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## NEWSLETTER ARTICLE

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### Employment Law

#### Can an Employer Deny Workers' Compensation Benefits if an Employee Lied on His Job Application?

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On March 4, 2008, in *Freeman v. J.L. Rothrock*, 657 S.E.2d 389, the North Carolina Court of Appeals ruled that where an employee misrepresented his prior medical history on a job application, or during a post-hiring, pre-placement physical examination, that employee was barred from recovering workers compensation benefits. This case has the potential to be a great opportunity for employers.

In *Freeman*, the employee completed a medical history questionnaire after receiving a conditional job offer. Despite two prior back injuries and permanent lifting restrictions, the employee stated he had never suffered from prior back conditions, there were no health reasons that would keep him from performing the job, he had no disabilities that would have affected his job performance, and he had never filed a workers' compensation claim. Furthermore, during his pre-placement medical examination, the employee also failed to reveal to the examining doctor that he had previously injured his back.

The Court of Appeals adopted the three-part "Larson test" for determining whether an employee's misrepresentation bars recovery of workers compensation benefits:

- (1) The employee must have knowingly and willfully made a false representation as to his/her physical condition at the time he/she was hired;
- (2) The employer must have relied upon the false representation, which must have been a substantial factor in the decision to hire the employee; and
- (3) The false representation must have in some way led to the workers compensation injury for which the employee is seeking compensation.

It appears the employer can raise the false representation issue at any point, as this case was decided even after the employer accepted the claim and began paying benefits; however, once raised, employers have the burden of proving all three parts of this test. The first part may be most difficult to prove, as evidence as to whether Plaintiff knowingly and willfully made a false representation may be difficult to prove unless the employee admits doing so. Testimony from the employer that it probably would not have hired the employee had it known of the employee's prior injury may be sufficient for the second part of the test (though if other employees are working with the same type of injury, that testimony may not be believed). Medical testimony that the employee's false representation placed the employee in a position of increased risk for the injury the employee sustained will likely be necessary to satisfy the third part of the test.

While *Freeman* is a good decision for employers, employers should interpret and apply this opinion with caution. First, the *Freeman* decision is inconsistent with at least one prior decision of the North Carolina Court of Appeals. Interestingly, the *Freeman* court specifically declined to follow a prior decision of the

Court of Appeals that *rejected* the Larson test. *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 587 S.E.2d 440 (2003), *disc. rev. denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). On April 10, 2008, the plaintiff in *Freeman* filed a Notice of Appeal to the North Carolina Supreme Court. Significantly, the *Hooker* decision was written by Judge Hudson, who now sits on the North Carolina Supreme Court.

Second, the opinion fails to directly address restrictions on pre-employment medical inquiries under the Americans with Disabilities Act of 1990 ("ADA"). Specifically, the opinion does not discuss whether an employer could deny workers compensation benefits if the false information was given by the employee in response to questions or medical examinations prohibited by the ADA or other anti-discrimination statutes. Employers may be tempted to treat the *Freeman* decision as a green light to ask potential employees for detailed information about past injuries with the hope that intentional misrepresentations on applications and elsewhere may ultimately allow employers to avoid paying benefits. However, asking for such information before making a conditional offer of employment would expose the employer to potential discrimination suits under the ADA and the North Carolina Persons with Disabilities Protection Act.

Among other things, these statutes seek to prevent discrimination against people with disabilities in the job application process. For example, under the ADA:

- It is illegal to ask a job applicant if he/she has a disability or about the nature or severity of any disability if the applicant has not been given a conditional offer of employment.
- It is illegal to ask or require a job applicant to take a medical examination if he/she has not been given a conditional offer of employment.
- In order for an employer to require medical examinations after an employee has been given a conditional offer of employment, the employer, among other things, must require the examination of *all* entering employees in the same job category.
- While job offers may be conditioned on these medical examinations, the ADA places restrictions on whether and how information gained during a post-offer medical exam may be used in making hiring decisions. In particular, if an applicant is not hired because the exam reveals a disability, the employer must be able to show that the reason the employee was not hired is job related and a business necessity, and that no reasonable accommodation would have made it possible for the applicant to perform the essential functions of the job.
- It is illegal to inquire into applicants' workers compensation histories before making a conditional offer of employment. After conditional job offers are made, an employer may ask about workers compensation histories as part of the medical examinations discussed above, but may not base employment decisions on speculation that an applicant may cause increased workers compensation costs in the future.

In summary, *Freeman* potentially gives employers a significant opportunity to limit workers compensation benefits where employees falsify employment applications. However, as there are many legal requirements regarding what may and may not be asked of potential employees during the application process, and when such questions may be asked, employers will be well-served to consult with legal counsel regarding their application and hiring practices and policies, rather than relying exclusively on the test set out in *Freeman*.