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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PERRY A. WARD,

Plaintiff,

v.

EHW CONSTRUCTORS, et al.,

Defendants.

CASE NO. C15-5338 BHS

ORDER GRANTING  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT AND GRANTING IN  
PART AND DENYING IN PART  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT

This matter comes before the Court on the summary judgment motions of Plaintiff Perry Ward ("Plaintiff") and Defendants EHW Constructors, American Bridge Company, J.V., Nova Group, Inc., and Skanska USA Civil Southeast, Inc. ("Defendants"). Dkts. 108, 109. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby (1) grants Defendants' motion for partial summary judgment and (2) grants in part and denies in part Plaintiff's motion for partial summary judgment.

**I. PROCEDURAL HISTORY**

On May 21, 2015, Plaintiff filed a complaint against Defendants *in rem* and *in personam* for personal injury. Dkt. 1. On June 22, 2015, Plaintiff filed an amended



1           The wharf project utilized a number of pieces of equipment. Among these were  
2 several floating structures, including the *Ringer II*, which was an un-crewed floating  
3 platform comprised of interlocking flexi-floats. The flexi-floats are a combination of  
4 portable, interlocking modular barges and ancillary attachments, designed for use in  
5 inland marine, heavy-construction applications, which, when connected, could reach  
6 several hundred feet in length. The group of flexi-floats comprising the *Ringer II* was  
7 held in place with anchors or “spuds” then maneuvered at the worksite either by tug or by  
8 deck wench. In addition to the flexi-floats, support skiffs were also used on the project  
9 to transport materials and laborers. These skiffs are flat-decked boats, approximately four  
10 feet wide and twelve feet in length with small, 90-horsepower motors. The skiffs were  
11 not used to move or reposition the flexi-float barges. *Id.* at 2–3.

12           On January 14, 2014, Defendants hired Plaintiff through Plaintiff’s local union for  
13 pile drivers. Plaintiff declares that he has been a pile driver for 36 years. Dkt. 30. The  
14 parties dispute the type of work Plaintiff performed and whether he qualifies as a seaman.  
15 Plaintiff contends that his “work was always completely out on the water, working on  
16 vessels doing the pile driving on piles out in the open, navigable waters.” *Id.* at 3.

17 Plaintiff further declares as follows:

18           All of the above [work] activities were . . . on vessels on the open  
19 waterway of Hood Canal, unattached to land, and in navigation for uses and  
20 purposes directly related to working on water. I was attached to/assigned to,  
21 on a continual basis, these vessels as for purposes of at-sea work and I  
22 never worked on land nor was I assigned to work on land. The vessel  
Ringer II was always at least 300 to 500 yards from shore, and the skiff  
would work in and around where the Ringer II was. None of my crew were  
ever even arguably considered to be longshore or State Workers  
Compensation participants and EHW never suggested or did anything other

1 than treat us as if we were crew members working together on vessels to  
2 accomplish the mission and function of those vessels. I have never received  
3 any benefits from any Longshore or State program and have never been  
4 processed under any of those programs.

5 *Id.* at 4–5.

6 Defendants contend that Plaintiff was part of a construction crew instead of a  
7 seaman. Steve Erickson, Defendants’ pile driving foreman, has declared as follows:

8 Two different types of crews worked on the project at Naval Base  
9 Kitsap-Bangor. One type of crew manned the vessels. This would include  
10 the vessel captains and deckhands. The other type of crew was a  
11 construction crew. The construction crews included crane operators,  
12 piledrivers, carpenters, and other laborers. The construction crews were  
13 responsible for the actual construction of the wharf. The wharf was an  
14 extension of land and while the construction crew utilized the crane barges  
15 and skiffs to complete their tasks, they were not assigned to operate or  
16 maintain the vessels.

17 In my role as Piledriver Foreman, I had the opportunity to work with  
18 Mr. Perry Ward. Both Mr. Ward and I were a part of the construction crew.  
19 All work performed by the crew on which I worked, including the work  
20 performed by Mr. Ward, was for the construction of the wharf.

