

Misrepresentation in the Hiring Process: NC Work Comp Claims

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Nobody likes a liar, especially when it involves a workers' compensation claim. Defendants have long argued and lobbied for a defense against claims in which a claimant makes a false representation on an employment contract regarding a physical condition and subsequently injures himself. Prior to the Workers' Compensation Reform Act, there was no such defense available in North Carolina. Although initially recognized by the Court of Appeals in *Freeman v. Rothrock*, 189 N.C. App. 31, 657 S.E.2d 389 (2008), the Supreme Court reversed the Court of Appeals' decision. The Supreme Court held that because the affirmative defense was not explicitly enumerated in the Act, it was not a legally recognized defense.

Following the *Freeman* decision, the North Carolina Legislature determined that claimants should not benefit from making false representations regarding their physical condition when entering into employment. As a result, the Legislature codified the Court of Appeals' decision in *Freeman* by including an affirmative defense for misrepresentation.

Although probably not a common defense, it is good practice to investigate each claim to see if there has been a misrepresentation within the meaning of N.C. Gen. Stat. § 97-12.1. Under § 97-12.1, which became effective for injuries occurring after June 24, 2011, a claimant is not entitled to any benefits under the Act for an injury by accident or occupational disease if the defendants can establish the following:

At the time of hire or in the course of entering into employment:

1. The employee knowingly and willfully made a false representation as to the employee's physical condition;
2. The employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; and
3. There was a causal connection between the false representation by the employee and the injury or occupational disease.

In determining whether the affirmative defense under N.C. Gen. Stat. § 97-12.1 exists, there are several things to look for while conducting the initial investigation. First, one should review the employment application and contract closely to see whether the employee was asked any questions about prior injuries, work restrictions or made any assertions about being able to perform certain duties.

It is helpful if the employment contract asks detailed questions regarding the claimant's physical capabilities at the time of hire and whether the claimant had filed previous workers' compensation claims. After reviewing the employment contract and application, consider conducting a claims search to see if the claimant had filed previous workers' compensation claims.

Establishing that a claimant made a false representation regarding his physical ability on an employment application can be much easier to prove if, for example, you find a clincher for a previously settled claim where the claimant was given permanent restrictions and later reported that he was physically capable of exceeding those restrictions on his application.

After establishing that a claimant made a willful misrepresentation, you should contact the employer representatives who conducted the interview and made the decision to hire the claimant. In determining whether the employer relied upon the false representations, ask the employer whether the claimant would have been hired if the claimant provided accurate information regarding his physical capacity.

Additionally, determine whether the claimant would have been considered for a lighter duty position if the claimant had been truthful in his application. If the claimant is hired for a job that exceeds his physical restrictions for his undisclosed condition, the defendant should have an argument that the employer relied upon the claimant's misrepresentations in hiring him.

Your work is not quite done after compiling sufficient evidence to prove the first two prongs under N.C. Gen. Stat. § 97-12.1. To establish a causal connection between the false representation and the injury, expert medical testimony must be obtained to meet your burden under the third prong. The defendant meets his burden by showing that the undisclosed medical condition increased the claimant's risk of re-injury.

The N.C. Gen. Stat. § 97-12.1 may not be available for every claim, but conducting an initial investigation into whether a misrepresentation occurred in the employment process could result in lower reserves and may allow you to settle the claim quicker.

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