JORDY ROUSSE	*	**NO. 2017-CA-0585**
VERSUS	*	
		COURT OF APPEAL
UNITED TUGS, INC.	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 61-674, DIVISION "A"
Honorable Kevin D. Conner, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

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APPEAL CONVERTED TO WRIT;
WRIT GRANTED; RELIEF DENIED

DECEMBER 20, 2017

In this maritime personal injury case, plaintiff/appellant, Jordy Rousse ("Rousse"), appeals the district court's April 19, 2017 judgment granting the motion for partial summary judgment filed by defendant/appellee, United Tugs, Inc. ("United"), and dismissing Rousse's claims for maintenance and cure. For the reasons that follow, we convert the appeal to an application for supervisory writ, grant the writ application, and deny relief.

On May 15, 2014, Rousse injured his back in a work-related accident while performing his duties as a deckhand aboard a vessel owned by United, his employer. On September 19, 2014, Rousse filed a petition for damages against United, alleging claims arising under the Jones Act, General Maritime Law, and the saving to suitors clause. United paid Rousse maintenance and cure following his accident, during which time Rousse underwent two lumbar spine surgeries.

On February 14, 2017, United filed a motion for partial summary judgment raising a *McCorpen* defense. United argued that, pursuant to *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547, 548 (5th Cir. 1968),[1] Rousse is precluded from receiving maintenance and cure because he concealed from his employer a pre-existing medical condition. United contended that, on October 10, 2013, prior to hiring Rousse, United required Rousse to undergo a pre-employment physical and complete a prior medical history questionnaire form. When completing the form,

[1] As discussed in this opinion, under *McCorpen v. Cent. Gulf S.S. Corp.,* 396 F.2d 547, 548 (5th Cir.1968), an injured seaman is not entitled to maintenance and cure where he knowingly or fraudulently conceals his preexisting illness from his employer and there is a causal link between the preexisting disability that was concealed and the disability incurred during the voyage.

Rousse failed to disclose prior back injuries and medical treatment for prior back complaints.

On April 19, 2017, the district court granted partial summary judgment and dismissed Rousse's claims against United for maintenance and cure. This appeal followed. Rousse sets forth a single assignment of error on appeal, contending that the district court erred in granting partial summary judgment.

Before we discuss the judgment in question, we must first address whether this court has appellate jurisdiction to review this matter. The district court judgment dismissed some, but not all, of Rousse's claims against United. Specifically, the judgment only dismissed Rousse's claims for maintenance and cure, but certain other claims against United, including claims of negligence and unseaworthiness, remain set for trial on the merits. Accordingly, the April 19, 2017 judgment is a partial judgment within the ambit of La. C.C.P. art. 1915(B), which provides:

> (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.
>
> (2) In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

The district court did not designate the judgment as final for the purpose of an immediate appeal; thus, this is not a final, appealable judgment, and this Court lacks appellate jurisdiction to review the judgment.

"The proper procedural vehicle to seek review of an interlocutory judgment that is not immediately appealable is an application for supervisory writ." *Delahoussaye v. Tulane Univ. Hosp. & Clinic*, 2012-0906, 12-0907, p. 4 (La. App. 4 Cir. 2/20/13), 155 So.3d 560, 562 (citing La. C.C.P. art. 2201). "[T]he difference between supervisory jurisdiction and appellate jurisdiction is that the former is discretionary on the part of the appellate court while the latter is invocable by the litigant as a matter of right." *Livingston Downs Racing Ass'n, Inc. v. La. State Racing Comm'n*, 96-1215, p. 3 (La. App. 4 Cir. 6/5/96), 675 So.2d 1214, 1216.

When confronted with a judgment in an appellate context that is not final and appealable, this Court is authorized to exercise its discretion to convert that appeal to an application for supervisory review. *See Stelluto v. Stelluto*, 2005-0074, p. 7 (La. 6/29/05), 914 So.2d 34, 39 ("the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts"). This Court has in similar circumstances ordinarily but not necessarily "converted 'appeals' of non-appealable judgments to applications for supervisory writs in those cases in which the motions for appeal were filed within the thirty-day period allowed for the filing of applications for supervisory writs." *Favrot v. Favrot*, 2010-0986, p. 6 (La. App. 4 Cir. 2/9/11), 68 So.3d 1099, 1104. *See also* Uniform Rules, Courts of Appeal, Rule 4–3.

