

EVERYTHING YOU WANTED TO KNOW ABOUT A MISREPRESENTATION DEFENSE IN A WORKERS' COMPENSATION CLAIM...AND THINGS YOU DIDN'T KNOW YOU NEEDED TO KNOW

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A workers' compensation claim can be defended by demonstrating fraud on the part of the claimant. The defense is challenging to prove, and requires thorough investigation. The following article contains practical tips for attorneys who believe they may be defending a claim involving a dishonest claimant.

The Florida workers' compensation statute is very clear on what benefits are due to injured workers. The responsibility of the employer/carrier is to promptly provide these benefits. Obviously, there are shades of gray that sometimes requires litigation and the judicial system. However, the Florida workers' compensation system is huge and sometimes it is an easy target for fraudulent activity.¹ Even though fraud touches all parts of workers' compensation, from the employer, to medical providers, to the claimant and others, this article will focus on fraud by the claimant. In addition to discussing the Workers' Compensation statute and case law interpreting it, the article will provide practice pointers to help the practitioner improve the possibilities of a successful misrepresentation defense.

A viable misrepresentation defense really may only come up once or twice a year. Keep a copy of this article in your toolbox and refer to it when those situations arise. Each section of the following article covers one of the statutory elements of the misrepresentation defense.

The Misrepresentation Defense

A misrepresentation defense is difficult, time consuming, and expensive, with absolutely no guarantee of success. If a case goes to trial and the Judge of Compensation Claims (JCC) does not rule in the employer/carrier's favor, there will be a large fee due to claimant's counsel. Hence, it is important to make sure that the fraud defense investigation is being performed thoroughly and reasonably.

Use your resources, talk to your surveillance group, and make sure the doctors are in agreement. Do not let blind pride get in the way; make sure that the misrepresentations are there, and be ready to abandon the fraud defense if it is just not plausible any more. Make sure you follow the basic steps of the statute, and know your judge. It's going to be a long, hard battle, so make sure that you plan. With patience, a detailed game plan, knowledge, and some luck, the chances of prevailing in a misrepresentation defense should increase dramatically. A good misrepresentation defense will also help in closing out a case for a fraction of the exposure.

PRACTICE POINTERS

- *You will need to show that the claimant knowingly made, or caused to be made, false, fraudulent, or misleading oral or written statements.*
- *Get as much information as possible from hospitals, medical providers, and pharmacies.*

The fraud investigation starts with the investigation into the accident. Does the claimant have a history of claims? Was there a witness? Did the claimant report the injury or illness in a timely manner? Did the injury coincide with a change in employment status? Is there a pre-existing condition? You will be surprised to see how many claimants'

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attorneys will run for the hills at the mention of fraud. Sometimes settlement is the answer; sometimes taking it the Department of Insurance Fraud is the answer. It all depends on the circumstances and your client.

The authors have had the opportunity to be involved in two fraud cases that reached the Department of Insurance Fraud and that have led to arrests. Going to the Department of Insurance Fraud and the State Attorney's office may lead to a recoupment of a substantial sum for your client. One of the best reasons to follow a misrepresentation defense all the way through is that it should act as a deterrent to future fraudulent claims against the employer.

The Misrepresentation Defense: a Two-Step Process

The misrepresentation defense, also known as the fraud defense in Florida workers' compensation claims, involves two sections of the Workers' Compensation Act. Section 440.105(4)(b) provides that it is a violation of the law to "knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement. Section 440.09(4)(a), Florida Statutes, provides that a claimant loses entitlement to benefits when the claimant commits a knowing or intentional violation of section 440.105, or commits any criminal act, for the purposes of securing workers' compensation benefits. Pleas of guilty or nolo contendere in criminal matters are included in the definition of intentional.²

In the recently decided case *City of Hialeah v. Bono*,³ the First District Court of Appeal reversed the JCC because that the JCC did not go through this two-part analysis. The JCC made no findings about whether the claimant actually made specific false or misleading statements; instead, the JCC applied civil standards on fraud, and characterized the inconsistencies in the claimant's statements as impeachment material. The court remanded for the JCC to make findings using the correct legal standard.

