Not Reported in F.Supp., 1991 WL 107279 (S.D.N.Y.), 1991 A.M.C. 2423
(Cite as: 1991 WL 107279 (S.D.N.Y.))

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United States District Court, S.D. New York.
Joseph **TAYLOR**, Plaintiff,
v.
BOUCHARD TRANSPORTATION CO., INC. and Tug Evening Tide Corp., Defendants.

No. 89 Civ. 5965(PKL).
June 12, 1991.

Friedman, Biondi & James, New York City (Bernard D. Friedman, of counsel), for plaintiff.

Freehill, Hogan & Mahar, New York City (John J. Walsh, and Thomas M. Canevari, of counsel), for defendants.

OPINION AND ORDER

LEISURE, District Judge:

***1** This action is brought by plaintiff seeking damages under the Jones Act, 46 U.S.C. § 688, for personal injuries he sustained in an accident while employed as a deckhand aboard defendants' tugboat the Evening Tide. The United States Coast Guard (the "Coast Guard") conducted an investigation following the accident and compiled a report indicating its findings, including the apparent cause of the accident. Defendants now move the Court to preclude the admission of the report into evidence, asserting that it is inherently untrustworthy and thus the hearsay exception embodied in Federal Rule of Evidence 803(8)(C) is inapplicable. Defendants also move to dismiss the second claim in plaintiff's complaint on the ground that plaintiff has reached the maximum possible cure with respect to his injuries, or, in the alternative, to preclude plaintiff from introducing evidence as to future losses, pain and suffering. Finally, although not mentioned in defendants' notice of motion, defendants' moving brief demands that plaintiff submit to physical therapy as part of plaintiff's duty to mitigate his damages.

Background

The instant action arises from an accident aboard the tugboat the Evening Tide on August 13, 1989, in which plaintiff Joseph Taylor suffered alleged bodily injury. Plaintiff served as a deckhand aboard the Evening Tide and was performing his duties when he sustained his injuries in the accident. Defendants are Bouchard Transportation Company, Inc. and the Tug Evening Tide Corp., the owners and operators of the vessel involved in this action.

At the time of the accident, the Evening Tide was attempting to bring a barge alongside the tug by bringing in the slack of the eight inch stern line that connected the barge and the tug. Ordinarily, this task would be accomplished by putting the eight inch line on a capstan. However, plaintiff alleges that the stern capstan suitable for the task was not operable on the Evening Tide the day of the accident. The eight inch line was instead to be drawn in by a towing machine. The line, however, proved to be too wide to negotiate the level winder of the towing mechanism through which it needed to pass. The eight inch line was then attached to a five inch line, which was rigged to an operable capstan at the bow of the tug, with the intention that the five inch line would force the eight inch line through the level winder. The accident occurred upon activating the towing mechanism, at which time the five inch line parted and struck plaintiff, severely injuring his thigh. Plaintiff was attended to by one of the crew members before being evacuated from the tug by the Coast Guard. He received emergency medical treatment and has since been declared permanently unfit to resume his duties.

Plaintiff has commenced this Jones Act suit seeking damages stemming from his personal injuries. A crucial issue to be determined in this action is whether Captain Joseph Carey, the captain of the Evening Tide, ordered the eight inch line to be attached to the five inch line and drawn through the level winder in the manner described above.

***2** On December 12, 1989, defendants officially reported the accident to the Coast Guard on a CG-2692 form. The Coast Guard subsequently began an investigation of the accident, conducted by Lieutenant Commander Charles F. Barker of the Coast Guard ("Commander Barker"), pursuant to 46 CFR § 4.07-1, requiring the Coast Guard to investigate marine casualties. Commander Barker reported the findings of his investigation in the form of both facts and opinions on portions of the CG-2692 form submitted by defendants (the "Report"). FN1 Under the portion of the Report marked "Description of Casualty," Commander Barker stated:

1. The stern capstan on the tug Evening Tide was inoperative on the day of the accident. In order to make up to a barge, Mr. Carey, the person in charge of the Evening Tide, ordered a 5" line to be spliced to an 8" line, and the 5" line led to the bow capstan. The path of the 5" line took it through a 5" level-winder. A deck hand was stationed at the bow capstan, Carey was on the bridge, and Taylor was at the stern. The bow capstan was energized, and the 5" line was brought up. When the 8" line reached the 5" roller, it would not pass through. Carey yelled to the bow capstan operator to stop, but the 5" line strained and parted. The 5" line recoiled and struck Taylor in the left thigh.

