STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

ROBERT SEPAROVICH,	)	MEC Case No. 14-97
	)	
Complainant,	)	Decision No. 180 - MEC
	)	
v.	)	DECISION AND ORDER
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
	)	

Robert Separovich, appearing on behalf of himself.

Christine Gregoire, Attorney General, by Stewart A. Johnston and Valerie B. Petrie, Assistant Attorneys General, appearing for and on behalf of the Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on May 2, 1997, when Robert Separovich, a member of the International Organization of Masters, Mates (MM&P), charged the Washington State Ferries (WSF) with engaging in unfair labor practices within the meaning of RCW 47.64.130(1) by interfering with, restraining or coercing employees in the exercise of rights and refusing to bargain collectively with representatives of employees. Mr. Separovich alleged, in his amended complaint filed on June 13, 1997, that WSF ignored Rule 1.03 – Scope and Interpretation of the Washington State Ferries/Masters, Mates and Pilots contract and conditioned his receipt of maintenance and cure benefits on his waiver of contractual rights in Rules 13.01 and 13.03 of the contract.

Robert Separovich asserted that WSF informed him that maintenance and cure for an injury he sustained at work would be continued only if he subjected himself to an independent medical examination. He maintained that WSF unilaterally changed the terms and conditions of his employment by its actions.

Remedy Requested

Separovich requested that WSF be ordered to reimburse him for the loss in maintenance and cure benefits incurred since the implementation of Mr. Yearby's November 1, 1996 letter and continue to provide maintenance and cure until Separovich is allowed to return to work. In addition, Mr. Separovich sought an order requiring WSF to cease and desist from alleged dishonest and deceitful tactics it had engaged in over the last two years as detailed in the statement of facts included with his complaint.

Background

Following review, the Marine Employees' Commission determined that the facts alleged may constitute an unfair labor practice, if later found to be true and provable. WAC 316-45-110. Commissioner David E. Williams was appointed to act as hearing examiner pursuant to WAC 316-45-130.

A settlement conference was convened on May 29, 1997; the parties failed to resolve the matter. Mr. Separovich filed an amendment to his complaint on June 13, 1997, which further alleged that following a grievance meeting between WSF and MM&P on December 18, 1996, Jim Yearby, WSF Human Resources Director, withdrew his November 1, 1996 letter responsible for canceling Separovich's maintenance and cure. However, during the MEC settlement conference on May 29, 1997, Mr. Yearby denied rescinding the letter and authorizing continuation of Robert Separovich's maintenance and cure, giving rise to the amended complaint.

WSF's answer to the complaint was timely filed. A hearing was held on August 13, 1997. The transcript was timely received; post-hearing briefs were timely filed by the parties.

STATEMENT OF THE ISSUE

The essential issues presented here are (1) whether Mr. Separovich, who is covered by the WSF/MM&P collective bargaining agreement, remained entitled to maintenance and cure when, after receiving that remedy for some 19 months, he refused to undergo a competent examination arranged by WSF to determine whether a maximum cure had been effected, after instructing his own doctor not to cooperate with WSF and (2) if so, whether the WSF's request for that examination and cessation of maintenance and cure under the instant circumstances amount to a statutory unfair labor practice, under RCW 47.64.130 and WAC 316-45-003.

Having read and carefully considered the entire record, including the initial unfair labor practice complaint, the hearing transcripts and exhibits and the post-hearing briefs, this Commission now hereby enters the following Findings of Fact.

FINDINGS OF FACT

1. Complainant, Robert Separovich is, and at all material times was, an employee of the respondent WSF.

2. In his category, as an employee of WSF, Mr. Separovich was covered by the formal collective bargaining agreement between WSF and MM&P which provides for maintenance and cure, a well-known remedy for injured personnel engaged actively in the maritime trades.

3. On April 10, 1995, Separovich sustained an industrial injury in the course of his employment by WSF.

4. Complementary to the collective bargaining contract, maintenance and cure were paid accordingly, to Separovich, until November 15, 1996. However, after due notice, Mr. Separovich declined to undergo an examination by a qualified medical practitioner, at the University of Washington, who had been selected by WSF for the purpose of determining whether "maximum medical cure" had been achieved in his case. Additionally, sometime before July 1996, Mr. Separovich had instructed his attending physician not to provide additional information regarding his condition to representatives of WSF. That instruction was honored.

