



particular relevance in this action is the section of the form entitled “Health History.” The applicant is directed to indicate whether he or she suffers from a particular condition by checking a “yes” or “no” box on the form. See Physical Examination Form, attached as Exhibit 9 to Memorandum of Law in Support of Plaintiff’s Motion for Partial Summary Judgment (“Plaintiff’s Summary Judgment Memo”). The “no” box on Defendant’s form was checked off in response to both “Head or spinal injuries” and “Permanent defect from illness, disease or injury.” Id.

Approximately one week after beginning work for Plaintiff, Defendant suffered an injury to his lower back while throwing a rope to a ship. Defendant’s pain was so severe that he was unable to sit for more than five minutes and unable to stand for more than two minutes. Plaintiff’s Summary Judgment Memo at 6. However, Defendant chose not to disclose the injury to his employer for fear that he would lose his job. Deposition of Michael McDevitt, attached as Exhibit 10 to Plaintiff’s Summary Judgment Memo (“McDevitt Dep.”) at 311:8 - 313:21.

Defendant suffered a second injury to his back several months later on May 5, 1999. Defendant asserts that this second injury occurred while he was handling the lines of a dredge that was being docked. See Defendant’s Answer to Plaintiff’s First Amended Complaint (“Defendant’s Answer”) at ¶ 5. Defendant had no choice but to report this second injury because it was serious enough to prevent him from working. Plaintiff agreed to cover Defendant’s medical treatment at a cost of \$535.75. Affidavit of Thomas Langan (“Langan Aff.”) at ¶ 12. Defendant returned to work on June 1, 1999. First Amended Complaint for Declaratory Judgment at ¶ 5.

On June 15, 1999, Defendant re-injured his back. See Defendant’s Answer at ¶ 6. Once again, Defendant’s injury prevented him from working. Plaintiff agreed to cover Defendant’s

medical expenses for this injury as well, which ultimately totaled \$23,886.20. Langan Aff. at ¶ 13. Defendant returned to work on November 3, 1999.

Finally, on November 27, 1999, Defendant injured his back for the fourth time since he began working for Plaintiff. First Amended Complaint for Declaratory Judgment at ¶ 7. He has not returned to work since. Id. Defendant's maintenance and cure for this fourth injury, which Plaintiff continued to pay through February 2001, amounted to \$58,179.81. Langan Aff. at ¶ 14. In total, Plaintiff has paid \$82,601.76 for Defendant's medical and living expenses.

Defendant concedes that he had suffered from a pre-existing back condition when he began his employment with Plaintiff. He first began to develop lower back pain in the late 1980's. See McDevitt Dep. at 84:10 - 84:12. Defendant's doctor at the time concluded that he had a herniated disc, which she chose to treat with epidural injections. Id. at 83:8 - 83:14. The first time Defendant's back problems interfered with his work was in 1994, when he was employed by the Delaware River Port Authority as a toll collector. As he was getting into his car to go to work one morning, "his back went out." McDevitt Dep. at 92:24 - 93:7. After examining him, Defendant's doctors determined that he was unable to continue working, and it was eighteen months before he was able to resume his duties. Plaintiff's Summary Judgment Memo at 2 - 3. Defendant asserts that the condition he suffered from while working for the Delaware River Port Authority involved his cervical spine, in contrast to the lumbar spine condition that afflicted him during his employment with Plaintiff. Defendant's Opposition Memo at 2.

Defendant's back condition also interfered with his employment at the Delaware County Courthouse in 1998. McDevitt Dep. at 98:16 - 98:19. In the course of performing his duties, Defendant threw his back out while lifting a twenty-five pound weight, and consequently was

forced to leave work for two weeks. Id. at 98:10 - 98:22. At oral argument, Defendant's counsel conceded that Defendant had received an epidural injection to alleviate his back symptoms just a few days before he came to work for Plaintiff.

## **II. LEGAL STANDARD**

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is “whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, “there can be ‘no genuine issue as to any material fact’ . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then “shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial.” Id.

## **III. ANALYSIS**

Maintenance and cure are “rights given to seamen who become ill or injured in the service of a vessel.” Deisler v. McCormack Aggregates, Co., 54 F.3d 1074, 1079 (3d Cir. 1995).

A shipowner is “obliged to pay maintenance and cure regardless of any fault on its part; only willful misconduct on the part of the seaman will deprive him of its protection.” Id. at 1080. Plaintiff argues that Defendant’s concealment of his back condition from Plaintiff constitutes “willful misconduct,” and that Defendant consequently was not entitled to maintenance and cure. Accordingly, Plaintiff seeks a declaration that Defendant is not entitled to any further payments and reimbursement for its maintenance and cure expenses already paid.

In the Third Circuit, a seaman’s failure to disclose “a pre-existing injury without more will not result in [the] loss of maintenance and cure.” Id. Before the seamen can be denied his benefits, three conditions must be met: (1) the seaman must have intentionally misrepresented or concealed medical facts” about himself; (2) those facts need to have been material considerations in the hiring decision; and (3) “there must be a nexus between the improperly concealed information and the disputed injury.” Id. at 1081. Defendant argues that the record in this case contains a genuine issue of fact as to the first requirement – whether Defendant’s concealment of his back condition was intentional – and that accordingly, the Court should not grant summary judgment.

To meet its initial burden of showing the absence of a genuine issue of fact, Plaintiff points to a number of items in the record, the most significant of which is an exchange from Defendant’s deposition, in which Defendant essentially admitted that he omitted mention of his spine condition even though he knew the form was asking him about it. See McDevitt Dep. at 90:12 - 91:6. This admission, reinforced by other circumstantial evidence, is more than sufficient to satisfy Plaintiff’s initial burden.

The burden thus shifts to Defendant, who must point to evidence in the record suggesting that the state of mind with which Defendant concealed his condition remains at issue. Defendant

directs the Court to an affidavit in which he states that “at the time of his post offer employment physical, it was affiant’s belief that he did not have a head or spine injury; affiant did not view any of his preexisting conditions as injuries to the head or spine.” Affidavit of Michael McDevitt, October 26, 2004 (“McDevitt Aff.”) at ¶ 30. Defendant explains that he checked off the box indicating that he did not have a “head or spine injury,” because he understood a “head or spine injury” to be a traumatic accident of some kind. His problem, in contrast, was a treatable condition that he believed would not interfere with his work. See Defendant’s Opposition Memo at 5.

Courts must avoid making determinations of credibility on summary judgment, reserving such questions for the jury. See Ness v. Marshal, 660 F.2d 517, 519 (3d Cir. 1981) (“[W]here intent is a substantive element of the course of action generally to be inferred from the facts and conduct of the parties, the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility.”). Defendant is entitled to have a jury determine whether he filled out the form in good faith. Accordingly, the Court finds that there remains a genuine issue of material fact and that summary judgment is not warranted. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**WEEKS MARINE, INC.**

**v.**

**MICHAEL MCDEVITT**

**: CIVIL ACTION  
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: NO. 01-CV-5609  
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**ORDER**

**AND NOW**, this \_\_\_\_\_ day of November, 2004, upon consideration of Plaintiff's Motion for Partial Summary Judgment (docket no. 53), the oral argument the Court heard on October 22, 2004, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the motion is **DENIED**.

**BY THE COURT:**

**S/Bruce W. Kauffman**

**BRUCE W. KAUFFMAN, J.**