. Bordagain Shipping Co.,* 418 F.2d 306, 307 (5th Cir.1969).

[33] *See* 46 C.J.S. Insurance § 1727, Total Loss Defined – Constructive or Technical Loss Distinguished. *Asphalt Intern., Inc. v. Enterprise Shipping Corp., S.A.,* 667 F.2d 261, 33 U.C.C. Rep. Serv. 570 (2d Cir. 1981).

[34] *American Home Assur. Co. v. Masters' Ships Management S.A.,* 423 F. Supp. 2d 193 (S.D. N.Y. 2006), *judgment aff'd,* 489 F.3d 497 (2d Cir. 2007).

[35] *Truong v. St. Paul Fire & Marine Ins. Co.,* 345 Fed. Appx. 948 (5th Cir. 2009).

[36] *See id*.

Further, in the case of a sunken vessel, declaration of the vessel as a total loss or constructive total loss may affect the insured's ability to recoup salvage expenses under a hull policy. That is primarily because the nature of salvage is to preserve any value left in the damaged vessel. Once the vessel is deemed a total loss or constructive total loss, the salvage may be deemed a wreck removal by the insurer, particularly in the event that the sunken vessel has been deemed a hazard to navigation by the Coast Guard and Army Corps of Engineers and its removal ordered. Because salvage costs may be recouped under the sue and labor clause of a hull policy, if the vessel is deemed a total constructive loss and its removal ordered, any salvage costs may properly fall under the insured's P&I policy, as opposed to the hull policy.

Accordingly, the determination of a vessel as a "constructive total loss" may have significant impacts on insurers and assureds.

8. What does it mean to have a "no cure, no pay" salvage contract?

"No cure, no pay" is a principal in salvage that states if a salvor is unable to salvage any material, they cannot receive compensation, regardless of the salvor's efforts or expenditures. The Lloyd's Open Form (LOF) standard agreement provides that the contract salvor is engaged on a "no cure, no pay" basis, by which it is entitled to compensation only if it is successful in whole or in part.[37]

However, the salvor can become entitled to "special consideration" as an exception to the "no cure-no pay" rule by incorporating a "SCOPIC" (special compensation protection and indemnity clause) agreement into the agreement. This allows the salvor to choose, by written notice to the owners of the vessel, to be compensated based upon time and materials, rather than "no cure-no pay."[9] The salvor can also invoke Article 14 of the 1989 International Convention on Salvage relating to special compensation for preventing or minimizing damage to the environment.[38]

9. Hang on, they need to pay me for a new dock/vessel, what am I depreciating? How is the replacement value calculated?

Generally, when a vessel is damaged as a result of an allision or collision and the vessel is not a total loss, the owner is entitled to recover the reasonable cost of repairs necessary to restore the vessel to its previous condition. However, a maritime tort defendant is not to be held liable for property damage he has not been shown to have caused or for the cost of repairs that enhance the value of the damaged property compared to its pre-tort condition.[39]

Further, principles of depreciation and betterment may be used to reduce the plaintiff's recovery, and, if repair or replacement costs form the basis of a damage award, a court sitting in

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[37] § 16:6. Contract salvage, 2 Admiralty & Mar. Law § 16:6 (6th ed.)
[38] *See id*, generally, citing to *Semco Salvage & Marine Pte. Ltd. v. Lancer Nav. Co. Ltd* (the Nagasaki Spirit), [1997] 1 Lloyd's Rep. 323 (H.L. 1997).
[39] *See, e.g., Genie-Lyn Ltd. v. Delaware Marine Operators, Inc.*, No. CIV.A. 00-0050, 2006 WL 42169, at *7 (W.D. La. Jan. 3, 2006).

admiralty must determine whether the repair adds new value to or extends the useful life of the property. If so, the court should make an appropriate reduction to the repair costs.[40]

For example, in *Genie-Lyn Ltd. v. Delaware Marine Operators, Inc*, the United States District Court for the Western District of Louisiana addressed how to apply depreciation to a vessel that was scratched during an allision and subsequently repainted. In that case, the vessel's paint was nearing the end of its useful life, with numerous areas of blistering and rust throughout the vessel's hull and superstructure that pre-dated the allision. Nevertheless, the court found that the damage sustained by the vessel required painting the entirety of the vessel, given expert testimony that suggested it would be impossible to "spot paint" the damaged areas, given the extent of damage sustained.

In applying the doctrines of depreciation and betterment, the Court calculated that the remaining useful life of the vessel paint prior to the allision was eight (8) years, and the subsequent extension of useful life, following the vessel repainting was twenty (20) years. It then deducted the number of remaining useful years (8) from the total number of years constituting the newly extended life of the vessel's exterior paint (20), thereby applying a depreciation rate of 60% (12/20) and reducing the damage award accordingly.[41]

10. What policies of coverage and endorsements are impacted by the above?

Generally, the above topics may greatly affect coverage in situations involving collisions, allisions, and salvage operations. In cases involving violations of an express warranty or implied warranty of seaworthiness, coverage may be denied or voided *ab initio*, depending on the written policy terms, and no payment for damage resulting from collision, allision, or salvage costs under a sue and labor clause may be afforded. Further, in cases involving a "port risk" insurance policy, failure to comply with the policy's terms in removing a vessel from its designated port may result in voiding of coverage.

Similarly, the presumptions at play in the *Pennsylvania*, *Oregon*, and *Louisiana* rules may affect liability and coverage potentially arising under a "Running Down Clause," and coverage for salvage and/or wreck removal costs may be affected by the purpose of the salvage and whether it was done at the direct of the Army Corps of Engineers and/or Coast Guard. Further, calculation of a vessel as a constructive total loss may also affect rights and liabilities between insurer and insured, as does the application of the principles of depreciation and betterment to any payment made for repairs that improve the condition of the vessel.

Part II: The Maritime Lien and Vessel Seizure Two of the Most Powerful Procedures in the Maritime Industry Can Help or Hurt your Company!

1. What is a "maritime lien?" What constitutes a valid lien? How is it perfected – i.e. placed, recorded, etc., on a vessel?

[40] *See id.*
[41] *See Genie-Lyn* at *15-17.

A maritime lien is a privileged claim upon maritime property, such as a vessel, arising out of services rendered to the vessel or injuries caused by the vessel.[42] Some maritime liens arise as a result of contractual relationships (such as for crewmembers' wages), but others can arise from non-contractual salvage operations or as a result of torts, including collisions or allisions. [43]

A "valid" maritime lien is different from a common law lien in that a maritime lien arises automatically and simultaneously with the service and will adhere to the vessel even through changes in ownership, until such a time when it executed through an action against the vessel *in rem* or otherwise extinguished by operation of law, such as by the doctrine of laches.[44]

The peculiarity of the maritime lien is further demonstrated by the fact that it has been deemed to "travel secretly" with the ship, even when it is sold to a good faith purchaser, taking priority over forms of security (such as a ship mortgage), although maritime liens have no effect until the plaintiff takes an action in rem. Accordingly, a maritime lien need not be "perfected" for it to be susceptible of execution.[45]

Although maritime liens need not be recorded to be effective, there exists a statutory procedure for discharging both maritime and state law liens on documented vessels. Liens on documented vessels may be recorded by filing a notice with the National Vessel Documentation Center. If a lien exists on an undocumented vessel, the lien should be recorded as provided by the law of the state where the vessel is titled.

Please be advised that a preferred vessel mortgage lien, while arguably a maritime lien, unlike other maritime liens must be recorded in order to be valid and enforceable.

2. What benefits does one get from placing a lien on a vessel? How is it removed once the lien is satisfied?

Maritime liens are a valuable security interest for businesses and individuals that supply goods to vessels, as the lien provides the creditor a right to proceed *in rem* against the vessel to secure payment, including petitioning the court to order arrest of the vessel to secure their claim. The maritime lien serves the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away.[46] The *in rem* action further serves as a significant motivating factor for shipowners to pay their debts, or risk arrest of their vessel.

Maritime liens can be extinguished in several ways, including:

- Waiver; either by implication or agreement (although waiver is disfavored and courts will require clear proof that the lienholder intended to forego enforcement of the lien);

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[42] *See Shoenbaum*, 1 Admiralty & Mar. Law § 9:1 (6th ed.)
[43] Neill Hutton, The Origin, Development, and Future of Maritime Liens and the Action in Rem, 28 Tul. Mar. L.J. 81, 87 (2003)

[44] *See Shoenbaum*, 1 Admiralty & Mar. Law § 9:1 (6th ed.)
[4545] *See* Hutton at 87-88.
[46] *See Equilease Corp. v. M/V Sampson*, 793 F. 2d 598 (5th Cir. 1986)

- Laches; where the lien holder has unreasonably delayed enforcement of the lien;

- Complete and total destruction of the vessel;

- Judicial sale of the vessel;

- Payment of the claim.

Notably, a maritime lien is not extinguished when the vessel is sold to a good faith purchaser for value. However, in the event that the lien is unrecorded and the lienholder has not exerted a "high degree of diligence" to preserve the lien, laches may apply in cases where the vessel has been sold to a good faith purchaser for value. [47]

The Commercial Instruments and Maritime Liens Act, 46 U.S.C. §31343, provides a statutory method of discharging recorded liens on vessels, providing that a lienholder should file an acknowledged certificate discharging the indebtedness with the National Vessel Documentation Center.[48] Further, 46 U.S.C. §31343(c)(2) provides a civil action in admiralty in federal court for an action to declare that a vessel is not subject to a maritime lien, with the potential for attorneys' fees to be awarded to the prevailing party.

Additionally, the running of the one-year statute of limitations under the Carriage of Goods by Sea Act extinguishes any maritime lien cargo may have on a vessel for breach of charter or cargo damage.[49]

3. When, how, and why might one seize a vessel? How is the seizure perfected and how do the courts get involved? How much does it cost to seize a vessel?

Vessel arrest and attachment are important tools in enforcing a maritime lien and providing a claimant security for their claim. Actions involving ship arrests and attachment are governed by the Federal Rules of Civil Procedure's Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Rule B governs attachments, Rule C governs arrest, Rule D governs petitory and possessory claims, and Rule E provides the procedures for both arrest and attachment.

Seizing, or arresting a vessel, is done under Rules B, C, D, and is brought only against the vessel itself, *in rem*, and only in federal court. A vessel arrest under Rules B, C, or D require the filing of a verified complaint, written under penalty of perjury. Further, the party seeking arrest is also required file a memorandum of law setting forth the reasons why the warrant should be issued and can also file or invoke local rules to allow the vessel to continue cargo operations and for a substitute custodian.

[47] Shoenbaum, 1 Admiralty & Mar. Law § 9:7 (6th ed.), citing *Tagaropulos, S.A. v. S.S. Santa Paula*, 502 F.2d 1171, 1974 AMC 2453 (9th Cir. 1974). *See also McLautghlin v. Dredge Gloucester*, 230 F. Supp. 623 (D. N.J. 1964).
[48] 46 U.S.C. §31343(c)(1).
[49] *Petroleos Mexicanos Refinacion v. M/T King*, 554 F.3d 99 (3d Cir. 2009).

Under Rules B, C and D, the Court reviews the claimant's complaint and any supporting papers, and if the conditions for an *in rem* action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel.

Following, in a vessel arrest, the warrant must be delivered to the U.S Marshals' office for service. Generally, the Marshals will not remain on the vessel while the is under arrest. Instead, the claimant will file a motion to have a substitute custodian remain with the vessel in lieu of the Marshals' office. Such appointment is conditioned on acceptance by the substitute custodian of responsibility and liability during the appointment and plaintiff's agreement to hold the Marshal harmless.

Costs to arrest a vessel vary by jurisdiction, as discussed further below, but generally include marshals' fees, court costs, and substitute custodian fees. Typically, the most important driver of costs in any vessel seizure depend upon what the custody costs, which typically include dockage, will be.

4. And the U.S. Marshal's Office – you can't do a seizure without their involvement!

Under the Supplemental Admiralty Rules, only a U.S. Marshal can serve the arrest warrant on a vessel. However, a person specially appointed may serve arrest warrants on maritime property other than vessels.

Before serving the Warrant of Arrest, the marshal will normally require a deposit of money to cover the cost of arresting and keeping in custody. These deposits will cover the costs associated with moorage, towing, custodian charges, and insurance.

Normally the vessel will be claimed by the owner and released relatively soon after its arrest. However, if it is not, as noted above, the vessel will stay under arrest. Typically, the marshal must also release the vessel, unless the Order of Arrest provides otherwise.

5. When the Vessel is seized – what happens next? How and why might I now release the Vessel? Do I get back the expenses I have incurred?

Rule E addresses procedures for release of a vessel following its arrest. Generally, the vessel is released only upon posting of adequate security, which can be accomplished by the posting of a bond or bank guarantee. The parties may agree on an amount to be posted, although a court can also order security to be posted. The parties may also stipulate or consent to a release.

If the vessel owner does not promptly offer to post security, the claimant may also move for an order directing the interlocutory sale of the vessel. In such a case, the claimant must show that a) the vessel is subject to deterioration, b) the expense of keeping the vessel is excessive, or c) the owner's delay in posting security has been unreasonable. Typically, courts hold that delay is unreasonable if the vessel is not released within four (4) months of arrest.

The marshals' office may refund unused portions of the deposit upon the vessel's release, but the costs of arrest are generally not recoverable absent a contractual provision providing so between the parties.

6. And what about the Letter of Undertaking (LOU)? Can I demand one? Why do I need one? What does such a document look like? What should I expect to be "The Ending of the Dispute"?

The most common method for securing release of a vessel is with a P&I Club Letter of Undertaking ("LOU"), which provides a security alternative to a bond. While a P&I Club will usually provide an LOU if certain conditions are fulfilled (including the claim falling under P&I cover and the member has paid their premiums), the P&I Club is generally not obligated to provide an LOU. As such, while a claimant in an arrest proceeding can "demand" an LOU, as noted above, the vessel owner is not required to provide it, and, in circumstances where adequate security cannot be agreed upon between the parties, the court may order posting of specific security.

The effect of filing a bond, LOU, stipulation for release is to transfer any lien from the ship to the fund represented by the bond or stipulation. Once the ship has been released, the lien is discharged (in the absence of fraud or misrepresentation). Further, subsection (6) of Rule E allows the court, on motion, to reduce the amount of security or to require new or additional security to be given.

However, the release of the vessel is not necessarily the "end" of the dispute, as the former lien holder may still be required to prove their right to payment. Further, the vessel owner may assert any defenses it has to payment of the debt. Additionally, in some cases, after security is obtained, the merits of the dispute may be decided by arbitration or in another forum. In that case, the arrest action may be stayed pending a decision in the other forum.

FRIDAY AGENDA

FRIDAY, APRIL 26, 2024

7:00 – 8:30 **Breakfast Buffet**

8:30 – 11:45 **WHAT DO I DO IN THE EVENT OF A JOINT U.S. COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION FOR A SERIOUS MARINE INCIDENT, AND WHO'S GOING TO HELP ME AND HOW?**

- *Hypothetical will be distributed to analyze for this panel and have a panel and audience discussion.*
- How do I concurrently manage the civil and criminal investigations that may arise in a Coast Guard investigation, while the NTSB conducts its own investigation?
- When does NTSB take over or Coast Guard maintain lead investigative authority, and vice versa?
- What reports can I expect from each agency, and how may those reports be used or not be used in civil and criminal litigation?
- When do I obtain lawyers for my crew members, who pays for them, what can those lawyers tell me or not tell me, and how do they interact with my own company or insurance lawyer in the investigation and defense of any claims?
- In short, what is step number one, step number two and step number three to protect me and my company?
- What policies of coverage are impacted in such a situation and what authorities do my underwriters have versus my company and me in making decisions on litigation strategy and investigation strategy?

Moderator:
Marc C. Hebert, Esq.

Panel Members:

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Marine Insurer

Captain Gregory Callaghan
Deputy Sector Commander
U.S. Coast Guard
New Orleans, LA
U.S. Coast Guard Representative

Brian Curtis
Deputy Managing Director
Investigations
National Transportation Safety Board
Washington, D.C.

