Affirmed and Opinion filed February 20, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00880-CV

NOBLE DRILLING (US) LLC, Appellant

V.

NATHAN DEAVER, Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2015-68183

O P I N I O N

In this maritime personal-injury case, Noble Drilling (US) LLC challenges the legal and factual sufficiency of the evidence supporting the judgment rendered on the verdict against it and in favor of its former employee, Nathan Deaver. We affirm.

I. BACKGROUND

Seven years before Deaver began working for Noble, he broke his right leg. After his leg healed, he tended to carry more of his weight on the lateral, or "outside" part of his right foot.

While working for Noble as a shaker hand on the drilling vessel *M/V NOBLE TOM MADDEN* in December 2014, Deaver felt "unbearable" pain in his right foot. He was evacuated from the vessel and was examined first by Dr. Robert Davis and then by podiatrist Dr. Alan Ettinger. Noble paid Deaver maintenance and cure while he was being treated by Dr. Ettinger for plantar fasciitis; however, Deaver discontinued treatment because he felt it was not working.

After Noble discovered that Deaver had ceased treatment, it stopped paying him maintenance and cure but told him it would reconsider the decision if Deaver submitted reports or records suggesting that medical treatment would further improve his condition. Deaver did not seek further treatment at that time. He obtained a full release to work without restrictions, and although his position at Noble was no longer available, he returned to his former occupation with a different employer.

Months later, Deaver sued Noble in a state district court under the Jones Act. He additionally asserted claims under general maritime law for unseaworthiness and for unpaid maintenance and cure but later dropped the maintenance part of the claim.

After Deaver's deposition, he visited orthopedic surgeon Dr. William Granberry. Deaver's counsel sent Noble Dr. Granberry's report. In the report, Dr. Granberry opined that Deaver required surgery on his right ankle to correct peroneal tendon subluxation sustained while Deaver worked for Noble. Noble refused the claim.

Deaver maintained at trial that the overuse injuries he sustained in service to the vessel included both plantar fasciitis and peroneal tendon subluxation, and that the overuse was the result of the vessel's unseaworthiness due to Noble's failure to assign sufficient competent staff to the duties Deaver performed. Noble countered that Deaver's complaints around the time of injury were related solely to plantar fasciitis and that Noble fulfilled its duties to Deaver by paying maintenance and cure related to that condition for so long as he was being treated for it. Noble denied that the vessel was unseaworthy. Noble does not dispute that Deaver now suffers not only from plantar fasciitis but also from peroneal tendon subluxation requiring corrective surgery; rather, Noble argues that Deaver's original episode of plantar fasciitis must have resolved, and his ankle injury and current episode of plantar fasciitis must have occurred, sometime after he was last treated by Dr. Ettinger, not while he was in service to the vessel.

The jury failed to find Noble liable for negligence under the Jones Act but held Noble liable under general maritime law. Deaver prevailed on his claim for unpaid cure, for which the jury assessed damages of $30,000, and because the jury found that the failure to pay was unreasonable, it assessed an additional $125,000 for aggravation of Deaver's condition. The jury also found that Noble's failure to pay for cure was willful or wanton, and based on that finding, the jury assessed trial and appellate attorney's fees. Deaver additionally prevailed on his unseaworthiness claim, with the jury attributing 90% of the responsibility for Deaver's injuries to Noble and 10% to Deaver. On that claim, the jury assessed damages of $10,000 for past physical pain, $10,000 for past mental anguish, $50,000 for future loss of earning capacity, and $25,000 for future medical expenses.

The trial court rendered judgment in accordance with the verdict and denied Noble's motion for new trial or for judgment notwithstanding the verdict.

II. ISSUES PRESENTED

Because three of Noble's four issues address findings in connection with Deaver's cure claim, we have reordered Noble's issues to address those findings first. As reordered, Noble contends in its first issue that there is legally and factually insufficient evidence that it owes Deaver cure benefits because Noble paid all of the medical bills for treatment of Deaver's plantar fasciitis and because he injured his peroneal tendon after leaving the *M/V NOBLE TOM MADDEN*'s service. In its second issue, Noble contends the evidence is legally and factually insufficient to support the jury's findings that Noble's failure to pay for treatment of Deaver's peroneal tendon injury was both unreasonable and willful or wanton. Noble asserts in its third issue that because it does not owe Deaver cure benefits, there is legally and factually insufficient evidence to support the awards that are based on its failure to pay the claim. In its fourth issue, Noble argues there is legally and factually insufficient evidence to support the jury's findings that the vessel's alleged unseaworthiness proximately caused Deaver's injuries.

