

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. Ballance 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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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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The employers' voice in workers' comp

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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.

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.

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