21 Dkt. 52. Mr. Eskins has declared as follows:

22 All work performed by the crew on which Mr. Ward worked was for  
the construction of the wharf. Mr. Ward did not serve on the tug crews that  
were used to reposition the RINGER II or other equipment. Mr. Ward’s  
time on barges and skiffs was spent performing work constructing the  
Naval wharf.

To my recollection, Mr. Ward, as a piledriver, would spend  
approximately 80% of his time performing precast and setting work on the  
pilings for the wharf. This consisted of cutting off piles, using torches on  
the piles, and setting pile plugs. He also worked on setting pre-casts for the  
pilings on concrete. Mr. Ward spent 10 hours a day working for EHW  
Constructors. Of that time, approximately 15-30 minutes would be spent on  
Job Safety analysis meetings on the crane barges, 30 minutes would be  
spent for lunch on the barges, and 30 minutes would be spent on the barges  
for breaks. Mr. Ward would spend approximately another 30 minutes to an  
hour on the barges gathering materials for his precasting or performing  
preparation work on the pilings. All other times were spent on wharf

1 construction, and he would utilize floating platforms or a work skiff as a  
2 work platform to perform his tasks. Mr. Ward was not hired, or responsible,  
3 for piloting or maintaining the barges and tugs used by EHW Constructors  
4 on the project. On a rare occasion, he would guide crane operators on the  
5 use of winches to manipulate the crane barges. During those occasions, the  
6 barges were anchored.

7 Dkt. 50 at 3–4.

8 Plaintiff’s duties are further clarified in the depositions of Mr. Eskins and Mr.  
9 Erickson. These depositions clarify that a pile buck like Plaintiff would participate in the  
10 maintenance and operation of a skiff. Dkt. 110-6 at 7. Also, Plaintiff’s job as a pile buck  
11 consisted in large part of work performed “out of a boat or float” or operating and  
12 moving about on a skiff. Dkt. 110-3 at 6, 13; Dkt. 110-6 at 9–12.

13 It is undisputed that neither Plaintiff nor any other employee completed an injury  
14 report or a near-miss report. Moreover, the foreman’s daily report for the date in  
15 question, which was initialed by Plaintiff, states that Plaintiff was not injured on April 14,  
16 2014. Dkt. 50-3 at 12.

17 Plaintiff has declared that, after the incident, he attempted to work through the  
18 pain. This lasted until June 2014 when Plaintiff “had to quit working” because he “could  
19 no longer stand the pain from [his] injury.” Dkt. 30 at 2. Contrary to Ward’s contention,  
20 Defendants’ position is that Ward was terminated due to “a marked reduction in force and  
21 absenteeism.” Dkt. 53 at 3.

22 On July 1, 2014, Defendants formally terminated Plaintiff. *Id.* Judy Anderson,  
23 Defendants’ field administrator met with Plaintiff in person and processed his termination  
24 paperwork. Dkt. 53 at 4. The termination notice states that the reasons for termination

1 were reduction in force and lack of availability for work and was signed by Plaintiff. Dkt.  
2 53-2. Anderson recalls that Plaintiff was “going to work on his log business after he left  
3 EHW Constructors” and even provided Anderson with a business card, which shows  
4 Plaintiff as owner of Ape Log Creations. Dkt. 53-3. With regard to Plaintiff’s injury,  
5 Anderson declares as follows:

6           Mr. Ward did not mention anything to me about any pain from  
7 which he was suffering nor did he mention anything to me about any injury  
8 he suffered while working for EHW Constructors. He did not appear in any  
9 pain when I met with him. He was actually in a very amiable mood. He did  
10 not have any complaints with his reasons for termination. He did not seem  
11 to have any issue with leaving EHW Constructors, as he continued to  
12 discuss his log business. Had Mr. Ward complained of any need for  
13 medical care or any pain he was suffering, I would have sent him to our  
14 safety officers.