III. STANDARD OF REVIEW

Legal and factual sufficiency are reviewed under the standards generally applicable to civil cases under state law rather than the lower standards of review applicable to Jones Act cases. Under these standards, we determine if legally sufficient evidence supports a finding by "view[ing] the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Evidence of a vital fact's existence is legally insufficient if (a) no evidence in the record supports it, (b) rules of law or of evidence bar the court from giving weight to the only evidence offered to prove it; (c) there is no more than a scintilla of supporting evidence, or (d) the evidence

conclusively establishes the converse. *See id.* at 810. When reviewing for factual sufficiency, we consider and weigh all of the pertinent evidence, and we will set the finding aside only if "the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016). Finally, whether reviewing the evidence for legal or for factual sufficiency, we defer to the jury's reasonable credibility determinations. *See, e.g.*, *Wilson*, 168 S.W.3d at 820; *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 625 (Tex. 2004); *Yetiv v. Comm'n for Lawyer Discipline*, No. 14-17-00666-CV, 2019 WL 1186822, at *5 (Tex. App.—Houston [14th Dist.] Mar. 14, 2019, no pet.) (mem. op.).

IV. FAILURE TO PAY CURE

In its first three issues, Noble maintains that it is not liable to Deaver for unpaid cure and that its failure to pay cure benefits for peroneal tendon subluxation was neither unreasonable nor "willful or wanton," and thus, it is not liable for any damages predicated on Deaver's cure claim. "Cure" is the payment of necessary medical services for "a seaman who is injured or becomes ill while in the service of a ship." *Mar. Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18 (Tex. 1996), *abrogated on other grounds by Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424, 129 S. Ct. 2561, 2575, 174 L. Ed. 2d 382 (2009). The cure obligation exists to induce masters and owners to protect seamen's health and safety while in service. *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S. Ct. 997, 1000, 8 L. Ed. 2d 88 (1962); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S. Ct. 651, 653, 82 L. Ed. 993(1938). A seaman's right to cure is not dependent upon a finding of negligence or unseaworthiness. *Mar. Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18 (Tex. 1996). "Aside from gross misconduct or insubordination, what the seaman is doing and why

[and] how he sustains injury does not affect his right to maintenance and cure. . . ." *Farrell v. United States*, 336 U.S. 511, 516, 69 S. Ct. 707, 709, 93 L. Ed. 850 (1949). An ill or injured seaman is entitled to cure "during that period of time in which he is suffering from a curable disability and obtaining curative treatment therefor." *Lewis v. Isthmian Lines, Inc*., 425 S.W.2d 893, 895 (Tex. App.—Houston [14th Dist.] 1968, no writ). A seaman may recover cure benefits "even for injuries or illnesses pre-existing the seaman's employment unless that seaman knowingly or fraudulently concealed his condition from the vessel owner at the time he was employed." *Meche v. Doucet*, 777 F.3d 237, 244 (5th Cir. 2015).[1] As the jury was correctly instructed, any ambiguities or doubts about a seaman's entitlement to cure must be resolved in the seaman's favor. *See Vaughn*, 369 U.S. at 532, 82 S. Ct. at 1000, 8 L. Ed. 2d 88.

A. Liability for Unpaid Cure Benefits

Noble asserts that it owes Deaver no further cure benefits because it paid for Deaver's maintenance and cure while he was being treated for plantar fasciitis, and according to Noble, this is the only complaint that arose during his service on the *M/V NOBLE TOM MADDEN*. It is undisputed that Noble paid all of the medical bills it received for treatment of Deaver's plantar fasciitis, but as Noble acknowledges, Deaver's evidence of unpaid cure was related solely to treatment of the injury to his peroneal tendons, and this was the only cure request Noble refused. Thus, the jury's finding that Noble owes Deaver cure benefits rests on the implicit determination that Deaver's peroneal tendon subluxation occurred during his service to the *M/V NOBLE TOM MADDEN*.

According to Noble, even Deaver's treating orthopedist Dr. Granberry testified that the damage to Deaver's peroneal tendons cannot be linked to his work

[1] Noble did not raise that affirmative defense.

on the *M/V NOBLE TOM MADDEN* unless Deaver raised complaints related to those areas at the time. Noble represents that Deaver made no such contemporaneous complaints, and thus, Deaver's injury must have occurred later. But the evidence does not support Noble's arguments.

First, Dr. Granberry did not testify that Deaver's peroneal tendon subluxation could not be linked to his service on the *M/V NOBLE TOM MADDEN* absent contemporaneous complaints of symptoms associated with that condition. Quite the opposite: Dr. Granberry stated that basic differential diagnosis begins with the patient's history, and from Deaver's history, his peroneal tendon subluxation began while he was working on the vessel. Noble's own expert Dr. Hanson similarly testified that to determine when a peroneal tendon injury occurred, one must look to the patient's history, which includes the patient's "recollection of the timing and what had hurt and when." According to Deaver's recollection, the symptoms indicative of peroneal tendon subluxation began aboard the vessel.

Second, Deaver's recollection of the history of his symptoms are corroborated by contemporaneously created medical records, which is shown by the physician witnesses' testimony about the differences between the symptoms of plantar fasciitis and peroneal tendon subluxation.