5. During the period from the date he was injured until the maintenance and cure was stopped as noted, Separovich and the WSF and others representing the Department of Transportation, engaged in both oral and written exchanges relative to the matter. These exchanges presented occasions to the parties for misunderstandings and misconceptions. However, no promise or commitment was made by or for WSF, to Separovich, to pay maintenance and cure to him regardless of his cooperation or lack thereof relative to medical information needed by the employer to evaluate his entitlement, if any.

Having entered the foregoing Findings of Fact, the Commission now enters the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.130 and .280.

2. The maintenance and cure device is a longstanding means for compensating those who are injured in the course of their maritime work. Thus, at §26:8, p 20, 4th ed. Norris', The Law of Seamen, notes:

> The ancient duty of the vessel and shipowner to provide the injured seaman with maintenance and cure arises from the contract of employment.

(Emphasis added.)

The extent of the duty to provide maintenance and cure has evolved over the years, largely in accord with and by reason of judicial decisions. By that process, according to Norris (1997, Supp. P 77), it is abundantly clear that:

> The cutoff point for maintenance and cure is not necessarily that at which the seaman recovers sufficiently to take up his old employment, but rather the time of "maximum possible cure."

3. The courts have determined that, relative to the factual question of "maximum possible cure," the employer/shipowner is entitled to arrange for an independent medical examination of the particular claimant. If the claimant concerned rejects that proposed examination and instructs his or her private physician not to communicate with the employer/shipowner about the state of claimant's recovery, then, claimant may be regarded as forfeiting the right to the monthly maintenance and cure. See McWilliams v. Texaco, Inc., 781 F.2d 514, 519 (1986); Gontarski v. Calmar S.S. Corp., 1967 AMC 966 (1967 D.C. Pa.).

4. Here, admittedly, the complainant, Mr. Separovich, refused to undergo an examination by a physician, at the University of Washington, relative to a fundamental question of medical fact; i.e., whether he, as the claimant, had attained maximum possible care. The obligation of an injured employee to submit to an examination by medical doctor is not unique to situations where the

question is related to maintenance and cure, as specified in a collective bargaining contract covering people engaged in maritime work.[1]

5. Under the circumstances of this case, then, given the well-seasoned principles defining maintenance and cure, claimant's admitted refusal of a medical examination requested reasonably by WSF was an allowable basis for the termination of the benefits at issue here. While, as a matter of personal privilege, he may be highly critical of the conduct of WSF management and others engaged in the processing and evaluation of his contractual rights, Mr. Separovich does not deny that ultimately he refused the IME at the University of Washington which had been requested by the employer. Although he believes that his notice of the date of examination at the University was too short, there is no evidence of record that he undertook to reschedule the appointment with the physician concerned or with WSF. In this connection, Mr. Separovich expressed the

---

[1] We are guided also by policy expressed in our state's industrial insurance laws, specifically RCW 51.32.110 which provides that the monthly benefits of industrial insurance may be denied to an injured worker, who, "refuses [without good cause] to submit to medical examination…if requested by the department or self insurer." The foregoing policy is expressed in more detail by WAC 296-410. Thus, the cited regulation provides, *inter alia*, that:

> **WAC 296-14-410 Reduction, suspension, or denial of compensation as a result of noncooperation.** In accordance with RCW 51.32.110, workers claiming benefits under this title are required to attend and cooperate at medical examinations and vocational evaluations requested by the department or self-insurer, to refrain from unsanitary or injurious practices which imperil or retard recovery, and to accept medical and surgical treatment reasonably essential for recovery from the industrial injury or occupational disease.
>
> When a worker obstructs or delays recovery from the industrial injury or occupational disease or fails to attend or cooperate, without good cause, at scheduled examinations or evaluations, or engages in unsanitary or injurious practices, or refuses, without good cause, to undergo proper and necessary treatment, the department, or self-insurer upon approval of the department, may reduce, suspend, or deny benefits to the worker.
>
> Actions of a worker's representative that result in refusal, obstruction, delay, or noncooperation will be imputed to the worker…

essentials of his position in a spirited and informative post hearing brief, as follows:

> The intent of my original complaint was to show that WSF through Mr. Yearby had committed an unfair labor practice. Thus by attempting to establish Quid Pro Quo circumstance to exist whereby M & C benefits for an injury I sustained would be continued if I subjected myself to an independent medical examination.

