



OCTOBER 2008

**5th Circuit Expands Application of *McCorpen* Defense in
Johnson v. Cenac Towing Inc., 2008 WL 4330553 (5th Cir. Sept. 24, 2008)**

Leroy Johnson was a tankerman working for Cenac Towing. On December 14, 2005, he and a coworker were moving a 175-pound cross-over hose when Johnson's coworker tripped and dropped his part of the load shifting the entire weight to Johnson. Johnson subsequently claimed that he injured his back, and filed suit in federal court against Cenac alleging negligence under the Jones Act, unseaworthiness and maintenance and cure.

Johnson had worked for Cenac on two previous occasions, each time filling out pre-employment physical questionnaires. In each of the previous pre-employment questionnaires, Johnson indicated in writing that he had never hurt his back, never received disability compensation, and only had surgery once, for a shoulder injury many years prior.

In truth, Johnson actually had two previous back injuries which he never reported. In the first case, he injured his neck and back, was disabled for ten months, and underwent neck surgery. In a second incident, he injured his back, was disabled for more than thirteen months, received a series of steroid injections, and experienced ongoing urological problems. Cenac's physician who approved employee's pre-employment physicals stated that he would not have approved Johnson for employment if he had known about the earlier injuries because of the possibility of Johnson aggravating his injuries or harming a coworker.

At trial, Cenac's counsel argued that Johnson's intentional misrepresentation of his prior injury cut off Cenac's liability for maintenance and cure under the *McCorpen* defense, and also that as an affirmative defense, any damages awarded to Johnson for his Jones Act and unseaworthiness claims should be reduced by the amount of his contributory negligence for concealing his prior injuries.

The district court held that maintenance and cure had been properly denied. While an employer must generally pay maintenance and cure regardless of fault, an employer may invoke the *McCorpen* defense when an employee willfully conceals a pre-existing injury and cut-off maintenance and cure. *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968). The district court found that the three elements of the *McCorpen* defense had been satisfied in this case: 1) the employer showed that the seaman intentionally misrepresented or concealed medical facts; 2) the non-disclosed facts were material to the employer's decision to hire the seaman; and 3) a connection existed between the withheld information and the seaman's injury. Maintenance and cure was therefore properly denied.



ADMIRALTY AND
MARITIME MATTERS

OCTOBER 2008

The district court, however, rejected Cenac's argument that its *McCorpen* defense could be used as an affirmative defense to offset any damages, based on the premise that had Cenac known of Johnson's pre-existing injuries, Johnson never would have been hired, and never would have injured his back to begin with.

On appeal, the Fifth Circuit affirmed that maintenance and cure had properly been denied under *McCorpen*, and that even though Johnson had willfully concealed his pre-existing injuries, this was no bar to his Jones Act or unseaworthiness claims. However, the Fifth Circuit reversed the trial court's determination that Johnson's willful misrepresentation could not be used as an affirmative defense for contributory negligence purposes.

In reaching this conclusion, the Fifth Circuit examined prior Fifth Circuit and Supreme Court case law and held that willful misrepresentation of a pre-existing injury could be used as an affirmative defense for contributory negligence purposes under certain circumstances. As a result, if a seaman conceals material information about a pre-existing injury or physical condition from his employer, then exposes his body to a risk of re-injury or aggravation of the condition, and then suffers re-injury or aggravates the injury, contributory negligence may be submitted to the trier of fact. The Fifth Circuit remanded the case to the district court with instructions that it examine the causal link between Johnson's willful misrepresentation and his injuries *vis-a-vis* would he have been injured if he was never hired.

The ramifications of the *Johnson* decision are interesting in that the Fifth Circuit appears to have further eroded the traditional notion that seaman are "wards of the admiralty" whom require the protection of the Courts to keep them from being taken advantage of by their employers. *Johnson* provides yet another valuable arrow in the quiver of defendants who seek to attack causation in Jones Act cases.

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