Lying Lies and the Lying Liars Who Tell Them: A Look At Fraud in the Application

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Not an uncommon scenario: An employer makes a conditional offer of employment for a somewhat physical job. After the conditional offer has been made, the worker discusses the job requirements with the employer at length and completes questionnaires relating to the physical requirements. The worker begins, and a month later, he sustains a significant back injury. He seeks workers' compensation benefits. The employer files the necessary paperwork,and the insurance carrier performs an investigation. At some point during the process, the carrier is alerted to the fact that the employee had a significant injury to the same body part *before* he started working in his current job. Further, he failed to disclose this injury during the hiring process, despite being asked directly about his physical abilities. The employer feels deceived. Had the worker provided the employer with additional information, the employer may have taken some precautions or placed this employee in a job more suitable to his physical capabilities. What is the employer's recourse where an employee lies about his physical capabilities, and how can the employer protect himself in the future?

When an employee files a workers' compensation claim after being dishonest on his employment application, he may be barred from pursuing benefits. Three requirements must be met for his misrepresentation to render the employment relationship voidable. In*Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), the Supreme Court established the factors necessary for an employee's misrepresentation to negate the employment relationship. First, the employee's false statement as to his physical condition must have been made "knowingly and willfully." For this reason, questions relating to the employee's ability to perform the work must be clear. Second, "the employer must have relied upon the false representation, and this reliance must have been a substantial factor in hiring." In *Brayboy v. Workforce*, 383 S.C. 463, 681 S.E.2d 567 (2009), the Supreme Court reasoned that had the employee been truthful, the employer "would have been able to give him suitable job assignments, which would not have included heavy lifting." The third factor identified in *Cooper* requires "a causal connection between the false representation and the injury." In other words, the injury for which the claimant now seeks workers' compensation benefits must be the same type of injury the worker's honest response would have prevented.

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Can the worker's simple failure to disclose prior physical injuries negate the employment relationship? From the employer's perspective, it often seems like the worker should have an affirmative duty to reveal his particular susceptibility to further injuries. Unfortunately, unless the employer *asks* the worker about his ability to perform a specific task, the worker cannot be expected to take affirmative steps to reveal this information. An employer should note that any questions relating to these physical abilities should be asked *after* a conditional offer of employment has been made. It is a good practice for the employer to put these types of job placement questions in writing, so the employer may later refer to the questionnaire should he find out that, despite carefully crafted questions, the employee has intentionally hidden a history of relevant injuries. Typically, the employer's testimony that the worker "told him he was able to do the work" will not suffice.

At times during the investigation of a workers' compensation injury, the carrier discovers more than just a prior workers' compensation claim for the same type of injury. Often, the carrier finds that the employee was placed on significant permanent work restrictions. If the worker's current job violates these restrictions, and due to that violation he has now sustained injuries to the same body part, the carrier may argue that his new injury does not qualify as an "injury by accident" under S.C. Code Ann. § 42-1-160. To qualify as an injury under The South Carolina Workers' Compensation Act, the event causing the injury or the outcome itself must be "unlooked for and untoward." *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 40 S.E.2d 626 (1946) An injury that is caused by the type of activities a doctor has previously advised the claimant not to perform does not meet the criteria of an unexpected injury, and therefore should not be found compensable. For this reason, it is often helpful for the carrier to obtain detailed medical records relating to the prior injury.

Unfortunately, if the employee's misrepresentation is not willful, or is not relied upon by the employer, or is not germane to the subsequent injury, the employee can still recover notwithstanding the fact he or she lied on the post-employment medical questionnaire. While such actions may violate employer policy and serve as grounds to void the employment relationship, the employer is still obligated to provide workers' compensation benefits notwithstanding the claim meeting all other requirements of compensability. Further, an employer must be careful and consult an employment attorney before implementing policies designed to identify potential fraud in the application so as not to run afoul of any other legislation, such as the ADA. But still, employee misrepresentation during the employment process is more commonplace than might otherwise be assumed and can serve to limit or eliminate the employee's access to benefits in the event of an accident.

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