11:45 – 12:00 **Closing Remarks**

President of GNOBFA
Karl C. Gonzales
Cooper-Marine
LaPlace, LA

Seminar Co-Director
Alan J. Savoie
the COOPER GROUP of companies
Hahnville, LA

Seminar Moderator
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Maurice C. Hebert, Jr., Esq.
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River Ridge, LA

FRIDAY SPEAKERS

ROBERT "CHIP" BIRTHISEL, ESQ. is a founding partner in Hamilton, Miller & Birthisel, LLP's Tampa office. He practices transportation and maritime law, personal injury and wrongful death defense, marine pollution, general liability defense, and insurance law. His practice includes international and domestic litigation and transactions. He is a retired Coast Guard officer, who spent his final years on active duty as a law specialist and trial attorney assigned to the U.S. Department of Justice, Aviation and Admiralty Litigation Section.

Chip represents a wide range of transportation, maritime, and general litigation clients, providing a myriad of services including litigation of maritime and land-based wrongful death and personal injury, maritime lien, bunker, P & I, cargo, and hull and machinery claims. He represents many of the world's largest insurers and has provided coverage opinions and defense and litigated declaratory judgment actions on behalf of numerous insurers. He also handles contractual matters (charters, bills of lading, sales, brokerage and finance agreements, concession agreements, franchise and license agreements, vehicle lease and purchase agreements, owner/operator agreements), from drafting to litigation.

His practice includes rendering advice on all marine regulatory matters, including coverage placement, flagging of vessels, classification society compliance, and U.S., flag state, and international (i.e. SOLAS, IMO, and Law of the Sea Conventions) regulatory compliance. In addition, he has provided counsel regarding the establishment of a variety of maritime businesses including cruise line operations, cargo lines, Ocean Transportation Intermediary licensing and compliance (VOCC, NVOCC, and Freight Forwarders), and marine and land-based terminal operations. He renders advice daily on compliance with U.S. Customs and Border Patrol, Coast Guard, Immigration, Federal Maritime Commission, National Highway Transportation Safety Administration, Environmental Protection Agency, and other international and domestic regulatory schemes.

Chip has represented and represents a variety of foreign entities and clients in international business transactions and litigation including clients in Japan, New Zealand, Australia, Mexico, Dominican Republic, Colombia, Panama, the Marshall Islands, England, Norway, Venezuela, Ireland, Korea, Costa Rica, Brazil, Honduras, the Philippines, most every island nation in the Caribbean, and Canada.

CAPTAIN GREGORY A. CALLAGHAN assumed the duties as Deputy Commander, Sector New Orleans in June 2022. In this capacity, he oversees over 1,000 active duty, reserve, civilian, and auxiliary Coast Guard personnel who serve over 300 miles of the Lower Mississippi River, 230 miles of the Intracoastal Waterway, and almost 4,000 miles of coastline in an area of responsibility totaling over 100,000 square nautical miles.

His previous operational assignments include Commanding Officer of Marine Safety Unit Texas City from 2016-2018 and Executive Officer from 2014-2016. There, his responsibilities included carrying out the Coast Guard's Homeland Security, Marine Safety, and Marine Environmental Protection missions in the Ports of Galveston, Texas City and Freeport, in over 120-miles of the Gulf Intracoastal Waterway, a 4,000 square-mile region of the Outer Continental Shelf, and the entrance to the nation's largest petrochemical complex. His time there included the preparation and response to Hurricane Harvey. From 2004-2008, Captain Callaghan was assigned to Sector Boston, MA, where he served as Chief of Port State Control, Assistant Chief of Waterways Management, Aids to Navigation Officer, and Senior Investigating Officer. From 2000-2004, he served at Marine Safety Office Miami, FL as Port State Control and Domestic Marine Inspector and Licensing Examiner at Regional Exam Center Miami.

Captain Callaghan's staff assignments include his most recent assignment as Chief of Prevention for the Eleventh Coast Guard District from 2019-2022 where he led staff, two Coast Guard Buoy Tenders, and more

than 2,500 Auxiliarist in management of the prevention mission in an area of responsibility covering California, Nevada, Utah, and Arizona and responsible for $500 Billion in international trade. From 2010-2014 he was assigned in the Office of Port and Facility Compliance at Coast Guard Headquarters where he served as the Coast Guard's program manager for the Transportation Worker Identification Credential enforcement and Chief of the Port and Facility Security Standards Branch leading research, development, and implementation of top priority maritime security regulations. Additionally, he was the Coast Guard representative to the U.S. and Canada Bi-National Maritime Security Working Group.

In 2020, Captain Callaghan was appointed by the Coast Guard Deputy Commandant for Operations as Chairman of the Marine Board of Investigation to investigate the causal factors in the loss of the commercial fishing vessel SCANDIES ROSE and five crew members which occurred on December 31, 2019.

Captain Callaghan served in the Coast Guard Reserves from 1996-2000 as part of the Maritime Academy Reserve Training Program and was assigned to Activities New York.

Captain Callaghan is a graduate of the State University of New York Maritime College where he received a Bachelor of Science degree and an Unlimited Third Mates License in the Merchant Marine. He has Master's in Public Administration and Certification in Port and Maritime Administration from Old Dominion University, and a Master's in National Security and Resource Strategy from the National Defense University's Eisenhower School.

MICHAEL W. MAGNER, ESQ. is a partner in Jones Walker's Litigation Practice Group. A former federal prosecutor, he represents clients in a wide range of commercial disputes, investigations, and white-collar criminal matters.

Mike provides preventive and litigation services for businesses and individuals in corporate and white-collar criminal matters. He also represents individuals and companies in connection with grand jury and other investigations.

Mike has particular experience in anti-corruption compliance and litigation matters on the domestic and international levels, with broad experience in civil and criminal RICO matters. He served as a federal prosecutor in New Orleans for 20 years. In that role, he was a key member of the team that successfully prosecuted former Louisiana Gov. Edwin Edwards, following a five-month trial. He was also the lead prosecutor in the Department of Justice's long-term investigation and prosecution of judicial and related public corruption known as "Operation Wrinkled Robe." In recognition of his work, Mike was awarded the Department of Justice's highest award for litigation, the John Marshall Award, as well as the Director's Award for Superior Performance by a Litigative Team.

Mike is particularly adept in handling long-term, complex white-collar investigations and trials, including export control, mail and wire fraud, government contract fraud, bribery, money laundering, police misconduct, and civil rights violations. In 2011, he served as the Federal Bureau of Investigation's advisor to the Kenyan Anti-Corruption Commission in Nairobi, Kenya, where he was embedded in their principal headquarters for nearly two months, and provided training to KACC's investigators, auditors, and attorneys on corruption compliance, investigative, and prosecution matters.

Following Hurricane Katrina, Mike prosecuted the first criminal case upon the re-opening of federal court and also successfully tried several high-profile civil rights cases against New Orleans policemen. He was the US Department of Justice's first counsel for emergency management and crisis response in the Office of

Director, Executive Office for US Attorneys in Washington, DC, for 18 months, where he represented the DOJ at various White House-level emergency exercises and planning meetings relating to the federal government's response to major criminal events, natural disasters, and pandemics.

CHARLES W. MCCAMMON joined Willis Towers Watson in October 2013 as Vice President – Risk Consulting to lead Willis Marine's growing commitment to risk consulting. With over thirty years of experience in the maritime industry he has an extensive operational, legal and military background. After graduating from Fort Schuyler in 1987, he went to sea aboard a variety of vessel types from tankers to roll/on roll/off vessels upgrading his license from Third Mate to Master. He came ashore in 1993 and was employed as a marine surveyor while also attending Loyola University (New Orleans) Law School.

After obtaining his J.D. in 1997, Charlie served as Assistant Vice President and General Counsel with one of the country's leading groups of towing companies. Mr. McCammon practiced general civil litigation, admiralty and maritime law in Philadelphia from 2000 to 2013.

His legal practice focused on representing owners, operators, charterers, builders and insurers of commercial vessels in claims involving charter party disputes, personal injury, property and cargo damage. He also represented vessel owners and managers in commercial matters including contract and charter party negotiations.

Charlie retired from the Navy Reserves after serving 32 years. He was mobilized to active duty on two occasions and is a veteran of the Iraq Campaign Operation New Dawn (2010/2011). He served as a Emergency Preparedness Liaison Officer for the last eight years of his Navy career.

Charlie was a volunteer child advocate in Philadelphia for 10 years and from 2007 to 2010 he was elected to the First Judicial District of Pennsylvania's Pro Bono Roll of Honor as an attorney whose pro bono work has been recognized by the judiciary as exemplary. Charlie has served as a member of the board of the Corinthian Yacht Club of Philadelphia and is an active J22 sailor at the same club. Charlie also owns Patriot Harbor Lines, a harbor tour business in Philadelphia.

NICHOLAS D. MOSES is a federal prosecutor at the United States Attorney's Office for the Eastern District of Louisiana. When he was the district's environmental crimes coordinator, he prosecuted cases stemming from both offshore and inland incidents. His convictions of several corporations and individuals in a multiple-fatality oil platform explosion case received a superior service award from the United States Environmental Protection Agency's Office of Enforcement and Compliance Assurance. He has investigated and prosecuted a variety of white-collar crimes, including the bank fraud prosecutions stemming from the largest bank failure in Louisiana history, nationwide and local healthcare fraud schemes, public corruption, racketeering, and tax fraud. Before joining the government, he practiced in New York as an in-house litigator at Credit Suisse Securities (USA) LLC and began his career at Cravath, Swaine & Moore LLP. He graduated from the University of Pennsylvania Law School and Boston University.

WHAT DO I DO IN THE EVENT OF A JOINT U.S. COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION FOR A SERIOUS MARINE INCIDENT, AND WHO'S GOING TO HELP ME AND HOW?

- *Hypothetical will be distributed to analyze for this panel and have a panel and audience discussion.*
- How do I concurrently manage the civil and criminal investigations that may arise in a Coast Guard investigation, while the NTSB conducts its own investigation?
- When does NTSB take over or Coast Guard maintain lead investigative authority, and vice versa?
- What reports can I expect from each agency, and how may those reports be used or not be used in civil and criminal litigation?
- When do I obtain lawyers for my crew members, who pays for them, what can those lawyers tell me or not tell me, and how do they interact with my own company or insurance lawyer in the investigation and defense of any claims?
- In short, what is step number one, step number two and step number three to protect me and my company?
- What policies of coverage are impacted in such a situation and what authorities do my underwriters have versus my company and me in making decisions on litigation strategy and investigation strategy?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
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MARINE CASUALTY INVESTIGATIONS: OVERVIEW, RESPONSIBILITIES, AND LIABILITIES

Chip Birthisel, Hamilton, Miller & Birthisel, with the assistance of:
Samantha Pearce, Jaimie Carlson, and Brook Somerville

Introduction

U.S. Coast Guard ("USCG" or "Coast Guard"), National Transportation Safety Board "NTSB") and civil and criminal litigation all have their own jurisdictions, rules of procedure and evidence, rights to counsel, and U.S. Code and Code of Federal Regulations provisions that apply. Some are consistent with one another -- many are not. When an investigation requires the production of documents and things (aka "real evidence") or live testimony, it *matters* who is asking for the evidence, in what forum, and under what authority. You cannot assume that because you are responsive in the USCG investigation, that the evidence obtained enjoys similar treatment, admissibility, and significance under the NTSB's rules and regulations; or that it enjoys some special status under the civil and criminal rules of procedure and constitutional case law associated with those bodies of law. What you *must* asume, is that most evidence obtained is probably admissible across-the-board in all matters related to an accident or casualty, and that you need to protect the record as much as possible from *all* sides.

Let's begin with the Coast Guard. The Coast Guard has broad authority to investigate casualties and accidents on vessels (except public vessels) occurring in the navigable waters of the U.S., and U.S. vessels wherever such casualty occurs, and foreign tank vessels operating in waters subject to the jurisdiction of the U.S. including the Exclusive Economic Zone that may involve significant harm to the environment or material damage affecting the seaworthiness or efficiency of the vessel.[1] There are specific exclusions found in 46 C.F.R. § 4.01-3 such as recreational

[1] 46 C.F.R. § 4.03-1.

vessels, certain diving incidents and shipyard workers, and major marine casualties with significant USCG functions related to safety.[2] Throughout this paper, "casualty" and "accident" will be used interchangeably, Marine Casualty Investigation ("MCI") or "investigation" may refer to any level of investigation and Marine Board of Investigation ("MBI") will typically refer to the more formal MCI. We attempt to provide guidance on minor, daily types of accidents involving somewhat short, informal MCIs, as well as more serious casualties likely to lead to an MBI.

A marine casualty or accident is broadly defined in 46 C.F.R. § 4.01-1 and includes but is not limited to: any fall overboard, injury, or loss of life of any person; and any occurrence involving a vessel that results in grounding, stranding, foundering, flooding, collision, allision, explosion, fire, reduction or loss of electrical power, propulsion or steering, failures or occurrences which impair any aspect of a vessel's operation, components, or cargo; and other circumstances that might affect or impair a vessel's seaworthiness, efficiency, or fitness for service or route; or any incident involving significant harm to the environment.[3]

The Coast Guard also enjoys jurisdiction over marine casualties where the U.S. is a "Substantially Interested State."[4]

Anytime a marine accident or casualty occurs there is a good chance a United States Coast Guard ("USCG"), and/or National Transportation Safety Board ("NTSB") investigation(s) will follow. There will almost always be some form of USCG investigation, whether it is an informal

[2] 46 C.F.R. § 4.01-3.
[3] 46 C.F.R. § 4.03-1.
[4] *See Reporting and Investigation of Marine Casualties where The United States is A Substantially Interested State*, NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 05-17, CHANGE 1, Nov. 21 2023, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/NVIC/2017/NVIC_05-17_CH-01__SubstantiallyInterestedStateInvestigations_Redacted.pdf?ver=HCRx5O5F0NazPfer64pjRQ%3D%3D ["COMDTPUB P16732 NVIC 05-17 Change 1"]. As this particular topic is more applicable to principles of international law, and particularly applicable to entities like foreign-flagged cruise lines operating in and out of U.S. waters and often carrying U.S. passengers, it is being addressed peripherally here for completeness only and is discussed further *infra.*

investigation involving reasonably insignificant property damage or personal injury conducted on-scene by local Officer in Charge of Marine Inspection ("OCMI"), Captain of the Port ("COTP"), and/or Sector or Marine Safety Unit ("MSU") investigators; or a deeper dive to determine if the facts and circumstances warrant the convening of a formal MBI by the OCMI/COTP.[5] In some cases an NTSB investigation may take place as well.

As will be further discussed below, depending on the severity of the incident and other objective and subjective regulatory and discretionary factors determined by the OCMI/COTP, the investigation could be as simple as a USCG Petty Officer arriving on-scene or calling your office seeking information; or you filing a CG-2692 and perhaps a couple of brief, requested witness statements -- or as complex as a full-blown, combined USCG/NTSB MBI involving scores of combined agency resources (USCG, NTSB, and others), service of subpoena's, presence and representation by counsel, live testimony, and the introduction and taking of evidence. An MBI/NTSB investigation could take days or it could take years.

The evidence gathered could have both civil and criminal consequences for any party to the investigation(s), including officers and crew on-scene, as well as management and company officers who were literally hundreds of miles from the scene of the incident at the time of its occurrence. The consequences may flow from the investigation itself and involve agency or DOJ action, or from civil lawsuits brought between people and entities who may or may not have been a party to the investigation at all.[6] Either way, the evidence taken by, and opinions of, the USCG and/or NTSB may have far-reaching, long-term legal effects on the parties to the third-party litigation, including potential *Pennsylvania Rule* presumptions (regarding civil liability based on

[5] 33 C.F.R. § 3.01-1.

