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Physical impairments, false representations on job applications

In *Jewison v. Frerichs Construction*, January 6, 1989, the Minnesota Supreme Court held that an employee's false representation as to physical condition or health at the time of hire may preclude a later award of workers' compensation benefits. However, on December 31, 1992, the Minnesota Supreme Court substantially limited this *Jewison* defense through *Huisenga v. Opus Corporation*.

In *Jewison*, the Court indicated that an employee, under certain circumstances, might be disqualified from receiving workers' compensation benefits if there is a misrepresentation as to prior health problems.

The Court indicated that a false representation as to physical condition or health made by an employee in procuring employment will result in no workers' compensation benefits for an otherwise compensable injury if it is shown that: (1) the employee knowingly and willfully made false representation as to his or her physical condition; (2) the employer substantially and justifiably relied on the false representation in the hiring of the employee (i.e., would not have hired the person at all had the truth been told, or perhaps would not have placed him or her in a particular position had the truth been told); and (3) a causal connection existed between the false representation and the injury (i.e., the injury would not have occurred but for the prior condition).

Each of the required elements must be proven. If all three elements can be established in a particular case, a denial of benefits or petition to discontinue benefits is in order, pursuant to *Jewison*. In the *Jewison* case, compensation benefits were awarded because the employer/insurer failed to show the last element. *Jewison*, the claimant, had had two prior back injuries. The current injury involved a slip-and-fall where the

claimant landed flat on his back with a heavy miter box on top of him. Because of the nature of the fall, the back injury could have occurred with or without the previous back condition, according to medical testimony. Therefore the employer/insurer failed to show a direct causal connection between the misrepresentation about the prior medical conditions and the current injury. However, if that employee had merely stooped over to pick something up and suffered an aggravation, it appeared that disqualification from benefits would have been the result.

In *Huisenga v. Opus Corporation*, December 31, 1992, the Minnesota Supreme Court held that the *Jewison* defense only applies to representations made in response to inquiries allowed under the Minnesota Human Rights Act (MHRA). Where the alleged misrepresentations occur in response to an inquiry that asks for more than essential job-related abilities as defined in the MHRA, the employer may not raise the *Jewison* defense based on the alleged false answers. The Supreme Court indicated that in those circumstances, the employer is not justified in relying on the false answers to illegal questions. Similarly, we can expect the Court to hold that an employer would not be justified in relying on false answers to questions that are illegal pursuant to the Americans With Disabilities Act (ADA).

Despite *Huisenga*, the ADA and MHRA do not preclude the use of the *Jewison* defense in workers' compensation claims. They do, however, limit the timing and the nature of inquiries into prior injuries or disabilities. While the ADA is new, the MHRA did exist at the time *Jewison* was decided. However, the inquiries were allowed as the Court in *Jewison* noted that in order to take advantage of the Second Injury Fund, employers

had to have knowledge of the employee's pre-existing physical impairments prior to the second injury. Because the Second Injury Fund no longer exists, there is no longer any reason for an employer to ask questions outside the limits of the MHRA or the ADA.

The ADA provides that an employer may not make pre-employment inquiries regarding disabilities. For example, an employer may not use an application form which lists impairments and ask applicants to check them off. The employer may not ask how the individual became disabled, the individual's prognosis, or how often the individual will require leave for treatment.

The ADA does allow an employer to make pre-employment inquiries into the ability of the applicant to perform job-related functions. In addition, the employer may ask an applicant to describe or demonstrate how, with reasonable accommodation, the applicant will be able to perform job-related functions. An employer may describe or demonstrate the essential job duties and ask whether the applicant can perform those functions with or without accommodation. Similarly, the employer may state the attendance requirements and ask whether the applicant can meet them.

After making a conditional job offer, an employer may ask about a person's workers' compensation and medical history in a medical inquiry or examination that is required of all applicants in the same job category. The inquiry or examination must be limited to that information that is relevant to the employee's ability to perform the essential functions of his or her job. In addition, under the MHRA, an employer must obtain the consent of the employee if it seeks information to assess the continuing ability of the employee to perform the job or health insurance eligibility.

Conclusion

Jewison v. Frerichs Construction, is still a good defense, but has been substantially limited by *Huisenga v. Opus Construction Company*, which made it clear that questions asked in violation of the ADA or the MHRA will not provide a basis for a *Jewison* defense. To avoid the *Huisenga* limitation, employers should review their applications and hiring procedures to make sure they are in compliance with both the ADA and the MHRA.