

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LARRY T. SMITH :
 :
 vs. : C.A. No. 89-0020 L
 :
 KYLE II, INC. :
 d/b/a F/V OLD COLONY :
 and HAROLD A. LOFTES, JR. :

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This matter is presently before the Court on the motion of defendant, Harold A. Loftes, Jr., for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The background of this case is as follows. Prior to and including January 18, 1988, plaintiff, Larry T. Smith, was employed by defendant, Kyle II, Inc., on board the fishing vessel Old Colony in the capacity of an able and ordinary seaman. Plaintiff alleges that on or about January 18, 1988, he slipped and fell on some ice which had formed on the deck of the Old Colony. He further alleges that, as a result of that incident, he suffered an injury to his back and was out of work for approximately one month. He then returned to work on the Old Colony for a short time before leaving to work on another vessel known as the Min Terse. Defendant Harold A. Loftes, Jr. owned the Min Terse and employed plaintiff on that vessel as a cook and seaman from March 14, 1988

to June 6, 1988 when plaintiff stopped working due to his back injury.

In plaintiff's Second Amended Complaint it is alleged that the defendant, Kyle II, Inc., is liable for negligence and for failure to provide a seaworthy vessel. Plaintiff also asserts a cause of action in admiralty alleging that Kyle II, Inc. is liable to him for maintenance and cure.

In Count IV of his Second Amended Complaint, plaintiff states an additional cause of action in admiralty alleging that defendant Loftes is liable to him for maintenance and cure for his period of disability commencing June 6, 1988. Defendant Loftes denies that he is liable to plaintiff for any maintenance and cure and has moved for summary judgment with respect to this issue. The Court after having heard arguments on the motion for summary judgment took the matter under advisement. The motion is now in order for decision.

FACTS

Defendants took the deposition of plaintiff on April 7, 1989. During the course of his deposition, plaintiff testified that when he first left the Old Colony after slipping on the ice, he made an appointment with Dr. Chamorro to receive treatment for his injuries. Plaintiff testified as follows with regard to his visit with Dr. Chamorro and his subsequent return to work on the Old Colony.

- A. I told him my back was hurting me, that I had slipped and stuff, and he told me that I had a pinched nerve and said for me to just rest and showed me ways for

me to sit and how to sleep to try to make it better.

- Q. Did he say that when you saw him, when he first examined you that you had a pinched nerve?
- A. I think I saw him a couple of times. I went back to him a couple of times. I went to him and I got x-rays. I don't remember the procedure that went on but the basic turnout of it was that I had a pinched nerve and he said if I just took some time off and relaxed and stayed home, it should get better.
- Q. Now, is that what he told you the last time he saw you?
- A. Yes, he said just take a month out of work and you should be fine, you should be able to go back to work.
- Q. He didn't tell you that he wanted to see you again?
- A. No, I don't believe so.
- Q. So, now you took a month out. What were you doing for that month you took out?
- A. Just staying home and resting.
- Q. How did you feel?
- A. Like hell. I was still hurting quite a bit but I started feeling a little bit better after a while and I went back to work on the Old Colony.
- Q. How did you feel when you went back to the Old Colony?
- A. I was hating it.
- Mr. Smith: Other than hating it.
- A. There was a lot of pain, you know. Other than pain I kept laying down and the guys kept saying come on, you can get up. You have to help us. I was saying my back is hurting, I can't, I can't; then I finally went to work for Harold after that.

Plaintiff also gave the following testimony regarding his employment on the Min Terse.

- Q. How were you feeling when you went aboard the Min

Terse?

A. Well, my back was still bothering me, I was in pain. I thought I might be able to handle the work there.

Q. Had it gotten better since the last trip you made on the Old Colony; that's the back we are talking about.

The Witness: Had my back gotten any better?

Mr. Smith: Right.

A. I don't think it had gotten any better, you know. My back was still bothering me.

Q. So, it was still bothering you but you figured you would give it a shot?

A. Yes, get going, keep trying to work.

Q. Did you tell anybody on the ventures (sic) that you had a problem with your back?

A. Well, they used to see me put a big elastic thing around me and they asked what it was for and I told them I had slipped on the Old Colony and my back was bothering me.

...

Q. Other than your duties cooking, you were also a deck hand and you helped out?

A. Yes.

Q. Did you have to do any lifting or bending?

A. No, not really. Those guys really carried me on there, you know. Those guys knew my back was bothering me and they were carrying me. They were really doing my work for me. That's one of the reasons I got off before I started causing hard feelings.

Q. Was that from the first time you went on?

A. Yes, I went on there -- they were fluking at first. It's very easy work and Harold does a lot of that so I thought I could still be able to fish and work there. I thought I would be able to hang out there.

Q. You say they knew you had a back problem. Was it

that you assumed they knew because you weren't able to work?

A. I should say I assumed. I knew they saw me put this thing on before we went out to deck, to haul back, I put this thing on. It was just held by Velcro and you know, they didn't -- they [k]new my back hurt. They definitely knew my back hurt me.

. . .

Q. So, would it be fair to say that when you started, your back was bothering you but you thought maybe it would get better?

A. Yes, that's right, that's correct.

Q. And it never did?

A. It never did.

Q. When you left the Minterse, how did your back feel?

A. It hurt.

Q. Did it hurt constantly or was it just when you moved a certain way?

A. Yes, it was hurting constantly, you know. We started whiting fishing and I couldn't handle that. See, when we were fluking it was all right. You can just go up and pick up a few fish and go back inside and play cards, eat, whatever you wanted to do. When we were whiting fishing, we were standing out on deck all day long, picking fish, working, pulling totes of fish around, and then that's when it really caught up to me and I realized my back wasn't getting any better.