Here, the judgment was signed on April 19, 2017, and the motion for appeal was filed on May 2, 2017, which is within the thirty-day time period allowed for the filing of an application for supervisory writ. We thus exercise our discretion and convert the instant appeal to an application for supervisory writ. *See, e.g., Zeigler v. Hous. Auth. of New Orleans (HANO)*, 2015-0626, pp. 3-4 (La. App. 4 Cir. 3/23/16), 192 So.3d 175, 178.

Courts of appeal review a grant of a motion for summary judgment *de novo* using the same criteria district courts consider when determining if summary judgment is proper. *Kennedy v. Sheriff of E. Baton Rouge*, 2005-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686 (citations omitted). The summary judgment procedure is favored in Louisiana. La. C.C.P. art. 966(A)(2).

"After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). Regarding the burden of proof on summary judgment, La. C.C.P. art. 966(D)(1) states:

> The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

The Louisiana Supreme Court has explained our state courts' "concurrent" subject matter jurisdiction in maritime cases as follows:

> As a general proposition, maritime law in the United States is federal law. This proposition is based upon Article III, § 2, cl. 1 of the United States Constitution, which provides that the federal judicial power "shall extend ... to all Cases of admiralty and maritime Jurisdiction."
>
> Notwithstanding, federal-court jurisdiction over maritime cases has not been entirely exclusive. Section 1333(1) of Title 28 of the United States Code, which is the successor to the Judiciary Act of 1789, bestows upon the federal district courts "original jurisdiction, exclusive of the courts of the States," of admiralty and maritime cases, "*saving to suitors in all cases all other remedies to which they are otherwise entitled*." The emphasized language, commonly referred to as the "saving to suitors" clause, has been interpreted as giving states the concurrent power to hear *in personam* admiralty cases. Thus, a maritime plaintiff may elect to pursue his *in personam* action in either state or federal court.
>
> Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. [footnote omitted] However, they may adopt such remedies, and attach to them such incidents as they see fit, so long as they do not attempt to make changes in the substantive maritime law. [footnote omitted]

Milstead v. Diamond M Offshore, Inc., 95-2446, pp. 6-7 (La. 7/2/96), 676 So.2d 89, 93-94 (internal citations omitted)(emphasis in original).

The matter before this Court requires us to determine whether Rousse has forfeited his entitlement to receive maintenance and cure. "A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis v. Lewis & Clark Marine Inc.*, 531 U.S. 438, 441 (2001). In *McCorpen*, the U.S. Fifth Circuit Court of Appeals held that an employer's obligation to pay maintenance and cure is eliminated if a seaman intentionally conceals or fails to disclose past

illness or injury to an employer who required the seaman to submit to a pre-hiring medical examination or interview. 396 F.2d at 548-49. We recognize that the *McCorpen* defense arises from jurisprudence of the U.S. Fifth Circuit, which has neither been adopted nor rejected by the U.S. Supreme Court and has not been codified in a federal statute.[2]

"In matters involving federal law, state courts are bound only by decisions of the United States Supreme Court. Federal appellate court decisions are persuasive only." *Shell Oil Co. v. Sec'y, Revenue & Taxation*, 96-0929, p. 9, n. 11 (La. 11/25/96), 683 So.2d 1204, 1210 (citations omitted). "Federal appellate decisions will not be followed in the face of positive jurisprudence of the Supreme Court of Louisiana to the contrary." *Id.*, 96-0929 at p. 9, 683 So.2d at 1210. Nonetheless, as federal appellate decisions are persuasive authority, "we review those opinions carefully to see if they provide further guidance for our analysis." *FIA Card Servs., N.A. v. Weaver*, 2010-1372, p. 7 (La. 3/15/11), 62 So.3d 709, 714. Likewise, federal district court decisions are not binding on this Court, but we may find their "rationale persuasive and concur with [their] conclusions." *Houston v. Avondale Shipyards, Inc.*, 506 So.2d 149, 150 (La. App. 4th Cir. 1987).