15 Dkt. 53 at 4.

16           On July 8, 2014, Plaintiff sought medical treatment for his work-related injuries  
17 with Dr. James M.T. Garrity, D.O. Plaintiff reported “pain radiating into his left upper  
18 extremity that is severe . . .” Dkt. 31-1. Dr. Garrity assessed a cervical sprain and  
19 recommended using Motrin for the pain as well as proceeding with an MRI. *Id.*

20           In early 2015, Plaintiff contacted the U.S. Department of Labor (“DOL”)  
21 regarding his injury. On February 3, 2015, the DOL contacted Defendants and informed  
22 them that Plaintiff had submitted a claim for compensation under the Longshore and  
23 Harbor Worker’s Compensation Act. Dkt. 30- 3. Defendants turned the claim over to  
24 their insurance carrier, Zurich. On February 16, 2015, Cynthia Schmidt, Zurich’s claim  
25 handler, sent a letter to Plaintiff regarding his claim stating that she had unsuccessfully  
26 tried to contact him on multiple occasions. *Id.* On February 18, 2015, Ms. Schmidt sent a

1 notice of controversion to the DOL explaining that Zurich “controverts the claim in its’  
2 [sic] entirety due to late reporting and due to no medical documentation to support an on-  
3 the-job injury.” Dkt. 55-1.

4 It appears that the first time Plaintiff raised his claim for maintenance and cure as  
5 a seaman occurred when he filed his complaint in this action on May 21, 2015, although  
6 there is no sworn testimony to this fact. *See* Dkt. 108 at 4. On January 27, 2016,  
7 Defendants instituted voluntary payments to Plaintiff for maintenance and cure, including  
8 back pay for maintenance to the date of Plaintiff’s alleged injury. Dkt. 41 at 2.

### 9 III. DISCUSSION

10 Defendants move for partial summary judgment on the issue of punitive damages.  
11 Dkt. 108. Plaintiff moves for summary judgment on the issue of his status as a seaman  
12 and some of Defendants’ affirmative defenses. Dkt. 109.

#### 13 A. Summary Judgment Standard

14 Summary judgment is proper only if the pleadings, the discovery and disclosure  
15 materials on file, and any affidavits show that there is no genuine dispute as to any  
16 material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ.  
17 P. 56(c). The moving party is entitled to judgment as a matter of law when the  
18 nonmoving party fails to make a sufficient showing on an essential element of a claim in  
19 the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*,  
20 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record,  
21 taken as a whole, could not lead a rational trier of fact to find for the nonmoving party.  
22 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving

1 party must present specific, significant probative evidence, not simply “some  
2 metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over  
3 a material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
4 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*  
5 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
6 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

7         The determination of the existence of a material fact is often a close question. The  
8 Court must consider the substantive evidentiary burden that the nonmoving party must  
9 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
10 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
11 issues of controversy in favor of the nonmoving party only when the facts specifically  
12 attested by that party contradict facts specifically attested by the moving party. The  
13 nonmoving party may not merely state that it will discredit the moving party’s evidence  
14 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
15 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
16 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
17 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

18         Finally, with regard to the burden of proof, “*where the moving party has the*  
19 *burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—*  
20 *his showing must be sufficient for the court to hold that no reasonable trier of fact could*  
21 *find other than for the moving party.*” *Calderone v. United States*, 799 F.2d 254, 259 (6th  
22



1 Cir. 1986) (citation omitted); *see also Southern Calif. Gas Co. v. City of Santa Ana*, 336  
2 F.3d 885, 888 (9th Cir. 2003).

3 **B. Defendants’ Motion for Summary Judgment on Punitive Damages**

4 Defendants move for summary judgment on punitive damages, arguing that  
5 Plaintiff cannot show that they engaged in a willful or wanton failure to satisfy  
6 obligations of maintenance and cure.