1. Plantar Fasciitis

Plantar fasciitis is the inflammation of a ligament that spans the bottom of the foot from the heel to the toes. According to podiatrist Dr. Ettinger, pain from plantar fasciitis is felt on the bottom of the foot at the medial or inside portion of the arch or the heel, that is, on the part toward the midline of the body. Dr. Ettinger testified that he tests for plantar fasciitis by determining if squeezing the heel causes pain.

Noble's expert orthopedic surgeon Dr. Travis Hanson testified that a person with plantar fasciitis typically feels pain on the "the medial aspect of the bottom of the heel," and Deaver's treating orthopedic surgeon Dr. Granberry testified that plantar fasciitis manifests as "heel pain."

2. Peroneal Tendon Subluxation

Peroneal tendon subluxation is a separate condition, and according to two of the three physicians, manifests in a different anatomical area. The two peroneal tendons connect to calf muscles near the end of the fibula, which is the lateral bone of the calf. The tendons pass behind the end of the fibula—the knobby bone protruding from outside of the ankle—then make a sharp turn below that bone. The shorter of the two tendons, the peroneus brevis, attaches to the outside of the foot, and the other, the peroneus longus, crosses, and connects to, the bottom of the foot.

The two orthopedic surgeons agreed on the symptoms of peroneal tendon subluxation. Deaver's treating physician Dr. Granberry testified that complaints typical of peroneal tendon issues include "pain on the outside of the ankle with a crunchy feeling and instability or giving way of the ankle." He explained that "fraying" of the tendons typically happens right behind the fibula, and if the person continues using the ankle, the tendons may "slip around the edge [of the fibula], and that's subluxation." Subluxation weakens the ankle "and it gives you that sense of giving way." Noble's expert Dr. Hanson similarly testified that "[s]ubluxation means that these tendons are unstable." As he explained, "Subluxation means it is not popping all the way over, it is just sort of unstable and the patient gets kind of a clicking sensation that can be painful."[2] Dr. Hanson also testified that Noble's exhibit (attached to this opinion as an appendix) correctly shows the areas in which

[2] *See also* NEW OXFORD AMERICAN DICTIONARY 1734 (Angus Stevenson & Christine Lindberg eds., 3d ed. 2010) (defining subluxation as "a partial dislocation").

peroneal tendon subluxation can cause pain, and that "[a] patient can be painful at any portion of that course of the tendons." As shown in the exhibit, the "course" to which Dr. Hanson referred travels behind the protruding ankle bone, then under it, and then angles down the outside of the foot.

Unlike the two orthopedic surgeons, podiatrist Dr. Ettinger testified that a person with a peroneal tendon injury "usually will have pain along the medial aspect of the arch area with it." Thus, according to Dr. Ettinger, both plantar fasciitis and injury to the peroneal tendons cause pain at the medial part of the arch.

3. Contemporaneous Complaints of Peroneal Tendon Injury

Given the jury's findings, we must presume that the jury credited the evidence of the two opposing orthopedic surgeons that ankle instability, pain behind or under the ankle bone, and pain on the outer part of the foot are all symptoms of peroneal tendon injury. Because that credibility determination is reasonable, we defer to it in reviewing the legal and factual sufficiency of the evidence. *Saulsberry v. Ross*, 485 S.W.3d 35, 41 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Wilson*, 168 S.W.3d at 820). Moreover, there is no evidence that plantar fasciitis can cause these symptoms. Thus, in reviewing the legal and factual sufficiency of the evidence that Deaver's injuries in December 2014 included peroneal tendon subluxation as well as plantar fasciitis, we treat complaints of ankle instability and pain in the ankle or outer foot as evidence of peroneal tendon subluxation and complaints of heel pain or pain on the bottom of the foot as evidence of plantar fasciitis. From the outset, Deaver reported symptoms of both conditions.

Deaver made his first official complaint of injury aboard the *M/V NOBLE TOM MADDEN* to Safety Training Supervisor Erica Rossart on December 14, 2014, and Rossart completed an "Unplanned Event Consequence Report." The report identifies "Parts of Body Injured/Ill or Needing Treatment" as "Feet / Ankles." Thus,

Deaver's first report of injury included complaints about his ankle, and such complaints are associated with peroneal tendon subluxation, not with plantar fasciitis. The report also incorporates Deaver's handwritten "Individual's Statement of Injury or Illness." Under "What happened," Deaver wrote, "My RT heel began hurting very bad and progressively has gotten worse." This symptom is associated with plantar fasciitis. Under "Physical Injuries or Complaints," Deaver wrote RT heel & foot hurts," and under "why did it happen," Deaver wrote "unsure, possibly stress from being on feet all day." Rossart sent Deaver to the ship's medic, who documented Deaver's chief complaint as "foot pain." The medic wrote, "Approximately 8 days ago, patient began feeling pain at the plantar heel of the right foot. Pain has gotten progressively worse." Thus, Deaver's complaints on December 14, 2014, to both Rossart and the ship's medic included both heel pain and foot pain. Heel pain is associated only with plantar fasciitis, but foot pain is associated with both plantar fasciitis and peroneal tendon subluxation, depending on which part of the foot is painful.

