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Earl McClain (left) and Skadden, Arps, Slate, Meagher & Flom LLP associate David M. Wagener meet in the hallway at Skadden's office in Chicago. McClain served in the Merchant Marine on civilian ships during World War II moving supplies for the war effort. Wagener helped McClain earn benefits for his wartime service after the federal government recognized merchant mariners as veterans. *Ben Speckmann*

Delivering the goods

Attorney, Army vet takes on WWII seaman's cause to gain recognition and VA benefits

BY JAMIE LOO

Law Bulletin staff writer

Passing ammunition to a Navy Armed Guard unit on the deck of a ship, 16-year-old Earl McClain had bigger things to worry about than his hearing.

Without any armor to protect him during World War II gunfights on the Atlantic and Pacific Oceans, he needed to stay alive.

McClain made it through the war and came home. But as a seaman with the Merchant

Marine, the federal government did not recognize him as a veteran and, as a result, he couldn't collect benefits.

As years went by, he started losing his hearing until it was nearly gone. The loud blasts and booming echoes that surrounded him during combat in his youth had caught up to him.

"There really wasn't a major intervening factor. He wasn't going to loud rock concerts every weekend for five years straight, and the type of work that he did in between just didn't expose him to any loud noises," said David M. Wagener, an associate with Skadden, Arps, Slate, Meagher & Flom LLP.

When McClain found out that the government had changed its

policy on merchant mariners who served during World War II, it started what became a nearly decadelong battle to prove his combat injuries and collect benefits.

Following an initial denial, Wagener took McClain's appeal on a pro bono basis and worked on it for six years. The pair celebrated victory over a steak dinner last month when McClain, 88, received 100 percent approval for his disability claim. He said it feels good to finally have a resolution.

"The way they do things and the way they done things over a period of time over several years, you know, it's hard to believe that finally it came through," he said.

A long wait for recognition

Born downstate in Shelbyville, McClain grew up in southeastern Missouri. He left home at age 14 and hitchhiked to St. Louis to look for work. At age 16, McClain wanted to join the Marines and went to a recruiting center. But at 6 feet 3 inches tall and about 133 pounds, the recruiter told him he was underweight.

"So they sent me to the Navy recruiting office which was next door, and the Navy said yeah, they'd take me," he said.

But what McClain didn't realize was that the Navy recruiter planned to send him into training to become a merchant marine.

Joshua Smith, interim director of the American Merchant Marine Museum at the U.S. Merchant Marine Academy in Kings Point, N.Y., said merchant mariners were civilian workers employed by steamship companies and were often members of labor unions. Being a mariner was a career, so mariners ranged in age from 16 through 80.

Merchant mariners who went to war were volunteers and Smith said many young men thought that they were in the military because they received similar training such as marching and saluting and wore uniforms with U.S. Maritime Service badges. Approximately 290,000 civilian seafarers served in the war.

During World War II, merchant marine ships in the Atlantic, Pacific and Indian Oceans carried cargo and troops. These ships were not armored, Smith said, and the slow-moving freighters were often the targets of gunfire from enemy aircraft, boats, submarine torpedoes and mines.

The ships were not heavily armed, but the Navy Armed Guard unit and seamen were expected to fight back, if attacked. Since the ships were not built for combat, there wasn't much protection even on the inside of a vessel. In the South Pacific, the ships usually traveled alone without military escorts.

"It was a scary time to be a mariner," Smith said.

In 1944 and 1945, McClain served on the S.S. F.J. Luckenbach, S.S. American Press and S.S. W.B. Rogers, which he recalls as three small cargo ships with crews of up to 35 men and 10 U.S. Navy Armed Guard members. During an attack, the armed guardsmen would control the weapons while seamen — like McClain — would pass ammunition to them.

“Most merchant ships had to run alone and we had very little firepower on them,” he said. “We had a 5-inch, 38 (-caliber) forward gun and a 3-inch aft, four machine guns. That was about it.”

Aside from the Marines, no other service suffered a higher casualty rate than the merchant marines in World War II. More than 6,100 men died while serving on merchant marine ships — nearly 1 in 30 mariners.

After the war, McClain returned to Shelbyville and married. He later joined the Marines and briefly served in the Korean War before receiving a dependency discharge to help raise his five kids at home.

In 2002, one of McClain's brothers was at a Marines reunion when he heard that overseas World War II merchant mariners could apply for benefits from the Department of Veterans Affairs.

The Department of Defense designated this special veterans' status in 1988, following a federal court decision which found that earlier denials to this group were “arbitrary and capricious.” The seal of the U.S. Merchant Marine is included in the national World War II Memorial in Washington, D.C.

McClain reached out to a VA office in Decatur in 2005 and started working with the Macon County Veterans Assistance Commission. After claims were denied by the VA, his case was sent to The John Marshall Law School's Veterans Legal Support Center & Clinic.

The veterans' clinic reached out to pro bono attorneys to find someone to take McClain's appeal which led to a connection with Skadden Pro Bono and Community Relations Supervisor Edward Houlihan. Houlihan thought it would be the perfect fit for Wagener, who expressed an interest in veterans' cases. He took it as his first pro bono case as an attorney in February 2009.

Wagener, 37, served as an infantry officer with the Army.



Earl McClain (left) and Skadden, Arps, Slate, Meagher & Flom LLP associate David M. Wagener discuss the menu at Joe's Seafood, Prime Steak, and Stone Crab during a celebratory dinner last month after McClain was successful in appealing for veteran's benefits. Wagener handled his case pro bono for six years. Ben Speckmann

He was deployed with the 82nd Airborne Division as a platoon leader in Afghanistan in 2003 and was a company executive officer in Iraq in 2004.