[6] Serious Marine Casualties will almost always result in someone filing a Shipowner's Limitation of Liability Act of 1851 action in Federal Court seeking to invoke "concursus," and potentially limit liability for the casualty. 46 U.S.C. § 30401 *et. seq*.

violation of a regulation or statute) , and could even give rise to a referral of charges by the USCG to the U.S. Attorney, who will make the decision on whether to send the matter to a grand jury, and possibly prosecute.[7] As part of the panel discussion to follow, Michael Magner and Marion Strauss, Jones Walker, LLP, have prepared an excellent paper: *SEAMAN'S MANSLAUTHER: CRIMINALIZATION OF MARINE-INCIDENT DEATHS.* I urge you all to review it and consider its advice.

One thing is certain, the NTSB is showing up a lot more at what were once only Coast Guard investigations, and the additional emphasis on attempts to criminally prosecute mariners and marine companies under 18 U.S.C. §1115 is real. The days of one or two civil lawyers being able to handle the complexity associated with the different agencies' investigative regulations, coupled with the increasing threat of criminal prosecution, has created the need for a team approach to the representation to ensure all bases are covered and your clients' flanks are protected. Even slight differences in the USCG's and NTSB's procedures in handling of documents, witness statements, and evidence, alone, will keep a capable legal team on its toes when you add the possibility of criminal and civil liability exposure the burden increases greatly. This is not to say that investigations are unnecessarily adversarial, but there truly is only one party to an investigation likely to suffer negative consequences – the party being investigated. All the other parties are either governmental agencies or parties seeking money from your client, so special attention and vigilance must be maintained at all times.

The likelihood of someone filing a Shipowners Limitation of Liability Act of 1851 action

[7] For example, while an MBI or NSTSB report may not, themselves, be admissible in a civil action, testimony and witness statements and other evidence probably *is*. *See* 46 U.S.C. § 6308(a) and 49 U.S.C. § 1154(b) in addition, the inadmissibility typically applies to actions between third parties. If the Coast Guard is trying to use it in a pollution case (which may have been the genesis for the MBI in the first instance) it is probably asmissible. As for their criminal admissibility we are unaware of a similar statute, but presuming anything that is elicited in a MBI or comes from your clients' testimony or records is probably admissible is the safest course.

("Limitation Action") early in the process, and adding a federal judge and magistrate to the mix can be both helpful and stressful.[8] While such an action is almost *routine* in most instances in which a Marine Board of Investigation has been formed -- in order to offer a client breathing room, invoke concursus,[9] and interject an additional layer of federal control. It will immediately create additional responsibilities in terms of managing civil claims and attempting to limit the damage done by witnesses and evidence in the MBI bleeding over into the Limitation Action. The filing of a Limitation Action may also serve to create mistrust from crewmember claimants and the families of deceased crewmembers; which, in turn may create witness loyalty and media issues as the plaintiffs' attorneys institute a full frontal media assault on the unsafe, cold-hearted vessel owners in order to stoke disloyalty to the company by the plaintiffs. This is not meant to cast aspersions at various stakeholders in the process, but merely to suggest that the process moves quickly and chaotically, and the only way to effectively weather the storm it is to be prepared in advance.

At the onset of an MBI, at very least, you should probably have: a civil lawyer on civil liability, a criminal lawyer on liability, civil lawyers on NTSB and MBI procedures and liability, a media consultant, and a member of the company's management team (and perhaps a counselor or therapist) to assist with the care and feeding of family members and crew.

If you have not yet received a letter advising you that you are a party to an investigation, in whatever form it is taking, you may want to request party status under USCG guidance found in CG-INV Policy Letter 1-14, dated January 14, 2014, The request for party status can be

[8] This does not even take into consideration dealing with state court actions that will likely be filed by plaintiffs to attempt to secure a state court venue with a jury.

[9] Concursus allows all actions arising out of the marine casualty to be adjudicated in a single proceeding; the court will require all claims to be filed by a certain date or be subject to dismissal. Concursus is often as important to managing the claims as the possibility of limitation itself.

particularly helpful in a lower-level, informal investigation that is not likely to rise to the level of a serious marine casualty, but could have liability consequences in the form of lesser fines and penalties. Party status tends to level the playing field somewhat and is the Coast Guard's attempt to include all stakeholders in the process. In essence, it is meant to give those with Party status access to information they might not otherwise have.

Advance Preparation

Upon the occurrence of an incident giving rise to the investigations and, indeed, well in advance of any casualty or accident, as part of an ongoing risk-management program, you should consult Coast Guard Navigation and Vessel Inspection Circular ("NVIC") No. NVIC 01-15, dated 21 July 2015.[10] This NVIC contains an excellent guide to when and whom in the Coast Guard to call in the event of a suspected marine casualty, including when a phone call is sufficient, and when a CG-2692 must be filed. It is important to review and follow this NVIC because some (most) notifications must be made by telephone or radio if you *think* it is a Marine Casualty, and the NVIC will walk you through whether a CG-2692 *must* be filed within 5 calendar days. In close calls regarding whether a reportable Marine Casualty has occurred, NVIC 01-15 suggests it is the Coast Guard's responsibility to tell you if the event *requires* a CG-2692. We urge you to put a copy of the NVIC on your computer desktop.

Spend time *now* identifying a casualty team to respond to a marine casualty. The team should broadly consist of people who *may* be needed:

- Lawyers – civil and criminal trial lawyers (more than one should be identified in the event the company decides to hire counsel for individuals and there is a potential conflict between the company and the individuals needing counsel);

[10] *See*; *Title 46, Code of Federal Regulations (CFR), Part 4 Marine Casualty Reporting Procedures Guide with Associated Standard Interpretations*, NAVIGATION AND VESSEL INSPECTION CIRCULAR, July, 21 2015, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/NVIC/2015/navic-01-15_Marine_Casualty_Reporting20150721.pdf ["COMDTPUB P16700.4. NVIC 01-15"].

- Experts on USCG/NTSB procedure and investigations;
- On-scene responders (surveyors, naval architects, cargo experts), navigation and deck seamanship experts;
- Mechanical, electrical, and fire experts;
- Cleanup and pollution response experts;
- Marine construction architects, surveyors, and salvors;
- Weather experts and meteorologists;
- Vessel safety experts including Safety Management Systems ("SMS" and Towing Safety Management Systems ("TSMS");
- Damage control experts;
- Public/media relations consultants;
- Psychological, medical, and grief counselors;
- Family liaison; and
- Clergy

Part of this process should be identifying who on your staff should be the company representative to the NTSB and USCG. That person should be experienced, knowledgeable, poised, and articulate; it is not a job that should be assigned last-minute as a collateral duty to someone who happens to have time; but should be an ongoing role a person routinely performs. It should be a person who your own captains and crews recognize as a resource to be notified, consulted, and trusted throughout their daily work lives, as necessary. Indeed, you do not want the Coast Guard or NTSB delving into things like safety complaints and stop-work authority found in your TSMS or SMS and your employees not knowing who has that authority (including themselves) and who fulfills those roles in the company (and how to reach them on their mobile or home phones after hours -- because we *all* know that these things usually occur on a holiday or weekend at 0200).

Likewise, in addition to general safety and stop-work protocol, your SMS should include the appropriate human resources guidance, including the recent policies found in Commandant Policy Letter 23-04, from Title 46 U.S.C. § 11101.[11] While investigations tend to focus on equipment, weather, fatigue, and other human factors, the work environment and issues of poor leadership or sexual harassment are taking new and heightened, importance in investigations because of their significant impact on the work environment, worker stress, and job performance.

Even in the case of a routine dock allision or small diesel spill while refueling, **we recommend if a CG-2692 is going to be submitted, it, and any witness statements, be reviewed by counsel** (criminal is typically not necessary – but *may* be).

You would be surprised at how many CG-2692s pop up in civil litigation that were completed and executed by an unsophisticated crewmember saying foolish things that ultimately wreak havoc on case defense. I am reminded of this line in a CG-2692 where the captain attempted to protect himself and/or make a point to management about the caliber of new hires:

> "This probably could have been prevented if Skeeter wasn't so green and had been trained not to put his hand in the line …"

Of course, such a comment led the plaintiff's (Skeeter's) counsel directly to an unseaworthiness allegation based on crew training (or lack of it). This kind of comment would *never* have appeared in a CG-2692 reviewed and submitted by counsel.

Moreover, a good plaintiffs' lawyer may seek to tap the USCG's database of CG-2692s via a Freedom of Information Act ("FOIA") request or subpoena in an attempt to make a claim that your operation is unsafe. The takeaway is that a seemingly routine government form can cause

[11] *See Guidance on Statutory Information Requirements Within Accommodation Spaces on Merchant* Vessels, UNITED STATES COAST GUARD, Nov. 13, 2023, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/Policy%20Letters/2023/CVC-PL-23-04%20SASH%20Signage.pdf

a lot of trouble in litigation involving the marine casualty at issue or something years from now! Give it the time and attention it deserves.

The industry often feels unnecessary pressure in quickly completing and submitting CG-2692s. Notwithstanding a seemingly anxious MST2 investigating officer at the local Sector *wanting* one immediately, **the regulations do not *require* them to be submitted sooner than within 5 (five) calendar days of the incident**. The oral reporting of certain incidents via telephone or radio are immediate, but the CG-2692 form is *not.*

Along these lines, we caution you about unnecessary and unchecked preparation of "Root Cause Analysis" ("RCA") being required by many entities in the industry, especially if you are moving petroleum products. At very least, we recommend ensuring some type of legal protection over disclosure and discovery of such processes by management of the data through counsel (inserting attorneys in the process such that the obtained information enjoys privilege or work-product protection). No doubt, RCA helps figure out what happened and may lend itself to safer operations. At the same time, however, it provides a direct written road map for civil (and maybe criminal) liability exposure. The point is *not* that it should not be done; only that it should be overseen and managed by liability-minded people.

We would be remiss if we did not mention training, drills, and relationships with authorities here. Marine Casualty management is a *process*, not an event. If you do not know your local Sector command, we recommend you get to know it, including the Commanding and Executive Officers, as well as the people in Prevention and Response. Your company personnel should get to know the people who show up when something does not go exactly as you wish. We also recommend you participate in the local Waterways Council and volunteer to be involved in table-top drills and exercises that take place from time to time in your port. People from the USCG should be invited

to Rotary, Propeller Club, and other waterfront functions such as the crawfish boil and golf outing in New Orleans (all ports have something similar). They will not compromise their integrity or governmental roles over personal relationships -- regulations do not permit it and they are trained not to accept gifts, etc., including meals and entertainment. But, inviting a handful of young junior enlisted men and women to the Propeller Club crawfish boil or donating some Saints end-zone tickets to the local Coast Guard Recreation and Morale Office is never a bad move.

We are from the Government and are here to Help

When the Coast Guard shows up; either when something happens or because it suspects something may have happened, you need to consider two things: (1) why and under what authority are they here; and (2) must you cooperate? Your gut tells you, much like the "mind if I look in your trunk" question, that you should cooperate. The answer to question #1 should help you decide; and it is not rude or otherwise uncooperative to politely ask under what authority they are there.[12]

Law enforcement is trained to ask "do you mind if we look in your trunk?" However, they are not well trained on how to react when you say "I would rather you didn't." This scenario presents somewhat of a Hobson's choice; you wish to be cooperative and friendly, because this is *the* agency that can make your life easy or difficult – but understand, that an immediate "go ahead" gives up a whole host of rights you otherwise have. There is no question theCoast Guard generally has the authority to board your vessel, and it has the authority to conduct a reasonable inspection; but it does not have unfettered discretion to do whatever it wants and to take whatever evidence it wants. Nor do you have to answer an investigators questions EXCEPT where there is an immediate threat to life or property (*i.e.* "how long ago and on which side of the tug did you see him go overboard" must be answered immediately; "how long have you been on watch without sleeping?"

[12] They will not tell you what they are looking for, but they will generally tell you under what authority they are aboard.

maybe not).

In my experience, both as a lawyer and a Coast Guard boarding officer, a boarding team will typically not balk at a professional response by a tug captain that he or members of his crew do not wish to talk or give statements without counsel present – particularly if the captain suggests that he or whomever the USCG wants to interview would be happy to visit the Sector with counsel the following day (or appear by telephone or Teams with counsel present). If the boarding officer suspects alcohol or drug use, the dynamics of such a conversation can change rapidly. Just know the Coast Guard can get most of what it asks for through a subpoena. However, in order for the Coast Guard to *enforce* its subpoena, it must go to a federal judge or magistrate to do so. Most boarding officers understand that if there has been a loss of life or severe personal injury, witnesses will not likely allow themselves to be interrogated without counsel present as there is simply too much at stake. Having said this, I have told boarding officers I prefer they not interview my client until I got there, and I had never received push-back. The old "you can do it here, or down at the station" makes for good television but is not the sort of thing routinely witnessed. Most Coast Guard men and women are polite, courteous, and professional.

Two caveats. First, be prepared for a boarding officer to challenge you and/or the witness regarding whom the attorney represents. I have even had one go as far as to outright tell the witness, "he is the company lawyer, not yours, you have to answer my questions." To which I politely replied, "no, I do represent him as well." This was followed with (I am not making this up) the young boarding officer telling me "you cannot do that, it's a conflict" (we used to call these "sea lawyers"); my client advised him politely, "I waived it." Second, attorneys should not <u>*instruct*</u> a witness to not answer the Coast Guard's questions *outright* – you may find yourself on the receiving end of an obstruction of justice charge by DOJ. The appropriate response by a client or

witness is probably "I intend to fully cooperate in your investigation but I also invoke my rights under the 5th Amendment," or "I would be happy to answer your questions, after I have the opportunity to discuss it with my lawyer."

Finally, USCG boarding teams have been known to relieve you of things for which they have not received authority from the captain or company (nautical charts, logbooks, etc.). I had many heated debates with my Coast Guard brethren about their authority to do this. Most would argue if something were in plain sight it is theirs to take. While that may technically be correct, I do not agree with that as I am of the school of thought that believes if the government is going to relieve you of something that is yours or over which you have custody, it is called a "seizure." A government investigator should advise if they are taking something, and under what authority they are taking it. Again, the issue here is not so much their ultimate right to get it; it is the objectionable process by which they are taking it (without proper notice or accountability). In sum, you should know what is being taken from your vessel in real time – not discover it when it is placed in front of you at an MBI.

I recommend you avoid the argument altogether. While the USCG has the right to access various parts of your vessel to look, it does not necessarily have the right to do so without escort by a member of your crew to ensure nothing is seized without your knowledge. Your captain can usually resolve this concern by requiring the captain requires a written list of anything the lead boarding officer takes from the boat. Most boarding officers will accommodate the request, as it is not an unreasonable request, they will likely have to inventory it at some point anyway and, frankly, they do not want to get blamed if something goes missing.

One final note on this. Obviously, if the vessel is taking on water or in flames (in other words, the subject of a SAR case) insisting on supervised movement about the vessel is probably

unwise.

Who Ya Gonna Call?

When a casualty occurs, we recommend reporting and response be accomplished in phases. As part of your company response plan, there should be designated individuals who accomplish specific tasks as a team so the most critical reporting and response can be undertaken first; followed by the less emergent, ongoing casualty response management. For example, one person reports to the Coast Guard and deals with it; another deals with towing, salvage, and cleanup vendors, and yet another deals with legal, media consultants, and family communications.[13] If this is practiced in a company table-top drill once or twice annually, it is much easier and smoother to handle if it actually happens. Even better, if you can make time to participate in a drill with local authorities the process can be better understood by all stakeholders. That way, if something does happen, everyone will have some familiarity with the various players and the processes through which a marine casualty is handled. Most Sectors and Waterways Management authorities conduct annual or semi-annual drills so they are prepared for a casualty.

We recommend the order of notification be handled in phases; with emergency/first responders **notified immediately**, followed by defense and casualty management entities for your business and crew. For example:

- Coast Guard: First because of possible Search and Rescue and pollution response. Assume that everything you do is "on the record" – because *it is*!
- National Response Center: Pollution response, no matter how slight.
- Harbor police and fire: Let them know USCG and NRC have been notified.
- Towing/salvage company: If the vessel is damaged or sunk you will need them.