At Deaver's request, he was evacuated from the ship on December 15, 2014. Noble took him to be evaluated by Dr. Robert Davis who diagnosed Deaver with "R[ight] ankle pain (Non occupational)." Dr. Davis also ordered x-rays of Deaver's ankle, which apparently were unremarkable. In a second form completed the same day, Dr. Davis wrote that Deaver's chief complaint was "right foot pain." The diagnosis on the second form is "R heel pain — prob[ably] calf tendon tightness due to prior injury." Noble's claims adjuster Delecia White spoke to Dr. Davis the same day and wrote in Deaver's file, "Davis said it seems that may be his calf tendon that runs down his heal [sic] that may be strained. He suggested that Nathan see his orthopedist to further examine him." As discussed above, the peroneal tendons run down the side of the heel and connect the calf muscles to the foot, and ankle pain is

one of the symptoms of peroneal tendon injury. Plantar fasciitis, on the other hand, is an inflammation of a ligament, not of a tendon, and causes pain on the bottom of the foot. Thus, just as on the preceding day, Deaver's complaints on December 15, 2014, included symptoms of both plantar fasciitis and peroneal tendon subluxation.

Four days later, Deaver saw chiropractor Dr. Jerry Day. Dr. Day noted that Deaver reported "right foot/ankle pain, especially along the lateral aspect of his heel/calcaneous region. He rates his pain as a 7/10 and describes [the pain] as being dull and achy, but·with certain movements he states his pain is sharp, stabbing[,] and burning. His pain started on/about 12-14-2014." Dr. Day's diagnoses included "Sprain/strain - foot," "Swelling - ankle/foot," and "Pain - ankle/foot." Deaver's complaint of pain on the outer part of his foot corresponds to peroneal tendon subluxation, not to plantar fasciitis.

Deaver followed up with podiatrist Dr. Ettinger. In the portion of his deposition played at trial, Dr. Ettinger testified that Deaver complained of heel pain, which Dr. Ettinger diagnosed and treated as plantar fasciitis. Dr. Ettinger further testified that he found no issues with Deaver's peroneal tendons. That testimony, however, conflicts with Dr. Ettinger's written records, which also were presented to the jury. Deaver wrote on the patient-intake form, "heel *& outer part of foot hurting.*"[3] And just as Deaver complained of pain in two areas, Dr. Ettinger actually made two diagnoses and treated two conditions. Dr. Ettinger diagnosed Deaver not only with "acute plantar fasciitis" but also with "R[ight] instability ankle – falling over." Dr. Ettinger treated the plantar fasciitis with a night splint and treated the ankle instability with an ankle brace. In Noble's file on Deaver's claim, White documents that she spoke to both Deaver and to Dr. Ettinger's employee "Dortha"

[3] Emphasis added.

after Deaver's first appointment. In White's notes from those conversations, Deaver's heel is not mentioned. According to White, Deaver related that "[h]e was given an ankle brace and a support brace to stab[i]lize his ankle," while Dortha reported that Deaver "has an unstable ankle trying to roll over."

Not only do Deaver's complaints to Rossart, Dr. Davis, Dr. Day, Dr. Ettinger, White, and Dortha all include symptoms of peroneal tendon subluxation, but every physician who treated Deaver in the weeks after he left Noble's service included ankle pain or ankle instability as a "diagnosis." Although these two physicians did not put a name to the condition causing the ankle pain and instability, Drs. Granberry and Hanson agreed that these are symptoms of peroneal tendon subluxation.

Neither at trial nor on appeal has Noble addressed the evidence that at the same time Deaver complained of heel pain, he also complained of ankle pain, outer-foot pain, and ankle instability, all of which are symptoms of peroneal tendon subluxation. To the contrary, Noble has consistently maintained that there is no such evidence, steadfastly insisting that Deaver complained exclusively of heel pain until he was seen by Dr. Granberry in 2016. Thus, the only explanation offered to the jury for these symptoms was that Deaver's peroneal tendon subluxation first manifested while he was in service to the *M/V NOBLE TOM MADDEN*.

4. Absence of Treatment and Return to Work Without Restrictions

Noble's only other arguments challenging the jury's finding that Noble owes Deaver unpaid cure benefits concern Deaver's lack of treatment from February 2015 to June 2015 and his return to work. According to Deaver, he decided after his second visit to Dr. Ettinger that the treatment was not working, but he still needed to work to support himself. He asked Noble in July 2015 to reemploy him, and White told him he first needed a release to full duty. Deaver obtained a release to work without restrictions from Dr. Ronald McDaniel, but was told that Noble was not

hiring. He returned to the same occupation, albeit with a different employer, and did not see a physician again until his trial counsel referred him to Dr. Granberry.

