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Louisiana Workers Compensation

Chapter 7

Workers Compensation Fraud

Section 1208 of the Workers Compensation Act provides penalties against both the employee and the employer when either party makes a willful misrepresentation for the purpose of obtaining or defeating a workers' compensation claim. When applied against an allegedly injured worker, Section 1208 fraud is a very powerful tool to defeat claims. It provides a harsh remedy against the employee of complete forfeiture of all past and future workers compensation benefits, including past and future penalties and attorney's fees. Section 1208 states in pertinent part:

> §1208. Misrepresentations concerning benefit payments; penalty
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> A. It shall be unlawful for any person, for the purpose of obtaining or defeating any benefit or payment under the provisions of this Chapter, either for himself or for any other person, to willfully make a false statement or representation.
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> B. It shall be unlawful for any person, whether present or absent, directly or indirectly, to aid and abet an employer or claimant, or directly or indirectly, counsel an employer or claimant to willfully make a false statement or representation.
>
> C.(1) Whoever violates any provision of this Section, when the benefits claimed or payments obtained have a value of ten thousand dollars or more, shall be imprisoned, with or without hard labor, for not more than ten years, or fined not more than ten thousand dollars, or both.

(2) Whoever violates any provision of this Section, when the benefits claimed or payments obtained have a value of two thousand five hundred dollars or more, but less than a value of ten thousand dollars shall be imprisoned, with or without hard labor, for not more than five years, or fined not more than five thousand dollars, or both.

(3) Whoever violates any provision of this Section, when the benefits claimed or payments obtained have a value of less than two thousand five hundred dollars, shall be imprisoned for not more than six months or fined not more than five hundred dollars, or both.

(4) Notwithstanding any provision of law to the contrary which defines "benefits claimed or payments obtained", for purposes of Subsection C of this Section, the definition of "benefits claimed or payments obtained" shall include the cost or value of indemnity benefits, and the cost or value of health care, medical case management, vocational rehabilitation, transportation expense, and the reasonable costs of investigation and litigation.

D. In addition to the criminal penalties provided for in Subsection C of this Section, any person violating the provisions of this Section may be assessed civil penalties by the workers' compensation judge of not less than five hundred dollars nor more than five thousand dollars payable to the Kids Chance Scholarship Fund, Louisiana Bar Foundation, and may be ordered to make restitution. Restitution may only be ordered for benefits claimed or payments obtained through fraud and only up to the time the employer became aware of the fraudulent conduct.

E. Any employee violating this Section shall, upon determination by workers' compensation judge, forfeit any right to compensation benefits under this Chapter.

The fraud provision of the Louisiana Workers Compensation Act provides for a criminal and civil penalty. The workers compensation act in Louisiana is administered by the Office of Workers Compensation. The Hearing Officers are given sole and exclusive subject matter jurisdiction to administer and adjudicate claims arising out of the Workers Compensation Act. The Hearing Officers do not have jurisdiction to prosecute “criminal” matters. The Hearing Officers will make the determination of whether Section 1208 has been violated. Afterwards, the claim is turned over to the Attorney General for criminal prosecution.

LOUISIANA SUPREME COURT'S INTERPRETATION OF SECTION 1208 FRAUD

The Louisiana Supreme Court in Resweber v. Haroil Construction Company, consolidated with Storks v. Manpower Temporary Services, 660 So.2d 7 (La. 1995) held, in applying Section 1208, that:

1. Section 1208 applies to any false statement or misrepresentation, including one concerning a prior injury, made specifically for the purposes of obtaining workers' compensation benefits.

2. Section 1208 becomes applicable at the time that the employee makes the statement, as opposed to the time of the accident.

3. Section 1208 does not require that the employee be put on notice of the consequences of making false statements or misrepresentations.

4. Section 1208 does not require that the employer be prejudiced by the employee's false statement or misrepresentation.

Section 1208 encompasses any false statements and representations, including one concerning prior injuries, made specifically for the purpose of obtaining workers' compensation benefits. Rosson v. Rust Constructors, Inc., 32, 789 (La. App. 2nd Cir. 3/1/00), 754 So.2d 324, citing Resweber v. Haroil Construction Company, supra and LeBlanc v. Grand Isle Shipyard, 95-2452 (La. App. 1st Cir. 06/28/96), 676 So.2d 1157.