[13] I mention family here because you do not want the family of a crewmember to hear of a missing person from the casualty for the first time on a local newscast; likewise, you do not want them showing up at your offices, the Coast Guard, or the local news channel frantically searching for their loved-one.

- Oil Spill Response Organization: You want to get them to the scene to boom things and get cleanup moving immediately (subject, of course to USCG On-Scene Commander).

- Civil and criminal lawyers: No one should speak to authorities or anyone else in media without them. This may be the *only* chance your lawyers have to obtain privileged versions of what happened from the witnesses. The interviews should probably not be recorded or written by the witnesses (may be admissible) but, instead, noted by an attorney asking questions (work product protected). Once the NTSB rules kick in, the status of interviews and your ability to get them will likely be seriously hampered. As part of your advanced training, we recommend you advise your employees that telling others about what they saw or heard is not protected. They should be especially careful of brothers, sisters, fiancés, romantic interests, and family members with whom they do not enjoy privilege. You should remind them immediately following the incident.

  We recommend you have a list of lawyers, particularly criminal lawyers, you can engage and assign to different witnesses. This can be quite expensive for a company, but leaving crew hanging out there without legal counsel can be dangerous in a variety of ways. We have often found ourselves in situations where we advise the P&I insurers that providing representation for the captain is necessary to protect the interests of the insured/member; it gets particularly difficult persuading them that a dozen or so lawyers may need to be engaged to cover all the bases. In addition to having a lawyer to represent individual witnesses, in a MBI involving USCG, NTSB, and possible criminal exposure, we recommend counsel be engaged for each of those purposes: 1 USCG, 1 NTSB, and 1 criminal with a loose joint defense agreement between that team and the individual witnesses' counsel.

- Media consultants: Work with management and lawyers to manage the flow of information. NEVER assume something is "off the record" with media, or USCG, or NTSB, or *anyone* – even if they *say* it is..

- Crew and Family support: Let employees and family know that something has happened and keep them advised.

- Marine surveyor: Assess damage, make insurance claims, and perhaps assist in accident construction and evidence preservation.

- Immediately advise your insurance broker and insurers.

- Consider Party in Interest request, if you are not yet designated.

- Get Freedom of Information Act requests out to all responders, including requests for radio communication recordings from the USCG and other authorities (do not forget bridge tenders, pilots, television stations, and CCTV to private docks, bridges, wharves, etc. whose coverage is increasing daily).

- Evidence preservation letters should go to all parties involved.

Secure your own evidence, including lines, failed equipment, etc., that is likely to be evidence in an investigation and subsequent/concurrent civil litigation. Do not forget cellular phones, laptops, iPads, and other electronic devices and databases. Now is not the time to clean out your hard drive. The investigators will know it. Data management should also be a process rather than event. You will probably have to engage IT assistance to search databases in response to subpoenas. It is *not* cheap.[14]

- If the matter warrants it, you should consider filing a Limitation of Liability action in federal court as soon as possible.

I. WHAT IS A MARINE CASUALTY INVESTIGATION?

According to the Coast Guard, the purpose of an MCI is not to assign blame or liability, but to improve marine safety through fact-finding and determining the causal and contributing factors that led to the casualty. The findings and recommendations of MCIs are then used to improve safety practices, to prevent similar accidents from happening in the future, update regulations, and to enhance training and education within the maritime industry.

However, do not be lulled into a false sense of security based on that stated purpose. Make no mistake about it, if incriminating evidence is revealed during what appears to be a somewhat benign civil investigation, it can, and will, be used against you if the US so chooses; and, arguably, it is under no duty or compulsion to stop an interview and advise you that you have crossed over into an incriminating line of inquiry. In addition, we have all seen law enforcement on television giving *Miranda* warnings (right to counsel). Those warnings are *only* required when the inquiry is *custodial*. If you are not in custody, and you are spouting off things that incriminate you, no one is *required* to stop you or help you. By the same token, the old "mind if I look in your trunk?" has led to more incriminating evidence seizure and convictions than you can imagine. The instant,

[14] A good general rule is if you don't want whatever is on the devices to be shared with the world, don't put it on there, especially emails, texts, and photos. Moreover, your policies regarding personal devices in wheelhouses or while on watch should include the warning that investigators will look at your texts immediately preceding, during, and after an incident to determine if you may have been distracted.

reaction is typically "go ahead" – because we do not like to be rude or "look" guilty. However, if that is the response, and they look and find something illegal, they will not hesitate to arrest you!

Moral to the story, if there is someone sitting in the back of your office, in civilian clothes, with a pad and paper, taking notes while the polite, uniformed USCG personnel are asking questions – he is *probably* Coast Guard Investigative Service, who has independent law enforcement authority to work with the US Attorney in cases referred by the appropriate Coast Guard command. Always look at the credentials of *everyone* conducting the investigation and record who they are and where they are from. Remember, *nothing* is off the record! Never hesitate to terminate the interview when you do not wish to talk anymore or you need to consult counsel – just because you were willing to sit down and speak to the authorities voluntarily at first, doesn't mean you cannot change your mind as you go and decide you should probably ask for counsel.

As a reminder, a marine casualty is a vessel-related incident (*e.g.*, falls overboard, injuries, death, groundings, collisions, fire, impairments affecting operation or safety, and other incidents involving environmental harm). The USCG defines a marine casualty as any event resulting in significant environmental harm or material damage affecting vessel seaworthiness or efficiency and involving a vessel within US navigable waters, a US vessel, or a foreign tank vessel operating in US jurisdictional waters.[15] The NTSB's definition of a marine casualty includes abandonment of vessels, or other marine occurrences that necessitate investigation as determined by the NTSB or USCG.[16]

Although there are multiple types of marine casualties, we will focus primarily on major marine casualties, which include: (1) loss of 6 (six) or more lives, (2) loss of a mechanically propelled vessel of 100 (one hundred) or more gross tons, (3) property damage estimated at

[15] 46 C.F.R. § 4.03-1.
[16] 49 C.F.R. § 831.51.

$2,000,000 (two million dollars) or more, or (4) serious threat to life, property, or environment by hazardous materials.[17]

II. WHO CONDUCTS MARINE CASUALTY INVESTIGATIONS?

The USCG and NTSB are the two main agencies who investigate marine casualties. Although the NTSB is charged with investigating transportation-related incidents, and the USCG is charged with compliance and oversight of marine safety standards, both agencies have permissive and mandatory obligations to conduct MCIs, depending upon the type of marine casualty at issue. The MCIs can be jointly or independently conducted.

A. Scope and Jurisdiction

1. USCG

The USCG primarily focuses on investigating marine related incidents and emergencies to enforce maritime regulations and to ensure compliance with safety standards. The USCG has jurisdiction to investigate *any* marine casualty involving death, serious injury, material loss of property, material damage to vessels, or significant harm to the environment (1) occurring on the navigable waters or territorial sea of the United States or (2) involving a non-public vessel of the United States.[18] The USCG may also investigate any marine casualty outside the territorial sea, when the United States is a substantially interested state.[19]

The USCG also enjoys the authority to enforce, fine, and penalize; including referral of a cast to the U.S. Attorney for prosecution.

[17] 46 U.S.C. § 6101(i).
[18] 46 U.S.C. § 63 *et. seq*.
[19] *Id.*

2. NTSB

The NTSB has no law enforcement or regulatory authority. It can only *recommend.* The NTSB investigates accidents across various modes of transportation. NTSB investigations are not adjudicatory proceedings and thus do not determine rights, liabilities, or blame of any person or entity. Rather, NTSB investigations aim to determine the probable cause of accidents and make safety recommendations to prevent similar incidents in the future. Its investigators are typically capable and experienced, and add a different transportation and shipping industry twist to its investigations. For example, NTSB investigators probably enjoy more cargo experience than their Coast Guard counterparts, and their understanding of manning and seamanship is typically based on significantly smaller crews than the Coast Guard, which enjoys military manning standards. .

The NTSB has jurisdiction to investigate any major marine casualty or any casualty involving public and non-public vessels.[20] However, the NTSB *must* investigate any marine casualty where: (1) it relates to a Coast Guard vessel and a non-public vessel with at least one fatality or seventy-five thousand dollars ($75,000.00) in property damage; (2) the Commandant and the NTSB Board agree the NTSB Board shall conduct the investigation, and the (i) casualty involves a public and a non-public vessel and at least one fatality or seventy-five thousand dollars ($75,000) in property damage; or (ii) the casualty is a major marine casualty involving significant safety issues relating to USCG safety functions.[21]

B. Who Leads a Marine Casualty Investigation: Memorandum of Understanding

At times, both the USCG and the NTSB have jurisdiction to investigate the same marine casualty. To reconcile this issue, the agencies executed a Memorandum of Understanding

[20] 46 C.F.R. § 4.40.15.
[21] *Id.*

("MOU") to outline who would lead an MCI in the event of overlap.[22] Per the MOU, the USCG *prefers* to lead all non-major MCIs, and the NTSB *prefers* to lead major MCIs.[23] If the NTSB chooses not to investigate a marine casualty within its jurisdiction and the casualty does not involve the Coast Guard, then the USCG may investigate on the NTSB's behalf. Regardless of which agency leads, the other agency may participate as an equal partner in gathering evidence and establishing facts, while keeping their analysis and conclusions independent.

III. Marine Casualty Investigation Procedure

An MCI occurs in the five (5) phases described below.

A. Phase 1: Mandatory Notification Requirements

If an event described under 46 C.F.R. subpart 4.05-1 occurs, the event is a reportable marine casualty, that must be promptly reported to the USCG in accordance with the two notice requirements discussed below.

1. The Immediate Notice Requirement

The immediate notice requirement requires the owner, agent, master, or person in charge of a vessel give notice as soon as possible to the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office, whenever the casualty involves any of the following: unintended groundings or allisions; loss of propulsion or steering; occurrences affecting vessel seaworthiness; loss of life; serious injuries requiring professional medical treatment; significant property damage exceeding seventy-five thousand dollars ($75,000); or environmental harm.[24] The notice must include information such as the vessel's name and official number, owner or agent details, nature

[22] *See* Memorandum of Understanding Between the National Transportation Safety Board and The United States Coast Guard Regarding Investigations and Related Matters (Jun. 17, 2021))(available at https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/INV/docs/NTSB-USCG%20MOU%20-%2020210617_Final.pdf?ver=qEjXa7CiQg8hJup9t6CytA%3D%3D)
[23] *See Id.* at 2, Sec. (3)(e).
[24] 46 C.F.R. § 4.05-1.

of the casualty, location, and the extent of injuries and property damage.[25] Failure to report can result in a penalty of up to twenty-five thousand dollars ($25,000.00).[26]

2. Written Notice Requirement

The USCG also requires the owner, agent, master, operator, or person in charge, to file a written report within five (5) days of a reportable marine casualty.[27] The written report must be submitted on Form CG-2692 and supplemented as necessary with appended forms.[28] Notably, if the written notice is filed without delay, it may also satisfy the immediate notice requirement.[29]

B. Phase 2: Preliminary Investigation Conducted by USCG

The USCG commences a preliminary investigation upon notice of a reportable marine casualty. Upon completion, the Commandant[30] reviews the findings and determines if any of four factors are present.[31] If the casualty falls under one of the four factors, the Commandant will notify the NTSB.

C. Phase 3: On-Scene Fact Finding by USCG, NTSB, or Both

If the preliminary investigation reveals a marine casualty occurred, an investigation will commence, varying significantly based on the leading agency and the severity of the casualty (*i.e.*,

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[25] 46 C.F.R. § 4.05-5.
[26] 46 U.S.C. § 6103(a).
[27] 46 C.F.R. § 4.05-10.
[28] Forms CG–2692A (Barge Addendum), CG–2692B (Report of Mandatory Chemical Testing Following a Serious Marine Incident Involving Vessels in Commercial Service), CG–2692C (Personnel Casualty Addendum), and/or CG–2692D (Involved Persons and Witnesses Addendum) to a Coast Guard Sector Office or Marine Inspection Office. Furthermore, reporting requirements extend to disclosing evidence of alcohol or drug use by individuals directly involved in the casualty, as discussed in 46 C.F.R.§§ 4.05-12, 4.06 *et seq*. Mandatory alcohol and drug testing is noted specifically with *serious marine incidents*. 46 C.F.R. § 4.05-10.
[29] 46 C.F.R. § 4.05-1.
[30] Practically speaking, this authority is typically delegated to the local Coast Guard Officer in Charge of Marine Inspections or Captain of the Port.
[31] These four factors include whether the casualty (1) is a major marine casualty involving at least one fatality or $75,000 in property damage; (2) involves both public and non-public vessels with at least one fatality or $75,000 in property damage; (3) involves a USCG and a non-public vessel with at least one fatality or $75,000 in property damage; and (4) is a major marine casualty a major marine casualty with significant safety issues related to USCG safety functions. 46 C.F.R. § 4.40-10.

the procedure following on-scene evidence collection, and the rights and obligations of interested parties). The subsections below discuss each agency's power to collect evidence in the MCI.

1. The USCG's Tools for Investigation Fact Finding

After determining a marine casualty occurred, the USCG selects the level of investigation to conduct—*i.e.* (1) "Data Collection;" (2) an "Informal Investigation;" or (3) a "Formal Investigation."[32] Most casualties necessitate paper-only Data Collections or Informal Investigations, conducted by a local Investigating Officer. However, in some circumstances, where the casualty is severe and complex, a Formal Investigation may occur, typically using a Marine Board of Investigation ("MBI") and conducted by a designated Chairman and assigned panel of officers.

USCG Investigating Officers and the MBI are endowed with the authority to subpoena witnesses and compel the production of relevant material.[33] A United States District Court may also compel compliance with a subpoena issued by an Investigating Officer.

During an MCI, investigators gather and analyze various types of evidence, including data from voyage data recorders or similar devices, radar and other navigational data, maintenance records, and relevant regulations and procedures. They may also inspect the vessel and collaborate with experts in fields such as naval architecture, marine engineering, or human factors. Any written statements or reports submitted as evidence must be sworn before an authorized officer.[34]

USCG Investigating Officers and the MBI may administer oaths to witnesses summoned

[32] **Data Collection** consists of filing paperwork, collecting basic information and entering it into a database for future reference and analysis. **Informal Investigations** are conducted by an investigating officer and are less exhaustive than formal investigations but still determine and report the facts and cause(s) of a casualty. **Formal Investigations,** is a quasi-judicial proceeding sometimes conducted by the USCG Marine Board of Investigation, is reserved for more serious incidents. United States Coast Guard, Marine Safety Manual, Volume V: Investigations and Enforcement 81 (April 2008), COMDTINST M16000.10A [hereinafter "MSM"].
[33] 46 C.F.R. §§ 4.07-5 4.09; 46 U.S.C. § 6304.
[34] 46 C.F.R. § 4.07 *et seq*.

before them.[35] Witnesses are typically examined orally, though deposition testimony may be permitted if good cause is shown and a Party-in-Interest requests it, or if initiated by the Investigating Officer or MBI.[36]

A Party-in-Interest may also submit interrogatories to be propounded to a witness to the USCG Investigating Officer or MBI for a ruling. When a deposition is complete, it is returned to the investigating entity (either the Investigating Officer, or the MBI), who presented it to the parties for examination. The investigating entity then rules on deposition's admissibility and addresses objections. Testimony may also be reduced to writing.[37]

2. The NTSB's Investigative Tools

Following the USCG preliminary investigation, the NTSB determines whether it wants to launch its own investigation. If it chooses to do so, its investigation begins with a fact-finding period, which is led by a lead investigator designated by the NTSB. As an independent agency with no oversight, NTSB investigators are vested with substantial authority to conduct thorough investigations into major marine casualties. The NTSB holds exclusive authority to determine the timing and methods for testing, data extraction, and examination of evidence, as mandated by federal law.[38] This includes the ability to enter any property where such incidents have occurred, inspect wreckage, and take all necessary actions to conduct a comprehensive inquiry.[39] Furthermore, investigators are empowered to inspect, photograph, or copy records and information, including medical records, pertinent to their investigations.[40] The NTSB may issue

[35] 46 C.F.R. §§ 4.07-5, 4.09.
[36] 46 C.F.R. § 4.12-1(a).
[37] 46 C.F.R. § 4.07-30.
[38] 49 C.F.R. § 831.59(c); 49 U.S.C. § 1134(d).
[39] 49 C.F.R. § 831.9(4).
[40] 49 C.F.R. § 831.9(5).

subpoenas,[41] and wield significant authority related to production of,[42] and access to,[43] evidence (to include ordering or an autopsy and postmortem tests of a person),[44] witness examination,[45] and ordering depositions.[46]

Any person interviewed, in any manner by the NTSB, has the right to be accompanied by one person who may be an attorney, however the accompanying party may provide support to the interviewee, but cannot supplement the witness's testimony, and cannot advocate for the interests of a witness's other affiliations (*e.g.*, insurance interests, interests of the witness's employer).[47] This person should be an attorney representing only the interests of the witness but the defense strategy should include at least some form of joint defense agreement in the event that representation of a witness necessarily drifts into another witnesses' lane.[48]

D. Phase 4: After On-Scene Fact Finding by USCG, NTSB, or Both

After the USCG and NTSB conclude on-scene investigations, theymay hold meetings, proceedings, or hearings. The USCG may also opt to conduct a MBI for any casualty it examines. The MBI is convened after the on-scene portion of the investigation is concluded, particularly when the NTSB leads the fact-finding investigation.

