

## **FAILURE TO DISCLOSE PRE-EXISTING CONDITIONS**

A Jones Act seaman's failure to disclose pre-existing conditions during the hiring process can provide his employer with two defenses in a subsequent personal injury lawsuit.

The first defense is commonly referred to as the *McCorpen* defense, which relieves the employer of its obligation to pay maintenance and cure if: (1) the employee concealed the pre-existing condition intentionally; (2) the concealment was material to the employer's decision to hire the employee; and (3) there is a direct connection between the condition that was concealed and the employee's current condition.

It will be impossible for the employer to prove intentional concealment unless the employer requires the employee to undergo a physical examination and complete a medical questionnaire as a condition of being hired. A detailed questionnaire that asks the right questions is key, e.g., "Have you ever injured your back? If so, when and where?" "Have you ever experienced any of the following: (back pain yes/no) (leg pain yes/no)?"

The concealment of a pre-existing condition is material if the employer would not have hired the employee had the employee fully disclosed the pre-existing condition. Ultimately, it will be necessary for the examining physician to testify that she would not have approved the employee for hiring if she had known of the pre-existing condition.

Consequently, it is critical that the physician conducting the examination have a thorough understanding of a prospective employee's job duties and the heavy manual labor involved, the nature of a Jones Act claim, and the types of pre-existing injuries that would likely disqualify a prospective employee. Careful advance planning with the examining physician is crucial.

Proving that there is a direct connection between the pre-existing condition and the employee's current symptoms is generally a matter of obtaining the employee's prior medical records. For example, in a back injury case, you will want to obtain prior MRI or CT films and reports that will show that the disc involved in the employee's Jones Act claim is at the same level as his pre-existing condition.

The second defense is the employee's comparative fault for failing to disclose the pre-existing condition. This defense applies to an employee's Jones Act negligence and unseaworthiness claims. If the employer can prove this defense by a preponderance of the evidence (more likely than not), the plaintiff's recovery for negligence and/or unseaworthiness will be reduced by the percentage of fault assigned to him by the judge or jury. In order to prevail on this defense, the employer must show that the seaman: (1) concealed material information about a pre-existing injury or physical condition from his employer; (2) exposed his body to a risk of re-injury or aggravation of the condition; and (3) then suffered a re-injury or aggravation of the pre-existing injury.

With regard to causation, the employer need only prove that the plaintiff's failure to disclose was a cause, even if only a slight cause, of his re-injury or aggravation of injury.

Please note: The information provided in this article is NOT legal advice. Do not rely on this article to establish company employment, hiring, or medical screening practices. You should work closely with your employment and Jones Act defense counsel in developing your policies and determining the applicability of the defenses discussed in this article to any particular claim.

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