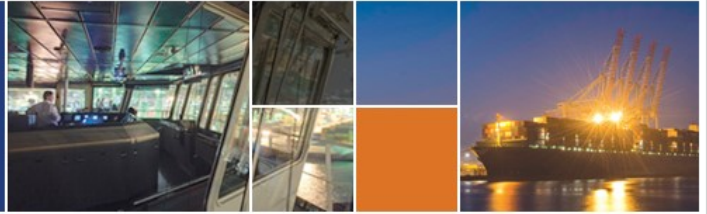




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Previous Employers PEME Still Valid?

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Since the 1968 case of *McCorpen v Central Gulf Corp* (United States Court of Appeals for the Fifth Circuit), shipowners, employers of Jones Act seamen, have relied upon the so called "McCorpen defence" to deny claims under the General Maritime Law for benefits (maintenance, cure, unearned wages) from crewmembers who, during a pre-employment examination, wilfully conceal a pre-existing injury or illness. This article discusses a recent decision by the US Courts on the application of the McCorpen defence when a crew member is transferred to a new employer following a merger or acquisition.

Introduction

Shipowners pride themselves on loss prevention. To support their crew management program, pre-employment medical examinations or questionnaires have become commonplace and are considered to be a very useful tool in assessing a seafarer's suitability for employment. They serve to inform a shipowner about a prospective employee's medical history and can provide the employer with some protection against having to pay for medical care in relation to an injury or illness which pre-dated the seafarer's employment onboard the vessel.

An interesting twist to this scenario is where a shipowner takes over the employment of a crewmember as the result of either a merger or acquisition of another shipowner. In this situation the question is whether the new employer would be expected to carry out fresh pre-employment medical examinations on all crewmembers, the employment of whom they had now assumed. If the answer to this question is yes then this would of course be an expensive and time consuming task and therefore the new owner would naturally like to be able to rely upon answers previously given by the crew during their pre-employment examination.

The McCorpen Defence

The McCorpen defence is a mechanism that US shipowners can use to avoid paying maintenance and cure benefits if it is established that a crewmember failed to disclose a pre-existing medical condition for which he is now seeking to claim maintenance and cure benefits.

To successfully establish a McCorpen defence, an employer must show that:

1. The claimant intentionally misrepresented or concealed medical facts;
2. The non-disclosed facts were material to the employer's decision to hire the claimant.
3. A connection exists between withheld information and the injury complained of in the lawsuit.

The courts have also made a distinction between non-disclosure and concealment.

Subjective non-disclosure is where the employer does not require a pre-employment medical examination with the rule being that a seaman must disclose a past illness or injury only when in his own opinion the employer would consider it a matter of importance.

Objective concealment is where the employer requires a seaman to submit to a pre-employment medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired.

The importance of this distinction is that subjective non-disclosure leaves interpretation to the crewmember as to whether as a pre-existing illness/injury is material to his job. Objective non-disclosure, places a greater onus on a shipowner employer to ask the right questions of a crewmember regarding his medical history.

Meche v Doucet and Key Marine Services LLC – The Facts

This issue was discussed in the recent case of *Meche v Doucet and Key Marine Services LLC* (Fifth Circuit Court of Appeals 22 January 2015).

By way of background, Meche was the captain of a crew boat serving a drilling rig off the coast of Louisiana. He had been employed by Moncla Marine (Moncla) which was subsequently acquired by Key Marine Services (Key). Meche initially claimed that he injured his back whilst lifting a hatch cover to check the oil on the vessel. He then later alleged that it was in fact a five foot wave in stormy conditions which hit the vessel and threw him over a railing.

In his law suit, Meche alleged that there was negligence on the part of the shipowner and that the vessel was unseaworthy. In assessing these claims, the court of appeal examined the crewmember's two explanations for the injury. As a result, the court noted the clear lack of consistency between the initial accident report and the one which subsequently formed the basis of the law suit.