[2] There is a split among the federal circuit courts of appeal as to what non-disclosures regarding prior injuries result in a seaman's forfeiture of maintenance and cure. The U.S. Third, Fourth, Eighth, and Ninth Circuits each apply a standard similar to the *McCorpen* defense. *See Deisler v. McCormack Aggregates Co.*, 54 F.3d 1074, 1081 (3d Cir. 1995); *Evans v. Blidberg Rothchild Co.*, 382 F.2d 637 (4th Cir. 1967); *Wactor v. Spartan Transportation Corp.*, 27 F.3d 347, 352 (8th Cir. 1994); *Tawada v. United States*, 162 F.2d 615 (9th Cir. 1947). The U.S. Second Circuit has rejected the *McCorpen* defense, holding that a seaman "who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health." *Sammon v. Cent. Gulf S. S. Corp.*, 442 F.2d 1028, 1029 (2d Cir. 1971)(quoting *Ahmed v. United States*, 177 F.2d 898, 900 (2d Cir. 1949)).

The Louisiana Supreme Court has never addressed the question of whether the *McCorpen* defense is viable in Louisiana. The only reported case, in which the Louisiana Fourth Circuit specifically examined and applied the *McCorpen* defense, was reversed by the Louisiana Supreme Court, which summarily found that the district court was "not clearly wrong" and reinstated the district court's judgment, without ascribing further reasons. *See Pichon v. Ocean Drilling & Expl. Co.*, 617 So.2d 38 (La. App. 4th Cir. 1993), *writ granted, judgment rev'd,* 619 So.2d 536 (La. 1993). Most recently, in *Cotton v. Delta Queen Steamboat Co.*, 2009-0736, pp. 11-12 (La. App. 4 Cir. 1/6/10), 36 So.3d 262, 270, this Court found no cause of action for an employer seeking *restitution* of maintenance and cure already paid to a seaman, where the district court denied cure as to certain physicians, finding that partial summary judgment was "supported by the *McCorpen* decision."[3]

Regarding other Louisiana state courts of appeal, the Louisiana Fifth Circuit has adopted and applied the *McCorpen* defense. *See, e.g., Hernandez v. Bunge Corp.*, 2001-1201 (La. App. 5 Cir. 4/10/02), 814 So.2d 783, *writ denied*, 2002-1551 (La. 9/30/02), 825 So.2d 1193. The First and Third Circuits have considered and examined the *McCorpen* defense, though in the particular cases at bar, those courts found the respective employers had not met their burdens of proof under the defense. *See, e.g., Folse v. Gulf Tran, Inc.*, 2003-0758 (La. App. 1 Cir. 2/23/04), 873 So.2d 718; *Greaud v. Acadian Towboats, Inc.*, 628 So.2d 52 (La. App. 1st Cir. 1993); *LaPrarie v. Hercules Offshore Corp.*, 2001-1193 (La. App. 3 Cir. 2/6/02),

[3] The prior judgment of the district court, which relied had on *McCorpen*, was not reviewed on appeal and was not before the Court. *Id.*, 2009-0736 at p. 11, n. 9, 36 So.3d at 270.

817 So.2d 149. We have found no reported case of this State specifically rejecting or declining to follow *McCorpen* in any maritime claim filed in a Louisiana state court. Accordingly, we find *McCorpen* persuasive authority. We now address the merits of United's *McCorpen* defense.

The U.S. Fifth Circuit set forth three elements an employer or shipowner must prove to establish a *McCorpen* defense: (1) the seaman intentionally misrepresented or concealed facts; (2) the omitted facts were material to the employer's hiring decision; and (3) a causal connection between the prior injury or ailment and the present injury in the complaint. 396 F.2d at 548-49. *See also Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 174 (5th Cir. 2005).

Rousse argues that the district court erred in granting summary judgment, as he disputes that any of the elements of the *McCorpen* defense were satisfied. He contends that genuine issues of material fact exist as to whether his non-disclosure of prior back complaints was intentional; whether the non-disclosed back complaints were material to United's hiring decision; and whether there is any link between his prior back complaints and his current injury.