Similarly, following the close of any on-scene investigations, the NTSB may hold an Investigative Hearing or Board Meeting on any casualty that it investigates and will generally

[41] 49 C.F.R. § 831.9(a)(3), (b).
[42] 49 C.F.R. § 831.5(a)(1); 49 C.F.R. § 831.55 (b)(1); *cf* 49 C.F.R. § 831.55 (discussing how the NTSB and USCG work together to collect evidence in marine casualty investigations).
[43] 49 C.F.R. § 831.55(d).
[44] 49 C.F.R. § 831.60(b). Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation. 49 C.F.R. § 831.60(b).
[45] 49 C.F.R. § 831.59(a)(6).
[46] 49 C.F.R. § 831.59(a)(2).
[47] 49 C.F.R. § 831.57(a); 49 C.F.R. § 831.7(a).
[48] 49 C.F.R. § 831.7(b).

avoid holding one until after the on-scene portion of the investigation is completed.[49] This process will also result in development of a public docket.

The NTSB will hold an Investigative Hearing in cases of substantial public interest to assist with determining facts about the marine casualty. An Investigative Hearing is public,[50] recorded, transcribed, wholly fact-finding, and allows the NTSB to gather sworn testimony from witnesses on issues identified by the investigative team.[51] Before a hearing, the NTSB holds a pre-hearing conference during which each designated party[52] has an opportunity to provide input on the subject matter of the hearing[53] to assist the agency in setting the focus of the discussion, to identify witnesses, and to limit the questions and evidence presented to the subject matter of the hearing.[54] At the conclusion of an investigative hearing, the NTSB will use the information gathered to complete its investigation in due course. The USCG may participate as a party or witness in any Investigative Hearing.

An NTSB Board Meeting is a formal gathering where five NTSB members discuss transportation-related matters within its jurisdiction, including MCIs.[55] These meetings are publicly held and may involve presentations of investigative findings, analysis of reports, consideration of safety recommendations, and discussions on policy matters.[56] They are only held when it is determined to be in the public interest and serve as a platform for public transparency

[49] The NTSB agency is operated and led by a five-member Board. This is not to be confused with the USCG's Marine Board of Investigators, which is acts as quasi-judicial fact-finding body in some USCG Formal Marine Casualty Investigations.
[50] While investigative hearings can be closed to the public, those sessions only occur if classified evidence or evidence which affects national security are received. As a practical matter and for the purpose of this seminar, hearings are public.
[51] 46 CFR § 4.40-15(a); 49 C.F.R. § 845.4.
[52] For more information about the NTSB Party System, *See NTSB Party System*, *Infra*.
[53] 49 C.F.R. § 845.6 (designating parties)
[54] For more information about the powers of the NTSB in conducting their investigations. *See NTSB Toolbelt, Infra*.
[55] 49 C.F.R. § 845.20.
[56] 49 C.F.R. § 845.21.

and accountability.[57]

E. Phase 5: Reporting and Recommendations

The process by which the NTSB and USCG investigate a major marine casualty, as previously shown, operate similarly, but as agencies they hold different mandates or goals which impact the outcome of their respective investigations. The reports and recommendations therein, if any, follow the conclusion of their respective investigations and provide unique and impactful ways to mitigate marine casualties in the future.

1. USCG Reports

After concluding a Data Collection or Informal Investigation, the Investigation Officer will draft a report and then forward it to the Officer in Charge, Marine Inspection, and District Command, containing recommendations and whether violations of laws or regulations pertaining to vessels have been reported.[58] In Formal Investigations, the reports are submitted to USCG Headquarters for finalization and approval.

2. NTSB Reports

When the NTSB is part of a marine casualty investigation, it may create two forms of reports: (1) Factual accident reports, and (2) Board Reports.[59] A Factual accident report contains the results of the investigation of the accident.[60] The NTSB is required to report on the facts and circumstances of major marine casualties or marine casualties it investigates.[61] A Board accident report contains the Board's determinations, including the probable cause of an accident, and is issued either as a narrative report or in a computer format.[62] There is a statutory bar to a Board

[57] 49 C.F.R. § 845.20.
[58] 46 C.F.R. § 4.07-10(a).
[59] 49 C.F.R. § 831.4(b).
[60] 49 C.F.R. § 835.2.
[61] 49 C.F.R. § 831.4(a).
[62] 49 C.F.R. § 835.2.

accident report, but not to Factual accident reports.[63] If the USCG investigates the major marine casualty on behalf of the NTSB, the NTSB may issue an abbreviated Board report.[64]

F. Optional Phase 6: Post Report Actions.

Following the completion of a USCG report, persons affected by the findings of fact, conclusions, or safety recommendations in the USCG marine casualty report may request the USCG entity take final action to reopen the investigation, reconsider its conclusions, or revise the report. The actions on those requests may be appealed using the procedures in 46 C.F.R. § 1.03.

Under 49 C.F.R. § 845.32(a), a final NTSB report may be challenged by submitting a petition of reconsideration or modification of NTSB's findings and determination of probable cause via email to the NTSB chairman or via regular mail to NTSB headquarters in Washington D.C.

IV. USCG PARTIES IN INTEREST; NTSB PARTY SYSTEM

This section will delve into the rights of interested parties within the context of marine casualty investigations, shedding light on their crucial role in the process and the rights and obligations afforded to them in MCIs.

A. USCG Parties-in-Interest

Among those affected by a USCG investigation are Parties-in-Interest, defined as individuals or entities with a direct interest in the investigation conducted by the MBI or the Investigating Officer, as outlined in 46 C.F.R. § 4.03-10. Parties-in-Interest include owners, charterers, or their agents, of the vessels involved in the marine casualty or accident, as well as licensed or certificated personnel whose conduct is under scrutiny, irrespective of their direct involvement in the incident. A party seeking status as a USCG Party-in-Interest, must be

[63] 49 U.S.C. § 1154(b); 49 C.F.R. § 835.2.
[64] 49 C.F.R. § 850.20; 46 C.F.R. § 4.40-20.

designated by the Investigating Officer or the MBI in accordance with the criteria defined in 46 C.F.R. § 4.03-10. To initiate this process, the Party-in-Interest should timely submit a written or verbal request (preferably both), to the Investigating Officer or MBIs, explicitly seeking a "Party-in-Interest designation." This request is pivotal in safeguarding the Party-in-Interest's rights to appeal and actively participate in the investigation no matter the USCG's level of investigative inquiry. Subsequently, the USCG must assess the designation request, and respond within five (5) business days from the date of receipt.

A Party-in-Interest designation holds significant implications, as it grants the right to fully participate in the investigation process. According to 46 C.F.R. § 4.07-35(a) and 46 C.F.R. § 4.09-15, parties in interest are entitled to legal representation, the ability to examine and cross-examine witnesses, to call witnesses on their own behalf, and to receive certain notices from the USCG regarding witness interviews and questioning of witnesses. Parties-in-Interest may also access information gathered by the USCG during the fact-finding phase, subject to approval, enabling them to utilize this material for cross-examination. Conversely, individuals who are not Parties-in-Interest, as outlined in 46 C.F.R. § 4.07-35(b) and 46 C.F.R. § 4.09-15, are only permitted counsel for advisory purposes when serving as a witness and cannot participate in questioning witnesses or other aspects of the investigation process.

B. NTSB Party System

The NTSB has a separate designation for interested parties, referred to as the "party system." Other than the USCG, no party has a *right* to become a party to a marine casualty investigation. The NTSB Investigator in charge *may* designate any other persons as a party, including government agencies (federal, state, or local), companies, and organizations whose employees, functions, activities, or products were involved in the marine casualty or major marine

casualty and that can provide suitable qualified technical personnel actively to assist in an investigation. A party may be any person or organization with specialized knowledge that would contribute to the development of pertinent evidence.

If a party is an organization or consists of numerous people, the party should designate a Party Coordinator (representative). A Party Coordinator is the NTSB's direct and official point-of-contact for the party, available at all times to the Lead Investigator in Charge. Accordingly, they must be well spoken, confident, collegial and collaborative. A Party Coordinator must also have sufficient status and authority within his or her organization to affect a complete and timely response to NTSB requests, with minimal need for higher approval or coordination. Party Coordinators will also need to help on scene and ensure the cooperation and compliance of their fellow employees. All Party Coordinators must sign the "Statement of Party Representatives to NTSB Investigation" upon acceptance of party status.

Similar to the USCG party in interest, designated parties in an NTSB investigation are given an opportunity to participate during the fact-finding stage. However, fact finding under the party system behaves differently than that of the USCG's party in interest system. Only designated parties may submit proposed findings, probable cause, and proposed safety recommendations to the NTSB. These proposed findings of cause and proposed safety recommendations are made part of a public docket when the board of the NTSB conducts its hearing to come to its final probable cause determinations. And only parties have standing to Petition for Reconsideration or Modification of The NTSB Board's Findings and Determination of Probable Cause, following an NTSB Report to challenge findings or determinations of cause. Being a party to an NTSB investigation also entails certain responsibilities and limitations. Parties are obligated to provide full and transparent cooperation with NTSB, must respond to the direction of NTSB

representatives, and cannot withhold any information pertinent to the investigation.

Overall, the impact of being a party to an NTSB investigation is more beneficial than detrimental in a major marine casualty, because the party can be involved in fact-finding, point the NTSB to (what the party determines is) the correct cause of the casualty, appeal NTSB findings published in reports, and protect itself in potential litigation later on.

C. Joint Investigations; Rights of Interested Parties

When the NTSB and the USCG jointly conduct interviews of third parties, the procedural rights of the involved parties differ depending on the leading agency. If a Party-in-Interest is interviewed by the USCG, they are entitled to legal representation, even if not under oath, and are afforded the opportunity to cross-examine witnesses and call their own witnesses. The NTSB does not guarantee similar rights to designated parties. In situations where both agencies are conducting joint interviews, the ability to cross-examine witnesses hinges on the agency leading the MCI. Nonetheless, the USCG retains its authority even when NTSB independently conducts investigations and proceedings.[65] However, if the NTSB leads an MCI, the USCG by policy restricts its own authority to designate Parties-in-Interest. Therefore, the designation procedure and the rights and privileges of an interested party will depend on the leading agency and the specific protocols chosen for investigation.

V. LEGAL CONCERNS IN MARINE CASUALTY INVESTIGATIONS

During MCIs, agencies expect cooperation and to be able to speak to witnesses and interested parties (to some extent) without their attorneys, and the agencies presume an expectation of cooperation. This is at odds with the interests of parties to protect their own individual rights, especially where the incident being investigated is severe.

[65] 46 C.F.R. § 4.40-3.

There is no guaranteed right to counsel, even in the investigation of more severe incidents such as major marine casualties, but witnesses and interested parties are free to retain their own counsel. In NTSB investigations, a Party Coordinator cannot be an attorney, and direct communication between the NTSB Lead Investigator in Charge and the Party Coordinator is permitted. In contrast, in USCG investigations, Parties-in-Interest, may seek legal representation to assist in fact-finding, cross-examination of witnesses, or in presenting their own witnesses.

The USCG Marine Safety Manual Volume 5 provides guidance to Investigating Officers on *Miranda* Rights during investigations. It states that *Miranda* warnings are only required during custodial interrogations, which may not always apply; as courts have held that routine USCG boardings are not custodial. Additionally, if a crewmember requests an attorney "on-scene," the manual specifies that the USCG is not obligated to stop asking questions or seeking assistance from reluctant crewmembers. Investigating Officers may continue questioning reluctant crewmembers in the same manner as cooperative crewmembers. However, a mariner under investigation has the right not to answer questions by the USCG if doing so might incriminate him. This right aligns with broader legal principles protecting individuals from self-incrimination. However, if a mariner fails to truthfully answer questions, or if something incriminating is uncovered, the mariner may be exposed to separate charges for perjury or obstruction of justice.

This lack of a guaranteed right to counsel poses challenges, especially in cases involving major marine casualties. Therefore, individuals concerned about criminal liability should be prepared to continually and explicitly invoke their rights to remain silent and contact their attorney immediately throughout the investigative process.

Although, the USCG and the NTSB expect parties to voluntarily cooperate with their MCI, parties to an MCI should be cautious of consenting to a scope of investigation which waives their

rights. For example, a USCG Investigating Officer may *request* the production of documents, and the Officer may share those same documents with the Coast Guard Investigative Services (who has the authority to investigate actual, alleged, or suspected *criminal* activity and arrest people). In the avoidance of doubt, retain an attorney capable of discerning cooperation and waiver.

VII. Liability for Responsible Parties

Although MCIs are not intended to affix criminal or civil liability, these investigations are not without consequence. Any evidence or findings of fact which affecting a vessel owner, master, crew, or other parties can be referred to another government body for further investigation.

Neither the USCG nor the NTSB conducting MCI may recommend corrective punishment in their resulting reports. However, parties to an investigation may still be subject to penalties, punishments, or sanctions under certain circumstances. The practical impact of this may be initiation of a suspension and revocation hearing for any licensed mariner involved in the marine casualty,[66] civil liability for the vessel owner or operator, and even criminal referral through involvement of the Coast Guard Investigative Service, or assumption by the U.S. Attorney without referral.[67]

VIII. CONCLUSION

The intricate nature of MCIs is undeniably intimidating, encompassing multiple stages of procedures that can vary based on the circumstance surrounding a casualty, public interest in the investigation, and the parties involved. Despite the unpredictable nature of these investigations, and many moving parts, successful representation and unneccessary liability exsposure can be achieved through proper preparation and attention before, during, and after the MBI.

While it is critical to have the appropriate team in place, in advance, to address the myriad

[66] *See* MSM at 493 (outlining Suspension and Revocation Proceedings); 46 U.S.C. Chapter 77 *et. seq.*
[67] *See* MSM at 199 (discussing the transfer of custody of evidence to CGIS).

issues that arise, leadership through the entire process is critical, especially in terms of the various responsible team members remaining focused on *their* particular function in the process, while lending their expertise, experience, and ongoing observations to the daily strategy.

Finally, the web if full of resources on USCG and NTSB investigations. Each agency has its own web pages devoted to discussion of the regulations and their applications. In addition, the topic is thoroughly discussed in the Coast Guard Marine Safety Manual, which is online in complete form. There are scores of legal briefs done by various law firms as well but they do not go into nearly the depth as the agency websites.

If you print each of the NVICs and other Coast Guard guidance in this paper, and look at the current version of the USCG/NTSB MOU cited here, you will be well on your way to having most of what you need to properly respond to most marine casualties and investigations. As an aside, I would be glad to point you to any resources I have identified or used over the years in putting together your response kit as well as experts who have been in the trenches and understand the process.