He later attended law school at the University of Michigan and was a summer associate at Skadden before joining the firm after graduation in 2008.

The first thing to do was create a record of McClain's service. Wagener said that if they could show that McClain's hearing loss was attributed to combat, then a lower standard of proof would apply as the VA reviewed his claim.

Normally, when someone is discharged from the military, they receive a DD Form 214 — a Certificate of Release or Discharge from Active Duty — that includes information such as discharge conditions and combat medals. Since mariners were not considered part of the military or recognized as veterans, McClain never received such a form.

“The Merchant Marines were at a big disadvantage because they essentially had to go create, out of whole cloth, these documents and work with organizations to try to and track down information,” Wagener said.

With help from associates and

research librarians, Wagener combed through historical records and accounts on the role of mariners onboard the ships. He searched for combat citations or medals that were given to Merchant Mariners or the Navy Armed Guard.

The captains of merchant marine ships and the Navy Armed Guard kept separate records, so they searched through ship logs looking for notes that showed when the vessels McClain served on came under fire and were engaged in combat.

“[T]hey essentially had to go create, out of whole cloth, these documents and work with organizations to try to and track down information.”

Meanwhile, Wagener was also handling other pro bono veterans' benefits cases. Houlihan said other lawyers were taking similar cases and, in 2011, Skadden's Chicago office started visiting places such as St. Leo Campus for Veterans on Emerald Avenue a few times each year to conduct mobile veteran clinics.

As he worked on McClain's case, Wagener learned a lot

about the VA system and veterans' records and started sharing it over an internal resource platform at the firm to help other lawyers with their pro bono cases.

The resources that Wagener created were sometimes helping his colleagues finish their cases ahead of him, Houlihan said. But the medical evidence and other war records that usually support benefits claims just didn't exist for mariners like McClain. The case was taking years.

“It was frustrating because Earl is my client. We'd talk, and I'd have to give him updates month after month that I'm not really getting real updates,” Wagener said. “If it's just in the queue, how many times over the years do you really want to hear that? It was tough, but that's the system.”

It also becomes more difficult over time to get hearing-loss claims granted, Wagener said, because it's an issue that can be attributed to aging. He was upfront with McClain about setting reasonable expectations.

“Earl and I would talk a lot about it, that this was not a claim that we should assume is going to be won,” he said. “We should assume that it's not going to be granted.”

As Wagener and McClain's family gathered new information from mariners and veterans' organizations, they began to apply for and receive service medals and ribbons.

One that stands out to McClain is the Philippine Liberation Medal, given by the Philippines to crew members on allied nations' ships for their role in liberating the islands in 1944 and 1945.

"It was very unexpected, really, and a big surprise. I really am more proud of it than I am the U.S. medals due to the fact that it was sent to me," McClain said. "I didn't have to really dig and fight for it like the other ones."

The medals and ribbons are displayed on a wall in McClain's home in Findlay with photos of him in his uniform. It's something that he shares with his six children, 17 grandchildren, 26 great-grandchildren and one great-great-grandchild, and the first thing that he shows to visitors.

Even if the appeal hadn't gone in McClain's favor, Wagener said, he was glad to help get this recognition for his client and family.

"It's not just a trinket. It has

profound meaning behind it," he said. "It tells a real story about his life and the lives of the people that he directly or indirectly helped."

The separate search for the Navy Armed Guard combat medals yielded valuable evidence for McClain's claim.

"It turned out that the naval armed guard that served on the W.B. Rogers received a battle star for the Battle of Okinawa," Wagener said. "Right there, that was evidence that he was in combat because he was on the ship with them, he was passing ammo to these guys."

An honor to serve

Around Veterans Day last year, McClain had a video hearing with a Board of Veterans' Appeals law judge. The judge remanded the claim back to the local VA office and ruled that VA medical staff had to recognize McClain's combat injuries and conduct another compensation and pension exam for benefits.

Cautiously optimistic, they awaited the next steps.

"I think that the most depressing part was when we had to wait six months after we

had the hearing here before we heard again, and that's after we had wrote to people in Washington," McClain said.

The VA scheduled McClain for his exam in late July. On Sept. 22, Wagener went to the VA office to get an update. Staff there only told him the claim was approved — but that he had to wait for an official letter for details on the amount.

He called McClain immediately, who was driving to the airport with his wife Lynda to pick up their granddaughter.

"He looked at me like, 'You're kidding,' and I said 'No, I don't think Dave was kidding, I think this is true,'" Lynda said. "And he said, 'I'll be.'"

When Wagener got the letter at Skadden's office the next day, he was in disbelief. The letter included a chart with dollar amounts dating back to the original claim in 2006.

The VA approved 100 percent of McClain's disability benefits for his hearing-loss claim and awarded more than \$24,000 in back pay and a monthly entitlement of more than \$3,000.

"Dave is a determined individual who is systemic with what

he does," said Houlihan, Skadden's pro bono supervisor. "Dave was never overwhelmed. He's a veteran, he kept his head down and kept going. He was ready to stand up to that task, and Mr. McClain was a great client. They were a good team."

Wagener said it was an honor to help McClain and that, as a fellow veteran, there is a deeper relationship and trust that they've shared.

McClain said he only feels as closely bonded to one person aside from Wagener — a shipmate named James watched over him like a brother during the war.

After his first meeting with Wagener over teleconference six years ago, McClain said he knew was in good hands. At the time, he couldn't believe that Wagener "was helping me, not knowing me, free of charge."

"You don't run into people, even the ones you know, but especially the ones you don't know that has done so much that David has," McClain said. "And it's something that you can't give enough thanks or give enough anything for, for that reason."