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Denying a claim for misrepresentation

Recent revisions to North Carolina's Workers' Compensation Act allow employers to deny a claim if the worker had misrepresented his or her physical abilities during the hiring process. But this defense is by no means a slam-dunk, as employers have the burden of proving all three elements of the defense, notes Mike Ballance, an attorney in the Raleigh office of Dickie McCamey & Chilcote.

"First, the employer must prove that the employee 'knowingly and willfully' made a 'false' representation. If plaintiff was only negligent or careless in his actions, the standard is not met," he says. A representation that is only "evasive" or "incomplete" may not be sufficient to meet the standard either.

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"Defendants next must prove that the employer 'relied upon' the misrepresentation and that the reliance was a 'substantial factor' in the hiring decision. If there is no evidence that the employer relied upon the representation, or if the evidence shows the representation only went to a minor issue in the hiring process, then the burden is not met," he adds.

"Finally, an employer must prove 'a causal connection' between the representation and the injury or occupational disease. Thus, if the injured worker had lied about the physical condition of his or her knees, but the injury suffered is to the shoulders, there might not be a causal connection, and the defense would not apply," Mr. Balance notes.

"The upshot is the new misrepresentation defense makes the hiring process far more important than it has traditionally been in workers' compensation claims. Documenting closely what occurred during the hiring process is essential if a case ultimately goes to litigation," he says. And, since nobody knows in advance which employee is going to suffer an injury, all employees must be treated the same in the hiring process.

At the very minimum, every employer should include a form or a statement in the job application packet which states the employee has been given an opportunity to discuss job duties and fully understands the essential physical functions required. The form should also make it clear that by signing the form the employee is certifying that he or she is capable of performing those functions with or without reasonable accommodations.

"In addition, the form should make it clear the employer is relying on the employee's certification, and that such reliance is a substantial factor in the hiring decision. Finally, the form should specify the employee understands that misrepresentation may result in denial of workers' compensation benefits," Mr. Ballance advises.

The employee should be required to sign and date this certification. This will provide documentary evidence to support the elements of the defense. However, it leaves the door open for an employee to claim he or she did not "fully understand" everything required, he notes.

Employers can reinforce their position by preparing a job description for every position in the company. The job description should contain a list of the essential physical components of the job and specific weight amounts and time requirements

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President's Note

Has North Carolina turned the corner?

We are pleased to report that at our 2012 annual conference in March we had more registrants, more sponsors, and more exhibitors than we have had in recent years.

Perhaps this is a sign the economy is improving. We were also gratified to receive a number of enthusiastic reports about the program from both first-timers and regular attendees.

Our focus this year was on recently passed reform legislation in North Carolina. Several of our presentations discussed the implications of the initiative and how employers should adjust and adapt to the new imperatives. It is truly remarkable how much time and effort our speakers devote to their presentations for what is essentially a labor of love. They deserve our gratitude for this valuable service.

It is not too early to start thinking about next year's conference. Once again we are soliciting your suggestions for topics and speakers. In particular, we are looking for participants for our employer panel discussion, which will focus on challenges employers are facing and how they are addressing them.

Please send your comments to me or to Moby Salahuddin, our executive director.

With very best wishes,

Jay Norris

CASE LAW UPDATE

By Joe Austin

Disability

It is well-settled that an employee can establish disability by proving either (a) she has been unable to find work in spite of a reasonable job search, or (b) it would be futile to look for work. The Industrial Commission can be lax in terms of what establishes a reasonable effort to find work, but recent cases from the Court of Appeals require that the Commission provide some factual basis to support an award of compensation for disability.

First, in the case of *Carr v. D.H.H.S.*, the Commission found that the employee had sustained multiple injuries while working as a nurse and awarded compensation. After noting that the Industrial Commission failed to make any determination as to whether the employee had made a reasonable job search or whether it would be futile for her to try to find other work, the Court reversed the award of compensation and remanded the case to the Industrial Commission to make appropriate findings of fact.

Second, in the case of *Salomon v. Oaks of Carolina*, the Commission determined that the employer was justified in terminating the employee for misconduct, but nevertheless awarded compensation to the employee on the grounds that she had proven to be disabled by making a reasonable job search.

In reviewing the award, the Court observed that while the employee admitted that she "went a couple places" to look for employment, the Commission's findings were nevertheless insufficient to establish a reasonable job search. In reaching this conclusion, the Court explained that the Commission (a) was required to explain the basis for its conclusion that the employee had made a reasonable job search, and (b) was not entitled to award compensation without detailed findings to support the determination that the job search had been reasonable.

Thus, the Court remanded the case to the Commission with a mandate to make adequate findings of fact.

Attendant Care

Within two weeks, the Court of Appeals issued conflicting decisions on the issue of whether an employee is required to get pre-approval for attendant care services.

In the case of *Mehaffey v. Burger King*, the Court ruled on December 6, 2011 that an employee's wife was not entitled to payment for attendant care services because the employee failed to obtain pre-approval for the wife to provide attendant care. Two weeks later, in the case of *Chandler v. Atlantic Scrap & Processing*, the Court reached the opposite conclusion, affirming an award by the Commission requiring the employer to make retroactive payments for attendant care services that were not pre-approved. At this point, both cases are pending before the Supreme Court.