While we may have painted the Coast Guard and NTSB as adversarial here, I think you will find they are generally willing to be helpful and that we all share a common goal of enhancing transportation safety.

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WHAT DO I DO IN THE EVENT OF A JOINT U.S. COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION FOR A SERIOUS MARINE INCIDENT, AND WHO'S GOING TO HELP ME AND HOW?

- *Hypothetical will be distributed to analyze for this panel and have a panel and audience discussion.*
- How do I concurrently manage the civil and criminal investigations that may arise in a Coast Guard investigation, while the NTSB conducts its own investigation?
- When does NTSB take over or Coast Guard maintain lead investigative authority, and vice versa?
- What reports can I expect from each agency, and how may those reports be used or not be used in civil and criminal litigation?
- When do I obtain lawyers for my crew members, who pays for them, what can those lawyers tell me or not tell me, and how do they interact with my own company or insurance lawyer in the investigation and defense of any claims?
- In short, what is step number one, step number two and step number three to protect me and my company?
- What policies of coverage are impacted in such a situation and what authorities do my underwriters have versus my company and me in making decisions on litigation strategy and investigation strategy?

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Seaman's Manslaughter: Criminalization of Marine-Incident Deaths

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Title 18 Section 1115 of the U.S. Criminal Code, colloquially referred to as "the seaman's manslaughter statute," criminalizes misconduct, negligence, inattention, fraud, connivance, or violation of law that results in the death of another. 18 U.S.C. § 1115. Criminal prosecutions under the statute are rare, but defense counsel must be aware of the potential complications a criminal investigation and prosecution may bring to a maritime fatality. The relatively recent resurgence of criminal prosecutions under 18 U.S.C. § 1115 has led courts to re-examine the requisite level of proof and conduct required to sustain a conviction under 18 U.S.C. § 1115. Part I of this Article analyzes the seaman's manslaughter statute itself. Part II demonstrates that seaman's manslaughter remains a viable federal offence by examining several recent prosecutions. Part III offers guidance to maritime defendants navigating a civil maritime investigation.[3] Part IV concludes that marine fatalities carry substantial risks to operators from both a civil and criminal standpoint.

I. ANALYSIS OF THE SEAMAN'S MANSLAUGHTER STATUTE

18 U.S. Code § 1115 - Misconduct or neglect of ship officers

Every **captain, engineer, pilot, or other person employed on any steamboat or vessel**, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any

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[3] A 2004 Loyola Law Review Article provided a comprehensive analysis of the seaman's manslaughter statute. The purpose of this article is to provide an updated overview of the current state of the law and trends. *SEAMAN'S MANSLAUGHTER: A POTENTIAL SEA OF TROUBLES FOR THE MARITIME DEFENDANT AND A CLEVER MECHANISM FOR TAKING ARMS AGAINST THE SLINGS AND ARROWS OF MARITIME PLAINTIFFS*, 50 Loy. L. Rev. 869 (2004).

person is destroyed, **and** every **owner, charterer, inspector, or other public officer**, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

When the owner or charterer of any steamboat or vessel is a corporation, **any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel**, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1115 (emphasis added).

Seaman's manslaughter holds three categories of individuals liable:

1) Every captain, engineer, pilot, or other person employed on any steamboat or vessel,
2) Every owner, charterer, inspector, or other public officer, and
3) When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel.[4]

Prosecutions under the first category of § 1115 have been limited to "captains," "engineers," "pilots," and "other person[s]" employed on a vessel who through misconduct, negligence, or inattention to duties cause the death of another.[5] The Fifth Circuit has defined "other persons" as those people with responsibilities relating to vessel transport functions and persons employed in a "marine operations, maintenance, or navigation" capacity.[6]

Prosecutions under the second category of § 1115 purport to reach "every owner, charterer, inspector, or other public officer" who through fraud, neglect, connivance, misconduct, or violation of law causes the death of another.[7] This category is designed to impose standards of care

[4] *United States v. Kaluza*, 780 F.3d 647, 657 (5th Cir. 2015) (citing 18 U.S.C. § 1115).
[5] 18 U.S.C. § 1115.
[6] *Kaluza*, 780 F.3d at 668.
[7] 18 U.S.C. § 1115.

upon persons who allow unsafe commercial vessels to sail.[8] The Fifth Circuit's recent discussion in *Kaluza* suggests that this category, unlike the first category, is broader and not limited to those with responsibilities relating to "marine operations, maintenance, or navigation of the vessel."[9]

Prosecutions under the third category of § 1115 may reach executive officers of the corporate owner or charterer of the vessel whose own fraud, neglect, connivance, misconduct, or violation of law resulted in death.[10] The Fifth Circuit's discussion in *Kaluza* suggests that for owners and corporate officers, the neglect for which they can be held criminally responsible is not limited to negligence in connection with the marine operations, maintenance, or navigation of the vessel.[11] However, the executive officers of a corporation cannot be charged as principals for the acts and omissions of the captain, pilot or other persons in charge of the operation of the boat, without an allegation of corporate guilt.[12]

To impose criminal liability under Section 1115, the burden is placed on the government to show beyond a reasonable doubt that the defendant committed all elements of Section 1115.[13] To accomplish this, the government must show the existence of a duty, a negligent breach of that duty, and the loss of life directly caused by that negligent breach of duty.[14]

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[8] *United States v. La Brecque*, 419 F. Supp. 430, 437 n.8 (D.N.J. July 27, 1976).

[9] 780 F.3d at 663.

[10] 18 U.S.C. § 1115.

[11] 780 F.3d at 663.

[12] *See United States v. Harvey*, 54 F. Supp. 910, 911 (D.Or. Sept. 3, 1943) (. . . in view of the history of the Act, it would seem that corporate guilt must be alleged; then, if the executive officers knowingly and wilfully caused or allowed the corporate acts or omissions, they may be charged personally.").

[13] 50 Loy. L. Rev. at 894.

[14] *Id*. at 894-95; *See United States v. BP Exploration and Production, Inc.*, No. 2012-cr-00292 (E.D. La. Nov. 15, 2012) ("Defendant BP, through Kaluza and Vidrine, in violation of its duty of care, negligently failed to maintain control of the Macondo well.").

Courts interpret Section 1115 as applying only to commercial vessels because the owners, operators, and inspectors of commercial vessels have unique responsibilities, or fiduciary duties, to those killed as a result of violations of the standard of care.[15]

The question of whether Section 1115 has gross negligence[16] or simple negligence[17] as a required element remains an open question in most circuits. The Fifth Circuit held in *Kaluza* and *O'Keefe* that simple negligence is sufficient to sustain a violation of 18 U.S.C. § 1115.[18] The Eleventh Circuit, citing *O'Keefe*, expressed in dicta that simple negligence is sufficient to sustain a violation of 18 U.S.C. § 1115.[19] However, the Ninth Circuit recently held in *United States v. Boylan*, 2022 U.S. Dist. LEXIS 186845 (C.D. Cal. Aug. 30, 2022) that gross negligence is a required element of 18 U.S.C. § 1115.[20] Whether or not Section 1115 requires gross negligence is important "because '[t]he failure of an indictment to detail each element of the charged offense

[15] *See United States v. O'Keefe*, 426 F.3d 274, 278 n.1 (5th Cir. 2005) (quoting *Van Schaick v. United States*, 159 F. 847, 855 (2d. Cir. 1908)) (". . . § 1115 applies only to commercial vessels whose operators and owners, historically speaking, 'daily have the lives of thousand of helpless humans beings in their keeping.'"); *see also La Brecque*, 419 F. Supp. at 437 ("Section 1115 only reaches commercial vessels."); *but see Hoopengarner v. United States*, 270 F.2d 465 (6th Cir. 1959) (involving the successful prosecution of an owner of a non-commercial recreational boat under § 1115, however, since the defendant never raised a no right of action defense, its precedential value is uncertain).

[16] *See O'Keefe*, 426 F.3d at 278 (". . . 'gross negligence'. . . has two subparts: that the defendant (a) acted with wanton or reckless disregard for human life; and (b) had knowledge that his conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject another.").

[17] *See id*. (". . . the term 'negligence' is defined as a breach of duty. A breach of a duty is defined as an omission to perform some duty, or it is a violation of some rule or standard of care, which is made to govern and control one in the discharge of some duty.").

[18] *Kaluza*, 780 F.3d at 657 ("Unlike the common law definition of manslaughter and the companion statutory definition for general manslaughter found in Section 1112, Section 1115 only requires the proof of any degree of negligence to meet the culpability threshold."); *see also O'Keefe*, 426 F.3d at 278 ("It appears clear from the purpose of the statute, its legislative history and the available case law interpreting it that any degree of negligence is sufficient to meet the culpability threshold.").

[19] *United States v. Alvarez*, 809 Fed. Appx. 562, 568 (11th Cir. 2020).

[20] 2022 U.S. Dist. LEXIS 186845 *21 ("Defendant has presented persuasive reasons for why the statute should be read to require gross negligence as an element necessary for conviction (and indictment), and the Government's reasons to the contrary do not convince the Court otherwise.").

generally constitutes a fatal defect.'"[21] As a practical matter, the issue may be academic as the Coast Guard and the Department of Justice will generally pursue prosecutions under the most egregious factual circumstances, those implicating gross negligence.

It should be noted that there is a higher standard of culpability required to convict executive officers under § 1115. To convict an executive officer, the government must prove that the officer knowingly and willfully caused or allowed fraud, neglect, connivance, misconduct, or violation of law which resulted in the loss of life.[22]

The statute requires that a person convicted under 18 U.S.C. § 1115 be fined under title 18 or imprisoned for a term of up to ten years.[23] The maximum fine that may be imposed is $250,000 or twice the gross financial gain to the defendant or twice the gross financial loss to the victim.[24] Additionally, a court may impose a term of supervised release after imprisonment.[25] Lastly, a court may, and in some circumstances, must order restitution for violations of 18 U.S.C. § 1115.[26]

II. RECENT PROSECUTIONS UNDER 18 U.S.C. § 1115

A 2004 Loyola Law Review Article provides a historical overview of the statute as well as an in-depth discussion of the *O'Keefe* prosecution.[27] At the time of the article's publication, the Fifth Circuit had not ruled on the defendant's appeal. *O'Keefe* involved the prosecution of a tugboat pilot who operated a vessel while under the influence of cocaine, causing the tugboat to sink and the death of his ex-wife whom he brought aboard the vessel in violation of company

[21] *Id*. at *4 (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)).
[22] 18 U.S.C. § 1115.
[23] 18 U.S.C. § 1115.
[24] *See* 18 U.S.C. § 3559.
[25] *See* U.S. SENTENCING GUIDE MANUAL § 5D1.1 (1989).
[26] *See* 18 U.S.C. § 3556.
[27] 50 Loy. L. Rev. 869.

policy.[28] At trial, O'Keefe requested a jury instruction that the government was required to prove gross negligence in order to convict.[29] The court denied this request and instructed the jury that any degree of negligence was sufficient to trigger criminal liability.[30] O'Keefe was convicted and sentenced to twelve months imprisonment, followed by three years of supervised release.[31] After the Loyola Law Review Article was published, O'Keefe appealed his judgment to the 5th Circuit.[32] The Fifth Circuit affirmed O'Keefe's conviction and sentence.[33] It held that "[it] [found] nothing in the statute's terms suggesting that the words 'misconduct, negligence or inattention,' were ever meant to imply gross negligence or heat of passion. . ."[34]

Since *O'Keefe*, there have been a number of prosecutions under 18 U.S.C. § 1115. The following prosecutions demonstrate that seaman's manslaughter is still a viable offence.

As a reminder, seaman's manslaughter holds three categories of individuals liable:

1) Every captain, engineer, pilot, or other person employed on any steamboat or vessel,
2) Every owner, charterer, inspector, or other public officer, and
3) When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel.[35]

The federal prosecution of Captain Jerry Boylan is a recent example of a prosecution under

[28] *United States v. O'Keefe*, No. 2003-cr-00137 (E.D. La. May 9, 2003).
[29] *United States v. O'Keefe*, 2004 U.S. Dist. LEXIS 1494 *2 (E.D. La. Feb. 4, 2004).
[30] *Id*.
[31] Judgment, *O'Keefe*, No. 2003-cr-00137 (E.D. La. Nov. 7, 2005) (Rec. Doc. 105).
[32] Notice of Appeal, *O'Keefe*, No. 2003-cr-00137 (E.D. La. June 28, 2004) (Rec. Doc. 92).
[33] Judgment of U.S. Court of Appeals, *O'Keefe*, No. 2003-cr-00137 (5th Cir. 2005) (Rec. Doc. 105).
[34] *Id*. at 8 (quoting 18 U.S.C. § 1115).
[35] *Kaluza*, 780 F.3d at 657 (citing 18 U.S.C. § 1115).

the first category[36] of 18 U.S.C. § 1115.[37] Jerry Boylan was the captain of the *Conception*, a 75-foot, wood and fiberglass passenger vessel based out of Santa Barbra, California.[38] The *Conception* was owned by the Fritzler Family Trust and operated by Mr. Boylan's employer, Truth Aquatics, Inc.[39] In the early morning of September 2, 2019, the *Conception* caught fire while it was anchored at Santa Cruz Island.[40] The fire spread quickly, and the vessel burned to the waterline.[41] Boylan was the first of five crewmembers to escape by jumping overboard.[42] The remaining thirty-three passengers and one crew member died aboard the burning vessel.[43] They were all trapped in the bunkroom below deck.[44]

On December 1, 2020, the government filed an indictment charging Captain Jerry Boylan with thirty-four separate counts of violation of 18 U.S.C § 1115, Misconduct or Neglect of Ship Officers.[45] On July 19, 2022, the government filed a first superseding indictment.[46] On September 1, 2022, the first superseding indictment was dismissed without prejudice for failure to allege gross negligence.[47] On October 18, 2022, the government filed the current charge pending against Boylan which includes one count of 18 U.S.C § 1115.[48] This indictment alleges that Boylan was

[36] Prosecutions under the first category of § 1115 have been limited to "captains," "engineers," "pilots," and other persons employed on a vessel who through misconduct, negligence, or inattention to duties cause the death of another. 18 U.S.C. § 1115.

[37] *United States v. Boylan*, No. 2020-cr-00600 (C.D. Cal. Dec. 1, 2020).

[38] Indictment at 1, *Boylan*, No. 2022-cr-00482 (C.D. Cal. Oct. 18, 2022) (Rec. Doc. 1) [hereinafter Indictment 2022].

[39] Motion to Dismiss Indictment at 6, *Boylan*, No. 2022-cr-00482 (C.D. Cal. Aug. 31, 2023) (Rec. Doc. 79) [hereinafter Motion to Dismiss].

[40] *Id*.

[41] *Id*. at 6-7.

[42] James E. Mercante, *Seaman's Manslaughter Statute Sinks Dive Boat Captain*, N.Y. L. J., Nov. 30, 2023.

[43] *Id*.

[44] Motion to Dismiss at 7.

[45] Indictment at 3-5, *Boylan*, No. 2020-cr-00600 (C.D. Cal. Dec. 1, 2020) (Rec. Doc. 1) [hereinafter Indictment 2020].

[46] First Superseding Indictment, *Boylan*, No. 2020-cr-00600 (C.D. Cal. July 19, 2022) (Rec. Doc. 46).

[47] *Boylan*, 2022 U.S. Dist. LEXIS 186845 at *21.