2. There is no evidence that drugs or alcohol played a part in this accident.

Affirmation of John J. Walsh, Esq., sworn to on March 12, 1991 ("Walsh Aff."), Exhibit C. Commander Barker concluded in the Report that the apparent cause of the accident was:

an error in judgement on the part of towing vessel operator Carey, in that he thought an 8" line would pass safely through a 5" roller. Contributing to this accident was that the operating company permitted the Evening Tide to work without an operable stern capstan.

Walsh Aff., Exhibit C. The Report was completed by Commander Barker on July 9, 1990, and approved by his superior, Captain Murdock, two days later.

Discussion

Defendants first move the Court to preclude admission of the Report into evidence, asserting that the Report is untrustworthy within the meaning of Federal Rule of Evidence 803(8)(C). Rule 803(8)(C) provides that:

[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:

... (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions and proceedings ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8)(C). "This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports." *Bradford Trust Co. v. Merrill Lynch Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir.1986). "To exclude evidence which technically falls under 803(8)(C) there must be 'an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify.' " *Bradford Trust, supra*, 805 F.2d at 54 (quoting *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613, 618 (8th Cir.1983)).

***3** Four nonexclusive factors have traditionally been applied by courts in determining whether a document sought to be introduced under Rule 803(8)(C) is untrustworthy. These factors are: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n. 11

(1988) (citing Advisory Committee's Notes on Fed.R.Evid. 803(8)). "As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court's sound exercise of discretion in determining whether the hearsay document offered in evidence has sufficient independent indicia of reliability to justify its admission." *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir.1981), *cert. denied*, 454 U.S. 1164 (1982). "A wide variety of public documents have been admitted pursuant to Rule 803(8)(C)." *Gentile v. County of Suffolk*, 129 F.R.D. 435, 448 (E.D.N.Y.1990) (citing cases).

Defendants argue that under the *Beech Aircraft* factors the Report is untrustworthy and should be excluded from evidence. Defendants first address the issue of timeliness. Defendants argue that the Coast Guard investigation was conducted in an untimely manner, asserting that Commander Barker did not request a CG-2692 form from them until December 1989, and that the investigation itself did not begin in substance until February 1990. However, the pertinent law and regulation required that *defendants* report the accident within five days of its occurrence using the CG-2692 form; the Coast Guard had no duty to send defendants the form. *See* 46 U.S.C. § 6101 and 46 CFR § 4.05-10(a). Thus the delay, to the extent there was a delay, was partly the result of defendants' failure to comply with the law. Moreover, there is no evidence that the speed with which the Coast Guard conducted its investigation was any less than is usually the case, or that the delay was of such a degree as to permit an inference of untrustworthiness with respect to the resulting Report.

Defendants next argue that the investigator's lack of skill and experience renders the Report untrustworthy. Although they concede that Commander Barker had been employed by the Coast Guard for over ten years at the time of the accident, defendants note that Commander Barker had only four months experience in the field of marine casualty investigations. They further argue that in carrying out his investigation, Commander Barker failed to consider certain sources of evidence. His level of experience is not disputed by plaintiff. Rather, plaintiff contends that Commander Barker's level of experience is largely unimportant to the issue of trustworthiness, given his supervisor's signed approval of the Report.

Although the Court does not agree that Commander Barker's prior experience is irrelevant, the presence of Captain Murdock's signature of approval lessens the Court's concern that the Report is somehow untrustworthy. In addition, although defendants list several omissions on the part of the investigator, they make no attempt to show that these omissions have any bearing on the Report's trustworthiness. There is no requirement that an investigator make use of all available materials in order to compile a trustworthy report for the purposes of Rule 803(8)(C). The relevant case law considers the completeness and finality of the document at issue to be the important question. For example, Judge Weinstein in *Gentile, supra*, 129 F.R.D. at 458, includes "finality of findings" as an additional consideration to those enumerated in *Beech Aircraft. See also United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742-43 (2d Cir.1989) (it was within district court's discretion to exclude government reports in part because of their interim or inconclusive nature). *But see Meriwether v. Coughlin*, 879 F.2d 1037, 1039 (2d Cir.1989) (admitting into evidence the last page of an interim report). The approval signature of Captain Murdock on the Report is convincing evidence of the Report's completeness and finality.