With respect to the first element of intentional concealment, Rousse argues that his subjective intent and language contained in United's pre-employment medical questionnaire form create factual disputes for trial. Specifically, Rousse contends that, at the time he completed the form, he had no current back pain and did not think that any of his prior injuries were "significant." The form at issue contained the following instruction:

> ATTENTION: YOU MUST ANSWER TRUTHFULLY REGARDING THE BELOW MEDICAL CONDITIONS. FAILURE TO ANSWER TRUTHFULLY WILL RESULT IN IMMEDIATE TERMINATION AND FORFEITURE OF WORKERS COMPENSATION BENEFITS AND FORFEITURE OF MAINTENANCE AND CURE.
>
> Circle Y for YES and N for NO if you currently have the following symptoms or have *significantly* in the past. Describe any "yes" at bottom.

(Emphasis added). Below the instruction, the form listed a series of medical conditions. There is no dispute that Rousse completed the form and answered N to all conditions, including "Injured back/back pain," "Recurrent neck/back pain," "Ruptured/herniated disc," "Difficulty walking/climbing," "Sciatica or nerve pain," "Numbness/paralysis," "MRI, CT scan, discogram or myelogram," and "Injury or illness which required loss time from work." There is also no dispute that United required Rousse to submit to a pre-hiring medical examination and to complete the medical questionnaire form at issue.

In its reasons for judgment, the district court provided a summary of the medical records introduced by United, documenting Rousse's prior lower back complaints, as follows:

> Medical records produced by United show that plaintiff [Rousse] underwent lumbar spine x-rays at age 16 in November, 2002 when he experienced lower back pain. At that time he was diagnosed with "probable spondylolisthesis of L5 on SI." On November 18, 2004, while working as a stock clerk, plaintiff visited an emergency room following a work related injury. On that occasion plaintiff reported to hospital staff that he had attempted to catch a co-worker who fell off of a ladder. He described pain in his lower back and numbness in his legs. Plaintiff further reported that his medical history included a "bulging L5-birth defect-sacral fracture." Following an automobile accident in November, 2004, plaintiff was treated at an emergency room for injuries to his head, right shoulder, and low back. He told hospital staff that he had lost consciousness at the time of the collision. As part of his medical history he reported a fracture of his

lower back. On that occasion plaintiff underwent a CT scan of his head and x-rays of his neck and low back. The radiologist's notes read "loss of normal lordosis with straightening and kyphosis of the [cervical] spine, nonspecific." For the lumbar spine, the radiologist noted, "Grade I anterolisthesis of L5 on SI likely congenital as this is similar to September 18th of 2004." In September, 2006, plaintiff was treated at an emergency room following a physical altercation. He reported to hospital staff that he sometimes took Xanax and Lortab for back problems.

On three separate dates in July, 2012, while working for another towing company, plaintiff sought treatment at Complete Occupational Health Services for low back pain that radiated to his legs. He reported that he felt a pull in his back while lifting a box. This was the same medical facility where plaintiff would later undergo his pre-employment physical for United. On July 24, 2012, plaintiff completed a form listing 88 medical conditions. He was instructed to circle the symptoms he had experienced. He indicated yes to injured hip; back surgery/injury; recurrent neck/back pain; difficulty walking/climbing; numbness/paralysis; and MRI, CT scan, discogram or myelogram. Plaintiff noted that "[a]ll my yes answers started 8 days ago." Plaintiff reported that he was taking "Hydroco/APAP" and that he used the medication for pain. He related that he experienced this type of back pain two to three times a year, and it normally resolved within two to three days. The diagnosis on this occasion was acute myofascial strain, acute low back pain, and sciatica. The clinic released plaintiff to return to work on July 30, 2012.

When plaintiff returned to Complete Occupational Health Service on October 10, 2013 for his pre-employment examination, he was given the same type of form as the one he had completed in July, 2012. This time he did not note any of his prior back problems. But when he was treated at Terrebonne General Medical Center on May 15, 2014 for alleged injuries sustained in the accident that is the subject of the instant lawsuit, plaintiff told medical staff that for five weeks he had suffered left low back pain radiating down his left leg, and that the pain worsened that day when he stepped off of a barge at work. Plaintiff reported that he had suffered similar episodes in the past.