Noble contends that Deaver's work release and his return to off-shore duty demonstrate that he was fully recovered; however, Deaver testified that he returned to work because he needed the money, and this statement is supported by Noble's file on Deaver's claim. There, White wrote that Deaver told her "he need[s] a job bad, he's been doing part-time jobs around his home to get by." As Deaver testified, "I kind of had to put my head down and get back to work regardless of the situation." Thus, when White told Deaver he first needed a release to work without restrictions, Deaver told Dr. McDaniel he had "no pain." Because economic necessity may induce an injured seaman to return to work before reaching maximum cure, "the cutoff point for maintenance and cure is not the time at which the seaman recovers sufficiently to return to his old job but rather is the time of maximum possible cure." *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982) (citing *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293, 1296 (5th Cir. 1973)).

Nor is it true that the long interval between Deaver's treatment by Dr. Ettinger and his treatment by Dr. Granberry establish that he had reached maximum cure. While a seaman refuses treatment, then there are no cure expenses for the employer to pay, and the obligation to pay for cure is suspended. *See, e.g.*, *Maritime Overseas Corp. v. Thomas*, 681 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Lewis*, 425 S.W.2d at 895. Similarly, if the seaman receives no curative treatment after being declared fit for duty, no further cure is owed. *See Lewis*, 425 S.W.2d at 895. But when Deaver resumed curative treatment, Noble's obligation to pay cure benefits also resumed. *See id.*; *see also Prude v. W. Seafood Co.*, 769 S.W.2d 663, 665 (Tex. App.—Houston [14th Dist.] 1989, no writ) ("[A] shipowner's obligation to supply maintenance and cure may be revived by the subsequent

appearance of new means of treatment after it has been discharged by the apparent achievement of maximum cure." (citing *Sobosle v. United States Steel Corp.*, 359 F.2d 7, 11 (3rd Cir. 1966))); *Frost v. Teco Barge Line, Inc.*, No. 04-CV-752 DRH, 2007 WL 178562, at *3 (S.D. Ill. Jan. 22, 2007) (employer required to pay for cure, because although doctor initially testified that plaintiff reached maximum medical improvement based on her refusal of treatment, doctor retracted that finding when patient "changed her mind and sought this treatment" that "would likely lead to increased improvement of [p]laintiff's condition").

We therefore conclude that the evidence is both legally and factually sufficient to support the jury's implicit determination that Deaver's injuries sustained while in service to the *M/V NOBLE TOM MADDEN* included peroneal tendon subluxation, and thus, the evidence also supports the jury's express finding that Noble is liable to Deaver for the unpaid costs of cure for that condition.

B. Unreasonable and Willful or Wanton Denial of Cure

If, after investigating a seaman's claim for maintenance and cure, the employer unreasonably rejects it, the employer is liable not only for the unpaid amounts but also for compensatory damages resulting from the failure to pay. *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987). If the employer has been more egregiously at fault in failing to pay, then it additionally can be held liable for punitive damages and attorney's fees. *See Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 417–18, 129 S. Ct. 2561, 2571, 174 L. Ed. 2d 382 (2009); *Morales*, 829 F.2d at 1358. The jury found that Noble unreasonably failed to pay Deaver's claim for cure and assessed compensatory damages. In addition, the jury found that Noble acted willfully or wantonly in denying the claim, and although the jury assessed no punitive damages, it assessed attorney's fees for trial and appeal.

In its second issue, Noble challenges the legal and factual sufficiency of the evidence supporting the jury's findings that Noble's failure to pay cure benefits was both unreasonable and willful or wanton.[4] Noble also states that it challenges the damages and attorney's fees that are based on these findings, but Noble has not briefed a challenge to the amounts awarded. Indeed, Noble never mentions the amounts that were assessed based on these findings; instead, Noble challenges only the existence of the awards. We therefore address only the liability findings on which those awards were based.

Although the charge did not define the term "unreasonable," the jury instructions explained that the "failure to pay maintenance and cure is willful or wanton if the shipowner acts callously or with the deliberate intent not to pay maintenance and cure." Given this definition, conduct so egregious as to be willful or wanton necessarily is also unreasonable.

[4] The jury's finding that Noble's failure to pay cure was "willful or wanton" served as the predicate for the assessment of attorney's fees. In its challenge to the liability finding on which the attorney-fee award is based, Noble frequently substitutes the expression "arbitrary and capricious" for "willful or wanton," but construing its brief liberally, we understand these arguments to challenge the jury's finding that Noble acted willfully or wantonly, despite the change in the language. *Cf. Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373, 382 (5th Cir. 2012) ("Arbitrary-and-capricious denial of a seaman's request for maintenance and cure can result in the employer's being liable for the seaman's attorney's fees."); *MNM Boats, Inc. v. Johnson*, 248 F.3d 1139 (5th Cir. 2001) ("We have described the conduct giving rise to a claim for attorney's fees as 'callous and recalcitrant,' 'arbitrary and capricious,' and 'willful, callous, and persistent.'" (quoting *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984), *overruled on other grounds by Guevara v. Maritime Overseas Corp*., 59 F.3d 1496 (5th Cir. 1995))); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17, 17–18 (Tex. 1996) (jury found petitioner's failure to pay maintenance and cure "was willful, arbitrary, and capricious"), *abrogated on other grounds by Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424, 129 S. Ct. 2561, 2575, 174 L. Ed. 2d 382 (2009). Though courts have used different legal standards to describe the higher level of fault that a seaman must prove to be entitled to punitive damages and attorney's fees based on the failure to pay maintenance or cure, Noble does not argue that we should measure the sufficiency of the evidence using a standard other than the charge given to the jury. We measure the sufficiency of the evidence using the charge given, and we take no position as to what a seaman must prove to be entitled to punitive damages and attorney's fees based on the failure to pay maintenance or cure.