***4** Defendants' final argument under the *Beech Aircraft* case is, in effect, that the Report must be untrustworthy because no hearing took place prior to its issuance. The absence of a hearing, however, does not require finding the Report to be untrustworthy. As Judge Weinstein has noted, " '[r]equiring that the government report of an investigation be based on an evidentiary hearing providing an opportunity for cross examination would rob

Rule 803(8)(C) of any practical utility.' " *Gentile, supra,* 129 F.R.D. at 456 (quoting *In re Japanese Electronic Products,* 723 F.2d 238, 268 (3rd Cir.1983)). In the case at bar, the mere lack of a hearing, in the absence of any other convincing indication of lack of trustworthiness, does not in and of itself create evidence of untrustworthiness.[FN2]

Defendants' remaining arguments are unconvincing. Defendants argue that the Report was incomplete, and that it was prepared for purposes other than those that it would serve at trial. The issue of completeness has already been discussed above, and will not be repeated here. As for the remaining issue, the Court believes that the fact that the original purpose of the Report was not to establish fault does not in any way suggest the Report is untrustworthy. The relevant regulation specifically provides that Coast Guard investigations "are not intended to fix civil or criminal responsibility." 46 CFR § 4.07-1(b). Nevertheless, the same regulation requires that such investigations:

determine as closely as possible ... (3) Whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of the law on the part of any licensed or certificated man contributed to the casualty ... [and] (4) Whether there is any evidence that ... any ... person caused or contributed to the cause of the casualty.

46 CFR § 4.07-1(c)(3) and (4). By carrying out these purposes, the Report is directly relevant to the issues in this case, and certainly no inference of untrustworthiness may be drawn therefrom.

Accordingly, having failed to make the requisite "affirmative showing of untrustworthiness," *see Bradford Trust, supra,* 805 F.2d at 54, defendants' motion to preclude admission of the Report into evidence, pursuant to Federal Rule of Evidence 803(8)(C), is denied.[FN3] It is important to recall that, as with any piece of admitted evidence, the ultimate determination of the Report's trustworthiness will rest with the jury. "The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." *Bradford Trust, supra,* 805 F.2d at 54. Defendants will have ample opportunity to call witnesses at trial in order to attempt to establish the untrustworthiness of the report.

Future Loss, Pain and Suffering

Defendants next move the Court to dismiss plaintiff's claim for maintenance and cure, or, in the alternative, to preclude plaintiff from introducing evidence of future losses, pain and suffering. "Maintenance and cure" is the right, under general maritime law, of a seaman injured in the service of a ship to wages, subsistence, lodging and care to the point where the maximum attainable cure has been reached. *See Rodriguez Alvarez v. Bahama Cruise Line Inc.,* 898 F.2d 312, 314-15 (2d Cir.1990); *Staffer v. Bouchard Transportation Co., Inc.,* 878 F.2d 638, 644 (2d Cir.1989).

***5** Both plaintiff and defendants agree that plaintiff's maximum medical cure was attained on August 21, 1990. Plaintiff agrees that he is not entitled to maintenance and cure beyond this date. Accordingly, plaintiff's maintenance and cure claim is dismissed to the extent that it represents a claim for damages beyond the agreed date of maximum medical cure.

Mitigation of Damages

Finally, defendants argue that plaintiff has a duty to mitigate damages and is therefore required to submit to physical therapy. Plaintiff agrees that he has the duty to mitigate his damages, but argues that physical therapy has not been recommended by any physician and is not an appropriate measure.

The Court notes that, in a trial by jury, it is not the duty of the Court to appraise the measures taken by the parties in an effort to mitigate damages. "Ordinarily, it is left to the jury to determine whether plaintiff in the exercise of ordinary care and at reasonable expense could have mitigated defendants' damages." *Fisher v. First Stamford Bank and Trust Co.,* 751 F.2d 519, 524 (2d Cir.1984). Thus, whether or not plaintiff has failed to mitigate

his damages is a question for the jury to resolve, and this Court will not require plaintiff to submit to medical treatment he does not believe is in his own best interest.

Conclusion

For the reasons set forth above, defendants' motion to preclude introduction of the Report into evidence on the ground that it is untrustworthy is denied. Defendants' motion to dismiss plaintiff's claim for maintenance and cure is granted, to the extent said claim is for damages for maintenance and cure beyond the date of maximum medical cure, *i.e.*, August 21, 1990. Defendants' motion to compel plaintiff to undergo physical therapy is denied. This action will be placed on the trial ready calendar.

SO ORDERED.

FN1. Defendants claim that they are uncertain as to which report plaintiff wishes to introduce as evidence, owing to the alleged existence of various versions of the CG-2692 form. However, only one report, included in defendants' moving papers as Exhibit C, bears the final approving signature of Captain Murdock of the Coast Guard. This report is the version discussed in plaintiff's papers in opposition to defendants' motion, and is clearly the report at issue.

FN2. Defendants concede that they have no evidence of any bias on the part of Commander Barker. Therefore, the fourth *Beech Aircraft* factor weighs in favor of admission of the Report. *Beech Aircraft, supra*, 488 U.S. at 167 n. 11.

FN3. In reaching this conclusion, the Court finds it unnecessary to refer to, or rely on, a statement of deckhand Arthur M. Tonnesan submitted to the Court by plaintiff.

S.D.N.Y.,1991.

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