That's the misrepresentation defense. If you can show that a claimant knowingly or *intentionally* made

a false, fraudulent, or misleading *oral or written* statement for the purpose of getting Workers' Compensation benefits, it will be a violation of section 440.105 and section 440.09, and his or her benefits can be stopped. However, if it were that simple, this would be a very short article and fraud would not exist in Workers' Compensation. But unfortunately, as we know, is it not that simple.

Let's take the law apart and let's see how the case law has interpreted it and let's look at some real-life scenarios to see how best to use the fraud defense.

What is false, fraudulent, or misleading?

As indicated above, the first step is to determine if a claimant has knowingly made a false, fraudulent, or misleading oral or written statement. The statement does not have to be limited to the injury on which the claim for benefits is based: in *THG Rentals v. Arnold*,⁴ the First District ruled that the false, fraudulent, or misleading statement does not need to be directly linked to the particular injury or benefits being sought. In *Arnold*, the claimant was seeking compensation based on a knee injury, and the employer/carrier provided evidence that the claimant had misrepresented facts about a separate back injury to his doctors. The court pointed out that the crucial inquiry was whether any false statement was made for the purpose of obtaining benefits, not whether the false statement was directly related to the claimant's knee injury.⁵

Is any false, fraudulent, or misleading statement enough? No. In *Paulson v. Dixie County Emergency Medical Services*,⁶ the First District ruled that the false or misleading statement "must have been made in the case for which Workers' Compensation benefits are currently being sought. Thus, the bar to receiving Workers' Compensation benefit based on false, fraudulent, misleading or incomplete statements is claim specific."⁷

However, apart from that limitation, the facts that are "material" to a workers' compensation claim are

not restricted to facts directly related to the accident for which benefits are claimed. In *Village Apartments v. Hernandez*,⁸ the First District stated that, "under most circumstances, accurate medical histories, evidence of prior accidents, and statements regarding the extent of current injuries are relevant and material to a workers' compensation claim."⁹ In that case, the claimant had testified three times that he had not been involved in prior automobile accidents; the employer/carrier proffered evidence showing the claimant had been involved in three such accidents. The JCC refused to consider the evidence. On appeal, the court reasoned, the evidence was offered to show the claimant had misrepresented material facts, not that the prior accidents had contributed to his injuries.¹⁰

PRACTICE POINTERS

- Do cross-chronologies of your documents and video surveillance. Try to get before and after surveillance from the claimant's medical appointments.
- Get plenty of video, different days, and different hours.
- If a medical condition is at issue, get the doctors to provide their opinions regarding the claimant's situation in writing BEFORE showing them your documentation, e.g., the claimant did not advise the physician of any pre-existing condition, or the claimant can't lift more than 10 pounds.

What types of statements will support the defense?

The knowingly false, fraudulent, or misleading statement made by the claimant can be either oral or written.

Workers' Compensation carriers and their defense firms love to get video surveillance. However, video surveillance, by itself, is not enough to prove a violation of sections 440.105(4)(b) and 440.09(4)(a). In *Diejuste v. J. Dodd Plumbing*,¹¹

the First District held surveillance video can support a finding of misrepresentation, but “only *oral or written statements* can serve as the predicate for disqualification from benefits.”¹²

PRACTICE POINTERS

- *Look at the statements made and compare them to the video and other documents, try to line up the time periods so that you can point to some specific activity. An example: the report of a medical exam states that the claimant can't lift more than 10 pounds, and you have video two days later of the claimant lifting more than that.*
- *Get video on different days and times. Try to get past the “I was in pain the next day” syndrome.*
- *Talk to video people. Make sure they know what the injuries are. If the claimant has a bad back, getting in and out cars is good video and can reveal telltale signs.*

In *Diejuste*, the video of the claimant showed that he only used his crutches when he attended medical appointments. Once he arrived at the doctor's office, he would use his crutches to go into the doctor's office. He did not use his crutches in other video taken of him.¹³ It appeared the claimant was trying to fool the doctor into thinking his condition was worse than it actually was. While the video was damaging on its face, the claimant had testified in deposition that he was able to walk without a cane or crutches and the doctors had advised him to “wean off” the crutches.¹⁴ When the doctors viewed the video, they indicated that there was nothing on the video which was inconsistent with the claimant's statements or presentation.¹⁵ Therefore, there was no violation of section 440.105(4)(b), as there were no verbal or written statements that the claimant knowingly made that were false, fraudulent, or misleading.

The *Diejuste* opinion indicates that nonverbal conduct “has value only to the extent it contradicts or dis-

proves an oral or written statement made by the claimant.”¹⁶ Nonetheless, nonverbal conduct, such as video surveillance or a physical examination, can play an important part in the finding of fraud. If the employer/carrier can prove that a claimant's written or oral statements constitute misrepresentation by presenting evidence of inconsistent or conflicting nonverbal conduct, they may have enough to prove a violation of section 440.105(4)(b). Any nonverbal conduct can be used, as long as it shows an inconsistency or disproves an oral or written statement. For example, in *Lucas v. ADT Security*,¹⁷ the First District affirmed a JCC order denying benefits on the grounds that the claimant violated section 440.105. The claimant in *Lucas* made the verbal statement that her pain was a 4 to 8 on a scale of 1 to 10. In writing, she rated her pain as 5 out of 10.¹⁸ The doctor who examined the claimant opined that her nonverbal conduct was inconsistent with her verbal statements.¹⁹ During the examination, the claimant sat on the edge of the examining table for approximately 22 minutes. The doctor testified that “people with back pain hate that. It puts a stretch on the sciatic nerve.” Additionally, the claimant did not show any signs of pain, no sign of discomfort, and there was no changing of position throughout the examination.²⁰

The doctor further opined that the physical testing he performed did not demonstrate a spine condition.²¹

During deposition, the doctor testified that the claimant's statements of pain did not correlate to his physical findings.²² Basically, the claimant's verbal statements and written statements as to her pain levels were inconsistent with the nonverbal conduct. The claimant's verbal statement was proven to be false, fraudulent, or misleading by the strength of the nonverbal evidence, but it was the verbal statement that was the predicate for fraud, not the nonverbal conduct.

Was the statement made for the purpose of obtaining benefits?

The next step needed to successfully raise a defense of a vi-

olation of sections 440.105(4)(b) and 440.09(4)(a) is that the false, incomplete, or misleading written or verbal statements must be made for the purpose of obtaining workers' compensation benefits.²³

PRACTICE POINTERS:

- *Set up your game plan. Determine if there is a possibility of fraud. Always go back and make sure that the fraud is still there and that you are getting the testimony/evidence you need.*
- *Follow up your discussion with the doctor a few weeks later, and show them the documentation you have, e.g., that the claimant has a pre-existing condition or that the claimant lifted much more than 10 pounds on different occasions.*
- *The doctors need to opine that had they known about the pre-existing condition they would have approached the treatment plan differently or that the claimant presented differently in the office than he did on the video.*
- *Before showing the doctor any video, you must supply a copy of same to the claimant and/or his or her attorney.*

A false, incomplete, or misleading statement just by itself is not enough. The false, incomplete or misleading statement needs to be made in an attempt to obtain benefits. For example, if a person falsifies his employment application, he is presenting a false statement. But the false statement is not made for the purpose of obtaining benefits, so workers' compensation benefits will not be stopped if the employer learns of the falsification.

In *Matrix Employee Leasing v. Hernandez*,²⁴ the claimant, as part of the hiring process, presented a false social security card to his employer. The claimant later was involved in a compensable workers' compensation accident. The employer/carrier denied the case based on the claimant having presented a false social security card at the time of hiring. The JCC ruled, and the First District affirmed, that even though the claim-

ant presented a false social security card at hiring, he was still entitled to workers' compensation because the social security card was not presented for the purpose of obtaining benefits.²⁵

The decision in *Quiroz v. Health Central Hospital*²⁶ is another example of the distinction between false statements made for the purpose of obtaining workers' compensation benefits and those made for other reasons. In *Quiroz*, the claimant made misrepresentations to his employer about the medical reasons for two absences.²⁷ The JCC found the claimant had falsified information for the purpose of obtaining benefits. The First District reversed, stating the misrepresentations "were clearly made for the purpose of preventing his termination from the hospital."²⁸ The court noted there was no evidence the misrepresentations would help the claimant actually obtain benefits.

In contrast, in *Arreola v. Administrative Concepts*,²⁹ a fake social security card was provided in connection with treatment. The JCC and the First District agreed that, because the social security card was presented in connection with workers' compensation treatment, the presentation of the false social security number was done for the purpose of obtaining benefits.³⁰

The crucial finding: intent

The judge needs to make a finding that the false or misleading written or oral statement, made for the purpose of obtaining workers' compensation benefits, was intentional. This is where misrepresentation cases become subjective. The First District in *Steel Dynamics, Inc. v. Markham*³¹ affirmed a JCC ruling that rejected a misrepresentation defense based on a number of inconsistencies in the claimant's deposition and trial testimony. The court explained that not all misrepresentations would demonstrate a specific intent to deceive for the purpose of receiving benefits:

because all testimony is, to a certain extent, shaded

by the personal experience and subjective perceptions of the providing witness, a revelation that a witnesses' experience or perception is different than that of the fact-finder or another witness is not, in and of itself, evidence of a willful or knowing intent to deceive; rather, it is commonly a demonstration of the varying degrees to which even well-intentioned individuals may interpret (or misinterpret), and later relay, objective events. It is only where a sufficient showing of a knowing or intentional misrepresentation for the specific purpose of deceiving and securing compensation benefits is demonstrated to the satisfaction of the JCC, that section 440.09(a) operates to divest a claimant of entitlement to compensation benefits.³²

PRACTICE POINTERS

When you depose the claimant, "drill down" without being obvious. If the claimant has had prior injuries, make sure that subject is dealt with in detail. If the claimant says he can't lift more than five pounds, don't ask "what is the most you can lift?" Use everyday objects that weigh under, near, and over five pounds. A gallon of milk weighs almost nine pounds. Can you lift a gallon of milk? Can you grab it from the refrigerator? Can you carry it to the table? How far is the table? Can you pick it from the bottom shelf? Then follow up later with a different everyday household item that weighs approximately 10 pounds and go through it again. Ask the questions in several ways. You want to ensure that, when you present the fraud defense, the claimant had every chance to be honest.

A finding of intent is basically an overview of the claimant's ac-

tions, activities, and statements rolled up together. That is why it is very important that the claimant be given every opportunity to recall prior accidents, and/or to detail his abilities and inabilities. The more opportunities claimants have to acknowledge and explain their possible fraudulent behavior, the stronger your case becomes.

Raising the misrepresentation defense

Even if an employer/carrier suspects fraud, it cannot file a motion to terminate an employee's entitlement to benefits if a petition for benefits is not pending.³³ An employer/carrier also cannot try to file a petition for benefits as a vehicle for determining whether an employee has made false statements for the purpose of securing benefits, as only claimants can file petitions for benefits.³⁴

The timing of raising the misrepresentation defense is very important. As the First District indicated in *Knight v. Walgreens*,³⁵ "an injured employee's right to receive workers' compensation benefits is a property right protected by procedural due process safeguards including notice and an opportunity to be heard."³⁶ Claims and defenses, including a misrepresentation defense, must be identified at the pre-trial conference.³⁷

There is a down side to raising a misrepresentation defense. Developing the defense is extremely time-consuming. And, if the claimant defeats the defense, claimant's counsel will more than likely be awarded hourly fees for defeating a misrepresentation defense.³⁸ The fee can be large.

Conclusion

A misrepresentation defense is difficult and expensive. Every year, it costs millions of dollars to fight fraud. Fraud, unfortunately, is not going away. If your early investigation indicates that there is a possibility of fraud, keep going. Make sure that you know the statute, understand the case law, figure out the judge's stance on fraud, and carefully plan

out your strategy.

