

from

DALE HALCOMB

v.

KIMBERLY CLARK TISSUE COMPANY, *ET AL.*

United States District Court, Southern District of Alabama (Southern Division).

May 31, 2000

No. 99-1092

PERSONAL INJURY — 1412. Duration.

Maximum medical improvement (MMI) for the purpose of ending maintenance and cure is a medical rather than legal finding, and one of fact rather than projection; the employer was wrong to end it on a doctor's report that he felt the seaman would be at MMI in one week; where there is ambiguity, it should continue and there is no justification for waiting to depose the doctor to find out the present fact; the employer is therefore ordered to resume payment.

Dennis M. O'Bryan, Gary Wm. Baun and John E. Drumm (O'Bryan Baun Cohen)
for Halcomb

William E. Ripkin, Jr. (Clark, Scott and Sullivan) *for Kimberly Clark*

Donald C. Radcliff (Armbrecht, Jackson, Demouy, Crowe, Holmes & Reeves) *for Labor Finders*

RICHARD W. VOLLMER, JR., D.J.:

This matter comes before the court on plaintiff Dale Halcomb's motion for reinstatement of maintenance and cure. According to Halcomb, defendant Kimberly Clark Tissue Company wrongfully terminated his maintenance and cure in January 2000, despite the lack of a medical finding that Halcomb has reached maximum medical improvement ("MMI").

Kimberly Clark, joined by defendant Labor Finders, opposes the motion primarily on the ground that Halcomb reached MMI in December 1999. The basis for this assertion is a November 29, 1999, entry by Halcomb's doctor, which states: "I feel that he [Halcomb] will be at MMI in one week".

The question of whether the seaman has reached MMI is a medical rather than legal question. *See Breese v. AWI, Inc.*, 1989 AMC 108, 113, 823 F.2d 100, 104 (5 Cir. 1987). Kimberly Clark has not presented any medical evidence which demonstrates that Halcomb has actually reached MMI. Kimberly Clark's argument is instead based upon a mere "projection." Because a medical determination "that terminates the right to maintenance and cure . . . should be unequivocal," *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 388 (5 Cir. 1985), the medical "projection" invoked by

Kimberly Clark is not sufficient to terminate Halcomb's maintenance and cure.

Moreover, the briefs submitted by the defendants themselves demonstrate that there is ambiguity as to whether Halcomb has achieved MMI. For instance, Labor Finders asks the court to delay any ruling until Labor Finders deposes Halcomb's treating physician to determine whether Halcomb has actually reached MMI. Such equivocation does nothing more than prove that ambiguity exists, and the Supreme Court has emphasized that any ambiguities concerning an injured seaman's entitlement to maintenance and cure must be resolved in favor of the seaman. *See Vaughan v. Atkinson*, 369 U.S. 527, 531, 1962 AMC 1131, 1134 (1962). The court will therefore order the reinstatement of Halcomb's maintenance and cure.

Accordingly, Halcomb's motion for reinstatement of maintenance and cure is granted.¹ Kimberly Clark and Labor Finders, jointly and severally, are thus ordered to provide Halcomb with immediate maintenance and cure from the date of suspension of payments until the date on which Halcomb is unequivocally diagnosed as reaching MMI. *See Tullos*, 750 F.2d at 388.

1. Halcomb's motion for a hearing on this issue is moot.