7 When a seaman is injured in the service of a vessel, the employer must pay  
8 maintenance and cure even where the employer is not at fault. *Barnes v. Sea Hawaii*  
9 *Rafting, LLC*, 983 F. Supp. 2d 1208, 1212 (D. Haw. 2013). An injured seaman may seek  
10 punitive damages against an employer “for the willful and wanton disregard of the  
11 maintenance and cure obligation.” *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404,  
12 424, 129 S. Ct. 2561, 2575, 174 L. Ed. 2d 382 (2009). “[A]n employer is entitled to  
13 investigate a claim for maintenance and cure before tendering any payments to the  
14 seaman—without subjecting itself to liability for compensatory or punitive damages.”  
15 *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723, 728 (5th Cir. 2013) (citing  
16 *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987)). But “[l]axness in  
17 investigating a claim that would have been found to be meritorious will subject a  
18 shipowner to liability for attorney’s fees and punitive damages.” *Rose v. Miss Pac., LLC*,  
19 3:09-CV-00306-ST, 2012 WL 75028, at \*8 (D. Or. Jan. 10, 2012) (quoting *Breese v.*  
20 *AWI, Inc.*, 823 F.2d 100, 104 (5th Cir.1987)).

21 Plaintiff first claimed that he was entitled to maintenance and cure when he filed  
22 his complaint. Defendants initially refused to pay maintenance and cure. To the extent

1 that Defendants contend they acted reasonably in delaying payment to investigate  
2 Plaintiffs claim, Plaintiff has presented sufficient evidence to suggest that Defendants  
3 were excessively “lax” in their efforts to investigate his alleged injury. Specifically, he  
4 indicates that he made multiple attempts to communicate with Defendants regarding his  
5 claim, including sending them medical information from his doctor, and that they were  
6 unresponsive. Therefore, if the legitimacy of Plaintiff’s injury was the only ground on  
7 which Defendants opposed maintenance and cure payments, the availability of punitive  
8 damages would properly be reserved for the finder of fact.

9       However, Defendants also oppose maintenance and cure payments on a theory that  
10 Plaintiff is not a seaman. “Refusal to pay maintenance and cure cannot be willful and  
11 wanton if it is based on a reasonable defense such as the seaman’s concealment of his  
12 medical condition.” *Rose*, 2012 WL 75028 at \*9 (citing *Brown v. Parker Drilling*  
13 *Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005). Indeed, “the willful, wanton and  
14 callous conduct required to ground an award of punitive damages requires an element of  
15 bad faith.” *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 90 (5th Cir. 1984).

16       In all the cases cited by the parties, and those reviewed in the Court’s own  
17 research, the Court is unable to find any analysis on whether punitive damages are  
18 available when an employer opposes maintenance and cure on the grounds that the  
19 employee is not a seaman. It appears that the Court is therefore facing an issue of first  
20 impression. To resolve this issue, in light of the above-cited authority, the Court will  
21 consider whether a rational juror could conclude that Defendants have acted in “bad  
22 faith” by contending that Plaintiff is not a seaman.

1           The Court has previously denied a motion for summary judgment by Plaintiff on  
2 the issue of his alleged seaman status. *See* Dkt. 67 at 8–10. As explained below, the Court  
3 does so again today. Based on the evidence presented by the parties, whether Defendant’s  
4 duties qualified him as a seaman substantially connected to *Ringer II* is an issue upon  
5 which reasonable minds could differ, thereby rendering Plaintiff’s seaman status an issue  
6 for the jury. *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916, 920 (9th Cir. 1999) (“[I]f  
7 reasonable persons, applying the proper legal standard, could differ as to whether the  
8 employee was a ‘member of the crew,’ it is a question for the jury.”) (quoting *McDermott*  
9 *Int’l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). Because reasonable minds could differ  
10 on whether Plaintiff’s duties rendered him a seaman, no rational juror could find that  
11 Defendants’ opposition to maintenance and cure was in bad faith. Therefore, the Court  
12 grants Defendants’ motion for summary judgment and finds that punitive damages are  
13 unavailable for Defendants’ allegedly wrongful refusal to pay maintenance and cure.

#### 14       **C. Plaintiff’s Motion for Summary Judgment**

##### 15           **1. Seaman Status**

16           To the extent Defendants oppose maintenance and cure on the theory that Plaintiff  
17 is not a seaman, the only question remaining is whether Plaintiff’s connection to the  
18 *Ringer II* was substantial in both nature and duration. *See* Dkt. 67 at 8–10.