Finally, after plaintiff stopped fishing on the Min Terse, he saw a second doctor who correctly diagnosed his injury as a herniated or ruptured disc and advised him not to return to work.

DISCUSSION

The law is well settled that summary judgment will only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(c); Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); Bank of New York v. Hoyt, 617 F. Supp. 1304, 1307 (D.R.I. 1985). After a careful review of the facts and law relevant to the motion sub judice, this Court concludes that there is a genuine issue as to a material fact and, furthermore, that defendant Loftes is not entitled to judgment as a matter of law. Therefore, the motion for summary judgment must be denied.

The United States District Court for the Eastern District of Louisiana has clearly enunciated the standard for determining whether a seaman is entitled to receive payments for maintenance and cure from an employer. The standard as set forth by that Court is as follows:

A vessel owner is obligated to furnish a seaman with maintenance and cure benefits with respect to an injury or illness that occurs or manifests itself while the seaman is in the service of the vessel. The origin or cause of the disability, the fact that it pre-existed the voyage, originated on another vessel, or even was due to the fault of another vessel are all irrelevant. Meade v. Skip Fisheries, Inc., 385 F. Supp. 725 (D. Mass. 1974) and cases cited therein. As long as a seaman believes in good faith that he is fit for duty, he is entitled to maintenance and cure from his present employer notwithstanding that he falls ill from a pre-existing illness.

Gauthier v. Crosby Marine Service, Inc., 499 F. Supp. 295, 299 (E.D. La. 1980), modified, 536 F. Supp. 269 (E.D. La. 1982) (emphasis added). See also, Burkert v. Weyerhaeuser Steamship Company, 350 F.2d 826, 831 (9th Cir. 1965) (proper standard . . . is whether the seaman, in good faith believed himself fit for duty

when he signed aboard for duty); Dragich v. Strika, 309 F.2d 161, 163-4 (9th Cir. 1962) (even in cases where the Libelant was suffering from a pre-existing illness, the courts have granted maintenance and cure unless it could be shown that the seaman knowingly or fraudulently concealed the illness from the shipowner); Lorensen v. Jenney Manufacturing Company, 155 F. Supp. 213, 214 (D. Mass. 1957) (spontaneous disclosure of past medical history or events is required only when, in the opinion of the seaman, the shipowner would consider them matters of importance).

In order to defeat a motion for summary judgment, the party opposing such motion must establish the existence of an issue of fact which is both "genuine" and "material". Hahn, 523 F.2d at 464. "To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" Id. (citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)). Although, for the purposes of this motion, the basic facts as set forth in plaintiff's deposition testimony are not in dispute, a key ultimate issue of fact is very much in controversy. That issue is, did plaintiff have a good faith belief that he was fit for duty when he accepted employment on the Min Terse?

It is clear from plaintiff's deposition testimony that he was not aware of the extent of his injuries when he returned to work on the Old Colony and when he secured his employment on the Min

Terse. Up until the time that he left the Min Terse, plaintiff had only seen one doctor, Dr. Chamorro. Dr. Chamorro examined him and told him that he had a pinched nerve and that he could probably go back to work after resting for one month. Plaintiff followed the doctor's instructions and returned to work a month later.

After returning to work on the Old Colony, plaintiff continued to experience a great deal of pain in his back, and, therefore, soon left that vessel to go to work on the Min Terse. He stated that although his back was still bothering him when he went to work on the Min Terse, he thought that he would be able to handle the work. In fact, plaintiff was able to handle the work while the vessel was fishing for fluke. However, when the Min Terse began fishing for whitefish, the work became more strenuous and plaintiff was unable to continue.

Defendant asserts that drawing all reasonable inferences and viewing the record in the light most favorable to plaintiff, the record does not suggest that plaintiff believed in good faith that he was fit for duty on the Min Terse. Plaintiff obviously disagrees. This Court concludes that there is sufficient evidence to support a finding of good faith. The Court, therefore, opines that there is a genuine issue of material fact which precludes the granting of defendant's motion for summary judgment.

Defendant Loftes also asserts that he is not liable to plaintiff for maintenance and cure because his injury did not manifest itself while he was in the service of the Min Terse. Defendant attempts to substantiate this conclusion by stating that

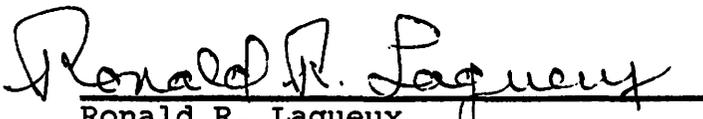
plaintiff was already in pain when he signed on the Min Terse and that the pre-existing pain remained at a constant level until he left the vessel. Clearly, the evidence before this Court at the moment is to the contrary. Although plaintiff was in pain, he was able to work on the Min Terse while it was fishing for fluke. When the boat began fishing for whitefish, however, the pain increased and he had to leave the vessel. It is obvious from the deposition testimony of plaintiff that he was suffering from an injury while he was on the Min Terse and that the injury manifested itself during the course of that employment. Clearly, on those facts, defendant Loftes would not be entitled to summary judgment as a matter of law.

If, after trial, defendant Loftes is found liable to plaintiff for maintenance and cure for his period of disability commencing June 6, 1988, an issue will arise as to the apportionment of liability between Loftes and co-defendant, the Kyle II. That issue also will be resolved at trial, if necessary.

CONCLUSION

For the above reasons, the motion of defendant Loftes for summary judgment is denied.

It is so Ordered.



Ronald R. Lagueux
United States District Judge

12/15/89
Date