

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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On April 1, TCDG will open an office in western North Carolina at 214 Executive Park, Asheville, NC, 28801. That office's resident attorneys, Julie Hooten and Bill Bulfer, can be reached by telephone at 828-254-4515, fax at 828-254-4516, and e-mail at jhooten@tcdg.com or wbulfer@tcdg.com.

CASE LAW UPDATE

Employee Barred from Recovery by False Statements Made at Time of Hiring

Randy Freeman had a history of low back injuries and workers' compensation claims. After his second back injury, he was assigned a 10% PPD rating and given permanent work restrictions that precluded him from continuing to work for his employer at the time as a truck driver. Despite being advised to look into another line of work, he applied with J.L. Rothrock for a truck driving position that exceeded his work restrictions.

Freeman executed a job description form that described the position for which he was applying as "strenuous." He also completed a medical history questionnaire on which he denied (1) suffering from any prior health conditions, including backache or herniated disc; (2) the existence of any health-related reason, physical defect or work limitation that would prevent him from performing the job; (3) any disabilities or impairments that might affect his job performance; or (4) having ever filed a workers' compensation claim. He later admitted that he made these false representations because he was concerned he would not be hired if he told the truth.

Less than two years after being hired by Rothrock, Freeman reinjured his low back while cranking a dolly at work. Rothrock and its insurer admitted liability for the injury and initiated payment of TTD, but nine months later they filed a Form 24, seeking to stop paying benefits on the

grounds that Freeman had refused an offer of suitable employment. Then, after their Form 24 was denied, they filed a motion for reconsideration, alleging that Freeman's claim should be denied because of the misrepresentations he made about his physical condition when applying for the job two years earlier.

That motion was referred for a full evidentiary hearing, after which the deputy commissioner who heard the case and later the Full Commission both found for Freeman, citing a 2003 decision of the Court of Appeals, *Hooker v. Stokes-Reynolds Hospital*, for the proposition that "North Carolina law does not provide a defense to workers' compensation claims on the ground of misrepresentation or falsification of information by the injured worker in obtaining employment."

The defendants appealed to the Court of Appeals, which in a 2-to-1 decision filed on March 4, *Freeman v. J.L. Rothrock*, reversed the Full Commission and held that claimant's misrepresentations during the hiring process barred his claim. In reaching that result, the Court declined to be bound by what it described as the *obiter dictum* of the *Hooker* decision that neither the Commission nor the state's appellate courts have the authority to adopt a defense with no specific statutory basis. Instead, the Court affirmatively adopted the three-part test described by Professor Larson in his treatise on workers' compensation law, under which recovery of workers' compensation benefits is barred in certain circumstances when the employee made false statements during the hiring process.

Even while acknowledging the Supreme Court's admonition against "judicial legislation" in construing the Workers' Compensation Act, the *Freeman* Court observed that ordinary common law tests such as "fraud in the inducement" closely parallel the elements of the "Larson test," which provides that an employee may be barred from recovering workers' compensation benefits as a result of statements made at the time of hiring if (1) the employer proves that the employee knowingly

and willfully made a false representation as to his or her physical condition; (2) the employer relied on that false representation and its reliance was a substantial factor in the hiring; and (3) there is a causal connection between the false representation and the employee's injury. The essential elements of the common law doctrine of "fraud in the inducement" are substantially similar, in that both require detrimental reliance on a knowingly-made false representation.

The *Freeman* Court reasoned that, as the employer-employee relationship is one founded in principles of contract, and since fraud in the inducement renders a contract void, it follows that "fraud in the inducement of employment would render the employment contract void." That, in turn, means claimant "would fail to meet the statutory definition of an 'employee' and therefore would lack standing under the Workers' Compensation Act."

The Court also noted that a majority of states "that have considered this issue have judicially recognized intentional misrepresentation to gain employment as an affirmative defense even in the absence of a specific statute." And, it found additional support for adopting the "Larson test" in the common law doctrine of equitable estoppel, which the Supreme Court applied to workers' compensation claims last year in *Gore v. Myrtle/Mueller*. Stating that "we refuse to continue to countenance fraud perpetrated upon employers in our state," the Court adopted "the three-pronged Larson test for misrepresentations made by a prospective employee at the time of hiring with respect to his or her medical condition, with the burden of proving each of the prongs resting with the employer."