The *McCorpen* decision explained that in "cases involving a pre-existing illness or other disability, the courts have made a distinction between nondisclosure and concealment." 396 F.2d at 548. "Where the shipowner does not require a pre-employment medical examination or interview, the rule is that a

seaman must disclose a past illness or injury only when in his own opinion the shipowner would consider it a matter of importance." *Id.* at 548-49. "On the other hand, where the shipowner requires a seaman to submit to a pre-hiring medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then he is not entitled to an award of maintenance and cure." *Id.* at 549.

The U.S. Fifth Circuit in *Brown v. Parker Drilling Offshore Corp.* held that "[t]he 'intentional concealment' element does not require a finding of subjective intent." 410 F.3d at 174 (quoting *Vitcovich v. Ocean Rover O.N.*, No. 94-35047, 106 F.3d 411, 1997 WL 21205, at *3 (9th Cir. Jan. 14, 1997)). "Rather, it refers to the rule that a seaman may be denied maintenance and cure for failure to disclose a medical condition only if he has been asked to reveal it." *Id.* "Failure to disclose medical information in an interview or questionnaire that is obviously designed to elicit such information therefore satisfies the 'intentional concealment' requirement." *Id.* The *Brown* court rejected an injured seaman's argument that he did not consider any prior back strain or muscle pulls to be "back injuries" when confronted with the question on an employment application. 410 F.3d at 175.

In *Wimberly v. Harvey Gulf Int'l Marine, LLC*, 126 F. Supp. 3d 725, 732 (E.D. La. 2015), the federal district court for the Eastern District of Louisiana considered a pre-employment medical history form containing the same instruction, using the "significantly" language of which Rousse complains. Relying on *Brown*, the *Wimberly* court rejected the seaman's argument and found that

subjective intent was not material to the "intentional concealment" element. *Id.* at 731-32. The court found that the plaintiff downplayed his past medical history and that this was evidence of objective intent to conceal. *Id.* at 732. *See also Ladnier v. REC Marine Logistics, L.L.C.*, No. 14-1278, 2015 WL 3824382, at *4 (E.D. La. June 19, 2015)(addressing the same instruction and adopting *Brown*'s holding that intentional concealment does not require a finding of subjective intent). We are persuaded by the reasoning in these cases. Here, the record is clear that Rousse complained of lower back pain and sought medical treatment for those complaints dating back to 2002; he did not, however, disclose this medical information to United on the medical questionnaire form that United required him to complete. Thus, we find that the intentional concealment element is satisfied, and Rousse's argument without merit.

We next turn to the second element of materiality. In *Brown*, the U.S. Fifth Circuit held that "[t]he fact that an employer asks a specific medical question on an application, and that the inquiry is rationally related to the applicant's physical ability to perform his job duties, renders the information material for the purpose of this analysis." 410 F.3d at 175.

Rousse argues that United failed to establish that any concealed facts were material to United's hiring decision. United supplied an affidavit of its president, Emmett Michel Eymard, who attested that if Rousse had accurately disclosed his prior medical history of back problems, United would not have hired Rousse without further medical evaluation, medical records review, and functional testing

to determine whether Rousse could perform the duties of a deckhand. Eymard attested that, as president, he set forth hiring policies and procedures relating to Rousse. Eymard further attested that United requires all prospective employees to complete the medical questionnaire form, and United uses the form "to have prospective employees disclose medical conditions and facts material to the ultimate decision whether or not to hire an employee." According to the affidavit, the form was "designed to form part of an overall assessment whether Jordy Rousse was physically capable of performing work of a deckhand on ocean going tugs operated by United Tugs." The affidavit stated that the "job of a deckhand at United Tugs is not a sedentary job and requires a certain level of physical activity" and listed numerous physical job duties of a deckhand.[4] Rousse did not submit any evidence to refute the affidavit.

Rousse contends that Eymard's affidavit is insufficient because Eymard failed to attest that Rousse would *not* have been hired had United known about the prior back complaints. Rousse cites to *Cal Dive Int'l, Inc. v. Grant*, No. 11-1657,

[4] According to Eymard's affidavit, the duties of a deckhand at United include:

a. "Making up the tow"
b. "Dropping, spotting and switching barges at docks"
c. "Assisting the vessel and tow in making locks"
d. "Standing lookout, or riding the head of the two as a lookout"
e. "Performing the various tasks necessary to carry out the above, such as making a coupling, operating winches and ratchets, and line handling, including splicing and throwing lines"
f. "Chipping and painting vessel"
g. "Other equipment maintenance as needed"
h. "Cleaning or scouring the boat"
i. "Cleaning quarters, including personal quarters"
j. "Cleaning the wheelhouse and galley"
k. "Cleaning the heads and companionways"
l. "Maintaining the barge, grease winches, dogs on hatch covers, etc."
m. "Dewatering the barge as necessary; and"
n. "Performing other cleaning chores as directed by the Master".

2013 WL 1099157, at *5 (E.D. La. March 15, 2013), in which the court found genuine issues of material fact as to the materiality prong where the employer submitted an affidavit that disclosure would have "materially affected Cal Dive's decision to hire her"; that the plaintiff "would have been sent for further evaluation and testing" and "[b]ased on the results of that testing, a determination on providing reasonable accommodations to allow her to perform the essential functions of her position safely would be made"; and that "[i]f no reasonable accommodations can be made, then she would not have been hired."

In Rousse's case, however, Eymard's affidavit contains no attestation that any reasonable accommodations were available to afford Rousse's potential hiring, in the event that Rousse had disclosed his prior back condition to United. We find Eymard's affidavit more similar to the employer's "declaration" discussed in *Dennis v. ESS Support Servs. Worldwide*, No. 15-690, 2016 WL 3689999, at *5 (E.D. La. July 12, 2016). In *Dennis*, the employer set forth a list of job requirements of the position and attested that had the plaintiff disclosed his prior injury, the employer would have required the plaintiff to produce additional medical records and undergo further testing and evaluation before reaching a decision to hire him. *Id.* The court rejected the plaintiff's argument that the employer would have hired him regardless and provided him with reasonable accommodations, and the court found no genuine issues of material fact as to the materiality prong. *Id.* We are persuaded by the reasoning provided in *Dennis* and *Brown*. Importantly, here, Rousse has not produced any evidence to refute

Eymard's affidavit. We find the materiality element is met, and Rousse's argument is without merit.

Lastly, we turn to the third element, causal connection. Rousse argues that his pre-accident and post-accident injuries are not similar and that no connection between these injuries exists. He also contends that his pre-injury medical records show no previous injury at the L3-4 or L4-5 levels of the spine; a post-accident lumbar MRI, however, showed a disc bulge at L3-4 and herniation at L4-5. United argues that the link between the prior injuries and present injury is satisfied because the prior and new injury affected the same body part – the lower back – and Rousse complained of the same symptoms, namely, low back pain radiating into his legs with numbness and tingling.

Brown stated:

> …[The employer] need not prove that the prior injuries are the sole causes of the herniation. It need only show a *causal relationship* between the prior injuries and the herniation. "[T]here is no requirement that a present injury be identical to a previous injury. All that is required is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage." *Quiming v. Int'l Pac. Enters., Ltd.*, 773 F.Supp. 230, 236 (D.Haw.1990) (*citing McCorpen*, 396 F.2d at 549.)

410 F.3d at 176 (emphasis in original). "'[W]here plaintiff claims an injury in the exact same area of the back as was previously injured, the causal connection is clear.'" *Id.* (quoting *Weatherford v. Nabors Offshore Corp.*, No. 03-0478, 2004 WL 414948, at *3 (E.D. La. March 3, 2004)).

In *Brown*, the plaintiff's expert witness acknowledged that plaintiff's prior back strains were in the same lumbar spine region as his current back condition, a

herniated disc. 410 F.3d at 176. The fact that the injuries were in the same location was considered sufficient for a causal connection. *Id.* The *Brown* court cited to *Weatherford*, 2004 WL 414948 at *3, which found an "obvious causal connection" between the plaintiff's previous and current injuries because the plaintiff had admitted to concealing a prior injury to his lower back, and his current claim included an allegation of a "sharp, stabbing pain" in his lower back.

Likewise, in *Wimberly*, 126 F. Supp. 3d at 734-35, the plaintiff complained of a current injury of "'moderate degenerative disc disease and spondylosis at the L4-5 and L5-S1 levels with central annular tear at both levels ... [and] chronic-appearing moderate T12 compression [fracture]…'" Prior to this injury, the plaintiff's history of back problems consisted of complaints of "lower back pain," "back pain," "back sprain," "lower back sprain," and diagnosis of an "L1 vertebral body wedge compression fracture of unknown age." *Id.* at 734. Relying on *Brown*, the court found that "[w]hile the compression fracture and the reports of back strains are not 'identical' to Wimberly's current disc injury, the location of his past issues of back pain and injuries coincide the previous injuries to the lower back area. The prior compression fracture and muscle sprains need not be the sole cause of the disc herniation to establish the causal link." *Id.* at 734-35 (citing *Brown*, 410 F.3d at 176). Rather, a "causal relationship exists when the prior injury is located on the same body part as the present injury." *Id.* at 735. *See also LeBlanc v. LA Carriers, LLC*, No. 15-1657, 2016 WL 1268342, at *7-9 (E.D. La. Mar. 31, 2016)(collecting cases)(finding no genuine issue of material fact as to causal

connection and rejecting plaintiff's argument that "the conditions need to be identical or at least cause similar symptoms").

In contrast, *Dennis* demonstrated that a genuine issue of material fact existed as to a causal link between a prior "high ankle" fracture and a subsequent work-related "low ankle" injury. 2016 WL 3689999 at *5. There, physicians testified to conflicting opinions of whether the subsequent injury aggravated the prior injury, and the court determined that the existence of a causal connection was an issue for trial in order to weigh credibility of expert witnesses. *Id.*

In the matter before us, Rousse has not introduced evidence of any physician's opinion that his prior and current back conditions are unrelated. Rather, Rousse comes forward with his interpretation of his medical records to argue that his old and new injuries are not similar. Nevertheless, there is no question that Rousse's prior injuries, as well as the injury in litigation, are to the lower back. Under the standard set out in *Brown*, *Weatherford*, and *Wimberly*, the causal connection element is met by the fact that all injuries were to the same body part. Again, we find these cases persuasive. We are not guided by *Dennis* with respect to the causal connection element because the record herein lacks any conflicting physician opinions as to the relationship between Rousse's current and past back complaints.[5] Thus, we find the causal connection element satisfied, and we find Rousse's position without merit.

[5] *Parker v. Jackup Boat Serv., LLC*, 542 F. Supp. 2d 481 (E.D. La. 2008), cited by Rousse, is distinguishable because the employer therein failed to submit any medical evidence of prior or current treatment for plaintiff's neck injury in support of its motion summary judgment. *Jenkins v. Aries Marine Corp.*, 590 F. Supp. 2d 807 (E.D. La. 2008) is likewise distinguishable because no evidence of medical treatment for a prior head injury was introduced in support of the

For the reasons stated above, we find that the district court properly granted partial summary judgment in favor of United, dismissing Rousse's claims for maintenance and cure. Accordingly, we convert the instant appeal to a writ application, exercise our supervisory jurisdiction to grant the writ application, and deny relief from the April 19, 2017 judgment of the district court.

employer's motion for summary judgment. *Johnson v. Cenac Towing, Inc.*, 599 F. Supp. 2d 721, 734 (E.D. La. 2009) is also not instructive as the particular issue before the district court, on remand from the U.S. Fifth Circuit, was whether the plaintiff was contributorily negligent. Rousse acknowledges in his brief that the remaining cases he cites regarding the causal connection element are those in which the employer prevailed on that issue.

APPEAL CONVERTED TO WRIT;
WRIT GRANTED; RELIEF DENIED