Proof sufficient to support a finding that an employer willfully or wantonly failed to pay maintenance and cure may include evidence that the employer (1) was lax in investigating a claim,[5] (2) terminated benefits in response to the seaman's retention of counsel,[6] (3) did not "reinstate benefits after diagnosis of an ailment previously not determined medically,"[7] or (4) denied that the seaman was injured despite its knowledge to the contrary.[8] The jury heard a great deal of evidence supporting a finding that Noble willfully or wantonly failed to pay Deaver cure benefits.

When Noble terminated Deaver's cure benefits after he stopped seeing Dr. Ettinger, Noble's Risk & Claims Manager Lisa Kirkwood wrote Deaver to forward "any records or reports to suggest that medical treatment will further improve your condition" so that Noble could reconsider the termination of benefits. And although Deaver's counsel sent Noble Dr. Granberry's report, Kirkwood not only testified that there was "no formal investigation" of Deaver's claim, she admitted that she did not read Dr. Granberry's report. She instead told Noble's counsel to arrange an independent medical exam with an orthopedist, and Noble's counsel selected Dr. Hanson, who testified that all of his litigation-related work for the last five years has been on behalf of defendants.

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[5] *Mar. Overseas Corp. v. Waiters*, 923 S.W.2d 36, 43–44 (Tex. App.—Houston [1st Dist.] 1995), *aff'd as modified*, 917 S.W.2d 17 (Tex. 1996).

[6] Id.

[7] Id.

[8] *Vo v. Doan*, No. 14-14-00994-CV, 2016 WL 3574671, at *5 (Tex. App.—Houston [14th Dist.] June 30, 2016, pet. denied) (mem. op.).

There also is overwhelming evidence that Noble did not "reinstate benefits after diagnosis of an ailment previously not determined medically." As previously discussed, Deaver had complained of ankle pain, pain on the outer part of his foot and ankle instability throughout the time that Noble was paying cure benefits in 2014 and 2015. Moreover, some of the medical expenses Noble was paying were for treatment of those symptoms. Dr. Ettinger, believing that peroneal tendon subluxation caused pain at the arch on the inside of the foot, did not diagnose the condition causing those symptoms. But Noble's retained expert agreed with Dr. Granberry that these are all symptoms of peroneal tendon subluxation and agreed with Dr. Granberry's diagnosis. Still, when the condition was belatedly diagnosed, Noble refused payment.

Finally, despite Noble's months of payments of maintenance and cure, Kirkwood disagreed at trial that Deaver "got hurt" or was injured on the vessel—even though all of the testifying physicians agreed that, at a minimum, Deaver's plantar fasciitis manifested while aboard the *M/V TOM MADDEN* in December 2014. According to Kirkwood, Deaver "said he had heel and foot pain," but she "wouldn't say . . . he got hurt. He said he had pain." She repeated this view, saying, "you keep saying he had an injury. He reported pain in his foot and his heel. I don't know that he had an injury or some kind of accident. That's what he reported."

Noble presents just two arguments in support of its position that evidence such as this is legally and factually insufficient to support findings that its denial of cure benefits was unreasonable and willful or wanton.

First, Noble argues that peroneal tendon subluxation was a new condition that arose after Deaver's service on the vessel, and thus, Noble's maintenance and cure

obligation could arise only in connection with Deaver's plantar fasciitis. We reject that argument for the reasons already discussed.

Second, Noble argues that it satisfied its cure obligation because plantar fasciitis normally resolves within eight months,[9] and although Noble did not pay cure for that long, it paid all of Deaver's medical expenses until he stopped seeing Dr. Ettinger in January 2015. But as Noble acknowledges, the jury's findings are necessarily based on its determination that Noble owes cure benefits for Deaver's peroneal tendon subluxation. And again, for the reasons previously discussed, the evidence supports that determination. *See also Diamond Offshore Mgmt. Co. v. Cummings*, No. 01-08-00647-CV, 2010 WL 1611391, at *5 (Tex. App.—Houston [1st Dist.] Apr. 22, 2010, pet. denied) (mem. op.) ("[F]aced with conflicting medical evidence of a seaman's medical condition, the fact finder must resolve that conflict with an eye toward the mandate that ambiguities or doubts are to be resolved in favor of maintenance and cure.").