(Complainant's Closing Brief, p.3.)

6. There is not sufficient ground established by the record here, on which Mr. Separovich can adequately explain his failures relative to the IME. As defined by case law, the concept of maintenance and cure, as referenced in the applicable MM&P/WSF contract, by implication, requires a claimant to undergo an IME requested reasonably by WSF, absent good cause shown as to why such a procedure may be refused justly. "Good cause" for refusal by complainant to undergo the instant IME was not shown here. Accordingly, there is no basis on which Mr. Separovich's relevant lack of cooperation in the circumstances can be justly allowed, notwithstanding his concern generated by various argumentative exchanges with agents and officials of the employer.

7. MEC concludes that WSF was within its rights, under the governing collective bargaining agreement and the material statutes, when it effected termination of Separovich's maintenance and cure in November of 1996.

8. WSF's decision to stop payments of maintenance and cure after November 15, 1996 was a reasonable act. By stopping these payments, WSF did not act in bad faith, willfully, wantonly, arbitrarily, capriciously, or with callousness or indifference. Morales v. Garijak, 829 F.2d 1355 (5th Cir. 1987); Yelverton v. Mobile Laboratories, Inc., 782 F.2d 555, (5th Cir. 1986); Harper v. Zapata Off-

Shore Co., 741 F.2d 87 (5th Cir. 1984); McNaughton v. Exxon Shipping Co., 813 F.Supp. 710 (N.D. Cal. 1982).

9. Mr. Separovich failed to produce any credible evidence to justify his entitlement to payment of maintenance and cure after November 15, 1996.

10. The foregoing is not to ignore nor suppress complainant's belief that he was promised the benefits he seeks by Jim Yearby, WSF Human Resource Director, and that such a promise was thereafter broken improperly. Because of that alleged promise and its suggested breach, Separovich argues that an unfair labor practice was committed. Relative to this aspect of the case, it ought to be noted that, in the labor relations community, it is common for misunderstandings to arise from communications generated in the course of efforts to reconcile a problem between a union-represented person and a member of management. After giving due regard to the differing understandings of Separovich and Yearby, it must be concluded that there is insufficient proof, as to what was said and what was misunderstood in the course of their exchanges. Thus, the charge of unfair labor practice as founded on such communications, has not been established with enough clarity to warrant a finding in support of that claim.

11. There is no foundation in the established and material facts, the statutory scheme or the MM&P collective bargaining contract to sustain the amended complaint of unfair labor practice. It does appear clearly that, after instructing his own attending physician to decline cooperation with WSF, Mr. Separovich refused, unilaterally, arrangements made reasonably by WSF for an IME. The concept of maintenance and cure, to work purposefully as intended, embodies obligations of the injured person as well as his rights. Here, it appears rather plainly that the obligations were not fulfilled, although the benefits were accorded, received, and accepted, in full measure, over an extended period of months. Under such circumstances, in protection of contractual arrangements for viable maintenance

and cure, not only for the instant complainant, but for the bargaining unit as a whole, it must be found that in the material premises. WSF did not breach the collective bargaining agreement nor violate the governing enactments.

12. Accordingly, the amended complaint of unfair labor practice, under RCW 47.64.130 and WAC 316-45-003, must be dismissed definitively.

ORDER

NOW THEREFORE, on the foregoing findings of fact and conclusions of law, the complaints of unfair labor practice in the above-captioned case are hereby dismissed with prejudice for the reasons expressed herein.

DATED this 27th day of October 1997

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner