Marilyn Raia
San Francisco,
Shareholder

Direct Dial: 415.352.2721
Fax: 415.352.2701
Email Attorney

Silence is Not Golden

By Marilyn Raia

In many elementary schools, teachers post the motto "Silence is Golden" on the bulletin board to help students remember they should be quiet in class. In the maritime context, however, the motto is best forgotten. Failing to speak in many situations can have adverse legal consequences for seamen.

Failing to reveal a medical condition during pre-employment physical

A seaman who fails to disclose a pre-existing medical condition to the doctor conducting a pre-employment physical examination may be deprived of the right to recover for personal injuries related to that condition. In McCorpen v. Central Gulf Steamship Corporation 396 F.2d 547 (5th Cir. 1968), seaman McCorpen failed to reveal to the US Public Health Service doctor conducting his pre-employment physical that he had a history of diabetes requiring daily insulin shots and strict diet control. The diabetes had not prevented him from performing his duties as a seaman for twenty years. McCorpen also signed an application in which he stated he had never been injured, sick, or otherwise disabled except for a back strain. He was approved for employment. During a voyage to the Middle East, McCorpen began seeing double when working in the very hot galley. He was treated twice in India, and at the end of the voyage he was treated at a public health hospital in Texas for diabetes control and chronic anemia.

McCorpen sued his employer for maintenance (daily stipend for housing and food). The district court entered judgment in favor of the employer holding McCorpen knowingly failed to disclose his pre-existing diabetes, which precluded an award of maintenance. McCorpen appealed. The judgment was affirmed.

McCorpen argued the question in the application about whether he had been injured, sick, or disabled was not specific enough to elicit a diabetic condition. The court rejected the argument. He also argued that the examining doctor testified he probably would have approved McCorpen for employment even if the diabetic condition had been disclosed. The court rejected that argument too, finding there was insufficient evidence for the doctor to conclude McCorpen's diabetes was fully under control and had presented no difficulties on a prior voyage. The court held that when a shipowner employer requires a seaman to submit to a pre-hiring medical examination and the seaman intentionally misrepresents or fails to disclose material facts about his condition, "the disclosure of which is plainly desired", the seaman is not entitled to recover maintenance and cure (medical treatment) if he suffers an injury related to that condition.

Failing to ask for help

A seaman who fails to ask for assistance with a task aboard ship may be deprived of the right to recover for personal injuries suffered while performing that task. Gaylor v. Canal Barge Company, 2015 AMC 2444 (E.D. La 2015) involved a cook on Canal Barge's vessel. At the time of the injury, Gaylor and a deckhand were in the vessel's galley storing groceries, a responsibility assigned to Gaylor. Gaylor was injured when he lifted an open box of meat in an attempt to move it closer to the freezer for unloading. The deckhand had placed the box on the floor three to four feet away from the freezer. Gaylor thought the box weighed 60 to 80 lbs. He knew the company had a 50 lb. maximum lifting limit but chose to lift the box by himself. He failed to ask the deckhand who was nearby and able to assist, for help.

Gaylor sued his employer alleging negligence under the Jones Act, unseaworthiness, and a right to maintenance and cure. He alleged he was not provided with a reasonably safe place to

work. He also alleged the vessel was unseaworthy because there was an unsafe work method which would not have been used had the box of meat been placed closer to the freezer for unloading. Finally, he alleged his employer did not provide the cooks with safety guidelines for putting boxes of groceries in the galley and unloading them. Rather, the employer left the determination of the safest method to do that task to the cook and deckhand.

Canal Barge moved for partial summary judgment. It argued Gaylor could not establish negligence or unseaworthiness because it repeatedly provided Gaylor with proper training and set standards for lifting, which Gaylor knew, but ignored. The district court granted the motion and entered partial summary judgment in Canal Barge's favor. It reasoned the seaman "must act with the care, skill and ability expected of a reasonable seaman in like circumstance" and if an accident is caused solely by the plaintiff's own fault, there can be no recovery. Gaylor's failure to ask for assistance precluded him from recovering on his Jones Act and unseaworthiness claims, leaving only the no-fault maintenance and cure claim for trial.

Failing to report an unseaworthy condition

A seaman who fails to report an unseaworthy condition may be held comparatively at fault for an injury resulting from that condition, and have his award reduced. In DuBose v. Matson Navigation Company, 403 F.2d 875 (9th Cir. 1968), DuBose worked as a kitchen helper aboard the SS Matsonia. He polished silverware in the ship's dishwashing room. A counter on which dishracks were placed was located four feet behind the sink at which DuBose worked. During meal service, dish-runners carried dishes from the serving areas on dishracks to the dishwashing room. Because of the close quarters, the dish-runners bumped the backs of DuBose's legs with the dishracks on the way to the counter. DuBose complained about his legs to the dish-runners but did not bring the issue to the attention of the ship's officers.

DuBose developed a cyst on the back of his leg. The cyst was surgically removed and the leg was put in a cast. After the surgery, DuBose developed a drop foot. His leg was placed in a metal brace. DuBose was able to return to work and perform his duties without meaningful impairment although he suffered from leg numbness, a stinging sensation in his leg, and the inability to sleep because of ankle pain.

DuBose sued Matson. The district court found the repetitive bumping by the dish-runners was "to some degree" a proximate cause of the injury. The court found DuBose's damages to be $14,700 but reduced the award by 75 percent because DuBose never complained to the ship's officers about the condition, never reported his injury, and continued to work. DuBose appealed the reduction of the award. He argued that because he had an assigned place to do his work, he could not have been comparatively at fault. The Ninth Circuit disagreed and affirmed the district court's 75 percent reduction of the damage award. It held DuBose was comparatively at fault because he knew of the repetitive bumping of his legs and did not bring that condition to the attention of his superiors.

Failing to report an unsafe procedure

If a seaman notices an unsafe procedure on a vessel, his failure to report it could lead to a significant reduction in damages recoverable for an injury. Broussard v. Stolt Offshore, Inc. 2007 AMC 1423 (E.D. La 2006) illustrates the point. Broussard was an experienced engineer who was assigned relief duty aboard Stolt's vessel. He injured himself while helping the regular chief engineer, Arias, move a 79-lb. fuel transfer hose from its storage location in the aft rudder compartment below the main deck, to the main deck fuel bunkering station. Arias climbed down

a ladder and tied a rope around the coiled hose. He then placed the coiled hose on the third rung of the ladder and pushed it up with his shoulder as he climbed the ladder. After Arias had pushed the coiled hose halfway up the ladder, Broussard leaned over to pull the hose up and dog the end to a hinge on the hatch cover. Broussard hurt his back doing so. He considered the procedure for bringing the hose on deck to be unsafe. However, he did not say anything to Arias, or try to stop the procedure.

Broussard sued Stolt for his injuries. He alleged Stolt 1) should not have stored the fuel transfer hose below the main deck; 2) failed to train Arias properly; 3) failed to conduct a safety meeting before retrieving the fuel transfer hose; and 4) used an unsafe procedure to lift the hose. The district court found Stolt negligent and the vessel unseaworthy because Arias used an unsafe method to lift the hose when other safer alternatives were available. However, the court allocated 40-percent fault to Broussard, reducing his recoverable damages accordingly, because he "had the obligation of telling Arias to stop lifting the hose once he perceived it was unsafe."

Seamen cannot remain silent about their physical condition before signing onto a vessel, or about certain conditions and procedures aboard the vessel. Their silence can bring about adverse consequences including barring a claim or reducing the recoverable damages.