Joe Austin leads the workers' compensation practice group at Young Moore and Henderson in Raleigh. A graduate of Davidson College, Joe received his law degree from Wake Forest University.

Commission gets tough on uninsured employers, after embarrassing coverage by Raleigh paper

The North Carolina Industrial Commission says from now on it will take a tough line against uninsured employers who are doing little or nothing to settle claims with injured workers.

"More than a dozen employers have been ordered to come to a hearing May 22 and settle a claim that has dragged for years. If the business owners don't–and can't settle a portion of the claim–they'll be ordered to jail. Law enforcement will be sent to arrest those who don't show up for the hearing, officials say," according to the *Raleigh News & Observer.*

The newspaper reported in April that tens of thousands of employers in North Carolina don't carry workers' compensation insurance, despite a stale law that requires businesses with three or more employees to provide the coverage. "And when workers were hurt, the commission has done little to ensure the uninsured employer paid the workers' medical bills and wages for missed work. Some workers ended up permanently disabled and reliant on Medicaid and welfare to survive," the newspaper reported.

Gov. Bev Perdue has said publicly she is demanding swift action from the Industrial Commission. "I read with the same pain that you did about what might be happening to our workers and what has happened to our workers," Perdue said. "I've sent word, I want it fixed and I want it fixed very quickly," the *News & Observer* reported.

The newspaper says its investigation revealed that 30,000 or more businesses in North Carolina are foregoing workers comp insurance. "The Commission has been lax about the problem. The commission does nothing proactively to enforce compliance. And, when employers are caught without insurance and a worker comes to the commission for help, the agency is slow to use its power to collect fines and press for criminal charges," the newspaper reported.

Under state law, businesses owners can be charged with a Class H felony for failing to carry workers compensation, and can be fined as much as $100 a day for each day they go without the coverage. The newspaper reported the case of one transportation company that decided to drop coverage to reduce costs. Twelve days later, one of its drivers died in a crash. Three years later, another of its driver died on the job, and the company was still without comp insurance.

The *N&O* estimated the number of uninsured employers by looking at the total number of licensed businesses in the state with four or more employees and comparing that with the number of insured employers in the N.C. Rate Bureau's database.

According to the NC Department of Commerce, 170, 000 companies with four or more employees operate in the state. Dun & Bradstreet counts about 172,000 businesses headquartered in the state with at least three employees. The newspaper reported it found only 140,000 or so insured employers at the rating bureau.

When a company drops coverage, it is required to notify the insurer, which must inform the N.C. Rate Bureau. The bureau then provides the information to the Industrial Commission, as it does with every new policy written, renewed, or canceled.

"While the commission uses the database to find the proper insurer when a claim is filed, no one at the Industrial Commission monitors the cancellations, even when it's a company it has previously threatened with fines and discipline to purchase insurance, the *News & Observer* reported.

Sue Taylor, director of insurance operations for the bureau, told the newspaper "I'm sure we could do a query in our system to come up with a list of all policies that have been canceled. We've not been asked to do that."

On its website, the Industrial Commission explains it began in late 2009 to review its contempt procedures in consultation with state judicial officials. "Throughout 2010, contacts were made and meetings held with various judicial and law enforcement officials to seek assistance in developing and refining lawful contempt procedures," the agency says.

"Necessary forms and procedures were drafted and revised multiple times with consulting officials. In 2011, these meetings continued to refine the procedures and receive training. Additional contacts were made with law enforcement and local prosecutors."

"As a result of this investment of time and effort and the generous assistance of judicial and law enforcement officials, the Industrial Commission has published a May 2012 contempt hearing docket and is in the process of scheduling regular contempt hearing dockets for the future," it adds.

coming up

October 9–12, 2012
17th Annual North Carolina Workers' Compensation Educational Conference. Raleigh Convention Center.

October 14–17, 2012
36th Annual Educational Conference on Workers' Compensation. The Westin Resort and Spa, Hilton Head, SC.

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for all such components. This should be attached to the job application, and no employee should be considered for employment who does not sign the statement.

"This is a useful practice because it provides evidence refuting a claim by the employee that he or she did not understand the requirements of the job. It also may result in some potential fraudulent applicants "self selecting" not to apply for the job, which is the optimal result for all involved," Mr. Ballance says.

> "This would effectively double the amount of evidence available for use in defense of any claim in the future..."

Although the steps outlined above would go a long way to support denial of a claim for misrepresentation, yet another step employers can take is send the prospective employee for a post-offer medical examination. "This will not only provide actual testing of the employee's abilities, but it will also trigger another point at which a fraudulent applicant will have to continue a willful misrepresentation in order to get the job," Mr. Ballance notes.

"This would effectively double the amount of evidence available for use in defense of any claim in the future. It may also result in discoveries about the plaintiff's physical condition (such as surgical scars or atrophy) that can be further investigated with the employee since the hiring process is now in the post-offer stage," he says.

"The downside of a physical examination is the expense involved. However, the amount of money spent on such an exam will pale in comparison to the amount of a serious workers' compensation claim that could have been avoided either by not hiring the person or by being able to successfully defend a claim under the new misrepresentation defense," he adds.

Michael Ballance is the Shareholder-in-Charge of the Raleigh Area office of Dickie McCamey & Chilcote, P.C. He can be contacted at MBALLANCE@DMCLAW.COM