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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PERRY A. WARD,

Plaintiff,

v.

EHW CONSTRUCTORS, et al.,

Defendants.

CASE NO. C15-5338 BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
SUSPEND VOLUNTARY
MAINTENANCE AND CURE
PAYMENTS

This matter comes before the Court on the motion of EHW Constructors, a joint venture comprised of American Bridge Company, Nova Group Inc., and Skanska USA Civil Southeast, Inc. ("Defendants") to suspend voluntary maintenance and cure payments to Perry Ward ("Plaintiff"). Dkt. 86. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. FACUTAL AND PROCEDURAL BACKGROUND

On July 8, 2014, Plaintiff saw Dr. James M.T. Garrity, who diagnosed Plaintiff with a cervical sprain with signs of C6 radiculopathy, allegedly stemming from a workplace injury. Dkt. 33 at 2. On August 3, 2015, Plaintiff met with Dr. Daniel A.

1 Brzusek for consultation. Dkt. 30. Dr. Brzusek also diagnosed Plaintiff with a cervical
2 sprain and C6 radiculopathy and referred him to a neurosurgeon for examination. Dkt. 30
3 at 5.

4 On May 21, 2015, Plaintiff filed a complaint *in rem* and *in personam* for personal
5 injury against Defendants, his employer. Dkt. 1. On June 22, 2015, Plaintiff filed an
6 amended complaint alleging that Defendants have failed to pay mandatory maritime
7 benefits. Dkt. 12.

8 On April 21, 2016, after Defendants began making maintenance and cure
9 payments, Plaintiff met with a neurosurgeon, Dr. William F. Ganz, who recommended a
10 C3–6 anterior discectomy and fusion with decompression of the left and right neural
11 foramina. Dkt. 91 at 5. Dr. Ganz further explained that Plaintiff could not undergo
12 surgery until he was nicotine free and that he must remain nicotine free for three months
13 after the surgery. *Id.* Plaintiff's medical records indicate he reported that he smoked one
14 pack of cigarettes per day. *Id.* at 3.

15 On June 21, 2016, Plaintiff met with Dr. Tung M. Ha, another neurosurgeon, for a
16 second opinion. Dkt. 93 at 11. Dr. Ha made no surgical recommendation at their first
17 meeting, but waited to review the results of Plaintiff's MRI. *Id.* at 5, 12. On July 11,
18 2016, after reviewing Plaintiff's MRI, Dr. Ha agreed with the recommendation of Dr.
19 Ganz and likewise recommended a C3–6 anterior cervical discectomy and fusion. *Id.* at 5.
20 He noted that a less conservative treatment would likely be ineffective. *Id.* at 5. Dr. Ha
21 also explained that Plaintiff must quit smoking for three months prior to surgery. *Id.* at 6.
22 Dr. Ha then noted that Plaintiff said he was still trying to quit. *Id.* at 13.

1 On July 19, 2016, Plaintiff was examined in a Fed. R. Civ. P. 35 panel exam by
2 Dr. Spencer Greendyke, an orthopedic surgeon, and Dr. Jeffrey Larson, a neurosurgeon.
3 Dkts. 89, 92. Doctors Greendyke and Larson both agreed with the prior surgical
4 recommendations. *Id.* They also noted that Plaintiff reported he had already begun
5 attempts to quit smoking by using nicorette gum and patches. Dkt. 89; Dkt. 92 at 7.
6 However, Dr. Greendyke also noted that Plaintiff admitted he was still smoking one and a
7 half packs of cigarettes each day. Dkt. 92 at 7. Doctors Greendyke and Larson have noted
8 that, without surgery, Plaintiff is at maximum medical improvement. Dkt. 89 at 17; Dkt.
9 92 at 14.

10 On August 5, 2016, Plaintiff's counsel informed Defendants' counsel that Plaintiff
11 could no longer have surgery prior to trial as expected. Dkt. 86 at 3; Dkt. 87; Dkt. 95 at 2.
12 It is unclear when Plaintiff will have surgery if he successfully quits smoking—there is
13 no surgery planned. Dkt. 103. The only indication that surgery will occur at some future
14 date appears in Plaintiff's assertion, made on September 7, 2016, that once he has "quit
15 smoking for the required time period, [he] hope[s] to schedule the surgical procedure
16 recommended by Dr. Ganz and Dr. Ha." *Id.* at 3.

17 On August 25, 2016, Defendants moved to suspend voluntary maintenance and
18 cure payments to Plaintiff. Dkt. 86. On September, 12, 2016, Plaintiff responded. Dkt.
19 101. On September 16, 2016, Defendants replied. Dkt. 104.