19           “[T]he purpose of the substantial connection test is to separate land-based workers  
20 who do not face the perils of the sea from sea-based workers whose duties necessarily  
21 require them to face those risks.” *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289,  
22 1293 (9th Cir. 1997). To satisfy this test, “[i]t is not necessary that a seaman aid in

1 navigation or contribute to the transportation of the vessel, but a seaman must be doing  
2 the ship's work." *Wilander*, 498 U.S. at 355. "[T]he court should focus on whether the  
3 employee's duties are 'primarily sea-based activities' in determining whether the nature  
4 of the connection to the vessel is substantial." *Scheuring v. Traylor Bros., Inc.*, 476 F.3d  
5 781, 786 (9th Cir. 2007). The Supreme Court has considered the substantial connection  
6 test in a more general sense, asking whether employees "owe their allegiance to a vessel  
7 and not solely to a land-based employer." *Wilander*, 498 U.S. at 347. "[I]f reasonable  
8 persons, applying the proper legal standard, could differ as to whether the employee was  
9 a 'member of the crew,' it is a question for the jury." *Delange*, 183 F.3d at 920 (quotation  
10 omitted).

11 In the order on Plaintiff's previous motion for summary judgment, the Court  
12 concluded that "[g]iven the similarity of *Gipson* and *Scheuring* to this case, the Court is  
13 unable to conclude that reasonable jurors could not find other than for Ward." Dkt. 67 at  
14 9. In reaching this conclusion, the Court cited (1) Plaintiff's limited association with the  
15 *Ringer II* and skiffs for the purposes of the wharf project and (2) the fact that Plaintiff's  
16 participation was not for the entire duration of the project. *Id.* at 9–10.

17 The developed record has certainly provided Plaintiff with a more persuasive case,  
18 and his case can be distinguished from both *Gipson v. Kajima Eng'g & Const., Inc.*, 972  
19 F. Supp. 537, 542 (C.D. Cal. 1997), *aff'd*, 173 F.3d 860 (9th Cir. 1999), and *Scheuring*,  
20 476 F.3d 781. Plaintiff has provided evidence to show that a pile buck like himself, at  
21 least to some extent, would participate in the maintenance of a skiff. Dkt. 110-6 at 7.  
22 Plaintiff's job as a pile buck consisted in large part of work performed "out of a boat or

1 float” or operating a skiff. Dkt. 110-3 at 6, 13; Dkt. 110-6 at 9–12. On the other hand, the  
2 issue remains that Plaintiff’s work also consisted largely of marine construction tasks  
3 (such as cutting piles, setting precast pile caps, and maintaining a crane) carried out from  
4 staging built around the pilings or from a barge that moved only slightly by anchor or,  
5 when larger movements were necessary, with the help of tugboats. Dkt. 110-3 at 5–7, 9.

6 Plaintiff also argues that the limited duration of his work involving the *Ringer II*  
7 should not factor into his status as a seaman, analogizing his position to that of a  
8 temporary summertime Alaskan fisherman who is undoubtedly a seaman. *See* Dkt. 109 at  
9 16. However, it is a long settled principle that fishermen are seamen. *The Virginia Belle*,  
10 204 F. 692, 693 (E.D. Va. 1913) (“[T]he maritime law treats persons engaged in fishing  
11 enterprises upon waters as seamen, and accords them the same rights, privileges, and  
12 remedies afforded seamen.”); *The Carrier Dove*, 97 F. 111, 112 (1st Cir. 1899)  
13 (“Fishermen are seamen, having uses and customs peculiar to their business, but are at  
14 the same time, except as modified by their peculiar contracts, express or implied,  
15 protected by law as other seamen are.”). In a case involving a boat fisherman, there  
16 would be no doubt that “the employee’s duties are ‘primarily sea-based activities.’”  
17 *Scheuring*, 476 F.3d at 786. Plaintiff’s job, however, consisted of many general marine  
18 construction work tasks, and while his position involved the frequent use of a barge,  
19 floating platforms, and a skiff in this instance, his work as a pile driver is not a well-  
20 established “sea-based activity.” *See, e.g., Gipson*, 972 F. Supp. 537 (pile driver not a  
21 seaman when he lacks “more or less permanent connection” with a particular skiff or  
22 barge); *Gault v. Modern Cont'l/Roadway Constr. Co., Inc., Joint Venture*, 100 Cal. App.