We overrule Noble's second issue.

C. Damages Based on Failure to Pay Cure

Noble's third issue is predicated solely on the success of its first and second issues. Noble does not discuss the amounts awarded or the evidence on which those amounts are based but contends only that because it does not owe Deaver cure benefits for his peroneal tendon subluxation, there is no basis for the awards that are based on the failure to pay cure, including the unreasonable or willful or wanton failure to pay. Because we have overruled Noble's first and second issues, we must overrule Noble's third issue as well.

[9] The evidence at trial addressed the time in which plantar fasciitis usually responds to conservative treatment. It is undisputed that Deaver's plantar fasciitis was not treated after January 2015, and as Dr. Ettinger testified, plantar fasciitis can worsen if untreated.

VI. UNSEAWORTHINESS

In its fourth issue, Noble contends that the evidence is legally and factually insufficient to support the jury's finding that the unseaworthiness of the *M/V NOBLE TOM MADDEN* proximately caused "the injuries in question." Noble did not object to the jury charge, so we measure the sufficiency of the evidence by the charge as submitted. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (sub. op. on denial of reh'g).

The trial court instructed the jury that "[a] shipowner owes every member of the crew employed on its vessel the absolute duty to keep and maintain the vessel . . . in a seaworthy condition at all times." The charge instructions also informed jurors that "[t]he duty to provide a seaworthy vessel includes the duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew if too few persons are assigned to a given task."[10] The instructions further stated, "The vessel owner is not required to provide . . . the finest crews on its vessel. It is required to provide only . . . a crew that is reasonably adequate." *See Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (vessel is unseaworthy if it is "not reasonably fit for its intended purpose"). Finally, an unseaworthiness claim requires proximate causation, and "a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness." *Gowdy v. Marine Spill Response Corp.*, 925 F.3d 200, 205 (5th

[10] Because Deaver alleged that the vessel was unseaworthy only in that Noble assigned too few competent workers to Deaver's duties, we do not address Noble's arguments that the vessel was seaworthy in other respects.

Cir. 2019) (quoting *Johnson v. Offshore Express, Inc*., 845 F.2d 1347, 1354 (5th Cir. 1988)). The jury was so instructed.

Reviewing the evidence under the applicable standards of review, we conclude that legally and factually sufficient evidence supports the jury's finding that the vessel's unseaworthiness proximately caused Deaver's injuries. Deaver alleged that he was overworked because Noble insufficiently staffed the shaker house, where Deaver primarily worked, with competent crew. As a result, Deaver had to frequently travel the four flights of stairs between the shaker house and the rig floor as well as the two flights of stairs within the shaker house during his twelve-hour shifts. According to Deaver, his superiors'[11] failure to respond to his repeated requests for assistance in the shaker house proximately caused his overuse injuries of plantar fasciitis and peroneal tendon subluxation. The only members of the crew who testified were assistant derrick hand Sparks Wilson, Deaver himself, and driller Jimmy Mouton.

Wilson testified that Deaver's injury occurred during the "hectic" time of the vessel's first drilling operation. He stated that supervision on the vessel was "terrible" because "you couldn't get enough help to do the stuff you needed to do." According to Wilson, "working in the shaker house, where Nathan [Deaver] was, was probably one of the worst places to be working at that—at that time." Although Wilson stated that working in the shaker house is a "one-man position, normally," things were different on the vessel's maiden drilling operation. Wilson described those conditions as follows:

[11] Noble crewmember Sparks Wilson and Deaver's expert witness, consulting safety engineer Jack Madeley, testified that the hierarchy of the drilling crew was, in ascending order, floor hand, shaker hand, pump hand, assistant derrick hand, derrick hand, assistant driller, driller, and finally, toolpusher.

> Someone called me and told me to go see what the problem was in the shaker house, or something; and I went up there. And it was, like, he [Deaver] was in there. It was several company men in there. Mud engineers, toolpushers, everybody. And it was just -- they were all pointing and wanting him to do this and do that. And I don't even remember exactly what the problem was, but it just . . . to me, it was too much work for one person to be doing. I couldn't believe that, from the rig floor, they wouldn't have sent some extra help down there.

When asked for his opinion of the way Noble staffed the shaker house, Wilson answered, "I thought it was unreasonable. They—they could have given him some help, and they didn't."

Deaver testified that while working in the shaker house, he phoned his superiors on the rig floor for help. Most of the time, the phone was answered by driller Guillermo "Memo" Bazarte, assistant driller Scott Booth, or assistant driller Richard Hart. Once or twice, driller Jimmy Mouton answered the phone. Deaver stated that despite his repeated requests for assistance, he rarely received it.

Mouton testified that he was not aware of a time Deaver called for help and did not receive it and that if Bazarte, Booth, or Hart received a call for assistance, they would have told him about the phone call. He stated he did not remember whether or not Deaver worked alone in the shaker house, and that the person best able to answer that question would be "[w]hoever it was or was not working with him, or him."

