***McCorpen* 101 for Lawyers**

by F. DANIEL KNIGHT

Decisions over the last several years by the 5th U.S. Circuit Court of Appeals have bolstered employers' defenses to maintenance-and-cure claims by injured seamen. But a 2013 decision has come to seamen's aid. Counsel on both side of the admiralty and maritime docket can take some steps to strengthen their clients' positions before litigation begins.

Since the Middle Ages, if a seaman became injured or ill in the service of his vessel, maritime law has afforded him maintenance and cure. Irrespective of fault, the seaman's employer must provide the seaman with the daily value of his food and lodging aboard the vessel (maintenance) and pay his medical bills (cure) related to the injury until the seaman reaches what's called maximum medical cure.

Many lawyers consider maintenance and cure the least attractive arrow in the seaman's three-arrow quiver of legal remedies against his employer and the vessel owner. That's because the other two arrows — Jones Act negligence and unseaworthiness — have offered broader categories of damages.

But, that preference changed dramatically in 2009, when the U.S. Supreme Court held in *Atlantic Sounding Inc. v. Townsend* that a seaman could recover punitive damages if his employer "willfully, wantonly, or wrongfully" denied him maintenance and cure.

Suddenly, maintenance-and-cure claims and their defenses were of great interest to the maritime legal community. Of particular importance to Texas lawyers are three 5th Circuit decisions interpreting one defense to maintenance and cure, called the *McCorpen* defense. While the 5th Circuit issued all three of these decisions before *Townsend*, they took on heightened importance after the U.S. Supreme Court introduced punitive damages into the maintenance-and-cure landscape.

In *McCorpen v. Central Gulf S.S. Corp.* (1968), the 5th Circuit established the following absolute defense to a maintenance-and-cure claim: 1. if a seaman intentionally misrepresented concealed medical facts at the time of hire, 2. and the employer would not have hired him had the employer known the facts, and 3. the seaman complains of injury related to the withheld medical information.

If an employer asks a prospective seaman to complete a health questionnaire or present himself for a pre-employment physical, the *McCorpen* court also held that the "intentional concealment" standard is not based upon the seaman's belief of being fit for duty, but the actual medical evidence.

Decades later, in *Brown v. Parker Drilling Offshore Corp.* (2005), the 5th Circuit affirmed the vitality of the *McCorpen* defense. The 5th Circuit also provided employers who undertake certain kinds of pre-employment due diligence with a safe harbor. The 5th Circuit held that an employer who requires seamen to fill out pre-employment questionnaires or undergo pre-employment physicals does not have to prove that a seaman subjectively intended to conceal the medical facts. Such an employer also is not subject to compensatory damages if it acts reasonably in withholding maintenance and cure based on the *McCorpen* defense.

Three years later, in *Johnson v. Cenac Towing*, a different 5th Circuit panel affirmed *Brown*. The judges further held that an employer who successfully establishes the *McCorpen* defense could bring a contributory-negligence claim, if the seaman concealed prior injuries or conditions, exposed his body to a risk of aggravation or injury by working with the pre-existing condition, and was injured as a result.

After remand, the U.S. district court in *Johnson* ultimately held the plaintiff was not negligent for his omissions regarding his medical history on his pre-employment physical and employment application, as there was no exposure to additional risk of injury by the plaintiffs working with a bad back, based upon the facts of the case.

Other cases, such as the 5th Circuit's decision in *Ramirez v. American Pollution Control Corp.* (2010)have found the elements met for contributory negligence and accordingly reduced a seaman's award under *Johnson*.

**Plan Now**

What practical steps can plaintiff’s counsel take to avoid, and defense counsel take to bolster, the *McCorpen* defense, now that the stakes have risen to include punitive damages, contributory-negligence causes of action, and forfeiture of maintenance-and-cure rights?

Counsel for seamen must be aware of the *Brown/Johnson* line of cases, as well as their limits. Even if an employer proves a *McCorpen* defense, the *McCorpen* decision makes clear the defense is not an absolute bar to recovery under either the Jones Act or unseaworthiness "arrows" afforded to seamen under the law.

Seamen's counsel also should take to heart that the *McCorpen* defense has limits. Recently, the 5th Circuit held in *Boudreaux v. Transocean Deepwater Inc.* (2013) that establishing a *McCorpen* defense did not entitle the employer to restitution for wrongly paid maintenance-or-cure benefits. That decision also foreclosed employers from arguing that a seaman's fraud in obtaining the job meant the employer wasn't liable for negligence or unseaworthiness because no employer/employee relationship existed.

Additionally, plaintiffs’ counsel should craft intake questions for prospective clients that will reveal information concerning the seaman's prior medical history. It will be helpful to obtain records from the health-care provider who performed the pre-employment physical, if the seaman remembers who that was. Such records can help seaman's counsel establish reasonable client expectations, as well as to prepare to fight the *McCorpen* defense.

Counsel for maritime employers should review their clients' pre-employment medical screening policies. Pre-employment questionnaires and physicals can provide useful evidence in the event that litigation ensues. Standardizing procedures for obtaining health information from job applicants and retaining documentation of that information will bolster the credibility of a witness who testifies that the employer adhered to those procedures. The existence of such procedures and information can benefit the defense.

Using proper forms that include written acknowledgment by the job applicant can increase the employer's chances of receiving a summary *McCorpen* disposition. Advanced diagnostic techniques, such as a MRI study of the spine prior to employment, may help identify potential concealment of medical facts.

John Locke wrote, "It is of great use to the sailor to know the length of his line, though he cannot with it fathom all the depths of the ocean." Lawyers should be able, through analysis of potential *McCorpen* issues, to know the length of their *McCorpen* line under the law, and, as best they can, fathom the depths as to the value of claims where *McCorpen* is at issue.

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