20 II. DISCUSSION

21 Defendants seek to suspend their voluntary maintenance and cure payments to
22 Plaintiff on the bases that (1) Plaintiff has already achieved maximum recovery, or (2)

1 Plaintiff has forfeited his right to maintenance and cure by withdrawing from treatment.
2 Dkt. 86.

3 **A. Maximum Maintenance and Cure**

4 Defendants first argue that they should be relieved of their duty to provide
5 maintenance and cure because Plaintiff has reached his maximum recovery. The concept
6 of “maintenance and cure” is rooted in ancient maritime law. *Vaughan v. Atkinson*, 369
7 U.S. 527, 532 (1962). The term refers to a ship owner’s obligation to pay for food and
8 lodging (‘maintenance’) in addition to any necessary health-care expenses (‘cure’)
9 incurred during the period of recovery from an injury or malady. *Whitman v. Miles*, 387
10 F.3d 68, 71 (1st Cir. 2004) (citing *Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 454 (1st
11 Cir. 1996)). Whenever a seaman is injured in the service of his or her vessel, the ship
12 owner must bring a seaman to port for treatment and must pay for maintenance and cure.
13 *Vaughn*, 369 U.S. at 532.

14 Maintenance and cure must be provided until the seaman reaches “maximum
15 cure”—a recovery as complete as the injury allows. *Permanente S.S. Corp. v. Martinez*,
16 369 F.2d 297, 298 (9th Cir. 1966). “If any doubts exist as to whether a seaman is entitled
17 to coverage, whether the medical treatment is necessary, or whether maximum cure has
18 been obtained, courts have resolved disputes in favor of the seaman and in favor of
19 granting the payment of medical expenses.” *Hedges v. Foss Mar. Co.*, C10-5046 RBL,
20 2015 WL 402809, at *2 (W.D. Wash. Jan. 29, 2015) (citing *Moore v. The Sally J.*, 27 F.
21 Supp. 2d 1255, 1262 (W.D. Wash. 1998)).

1 It is clear from the medical reports that Plaintiff has not reached his maximum
2 recovery. Each of Plaintiff's evaluations suggests that he undergo surgery for his injury.
3 Dkts. 88, 89, 91, 93. Although Defendants argue that Plaintiff has reached maximum
4 recovery until he quits smoking and becomes eligible for surgery, this argument tacitly
5 admits that Plaintiff has not yet reached maximum recovery. Accordingly, the Court
6 denies Defendants' motion on this issue.

7 **B. Withdrawal from Treatment**

8 Alternatively, Defendants argue that Plaintiff has forfeited his right to
9 maintenance and cure by withdrawing from the treatment recommended by his doctors.
10 Dkt. 86 at 4–5. Maintenance and cure payments “are held forfeit only under certain well-
11 defined and narrowly limited circumstances.” *Oswalt v. Williamson Towing Co., Inc.*,
12 488 F.2d 51, 53 (5th Cir. 1974). The purpose of maintenance and cure is to provide
13 subsistence while a seaman is recovering. *Whitman*, 387 F.3d at 71. “When, therefore,
14 [maximum recovery] is either reached *or the erstwhile patient voluntarily stops short of*
15 *its attainment by refusing medical attention*, the justification for the payments likewise
16 ceases.” *Oswalt*, 488 F.2d at 54 (emphasis added).

17 In the Ninth Circuit, “[i]t is well settled that a seaman’s right to maintenance and
18 cure is forfeited by voluntary rejection of hospital care.” *U.S. v. Johnson*, 160 F.2d 789,
19 798 (9th Cir.1947), *affirmed in part, reversed in part*, 333 U.S. 46 (1948). *See also*
20 *Truman v. Chas. Kurz & Co.*, 239 F. Supp. 636, 638 (D. Or. 1965) (“The cases have
21 consistently held that a seaman’s right to maintenance and cure is forfeited by voluntary
22 rejection of hospital care on his part”); *Moriarty v. Oliver J. Olson & Co.*, 72 F. Supp.

1 446, 449 (N.D. Cal. 1947) (Maintenance and cure is forfeited “when [seaman’s] conduct
2 at the hospitals has been the equivalent of a rejection of treatment.”).

3 Defendants also cite numerous decisions from other jurisdictions to bolster the
4 argument that maintenance and cure are forfeited by a seaman who “quit[s] participation
5 in a course of therapy already begun.” Dkt. 86 at 4–5 (quoting *Oswalt*, 488 F.2d at 53–
6 54). In those cases cited by Defendants, whether a seaman’s withdrawal from treatment
7 resulted in a forfeiture of payments depended on whether the seaman made an
8 “*unreasonable* refusal to accept medical care offered by his employer.” *Oswalt*, 488 F.2d
9 at 53 (emphasis added).