The jury presumably resolved the conflicting evidence in Deaver's favor, and we defer to that reasonable credibility determination. *See Gunn v. McCoy*, 554 S.W.3d 645, 665 (Tex. 2018). Viewed in a light favorable to the verdict, the evidence is legally sufficient to establish that Noble failed to adequately staff the shaker house with competent crew, rendering the vessel unseaworthy. Viewed in a neutral light, the evidence also is factually sufficient to support the jury's finding.

As for whether the inadequate staffing proximately caused Deaver's injuries, it is undisputed that plantar fasciitis is an overuse or repetition injury, and Dr. Granberry testified that Deaver's peroneal tendon subluxation developed from overuse during his service on the vessel by his continued use of the ankle after the peroneal tendons began to fray. He stated that Deaver "had overused [the ankle] or used it in an unusual way that led to some irritation or maybe further fraying of that tendon." He explained that "as you keep using your ankle, [the peroneal tendons] keep grinding away. Sometimes they slip around the edge [of the fibula] and that's subluxation." According to Dr. Granberry, this is what happened to Deaver. Although Dr. Hanson stated that walking up and down stairs "doesn't really scream peroneal tendons" because they are more of a lateral strain, both Deaver and Mouton testified that the stairs twist.

There is no evidence that Deaver suffered from plantar fasciitis or peroneal tendon subluxation before his service on the *M/V NOBLE TOM MADDEN*. Moreover, Wilson testified that Deaver initially had no physical impairment, but when he observed Deaver working at a later time, Deaver was "drenched with sweat and red-faced," "limping," and "had a grimace on his face. You know, it was like you could tell he was in pain." Indeed, Wilson related that Deaver told him "more than once about pain, severe pain." And as previously discussed, Deaver's complaints of tendon injury and plantar fasciitis both began on the vessel. We accordingly reject Noble's challenge to the jury's liability finding on Deaver's unseaworthiness claim.

Regarding damages, Noble observes that "[t]he only damages awarded [on the unseaworthiness claim] were for pain and suffering, mental anguish, lost earning capacity and surgical expenses attributable to the alleged peroneal tendon injury." According to Noble, these damage awards must fail because "[t]here is no evidence

that the peroneal tendon condition was either caused or aggravated during Deaver's work on the *NOBLE TOM MADDEN*. In the alternative, such findings are based on insufficient evidence and/or are against the great weight and preponderance of the evidence in this case." Noble does not otherwise discuss unseaworthiness damages, and for the reasons previously discussed, we reject Noble's challenge to the liability findings on which the damage awards for unseaworthiness are based.

We overrule Noble's fourth issue.

VII. CONCLUSION

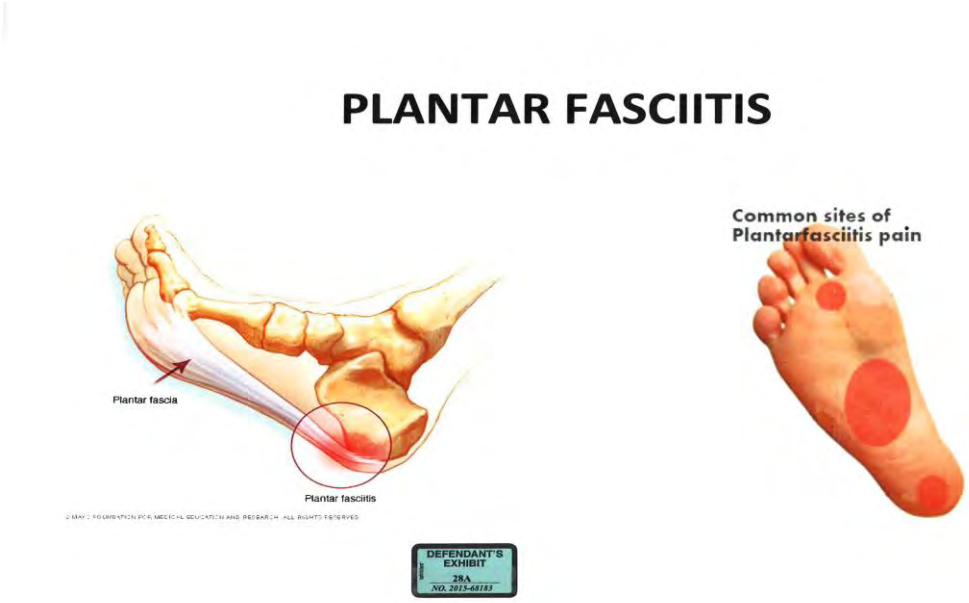
On this record, and in light of the jury's reasonable credibility determinations, the evidence is both legally and factually sufficient to support the verdict. We therefore affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Bourliot.

APPENDIX

Noble's exhibit of plantar fasciitis symptoms:



Noble's exhibit of peroneal tendon subluxation symptoms: