

# SOUTH CAROLINA Workers' Comp LAW BLOG



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Toll Free: 888.648.0526

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## What happens if a prospective employee conceals a prior injury and then injures that same body part on your job?



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What happens if a prospective employee conceals a prior injury and then injures that same body part on your job? You may be able to successfully assert the defense of Fraud in the Application to bar the claim.

Last week, the Court of Appeals re-examined the defense in the case of *George Rabon v. Arrow Exterminating, Inc. and Twin City Fire Insurance Company*. In this case, the claimant (Rabon) worked as a carpenter for the employer (Arrow). He was injured in 2006 after falling from a ladder and injuring his ribs, neck and back with radiating weakness into his left leg.

On his employment application, the claimant said he could do "painting, finishing sheetrock, tile, trim work, framing, plumbing, heating and air, vinyl siding, roofing, windows, hang doors, run gas line, little bit electric, run my own crew." The employment application did not ask him to disclose any current or prior injuries. Furthermore, no one with the employer ever asked the claimant if he had any prior injuries or physical problems.

The fraud in the application defense prohibits an employee from receiving workers' compensation benefits if he makes a false statement in his employment application, provided that three factors are met: "(1) The employee knowingly and willfully made a false representation as to his or her physical condition; (2) The employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury." *Cooper v. McDevitt Street Co.*, 260 S.C. 463, 368, 196 S.E.2d 833, 835 (1973). The employer must prove all three factors are present. *Vines v. Champion Building Products*, 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

The Court of Appeals determined that because the claimant did not knowingly and willfully make a false representation as to his physical condition, the defense did not apply. The court relied on the fact the employer did not inquire about current or prior injuries and the fact the claimant was physically able to do all the jobs required of him.

### Practice Point:

Employers must ask! After offering a position, as a condition of employment, include a thorough medical questionnaire about the candidate's ability to meet the physical demands of the job, including whether any prior injuries could preclude him from meeting the physical demands. If the employee intentionally misrepresented his physical condition, the first prong of the test would be satisfied.

**Rebecca Halberg, Associate**  
Direct Line: 803.255.0456  
[rhalberg@collinsandlacy.com](mailto:rhalberg@collinsandlacy.com)

### Practice Areas:

- Workers' Compensation

An alternative argument: Look closely at prior medical records for work restrictions. If a claimant was previously told by a physician not to crawl, and the claimant is injured crawling, you may be able to argue there was no accident because the result was expected.

#### **About Anne Marie Hempy**

Rebecca Kirkland Halberg is a senior associate practicing in workers' compensation. She regularly appears before the South Carolina Workers' Compensation Commission. As a member of the Board of Directors for Kids' Chance South Carolina, Rebecca continually gives back to families of workers who were injured or killed on the job. During law school, Rebecca served as a law clerk for Collins & Lacy. She joined the firm as an associate after being admitted to the South Carolina Bar in 2006.

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