10 In the Ninth Circuit, the operative term in this “narrowly limited circumstance”
11 concerning the maintenance and cure obligation appears to be the term *voluntary*
12 *rejection*, or—in the extra-jurisdictional authorities offered by Defendants—the term
13 *unreasonable refusal*. Here, the undisputed evidence shows that Plaintiff’s treatment has
14 been halted and his surgery delayed indefinitely because Plaintiff has failed to quit using
15 nicotine as required by his doctors. Therefore, the Court must assess whether Plaintiff’s
16 failure to quit smoking or using nicotine and the delay of any further treatment constitutes
17 a voluntary or unreasonable rejection of medical care.

18 The Court is sympathetic to the difficulties associated with confronting an
19 addiction, but the choice to quit using nicotine ultimately lies with Plaintiff. Plaintiff
20 cursorily asserts that he is attempting to quit. However, his examination with Dr.
21 Greendyke indicates that his smoking has increased since August 3, 2015, when Dr. Ganz
22 told him that surgery could proceed only after he stopped using nicotine. *Compare* Dkt.

1 91 at 3 *with* Dkt. 92 at 7. A surgery has not been scheduled. *See* Dkt. 103. No evidence
2 suggests that Plaintiff is progressing down the only avenue of treatment whereby he may
3 further achieve maximum recovery.

4 The Court finds that Plaintiff’s failure to quit smoking is tantamount to a voluntary
5 rejection of treatment for the purpose of applying the Ninth Circuit’s precedent in
6 *Johnson*, 160 F.2d 789. To find otherwise would belie the principle that “an injured
7 seaman may not wilfully prolong for an indefinite time the shipowner’s liability for his
8 maintenance and cure. He is bound to seek treatment needed to improve his condition
9” *Gaynor v. United States*, 90 F. Supp. 751, 754 (E.D. Pa. 1950), *cited with approval*
10 *on other grounds in Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 537 (9th Cir.
11 1962). The Court further notes that Defendants have stipulated to resume payments if
12 Plaintiff resumes medical treatment. *See* Dkt. 86 at 5. Therefore, the Court’s present
13 order will not preclude Plaintiff from receiving further maintenance and cure if he can
14 make a future showing that his smoking habit does not relegate any further treatment to
15 the remote and indefinite future.

16 **C. Date of Withdrawal**

17 While the Court finds that Plaintiff’s failure to quit smoking constitutes a
18 constructive withdrawal from treatment, it remains difficult to ascertain an exact date
19 when this withdrawal occurred. The parties have offered little aid to the Court because
20 they have not directly addressed this issue. Arguably, the date of withdrawal could be
21 construed as the time where it first became apparent that Plaintiff was rejecting his
22 doctors’ recommendations by failing to reduce his nicotine consumption. Alternatively,

1 Plaintiff's withdrawal could be deemed effective on the date when he could have had
2 surgery if he was following his doctor's recommendations, but his failure to stop smoking
3 would require that he forgo or reject the prescribed treatment. As stated above, "[i]f any
4 doubts exist as to whether a seaman is entitled to coverage . . . courts have resolved
5 disputes in favor of the seaman and in favor of granting the payment of medical
6 expenses." *Hedges*, C10-5046 RBL, 2015 WL 402809 at *2. Under this standard, the
7 Court finds Plaintiff's withdrawal to be effective on the day when his failure to quit
8 smoking could have resulted in the rejection of some actual treatment.

9 Dr. Ha recommended surgery and told Plaintiff he needed to quit smoking on July
10 11, 2016. Dkt. 93 at 5–6. He also told Plaintiff he needed to quit smoking for at least
11 three months prior to surgery. *Id.* at 6. Therefore, so long as Plaintiff was complying with
12 his doctors' recommendations, the earliest day he could be scheduled for treatment was at
13 least three months out. It did not become apparent that Plaintiff was not complying with
14 his doctors' recommendations until he was examined by Dr. Greendyke on July 19, 2016.
15 Dkt. 92. Measuring from the date when it first became apparent that Plaintiff was not
16 complying with his doctors' recommendations, the earliest date when Plaintiff's failure to
17 abstain from nicotine could have resulted in the refusal of the treatment itself would have
18 been October 19, 2016. Therefore, the Court finds that Plaintiff's withdrawal results in
19 the forfeiture of any maintenance payments after October 19, 2016.

1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion to suspend voluntary
3 maintenance and cure payments (Dkt. 86) is **GRANTED**.

4 Dated this 24th day of October, 2016.

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6 BENJAMIN H. SETTLE
7 United States District Judge

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