1 4th 991, 1003 (2002) (pile driver’s connection to barge as a vessel in navigation is a  
2 question of fact).

3 Accordingly, the Court finds that issues remain on the quantity of Plaintiff’s work  
4 performed from the staging, the skiffs, or the barge, and what tasks should be considered  
5 “sea-based activity.” While the Court might be inclined to find that Plaintiff’s activities  
6 consisted of many sea-based activities, a question remains as to whether Plaintiff’s  
7 “duties are ‘*primarily* sea-based activities.’” *Scheuring*, 476 F.3d at 786 (emphasis  
8 added). Moreover, to the extent the Court previously analogized *Gipson* to the present  
9 case, issues of fact remain on whether the *Ringer II* or the floating platforms from which  
10 plaintiff worked, although it is clear that they would move to some extent, should be  
11 considered vessels *in navigation*. Accordingly, the Court denies summary judgment on  
12 the issue of Plaintiff’s seaman status, as reasonable minds could differ on whether he has  
13 a connection to a vessel in navigation that is substantial both in duration and in nature.

14 **2. Affirmative Defenses**

15 Plaintiff moves for summary judgment on four of Defendants’ remaining  
16 affirmative defenses, including (1) third party fault, (2) limitation of liability under 46  
17 U.S.C. §§ 30501-30512, (3) willful misconduct of Plaintiff, and (4) a *McCorpen* defense.  
18 Dkt. 109 at 17.

19 **a. Seventh Affirmative Defense: Third Party Fault**

20 Defendants stipulate to the withdrawal of this affirmative defense. Accordingly,  
21 the Court grants summary judgment in favor of Plaintiff on this issue.  
22

1                   **b.       Twelfth Affirmative Defense: Limitation of Liability**

2                   The Court denies Plaintiff’s motion for summary judgment on Defendants’ twelfth  
3 affirmative defense. Plaintiff argues that Defendants have failed to bring an action under  
4 46 U.S.C. §§ 30501-30512 within six months after a claimant gives notice of a claim.  
5 Dkt. 109 at 18. However, the six-month limitation does not apply when limitation of  
6 liability is asserted as an affirmative defense in a responsive pleading.

7                   Plaintiff also cursorily argues that Defendants “failed to provide any evidence  
8 (whether in discovery responses, initial disclosures, or otherwise) that would support a  
9 number of its defenses, including notably its seventh, twelfth, sixteenth, and nineteenth  
10 defenses.” Dkt. 109 at 18. However, in their motion, Plaintiffs offer no analysis on what  
11 evidence is necessary or lacking for Defendants to satisfy their burden on this affirmative  
12 defense. On summary judgment, “[t]he moving party bears the initial burden of showing  
13 that there is no evidence which supports an element essential to the nonmovant’s claim.”  
14 *Harris v. Extendicare Homes, Inc.*, C10-5752RBL, 2012 WL 1327816, at \*1 (W.D.  
15 Wash. Apr. 17, 2012) (citing *Celotex*, 477 U.S. at 322). Having failed to offer any  
16 analysis on this issue, Plaintiff has failed to satisfy his initial burden in showing that  
17 Defendants lack evidence on any essential elements of this defense. Therefore, the Court  
18 denies summary judgment on this issue, although Plaintiff may later renew his motion  
19 with supporting analysis.<sup>1</sup>

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21                   <sup>1</sup> In his reply, Plaintiff also argues that this affirmative defense should be stricken as a  
22 sanction for spoliation of evidence. Dkt. 125 at 10–11. The Court refuses to address such an  
argument when raised in a reply brief on summary judgment. If Plaintiff wishes for the Court to