Following this, the court of appeal deemed Meche to be an unreliable witness and affirmed the district court's decision finding no negligence against his employer and vessel owner.

The Application of the McCorpen Defence

Meche was a Jones Act seaman and therefore also asserted a claim for maintenance and cure. Maintenance is a daily living allowance paid by the employer to an injured or ill seafarer so long as the seaman is outside a hospital and has not reached the point of maximum cure. Cure is the right to necessary medical services.

Key argued that the McCorpen rule would preclude Meche from obtaining maintenance and cure in this case.

In his pre-employment medical questionnaire before being employed by Moncla, Meche had stated that he had not previously sustained any lower back injuries or had any trouble with that part of his body. Meche signed the questionnaire under the statement declaring that all responses on the application were correct. However, discovery had revealed that Meche had in fact sustained three prior work-related lower back and neck injuries for which he sued his former employers and received damages. As Meche knew that the information on the application form was not correct he had intentionally concealed his prior injuries as a matter of law.

Notwithstanding the clear intentional concealment, the district court found that Key did not request a pre-employment medical examination for Meche when it acquired Moncla. Therefore the subjective non-disclosure standard was applied; the result of this being that the McCorpen defence could not be maintained by the shipowner. Key argued on appeal that the district court should have applied the objective concealment standard because although Meche had not been subjected to a pre-employment examination by his new employer he had been by his previous one.

because although Meche had not been subjected to a pre-employment examination by his new employer he had been by his previous one, Moncla, upon whose records Key relied. Key therefore argued that for the purposes of a McCorpen defence, that in cases of merger or acquisition, a misrepresentation to the previous employer is tantamount to a misrepresentation to the new one.

Key further argued that it would make little economical or logical sense to require a successor employer to re-examine its predecessor's employees solely for the purpose of potentially avoiding a maintenance and cure liability for their previously concealed medical conditions. After all, a dishonest seaman who previously concealed their medical history is unlikely to volunteer that information during a subsequent re-examination.

Meche tried to argue that an intervening asset sale should render the McCorpen defence inapplicable because the successor employer did not conduct an examination. His rationale for this was that by allowing a current employer to rely upon a previous employer's medical examination a seaman would effectively be punished for life for making a mistake.

The court of appeal agreed with the shipowner that employers need to be certain that each employee is physically able to do the work which is required of them; not only to protect the employer from liability but also to protect other employees. Accordingly, the court ruled that Key was entitled to rely upon the non-disclosure by Meche to Moncla. The Court rejected Meche's argument on the basis that the rule would only apply where a company purchases the division and keeps the predecessor's seamen in its employ. It would not punish a seaman who leaves his or her employer for an entirely unrelated company.

Does It Matter If The Questionnaire Was Completed On Behalf Of The Seaman?

Once the Court had decided that Key could rely upon Meche's non-disclosure to Moncla the crewmember argued that he did not intentionally conceal his medical history. The basis for this argument was that he did not personally complete the written medical questionnaire and that it was his daughter-in-law (Lesley) who had filled out the form on his behalf. The explanation for this was that Meche does not read and write very well. If the court had been persuaded that Meche lacked the literacy skills necessary to read and review Lesley's responses before signing the form then his argument may have been accepted. However the court did not accept this, the reason for this was largely based upon the fact that Meche had previously admitted to personally filling out a different medical form for another employer several months before applying to work for Moncla.

The court held that Meche's ability to understand what he was signing was clear. Therefore his concealment of his medical history was intentional for the purposes of establishing a McCorpen defence.

Conclusion

This is a positive ruling for shipowners as it allows them to rely upon a PEME that was undertaken by a crewmember's previous employer, should that employer merge or be taken over by a new shipowner. If the Court of Appeals for the Fifth Circuit had not come to this conclusion it would have been costly for shipowners not least they would have to consider undertaking fresh PEME's for all crewmember's taken on subsequent to a merger or takeover.

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