The element of intent is the most difficult to establish and, as such, will make or break your defense. Use all the tools in your toolbox — get good surveillance, let your investigators know what to look for, and take a thorough and detailed deposition of the claimant. Give the claimant every opportunity to address the possible fraudulent activity.

It is very easy to lose your objectivity in a fraud case. Always question whether the misrepresentation defense is still plausible. If you continue to have a plausible misrepresentation defense, follow your game plan and continuously tweak it to ensure the best possible results are obtained. Ultimately, your efforts will result in savings for the workers' compensation system as a whole, by making claimants who may be thinking of duping the system think twice.

¹ Coalition Against Insurance Fraud, "By the Numbers: Fraud Statistics - workers' compensation," www.insurancefraud.org/statistics/htm#9 (July 2015). According to these statistics, more than half of employers surveyed agreed that the following were

indicators of possible fraud: an employee with a history of claims, an incident without any witnesses, an illness or injury that was not reported in a timely manner, and an injury coinciding with a change in employment status.

- ² § 440.09(4)(a), Fla. Stat. (2016).
³ 207 So. 3d 1030 (Fla. 1st DCA 2017).
⁴ 196 So. 3d 485 (Fla. 1st DCA 2016).
⁵ *Id.* at 487. The standard of proof is not clear and convincing evidence; the employer/carrier need only show by a preponderance of the evidence that the claimant "knowingly or intentionally made any false, incomplete or misleading statements in an attempt to obtain workers' compensation benefits." *Village of North Palm Beach v. McKale*, 911 So. 2d 1282, 1283-84 (Fla. 1st DCA 2005).
⁶ 936 So. 2d 1109 (Fla. 1st DCA 2006).
⁷ *Id.* at 1111.
⁸ 856 So. 2d 1140 (Fla. 1st DCA 2003).
⁹ *Id.* at 1141.
¹⁰ *Id.* at 1142.
¹¹ 3 So. 3d 1275 (Fla. 1st DCA 2009).
¹² *Id.* at 1277 (emphasis in original).
¹³ *Id.* at 1271.
¹⁴ *Id.* at 1276.
¹⁵ *Id.* at 1278.
¹⁶ *Id.* at 1277-1278.
¹⁷ 72 So. 3d 270 (Fla. 1st DCA 2011).
¹⁸ *Id.* at 271.
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.* at 272.
²² *Id.* at 273.
²³ 911 So. 2d 1282 (Fla. 1st DCA 2005).

- ²⁴ 975 So. 2d 1217 (Fla. 1st DCA 2008).
²⁵ *Id.*
²⁶ 929 So. 2d 563 (Fla. 1st DCA 2006).
²⁷ *Id.* at 565.
²⁸ *Id.*
²⁹ 17 So. 3d 792 (Fla. 1st DCA 2009).
³⁰ *Id.*
³¹ 46 So. 3d 641 (Fla. 1st DCA 2010).
³² *Id.* at 646-47.
³³ *Florida Dep't of Transp. v. Rippy*, 67 So3d 1122, 1123 (Fla. 1st DCA 2011).
³⁴ *Polston v. Hurricane Island Outward Bound*, 920 So. 2d 766, 767 (Fla. 1st DCA 2006). The claimant in *Polston* had filed a petition for benefits, but then voluntarily dismissed the petition.
³⁵ 109 So. 3d 1224 (Fla. 1st DCA 2013).
³⁶ *Id.* at 1228.
³⁷ *Id.* (citing *Isaac v. Green Iguana, Inc.*, 871 So. 2d 1004, 106 (Fla. 1st DCA 2004)).
³⁸ Section 440.34(3)(c) provides that "a claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer ... [i]n a proceeding in which a carrier or employer denies that an injury occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability." See also *Carrillo v. Case Eng'g, Inc.*, 53 So. 3d 1214 (Fla. 1st DCA 2011) (reversing a JCC order denying claimant's attorney's fees "because, in defeating the affirmative defense contemplated by sections 440.09 and 440.105, the claimant prevailed on an issue of compensability").



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