

**AGRAVATION OF
PRE-EXISTING INJURY
CASES MAY NOW BE MORE
DIFFICULT TO DEFEND:
KOCH V UNITED STATES -
THE FIFTH CIRCUIT ADOPTS
BROAD INTERPRETATION
OF “EGGSHELL SKULL”
DOCTRINE**

Many maritime personal injury claims are filed alleging that the incident on the employer's vessel aggravated a pre-existing disease or physical defect to the extent that the worker is now disabled. The employer generally claims it is not responsible for that portion of the physical condition that pre-existed the incident on board ship. This common battle is fought by maritime employers in litigation on a daily basis. A recent decision from the Court of Appeals for the 5th Federal Circuit has made this strategy more difficult for employers to implement.

“After the accident on the S.S. ALTAIR, Mr. Koch’s physicians found that his fall “exacerbated his preexisting osteoarthritic conditions and caused the urgent necessity for surgical bilateral knee replacements.” *Id.* at 271. Before this was performed, Mr. Koch was also diagnosed with a herniated disc and aggravation of his preexisting cervical spondylosis.”

Background

On February 2, 2012, Mr. Ricky Koch, a 54-year-old foreman and employee of Economy Iron Works, fell down a dimly lit stairwell in the course of a routine inspection aboard a public vessel owned by the United States Maritime Administration, the S.S. ALTAIR. While descending the stairwell, Mr. Koch had foregone the use of a flashlight in order to hold the handrail with two hands. He was unable to see the last step once the handrail had ended and fell backwards. After this, Mr. Koch completed the walkthrough on the S.S. ALTAIR, but was unable to perform his duties on the adjacent vessel, the S.S. BELLATRIX, so he returned to Economy Iron for the remainder of the work day. Later that evening, Mr. Koch’s wife returned home and found that Mr. Koch was unable to move out of his chair, leading them to seek medical treatment for his injuries.

Prior to his fall, Mr. Koch had an extensive medical history and his preexisting injuries were summarized by the Fifth Circuit as follows:

“In 2002, Dr. Richard Corales diagnosed Koch as suffering from degenerative disc disease. In 2004, Koch was diagnosed with multiple

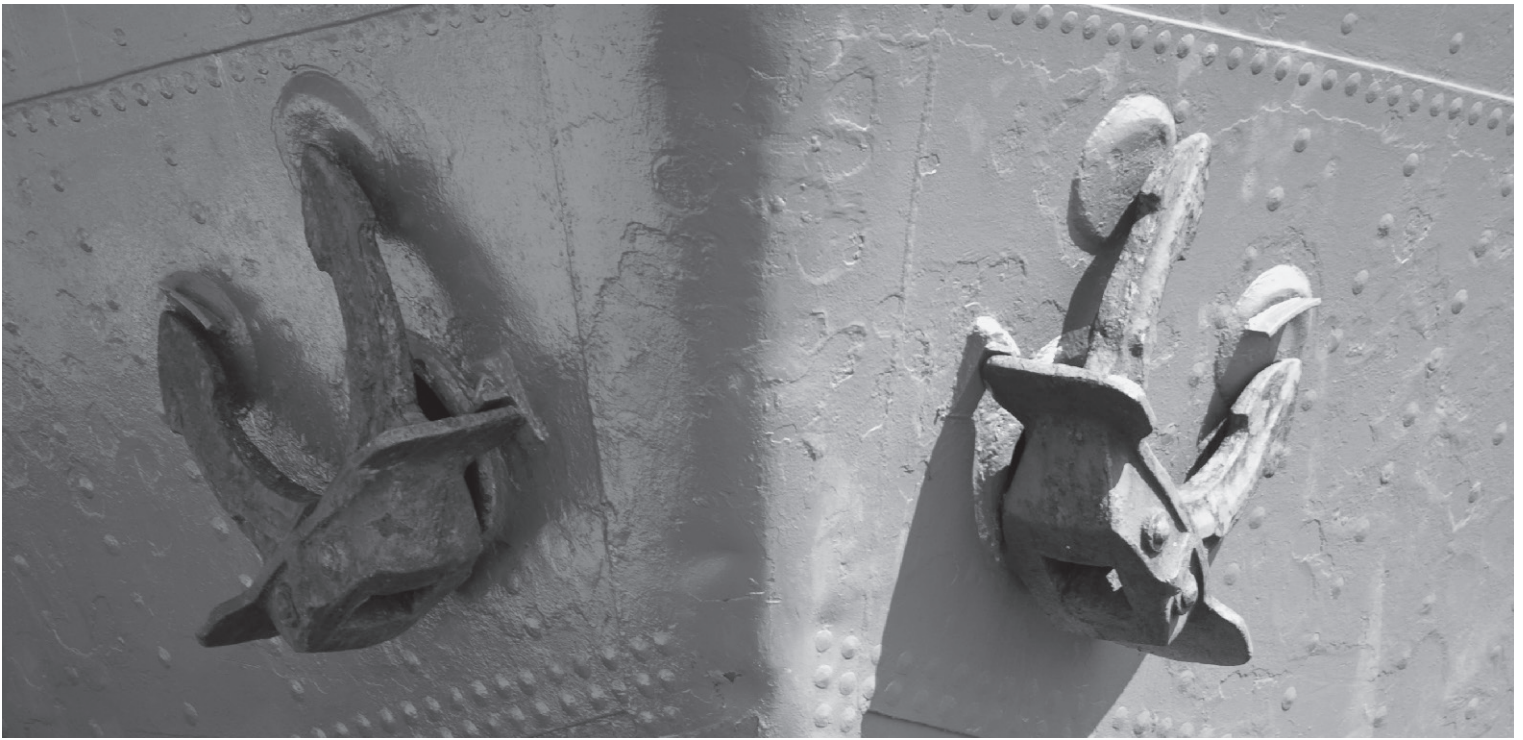
joint arthritis by Dr. Terry Habig who referred him to a rheumatologist. In 2005, Dr. Merlin Wilson, a rheumatologist, diagnosed Koch with generalized osteoarthritis and concluded that he needed total knee replacement. In December 2007, Koch saw Dr. Miranne, who recorded that Koch had a history of “progressive lower back pain for many years” and documented, inter alia, carpal tunnel syndrome. In January 2008, Dr. Lucien Miranne performed cervical spine fusion surgery of Koch’s C3–4 and C4–5. In January 2009, Koch was seen by Dr. Lockwood Ochsner, who said he considered doing bilateral total knee replacement. In January 2012, Dr. Wilson saw Koch again and noted that he needed total knee replacement surgery “in the worst way.”

Koch v United States, 857 F.3d 267, 272 (5th Cir. 2017). After the accident on the S.S. ALTAIR, Mr. Koch’s physicians found that his fall “exacerbated his preexisting osteoarthritic conditions and caused the urgent necessity for surgical bilateral knee replacements.” *Id.* at 271. Before this was performed, Mr. Koch was also diagnosed with a herniated disc and aggravation of his preexisting cervical spondylosis. *Id.* Subsequent surgical procedures for

both the knee and back injuries led to further complications, cumulatively resulting in Mr. Koch’s inability to work again.

The District Court

Mrs. Koch ultimately filed suit against the United States for maritime negligence in federal district court for the Eastern District of Louisiana under the Longshore and Harborworkers’ Compensation Act (LHWCA). The maritime negligence analysis turned on the causation element where the district court rejected the United States’ preexisting condition argument and held in favor of Mr. and Mrs. Koch, finding that the inadequate lighting in the stairwell was both the factual and legal cause of his injuries. *Koch v United States*, CIV.A. 13-205, 2015 WL 4129312, at *3 (E.D. La. July 7, 2015), *aff’d*, 857 F.3d 267 (5th Cir. 2017). The court did not believe the evidence presented at trial established that any of Mr. Koch’s injuries were inevitable and refused to attach weight to testimony of the Government’s expert Dr. Hagemann indicating otherwise because of his limited knowledge of Mr. Koch’s injuries. Mr. and Mrs. Koch were awarded upwards of 2.83 million dollars for medical



expenses, lost wages, pain and suffering, and loss of consortium. *Id.*

The Fifth Circuit reviews the case

The United States appealed this verdict to the Fifth Circuit arguing that Mr. Koch had become disabled prior to the accident on February 2, 2012 with his pre-incident diagnoses of chronic osteoarthritis in both knees, degenerative disc disease and carpal tunnel syndrome. Although it is a generally accepted principle that defendant's are fully liable for all injuries caused by a wrongful act, including those involving a pre-existing condition made more severe, there are two exceptions the United States relied on for their argument. See *Maurer v United States*, 668 F.2d 98, 99-100 (2d Cir. 1981) (laying out the general principle that defendant's are fully liable despite the preexisting conditions of the plaintiff). First, "when a plaintiff is incapacitated or disabled prior to an accident, the defendant is liable only for the additional harm or aggravation that he caused." *Evans v S. J. Groves & Sons Co.*, 315 F.2d 335 at 347 (2d Cir. 1963). Second, "when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's

damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury" where the burden is on the defendant to prove the inevitable damages from the preexisting condition. *Id.* at 348. The Fifth Circuit found no error in the district court's determinations that neither of these exceptions applied. The Government argued that *Maurer's* general rule was still inapplicable because the facts of that case dealt with an "eggshell skull" situation and was therefore limited to scenarios where the preexisting condition had not manifested itself prior to the accident in question. Koch, 857 F.3d 267 at 274. The Fifth Circuit did not accept this reasoning and found the principle of *Maurer* to be controlling. *Id.* The court expressly recognized that it was not bound by tort treatises of the Restatement of Torts, but found significance in the lack of any Restatement section limiting the "eggshell" or "thin-skull" rule to support its position. *Id.*

The Government also challenged the factual determinations of the district court, asserting the totality of the evidence demonstrated that preexisting conditions caused Mr. Koch to become disabled prior

to the accident aboard the S.S. ALTAIR. Since this was a finding of fact, it was reviewed under a clearly erroneous standard. The Fifth Circuit declined to find the district court's reasoning clearly erroneous since the fact finder's choice between two permissible views of evidence cannot be clearly erroneous and a judge's finding that is not contradicted by extrinsic evidence can "virtually never be clear error". *Id.* at 276 (citing *Anderson v City of Bessemer City, N.C.*, 470 U.S. 564 (U.S. 1985)). The court concluded that no clear error was made in weighing the testimony of the treating physicians, who testified that all surgeries performed on Mr. Koch were necessitated by the February 2, 2012 accident, over the Government's expert medical witness, Dr. Hagemann.

In affirming the district court's decision, the Fifth Circuit clearly refused to limit the scope of *Maurer* and reinforced the broad application of its principle: defendants will be fully liable for their wrongful acts, despite the preexisting condition of the plaintiff. The court also indicated that the exceptions set forth in *Evans* would require a high threshold of extrinsic evidence by refusing to

place any significant weight on Dr. Hagemann's testimony.

What's an employer to do?

The current Fifth Circuit Pattern Jury Charge does not have a jury instruction on aggravation of a pre-existing injury. The prior version of the Pattern Jury Charge did and instructed the jury as follows:

"AGGRAVATION OR ACTIVATION OF DISEASE OR DEFECT (Damage Instruction 15.5): You may award damages for aggravation of an existing disease or physical defect [or activation of any such latent condition] resulting from physical injury to the plaintiff. If you find that there was such an aggravation, you should determine, if you can, what portion of the plaintiff's condition resulted from the aggravation, and make allowance in your verdict only for the aggravation."

Often, even the plaintiff's doctor will testify that he or she cannot say what percentage of the plaintiff's physical

condition pre-existed the on-board incident. The defendant then argues in closing that if the doctor can't determine how much of the condition was caused by the defendant, neither can the jury. Consequently under the court's instruction, you cannot award any damages.¹

Just because an instruction is not in the Pattern Jury Charge does not mean counsel for the employer cannot argue for it. Counsel should still seek the aggravation charge and cite the Evans case and others in support of the request. If in Texas state court, counsel should seek the Texas version of the aggravation charge.

To inoculate against aggravation of injury claims, an employer can require an extensive pre-employment medical questionnaire seeking information about pre-existing conditions. In the maintenance and cure context, if a seaman fails to disclose a condition and later claims injury to that part of the body, the employer can deny maintenance and cure benefits under

the *McCorpen* doctrine. This doctrine holds a plaintiff contributorily negligent in instances where the seaman is aware he has a pre-existing condition, fails to disclose it, and then risks further injury by working aboard ship. The seaman's U.S. Coast Guard file should also be obtained by counsel during discovery. A mariner renewing his mariner's documents must disclose, under oath, any pre-existing conditions in order to be considered for renewal. If the seaman fails to disclose a condition which would preclude him for getting his seaman's papers, the defendant can argue if he had properly disclosed the condition, he would not have been issued his seaman's papers and never have joined the ship in the first place.

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1. The Texas state pattern jury charge on aggravation of injury is similar: "Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in questions." Texas Pattern Jury Charge 8.8

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