[48] Indictment 2022.

the captain and master of the *Conception* and, as such, was responsible for the safety and security of the vessel, its crew, and its passengers.[49] Specifically, it alleges that Boylan acted with a wanton or reckless disregard for human life by engaging in misconduct, gross negligence, and inattention to his duties on such vessel, by virtue of:

> (1) his failure to maintain a night watch or roving patrol, despite his duty to do so set forth in the Certificate of Inspection posted onboard the *P/V Conception* and 46 C.F.R. § 185.410;
>
> (2) his failure to conduct sufficient fire drills, despite his duty to do so set forth in 46 C.F.R. § 185.524;
>
> (3) his failure to conduct sufficient crew training regarding emergencies, fires, and firefighting, despite his duty to do so set forth in 46 C.F.R. §§ 185.420 and 185.510;
>
> (4) his failure to instruct or provide directions to crewmembers regarding firefighting at the time of the fire;
>
> (5) his failure to use the fire axe and fire extinguisher next to him in the wheelhouse to fight the fire or attempt to rescue the 33 passengers and one crewmember who were alive but trapped onboard the vessel;
>
> (6) his failure to go to the main deck to fight the fire or attempt to rescue the passengers and crewmember;
>
> (7) his failure to perform any lifesaving or firefighting activities whatsoever at the time of the fire, even though he was uninjured;
>
> (8) his failure to use the vessel's public address ("PA") system to alert passengers or crewmembers about the fire;
>
> (9) his abandonment of ship during the fire even though 33 passengers and one crewmember were still alive and trapped below deck in the vessel's bunkroom and in need of assistance to escape; and
>
> (10) after he was the first crewmember to abandon ship, his order to the other crewmembers to abandon ship during the fire instead of instructing them to fight the fire or engage in other lifesaving activities to rescue the 33 passengers and one crewmember who were

[49] *Id*. at 1.

trapped below deck.[50] Finally, it alleges that Boylan knew that his conduct was a threat to the lives of others and knew of circumstances that would reasonably cause him to foresee that his conduct might be a threat to the lives of others.[51]

Boylan filed a motion to dismiss moving the court to dismiss the indictment due to the government's interference with testimonial evidence or, in the alternative, to order remedies to address the government's misconduct and prevent ongoing witness tampering.[52] Additionally, Boylan filed a second motion to dismiss moving the court for special jury selection procedures due to the specific nature of the case and the significant pretrial publicity it had received.[53] The court denied both of these motions.[54] The case proceeded to trial, and in November 2023, the jury found Boylan guilty of seaman's manslaughter.[55] Captain Boylan faces up to ten years in federal prison.[56]

There have been a handful of other prosecutions under the first category of 18 U.S.C. § 1115. *United States v. Gorishti* involves the pending prosecution of a second mate who navigated a vessel into a recreation boat, causing the boat to capsize and the death of one of its passengers.[57] On November 3, 2021, Gorishti was charged with one count of seaman's manslaughter.[58] The indictment alleges that Gorishti, as second mate, was responsible for the safe navigation of the vessel.[59] This prosecution is ongoing.

[50] *Id*. at 2-3.
[51] *Id*. at 5.
[52] Motion to Dismiss at 3.
[53] Motion for Special Jury Instructions, *Boylan*, No. 2022-cr-00482 (C.D. Cal. Sept. 8, 2023) (Rec. Doc. 95).
[54] Minutes in Chambers at 2-3, *Boylan*, No. 2022-cr-00482 (C.D. Cal. Sept. 25, 2023) (Rec. Doc. 146).
[55] Minutes of Jury Trial, *Boylan*, No. 2022-cr-00482 (C.D. Cal. Nov. 6, 2023) (Rec. Doc. 318).
[56] "Captain of Santa Barbara-Based Dive Boat that Burned and Sank, Resulting in 34 Deaths, Found Guilty of Felony Federal Offense," U.S.A.O. C.D. of Cal. (Nov. 6, 2023) https://www.justice.gov/usao-cdca/pr/captain-santa-barbara-based-dive-boat-burned-and-sank-resulting-34-deaths-found-guilty.
[57] Indictment ¶ 9, *United States v. Gorishti*, No. 2021-cr-00802 (N.D. Ohio Nov. 3, 2021) (Rec. Doc. 1).
[58] *Id*.
[59] *Id*. ¶ 7.

United States v. Alvarez involved the prosecution of a captain of a vessel who was unlicensed, following an incident in which the captain beached the vessel to allow passengers to swim, and then restarted the engine and accelerated in reverse at a high speed while passengers were still in the water swimming, resulting in the death of a passenger.[60] Alvarez was charged with one count of seaman's manslaughter.[61] Alvarez then filed a motion to dismiss arguing that Section 1115 is facially unconstitutional and the indictment was facially defective because it failed to allege gross negligence and failed to provide a factual basis to support the charge.[62] Alvarez's motion to dismiss was denied.[63] Alvarez was sentenced to thirty-three months imprisonment, followed by three years of supervised release.[64] Alvarez appealed his conviction to the Eleventh Circuit.[65] The Eleventh Circuit affirmed the judgment of the district court.[66] It rejected Alvarez's due process and *mens rea* arguments and held that Alvarez's thirty-three month sentence was proper.[67] Subsequently, Alvarez's previous sentence was revoked and Alvarez was sentenced to five months imprisonment, followed by seventeen months of supervised release.[68] There is a separate prosecution still pending against Alvarez in the Southern District of Florida.[69]

United States v. Kaluza and Vidrine stemmed from the Macondo blow out and oil spill and involved the prosecution of BP's well site leaders onboard the *Deepwater Horizon* drilling rig who, during well pressure testing, allegedly observed clear indications that the well was not secure

[60] Indictment, *United States v. Alvarez*, No. 2018-cr-20314 (S.D. Fl. Apr. 19, 2018) (Rec. Doc. 6).
[61] *Id*.
[62] Motion to Dismiss, *Alvarez*, No. 2018-cr-20314 (S.D. Fl. July 9, 2018) (Rec. Doc. 21).
[63] Order, *Alvarez*, No. 2018-cr-20314 (S.D. Fl. Aug. 14, 2018) (Rec. Doc. 28).
[64] Judgment, *Alvarez*, No. 2018-cr-20314 (S.D. Fl. Dec. 3, 2018) (Rec. Doc. 55).
[65] *United States v. Alvarez*, 809 Fed. Appx. 562 (11th Cir. 2020).
[66] *Id*. at 574.
[67] *Id*. at 568-74.
[68] Judgment, *Alvarez*, No. 2018-cr-20314 (S.D. Fl. Dec. 22, 2021) (Rec. Doc. 107).
[69] See Complaint, *Alvarez*, No. 2018-mj-02513 (S.D. Fl. Apr. 9, 2018) (Rec. Doc. 1).

and that oil and gas were flowing into the well, but chose not to take obvious and appropriate steps to prevent the blowout, resulting in the deaths of eleven individuals and enormous environmental damage.[70] On November 14, 2012, Kaluza and Vidrine were charged with eleven counts of seaman's manslaughter.[71] Kaluza and Vidrine filed a motion to dismiss arguing that Section 1115 applied only to "ship officers" and other employees working in marine operations, maintenance, or navigation—and not someone in Mr. Kaluza's and Mr. Vidrine's position.[72] On December 10, 2013, the Eastern District of Louisiana granted Kaluza's and Vidrine's motion to dismiss for failure to charge an offense because neither defendant fell within the meaning of the criminal statute.[73] The government appealed this determination.[74] The Fifth Circuit affirmed the district court's ruling reasoning that neither defendant fell within the meaning of the phrase "[e]very. . . other person employed on any. . . vessel," because they did not have "responsibilities relating to vessel transport functions."[75]

United States v. Devlin involved the prosecution of a licensed mate who while distracted by use of his cell phone and a laptop computer, elected to pilot the towboat from its lower wheelhouse and did not maintain a proper lookout, which resulted in the vessel's collision with a tourist boat and the death of two passengers.[76] The defendant pled guilty and was sentenced to twelve months plus one day imprisonment, followed by three years of supervised release.[77]

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[70] Superseding Indictment at ¶ 18, *United States v. Kaluza*, No. 2012-cr-00265 (E.D. La. Nov. 14, 2012) (Rec. Doc. 7).

[71] *Id*. at 14-9.

[72] Motion to Dismiss, *Kaluza*, No. 2012-cr-00265 (E.D. La. May 30, 2013) (Rec. Doc. 52).

[73] Order and Reasons at 51, *Kaluza*, No. 2012-cr-00265 (E.D. La. Dec. 10, 2013) (Rec. Doc. 118).

[74] Notice of Appeal, *Kaluza*, No. 2012-cr-00265 (E.D. La. Feb. 7, 2014) (Rec. Doc. 128).

[75] *U.S. v. Kaluza*, 780 F.3d 647, 668 (5th Cir. 2015); Order, *Kaluza*, No. 2012-cr-00265 (5th Cir. Apr. 2, 2015) (Rec. Doc. 141).

[76] Indictment, *United States v. Devlin*, No. 2011-cr-00386 (E.D. Pa. July 14, 2011) (Rec. Doc. 1).

[77] Judgment, *Devlin*, No. 2011-cr-00386 (E.D. Pa. Nov. 8, 2011) (Rec. Doc. 15).

United States v. Schroeder involved the prosecution of a ship master who knew of significant safety issues on the vessel and failed to make necessary repairs.[78] The resulting failures of the bow thruster and shaft generator caused the vessel to collide with a dock, resulting in the death of one contractor.[79] Schroeder was charged with one count of seaman's manslaughter.[80] Schroeder filed a motion to dismiss on two bases: (1) failure to allege two essential elements of a Section 1115 violation (gross negligence and knowledge of the risk to others of his conduct); and (2) failure to allege adequate facts and circumstances to state an offense.[81] The Southern District of Alabama denied Schroeder's motion to dismiss.[82] It reasoned that neither gross negligence, nor knowledge of the risk that defendant's conduct posed to others, are required elements of Section 1115 and the indictment was sufficiently detailed.[83] Schroeder was sentenced to time served, followed by three years of supervised release.[84]

The federal prosecution of a Director of Ferry Operations Patrick Ryan is an example of an attempted prosecution under the second category[85] of 18 U.S.C. § 1115.[86] On October 15, 2003, the Staten Island Ferry Service vessel, *Andrew J. Barberi* ("*Barberi*"), crashed into the St. George terminal.[87] The crash occurred when the Captain of the vessel, Richard Smith[88], who was under

[78] Indictment at 2-3, *United States v. Schroeder*, No. 2006-cr-00088 (S.D. Ala. Apr. 14, 2006) (Rec. Doc. 1).
[79] *Id*.
[80] *Id*.
[81] Memorandum in Support at 2, *Schroeder*, No. 2006-cr-00088 (S.D. Ala. May 24, 2006) (Rec. Doc. 26).
[82] Order at 4, *Schroeder*, No. 2006-cr-00088 (S.D. Ala. June 12, 2006) (Rec. Doc. 34).
[83] *Id*. at 4-5.
[84] Judgment, *United States v. Schroeder*, No. 2006-cr-00088 (S.D. Ala. Feb. 7, 2007) (Rec. Doc. 174).
[85] Prosecutions under the second category of § 1115 reach "every owner, charterer, inspector, or other public officer" who through fraud, neglect, connivance, misconduct, or violation of law causes the death of another. 18 U.S.C. § 1115. This category is designed to impose standards of care upon persons who allow unsafe commercial vessels to sail. *La Brecque*, 419 F. Supp. at 437 n.8.
[86] *United States v. Ryan*, No. 2004-cr-00673 (E.D. N.Y. July 27, 2004).
[87] Memorandum and Order at 1, *Ryan*, No. 2004-cr-00673 (E.D. N.Y. Apr. 22, 2005) (Rec. Doc. 57).
[88] Smith pleaded guilty to eleven counts of seaman's manslaughter and was sentenced to eighteen months in jail. *See Agni v. Wenshall (In re City of New York)*, 522 F.3d 279, 281 (2nd Cir. 2008).

the influence of strong prescription medications, blacked out at the helm.[89] At the time of the collision, Patrick Ryan was the Director of Ferry Operations.[90] Subsequently, the government filed an indictment charging Ryan with violation of 18 U.S.C § 1115, as both a "public officer" and an "executive officer."[91] The indictment charged that Ryan was "responsible for fulfilling the Ferry's duty to ensure the safety of its passengers during every voyage on the [r]oute[,]" including a responsibility to "ensur[e] . . . against the hazard of a pilot's sudden disability."[92] Specifically, it charged that Ryan should have enforced a two-pilot rule which requires both the captain and the assistant captain to be in the pilothouse while the ferry is operating.[93] Further, it charged that "the Ferry operated without centrally promulgated and uniform rules, procedures or practices either to guard against the serious hazard of the sudden disability of the pilot or to instruct the Ferry's personnel on the appropriate actions to ensure the safety of the passengers in the event of a pilot's sudden disability."[94] Specifically, it alleged that: (1) captains and assistant captains were not always together in the operating pilothouse during routes; (2) on the night shift, some captains and assistant captains split shifts such that only one piloted the vessel in both directions while the other did not navigate and sometimes slept; and (3) deckhands with assignments in the operating pilothouses were not trained on actions to be taken to guard against the hazard of the sudden disability of the pilot.[95]

[89] *Id*.
[90] *Id*.
[91] Indictment, *United States v. Ryan*, No. 2004-cr-00673 (E.D. N.Y. July 27, 2004) (Rec. Doc. 1).
[92] *Id*. ¶ 10.
[93] *Id*. ¶ 12.
[94] *Id*. ¶ 19.
[95] *Id*.

Ryan filed a motion to dismiss the indictment.[96] Ryan argued that he was neither an "inspector, or other public officer," nor an "executive officer" of the city of New York under § 1115.[97] The district court denied Ryan's motion to dismiss.[98] It held that Ryan's position as Director of Ferry Operations did not qualify him as a public officer under § 1115 because the position was neither created by statute nor included duties defined by law.[99] The court did, however, submit the executive officer charge to the jury.[100] At trial, Ryan was convicted and sentenced to one year and one day in prison.[101]

The federal corporate prosecution of BP Exploration and Production, Inc. ("BP") is a recent example of a prosecution under the second category of 18 U.S.C. § 1115.[102] BP, a multinational energy corporation, drilled wells in the Gulf to extract oil and natural gas to sell for profit.[103] The government alleged that because drilling operations were dangerous, the deepwater oil exploration industry developed customs, standards and testing practices designed to ensure the pressures inside the wells were safely managed at all times.[104] In order to comply with these standards, BP assigned two well site leaders onboard each of their rigs.[105]

BP was undertaking drilling of the Macondo well using Transocean's *Deepwater Horizon* drilling rig and rig crew.[106] Robert Kaluza and Donald Vidrine were the well site leaders onboard

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[96] Motion to Dismiss, *Ryan*, No. 2004-cr-00673 (E.D. N.Y. Dec. 17, 2004) (Rec. Doc. 22).
[97] *Id*. at 14.
[98] Order at 7, *Ryan*, No. 2004-cr-00673 (E.D. N.Y. Apr. 22, 2005) (Rec. Doc. 57).
[99] *Id*.
[100] *Id*.
[101] Judgment at 2, *Ryan*, No. 2004-cr-00673 (E.D. N.Y. Feb. 13, 2006) (Rec. Doc. 79).
[102] Indictment, *United States v. BP Exploration and Production, Inc.*, No. 2012-cr-00292 (E.D. La. Nov. 15, 2012) (Rec. Doc. 1).
[103] *Id*. at 2.
[104] *Id*. at 3.
[105] *Id*. at 3.
[106] *Id*. at 4.

the *Deepwater Horizon*.[107] Subsequently, BP shut in the well and Kaluza and Vidrine were responsible for supervising the negative pressure testing and determining whether the testing was successful.[108] On April 20, 2010, Kaluza and Vidrine allegedly became aware of multiple indications that the well was not secure.[109] Kaluza and Vidrine failed to alert onshore engineers of these problems.[110] As a result, the Macondo well was lost causing explosions aboard the *Deepwater Horizon* that killed eleven crewman.[111]

On November 15, 2012, BP, in their capacity as the charterer of the *Deepwater Horizon*, was charged with eleven counts of seaman's manslaughter.[112] The indictment alleged that BP, through Kaluza and Vidrine, engaged in negligence, neglect, violation of law, and inattention to duties which caused the deaths of eleven crewmen.[113] Further, it alleged that Defendant BP, through Kaluza and Vidrine, in violation of its duty of care, negligently failed to maintain control of the Macondo well.[114] Specifically, BP failed to: (1) phone engineers onshore to advise them during the negative testing of the multiple indications that the well was not secure; (2) adequately account for the abnormal readings during the testing; (3) accepted a nonsensical explanation for the abnormal readings, again without calling engineers onshore to consult; (4) eventually decided to stop investigating the abnormal readings any further; and (5) deemed the negative testing a success, which caused displacement of the well to proceed and blowout of the well to later occur.[115]

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[107] *Id*. at 5-6.
[108] *Id*. at 6.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 7.
[112] *Id*. at 18-23.
[113] *Id*.
[114] *Id*. at 7.
[115] *Id*.