1                   **c.       Sixteenth Affirmative Defense: Willful Misconduct of Plaintiff**

2                   Plaintiff argues that there is no evidence to suggest that any misconduct on his part  
3 contributed to his alleged injuries. However, Plaintiff provides no analysis on what  
4 actions or behavior may be considered as willful misconduct contributing to his injuries.  
5 Evidence suggests that Plaintiff delayed seeking treatment of his alleged injury for  
6 approximately several months, during which time he continued to perform the physical  
7 labor of his position despite experiencing pain. If a jury determines that Plaintiff was  
8 concealing his injury during this time, it could rationally conclude that Defendant's own  
9 willful actions further contributed to his injuries.

10                  He also indicates that there is no expert medical testimony to suggest that a willful  
11 delay in seeking treatment could have contributed to the injury. Dkt. 152 at 11. However,  
12 this argument was raised in Defendant's reply instead of his motion, and Plaintiff offers  
13 no legal analysis on whether such a defense requires expert medical testimony to show  
14 causation. Accordingly, the Court denies Plaintiff's motion for summary judgment on  
15 this defense.

16                  Nonetheless, the Court notes that to the extent Defendants (1) have not yet  
17 disclosed potentially necessary expert testimony regarding such a defense, and (2) seek to  
18 use Plaintiff's smoking habit as evidence that Plaintiff willfully contributed to his  
19 injuries, Plaintiff may properly address these evidentiary issues in motions *in limine*.

20 Moreover, to the extent that Plaintiff can provide legal authority showing that a lack of

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21  
22 entertain an argument on sanctions for alleged spoliation, he can so move in accordance with the applicable civil and local rules.



1 | medical evidence precludes this affirmative defense, he may seek to renew this motion  
2 | with the proper analytical support.

3 | **d. Nineteenth Affirmative Defense: *McCorpen* Defense**

4 | Plaintiff moves for summary judgment on Defendant’s *McCorpen* affirmative  
5 | defense. “Under the so-called ‘*McCorpen*’ defense, when a seaman is asked to disclose  
6 | pertinent information during a pre-hiring medical examination or interview and  
7 | intentionally conceals or misrepresents material facts, he is not entitled to an award of  
8 | maintenance and cure.” *Coastal Villages Pollock, LLC v. Naufahu*, C13-1234-JCC, 2014  
9 | WL 1053126, at \*4 (W.D. Wash. Mar. 19, 2014), *aff’d*, 14-35353, 2016 WL 5845732  
10 | (9th Cir. Oct. 6, 2016) (citing *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547, 549  
11 | (5th Cir. 1968)). The *McCorpen* defense is based on the principle that “[w]hen a seaman  
12 | signs aboard, he must have a good faith belief that he is reasonably fit for duty.” *Burkert*  
13 | *v. Weyerhaeuser S. S. Co.*, 350 F.2d 826, 829 (9th Cir. 1965).

14 | Here, no evidence suggests that Defendants performed a pre-hiring medical  
15 | examination or interview. Accordingly, it appears that Defendants must satisfy their  
16 | burden on this affirmative defense by showing that Plaintiff lacked a good faith belief  
17 | that he was fit for duty. Defendants provide evidence that Plaintiff had been previously  
18 | diagnosed with cervical spine injuries and related neuropathy. Dkts. 119-4, 119-5. While  
19 | the evidence that Plaintiff cites regarding his esteemed reputation as a good worker and  
20 | his arguments regarding the medical significance of his previous diagnosis are highly  
21 | persuasive, *see* Dkt. 125 at 12–13, the evidence of a preexisting condition is sufficient to  
22 | create a reasonable dispute of material fact that must be submitted to a jury.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion for summary  
3 judgment on the issue of punitive damages (Dkt. 108) is **GRANTED**. Plaintiff's motion  
4 for partial summary judgment (Dkt. 109) is **GRANTED in part**, and **DENIED in part**  
5 as stated herein.

6 Dated this 22nd day of December, 2016.

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9 BENJAMIN H. SETTLE  
United States District Judge