Applying that test to the facts in *Freeman*, the Court noted that the Commission found claimant deliberately misrepresented his physical condition at the time he was hired. At the same time, the Commission erred in applying the second prong of the test when it found that Rothrock did not rely on claimant's false representation, as Rothrock's recruiting director testified unequivocally that he would not have hired Freeman, but for the false representations he made about his prior medical condition. And, with regard to the test's third prong, whether there was a causal connection between Freeman's false representations and his injury, the Court found there was no evidence to support the Commission's finding that claimant's prior back problems did not increase his risk of sustaining the type of injury he later suffered while working for Rothrock. To the contrary *all* of the doctors who testified acknowledged that claimant's undisclosed medical condition increased his risk of sustaining the kind of back injury that eventually occurred. As a consequence, the Court concluded, "common sense dictates that a

prior injury of the nature suffered ... would create a predisposition to further injury considering the nature of the work involved."

Risk Handling Hint: Judge Wynn dissented from the majority opinion in *Freeman*, stating that "[b]ecause the Larson test is not included in our Workers' Compensation Act, the adoption of the test by this Court is impermissible judicial legislation." Because Judge Wynn's dissent affords claimant an automatic right of appeal, it is anticipated that the Supreme Court will have an opportunity to weigh in on the important issues raised by the majority opinion in *Freeman*.

Whether or not it does, it is imperative that risk managers recognize that the "Larson test" does not establish an affirmative defense similar to intoxication. Rather, it creates a *jurisdictional* question for the courts to resolve as to whether the employer-employee relationship ever arose at all. The Workers' Compensation Act defines "employee" as one who is "engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written," but it has taken decisions from the appellate courts to establish when a contract of employment was made and what factors are necessary to establish the creation of an employment, as opposed to independent contractor, relationship. Those same courts have long been willing to allow employees to utilize the doctrine of equitable estoppel to block employers from asserting the two year statute of limitations found in N.C.G.S. § 97-24 as a jurisdictional bar to an untimely-filed claim, even though no statute specifically created that particular doctrine. Likewise, employers should be permitted to assert well-settled common law principles such as fraud in the inducement as a basis for contesting claims, if they have proven the requisite elements of affirmative defenses of that type.

At the same time, risk managers should be cognizant of the fact that, even if the Supreme Court affirms the majority opinion in *Freeman*, its holding may be restricted from widespread application by limitations imposed by the Americans with Disabilities Act on an employer's ability to ask detailed questions about a job applicant's past medical treatment and physical disabilities. Although a complete discussion of the ADA and its implications on application of the holding in *Freeman* to other claims is beyond the scope of this newsletter, guidance in that regard can be obtained from the TCDG employment law team headed by Melissa Cleary.

Increased Risk Test Applied in Lightning Strike Case

Kenneth Heatherly, a drywall hanger for the Hollingsworth Company, was working at a job site high on a mountain when a thunderstorm arose, prompting the whole work crew to take

shelter in an unfinished garage. While he was using the telephone to advise his employer that they had stopped working, lightning struck nearby. Heatherly was knocked several feet in the air, fracturing his right hand in the resulting fall. His claim for workers' compensation was denied on the grounds that his employment as a drywall hanger did not place him at an increased risk of being struck by lightning, but the deputy commissioner and Full Commission disagreed and benefits were awarded, although they made no findings of fact or conclusions of law about increased risk.

The defendants appealed, and on March 18, in *Heatherly v. The Hollingsworth Company*, the Court of Appeals reversed, noting at the outset of its opinion that the test for compensability in lightning strike cases was established in 1959 by the Supreme Court in *Pope v. Goodson*, which held that the proper inquiry is whether "the danger to which [the employee] was subjected [is] one which was incident to the employment, or ... one to which other people, the public generally, in that neighborhood, were subjected."

The *Heatherly* Court agreed with the defendants that the Commission's findings would not support a conclusion of law that claimant was at an increased risk of being struck by lightning as compared to the risk to which "the public generally, in that neighborhood, ... [was] subjected." Further, in concluding that claimant's injury was compensable, the Commission had improperly applied a so-called "positional risk" analysis, which the Court expressly rejected two years ago in *Rose v. City of Rocky Mount*. Therefore, since the Commission had reached its decision under a misapprehension of the law, the case was remanded for the Commission to make new findings of fact and conclusions of law in accordance with the increased risk principles first articulated by the Supreme Court in *Pope*.

Risk Handling Hint: The decision in *Heatherly* serves as a useful reminder to risk managers and their counsel that the positional risk theory of recovery is not the law of this State and that for an employee to recover for an injury sustained as the result of an "act of God," he must show that the nature of his employment, as opposed to his physical location at the time, placed him at an increased risk of suffering the type of injury that occurred.

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