On January 29, 2013, BP pled guilty to eleven counts of seaman's manslaughter as part of a larger plea agreement encompassing multiple violations of federal law.[116] BP admitted that Kaluza and Vidrine's negligent supervision of well pressure testing resulted in the deaths of eleven people.[117] BP was sentenced to pay $4 billion dollars in criminal fines and penalties and sentenced to five years of probation.[118] BP was also required to retain a process safety and risk management monitor, an independent auditor, and an ethics monitor.[119] As evidenced by the Fifth Circuit's decision in *Kaluza*, this conviction would likely not have been affirmed on appeal had BP not pled guilty and waived its appeal rights.[120]

There have been a few other prosecutions under the second category of 18 U.S.C. § 1115. *United States v. Maubert-Cayla* involved the prosecution of the owner and charterer of a yacht for employing an unlicensed captain who he knew was using alcohol and cocaine at the time, following an incident in which the captain drove the yacht at a high rate of speed, beached it to allow passengers to swim, and then restarted the engine and accelerated in reverse at a high speed while passengers were still in the water swimming, resulting in the death of a passenger.[121] On January 14, 2019, Maubert-Cayla pled guilty and was sentenced to six months in jail, followed by three years of supervised release.[122]

United States v. Hutchinson involved the prosecution of the owner of a lobster boat for operating a vessel in forecasted dangerous weather and sea conditions while under the influence

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[116] Judgment at 1, *BP Exploration and Production, Inc.*, No. 2012-cr-00292 (E.D. La. Jan. 29, 2013) (Rec. Doc. 66).
[117] "United States v. BP Exploration and Production, Inc.," U.S. DOJ.
[118] Judgment at 3-4.
[119] *Id*.
[120] *See U.S. v. Kaluza*, 780 F.3d 647 (5th Cir. 2015).
[121] Indictment, *United States v. Maubert-Cayla*, No. 2018-cr-20678 (S.D. Fl. Aug. 14, 2018) (Rec. Doc. 7).
[122] Judgment, *Maubert-Cayla*, No. 2018-cr-20678 (S.D. Fl. Jan. 14, 2019) (Rec. Doc. 40).

of controlled substances and alcohol resulting in the vessel capsizing and two crewmembers being lost at sea.[123] On the evening of the incident, law enforcement drew a blood sample from Hutchinson without obtaining a warrant.[124] Hutchinson was charged with two counts of seaman's manslaughter.[125] He filed a motion to suppress the results of the blood test and any later statements he made to law enforcement that were based upon the test results.[126] The District Court of Maine determined that the blood draw and its test results were inadmissible "[b]ecause there was no statutory or regulatory justification for a blood draw without consent, because there was no effective consent, because there was no warrant and no exigent circumstance to excuse seeking a warrant and no probable cause.[127] However, it held that the government could use the tainted evidence to impeach any testimony offered by Hutchinson, and in response to any defense tactics that otherwise opened the door to it.[128]

United States v. Jones involved the prosecution of a dive boat owner who knew of significant safety issues on the vessel and failed to make necessary repairs.[129] The resulting failures of the bilge pump and unsecured bench caused the boat to capsize and a passenger to become pinned between the bench and the vessel's windshield, resulting in the passenger's drowning death.[130] Jones was indicted in October 2012.[131] Years later, in May 2022, Jones entered into a plea agreement with the government whereby he pled guilty to Sections 1112 and 2 and the

[123] Indictment, *United States v. Hutchinson*, No. 2016-cr-00168 (D.Me. Dec. 14, 2016) (Rec. Doc. 3).
[124] *United States v. Hutchinson*, 2018 U.S. Dist. LEXIS 7180, *1 (D.Me. Jan. 17, 2018).
[125] Indictment, *Hutchinson*, No. 2016-cr-00168 (D.Me. Dec. 14, 2016) (Rec. Doc. 3).
[126] Motion to Suppress, *Hutchinson*, No. 2016-cr-00168 (D.Me. Oct. 2, 2017) (Rec. Doc. 77).
[127] *Hutchinson*, 2018 U.S. Dist. LEXIS 7180 at *29-30.
[128] *Id*. at *32.
[129] Indictment. *United States v. Jones*, No. 2012-cr-10013 (S.D. Fl. Oct. 19, 2012) (Rec. Doc. 3).
[130] *Id*.
[131] *Id*.

government dismissed the remaining counts, including the seaman's manslaughter count, within the indictment.[132]

III. PRACTICAL STEPS IN RESPONDING TO A MARITIME FATALITY

Responding to a death case involving a seaman (or putative seaman) involves many of the same concerns as any other marine casualty but the stakes may be higher and more complex. Criminal prosecutions are relatively rare and unpredictable and dependent on the severity of the casualty and whether the Coast Guard takes an active interest in the matter and an Assistant United States Attorney is willing to prosecute. The time to appraise and triage the situation will likely be shorter.

Depending on the seriousness of the casualty, the operator may be presented with search warrants, administrative or grand jury subpoenas, agent interviews, and other enforcement techniques. Key short-term objectives will include:

- Appointment of external counsel to manage communications with law enforcement;
- Working with IT and custodians to preserve all documents and evidence;
- Providing guidance on internal communications, social media, and new document creation; and
- Advising employees of their rights and obligations.

A. Appointment of External Counsel

More sophisticated operators will likely have some type of contingency plan in the event of a major casualty which will routinely require involvement of outside counsel. This is essential to preserve the attorney-client privilege when interviewing the involved crew members and other witnesses. Whenever a member of management becomes aware of a potential law enforcement

[132] Plea Agreement, *Jones*, No. 2012-cr-10013 (S.D. Fl. May 20, 2022) (Rec. Doc. 43).

encounter and potential criminal culpability, they should immediately notify senior leadership, which in turn should engage external counsel for the company. Having an external counsel identified before a crisis manifests is critical to a timely response. External counsel will be prepared to provide on-site support when appropriate, act as a buffer between law enforcement and the company, and provide immediate advice to mitigate the risk of early, and potentially fatal, missteps.

Counsel's initial assessment of the situation will determine whether there are credible allegations of fault against the captain, other crew members, or management personnel. This will inform the operator of the vessel of the best strategy in dealing with the government. Depending on counsel's assessment of potential culpability, consideration should be given to retaining separate criminal counsel for the particular individuals involved in the fatality to advise them on their potential criminal liability, and the need to possibly invoke that individual's Fifth Amendment protection. Failure to do so can create a difficult conflict of interest for company counsel. Depending upon the circumstances, individual, or at least "pool counsel" should be retained. Ideally, criminal counsel should be someone with whom company counsel has a cooperative relationship so vital information can be shared pursuant to a formal or informal joint defense umbrella. Such a cooperative relationship, where possible and consistent with counsel's ethical obligations, will allow the company to gain maximum awareness of the facts, potential claims and theories of liability, and so forth.

B. Preservation of Documents and Evidence

Once the company has notice of a law enforcement investigation, it is required by law to preserve all relevant documents and evidence. Failure to do so provides the government with an

easier to prove case of obstruction of justice, false statements to law enforcement officers, and similar crimes. Particular care should be taken to preserve cellular phone records, including text messages and similar digital communications. The sample notice below can be modified with the support of external counsel to address the circumstances of a particular investigation and then circulated as soon as practicable to relevant departments and document custodians.

Sample Document Retention Notice:

> Until further notice, you must retain and preserve all files, documents, and other written or recorded material concerning *[provide description of investigation]* in their current form without modification or alteration. This includes all originals, copies, incoming and outgoing electronic mail, and other data sets. This directive suspends any document retention program, and you should identify and segregate any documents that are potentially relevant to the incident. **If you have any doubt about whether a particular document may be relevant to the incident, always err on the side of caution.** Further, you may be asked to be interviewed by attorneys retained to render legal advice to the Company. You are expected to cooperate fully and to provide detailed, truthful, and complete answers to all questions to the extent of your knowledge.

C. Confidentiality and Document Creation Notice

Maintaining confidentiality and limiting written communications speculating about a law enforcement encounter requires the company to act promptly to provide its employees with guidance on these issues. These types of incidents are fast moving and rumors and misinformation may be repeated. Verbal communications are often preferable until the company and counsel have confirmed relevant facts. Employees may not understand that they are always on the record and that everything they say and write may be scrutinized later by people they do not know and who may lack the full context of their statements. Further, in a world driven by social media, acting quickly to issue a document creation notice will mitigate the risk of unwanted postings.

D. Employee Rights and Obligations

A company may not directly or indirectly discourage employees from speaking with law enforcement investigators. However, a company may advise its employees of their right to request that their attorney be present during any questioning. The company may also tell employees that the company may make criminal counsel available to them and pay that counsel to represent them and that the counsel will be their personal counsel and not company counsel. The company should state to employees that if they choose to speak with law enforcement, they must provide truthful, complete answers and to not say or do anything to mislead law enforcement or obstruct the investigation.

E. Next Steps

Responding to the immediate issues raised by a law enforcement encounter often requires days as opposed to weeks. Managing the crisis will then become a marathon. Each encounter will pose unique threats and require a tailored response that takes into account the nature of the investigation, criminal and civil litigation risk, the nature and degree of media attention, the potential impact on customers, suppliers, and other key stakeholders, and the identity of any implicated employees.

F. Guidance for Search Warrants

Search warrants are disruptive and inherently serious because they indicate that a judge has found probable cause that a crime has been committed and that the place or thing being searched contains evidence of that crime.

Advance planning can help protect the rights and interests of your business and employees and reduce the stress and chaos of the process.

Immediate action is required but must be handled in a way to avoid allegations of obstruction of justice and to obtain as much information about the allegations as possible.

The following can act as a checklist for preparing for any type of criminal investigation, including a marine fatality:

BEFORE THE SEARCH

- Have written policies and procedures to follow if a search occurs, to include identification and training of a search warrant response team and team leader tasked with responsibility for the initial interaction with law enforcement.
- Identify outside criminal counsel to be immediately contacted by the response team.

DURING THE SEARCH

- Obtain agents' identification and ask for their business cards or record their names and numbers.
- Obtain copies of the warrant, affidavit, and any other available documents.
- Immediately contact your response team leader and outside counsel.
- Request a delay until counsel arrives or have counsel communicate with the agents during the search.
- Notify agents there are protected, privileged documents and request they not be searched or seized.
- Alert employees of the search, send non-essential personnel home, and advise all employees of their rights and obligations.
- Assign a company employee to act as a liaison with the agents and observe the search, what is seized and who is interviewed.
- Offer employees their own counsel when being interviewed or providing documents.
- Identify and note all documents and other items seized, video contemporaneously what the agents are videoing, and request a split sample if appropriate.
- Obtain an inventory from the agents of all items seized.

AFTER THE SEARCH

- Counsel will determine what was seized, protect any privileged materials, and determine what the company needs returned immediately to resume operations.
- Counsel will debrief all employees interviewed.
- Suspend routine document and data destruction and notify employees that all relevant documents and data must be preserved.

- Provide guidance to employees should law enforcement contact them as to their rights and obligations and the availability of counsel to represent them.
- Counsel will conduct an internal privileged investigation to determine the facts about the allegations.
- Counsel will work with the government attorneys and agents.

G. Guidance for Law Enforcement Interviews

Law enforcement agents will often arrive at your employees' homes or workplaces unannounced in the early hours of the morning to catch them unprepared. They may employ multiple tactics to elicit incriminating information or catch you in what they believe to be a false statement. Additionally, they may seek to intimidate you overtly or subtly into responding to their inquiries. Rarely does anyone respond fully, accurately and completely when caught unaware without an opportunity to prepare their thoughts — particularly in their driveway at 7:00 a.m.

Despite the agents' entreaties to "get ahead of the issue," "assist" law enforcement; demonstrate your honesty and sincerity, and always respond, "I would love to assist you, but I really need to speak to my counsel first." Trained criminal counsel can perform the necessary reconnaissance and intelligence gathering to allow you to prepare to respond fully and in a well-prepared manner and avoid inadvertent errors. On occasion, counsel may advise you to decline an interview until additional information can be gathered.

Additionally, after politely declining or postponing the interview, you should ask the agents to explain what they are investigating and the scope of the matter. Ask for the agents' names, agency, and business cards.

H. GUIDANCE FOR WHEN YOU RECEIVE A GRAND JURY SUBPOENA OR DOCUMENT DEMAND FROM THE GOVERNMENT

Grand jury subpoenas and regulatory subpoenas are fundamentally different from civil subpoenas issued by parties to civil litigation and carry significant risks if not handled properly.

You need criminal counsel who knows how to contact and work with the particular law enforcement agency and agents to:

- Determine whether your role is one of witness, subject, or target.
- Identify the scope and objectives of the investigation.
- Protect your rights and maintain the attorney-client privilege.
- Minimize your costs and the burden of responding.
- Establish your credibility and avoid inadvertent mistakes.

This will protect your interests in the underlying case and against obstruction of justice claims.

IV. CONCLUSION

In conclusion, marine fatalities, while always tragic, carry substantial risks to operators from both a civil and criminal standpoint. While prosecutions under the seaman's manslaughter statute are not routine, operators and internal counsel should proceed cautiously and prepare for the worst-case scenario.

WHAT DO I DO IN THE EVENT OF A JOINT U.S. COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION FOR A SERIOUS MARINE INCIDENT, AND WHO'S GOING TO HELP ME AND HOW?

- *Hypothetical will be distributed to analyze for this panel and have a panel and audience discussion.*
- How do I concurrently manage the civil and criminal investigations that may arise in a Coast Guard investigation, while the NTSB conducts its own investigation?
- When does NTSB take over or Coast Guard maintain lead investigative authority, and vice versa?
- What reports can I expect from each agency, and how may those reports be used or not be used in civil and criminal litigation?
- When do I obtain lawyers for my crew members, who pays for them, what can those lawyers tell me or not tell me, and how do they interact with my own company or insurance lawyer in the investigation and defense of any claims?
- In short, what is step number one, step number two and step number three to protect me and my company?
- What policies of coverage are impacted in such a situation and what authorities do my underwriters have versus my company and me in making decisions on litigation strategy and investigation strategy?

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2024 RIVER AND MARINE INDUSTRY SEMINAR

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2024 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Captain Gregory Callaghan
Deputy Sector Commander
U.S. Coast Guard
New Orleans, Louisiana
U.S. Coast Guard Representative


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WHAT DO I DO IN THE EVENT OF A JOINT U.S. COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATION FOR A SERIOUS MARINE INCIDENT, AND WHO'S GOING TO HELP ME AND HOW?

- *Hypothetical will be distributed to analyze for this panel and have a panel and audience discussion.*
- How do I concurrently manage the civil and criminal investigations that may arise in a Coast Guard investigation, while the NTSB conducts its own investigation?
- When does NTSB take over or Coast Guard maintain lead investigative authority, and vice versa?
- What reports can I expect from each agency, and how may those reports be used or not be used in civil and criminal litigation?
- When do I obtain lawyers for my crew members, who pays for them, what can those lawyers tell me or not tell me, and how do they interact with my own company or insurance lawyer in the investigation and defense of any claims?
- In short, what is step number one, step number two and step number three to protect me and my company?
- What policies of coverage are impacted in such a situation and what authorities do my underwriters have versus my company and me in making decisions on litigation strategy and investigation strategy?

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