In enacting and amending LSA-R.S. 23:1208, the legislature made a policy decision that willful and deliberately false statements made specifically for the purpose of obtaining workers' compensation benefits are an attempt to defraud the workers' compensation system and should be dealt with harshly. The legislature has shown a continued effort over the years to make LSA-R.S. 23:1208 easier to enforce and to make its penalties stronger. It is clear from the history of this statute that the legislature intended that any false statements or representations willfully made for the purpose of obtaining benefits would result in forfeiture of those benefits and this legislative intent cannot be ignored. Resweber, supra; Rosson, supra; Bass v. Allen Cannery Company, Inc., 30, 635 (La. App. 2nd Cir.6/26/98), 715 So.2d 142.

MISREPRESENTATION ABOUT PRIOR MEDICAL CONDITION

In cases where the false statements involve prior medical conditions and injuries, the courts have stated, "The relationship between the false statement and the pending claim will be probative in determining whether the statement was made willfully for the purpose of obtaining benefits. An inadvertent or inconsequential false statement would not result in the forfeiture of benefits." Rosson, supra and Bass, supra, citing Resweber v. Haroil Construction Company, supra. In Bass, supra, the claimant provided false statements in her deposition regarding her medical history. Bass made a claim for injuries to her lower back, down into her right leg, and her shoulders. She also claimed her

migraine headaches had increased. In her deposition, she claimed that prior to her work accident, she had never injured her lower back, had never complained of pain in the lower back, nor had she complained of symptoms of pain and numbness in her right leg. She also denied pre-existing shoulder pain. She claims her last migraine headache was one year prior to the injury. She was also denied ever having her neck or back x-rayed before and denied having any previous car accidents. She denied prior hospitalizations.

Following Bass' deposition, the defendant obtained plaintiff's medical records which demonstrated her testimony to be filled with falsehoods. It showed a serious previous automobile accident in 1977 resulting in fractured vertebrae requiring extensive medical treatment. The medical records also show the claimant consistently complained of neck and back pain and migraine headaches all the way up until the time of her work injury, she had numerous x-rays, she frequented a medical center for treatment of these symptoms. There was also evidence of hospital treatment for weakness and recurrent numbness in the toes, treatment for headaches, neck pain, shoulder pain, with pain radiating down the back. She had been to the hospital on multiple occasions for complaints of headaches, dizziness, weakness and vomiting. Even in the months leading up to her alleged work accident, Bass was still being treated for complaints of head pain, neck pain and shoulder pain. There were additional records from her family physician showing multiple treatments for many of the same symptoms prior to her work accident.

In reversing the trial court, and then finding that the claimant violated Section 1208, the Court noted:

> The record in this case shows the plaintiff willfully and deliberately made false statements about her medical history. The transcript shows that the questions posed were straightforward and not subject to any misinterpretation by the plaintiff, who is a high school graduate. We do not see how the plaintiff could have misunderstood simple questions such as, 'Have you ever had an X-ray for your neck or back?;' 'Have you ever been hospitalized other than for the birth of your kids?;' and, 'Have you ever been in a car wreck?' When confronted with the falsities, the plaintiff did not offer a satisfactory explanation, instead saying, 'I wasn't thinking' or 'My mind wasn't focusing.' Bass at 149.

The court also noted that the claimant did admit to being treated with her family physician in the past, Dr. Garrison, but she only admitted to bladder problems. The court noted that the plaintiff "conveniently omitted the numerous times she consulted him for migraines, as well as neck, back and shoulder pain. Also, it is not reasonable to believe the plaintiff simply forgot about her serious auto accident in 1977. We note that on several occasions when plaintiff went to E. A. Conway Medical Center with her numerous ailments, the auto accident is included in her medical history." Id.

The court in Bass also noted that the claimant's false statements and misrepresentations were not inadvertent or insignificant, but instead they dealt directly with **the same physical complaints the claimant sought to contribute to her alleged injury.** Accordingly, the court in Bass held:

> Given the extent of plaintiff's false statements and the fact that they bore directly on the issue of whether she sustained a work related injury, we can reach no other conclusion that the plaintiff's misstatements were made in order to obtain workers' compensation benefits. No other reasonable motivation appears in this record for the extensive deception perpetrated by this plaintiff in this case. Because we find the three requirements of LSA-R.S. 23:1208 are satisfied here, the plaintiff must forfeit any claims she might have for workers' compensation benefits.

In Rosson, supra, the claimant was hit on the top of the head by a piece of falling angle iron, resulting in alleged injuries to his neck, back and head. In his deposition, Rosson gave a history of treatment at the V.A. Hospital in the past for hearing loss problems. However, he was directly asked if he ever received treatment at the V.A. for neck or back complaints, to which he responded, "No." The defendants obtained a copy of the claimant's pre-existing medical records from the V.A. Hospital, which showed numerous visits for neck and back complaints. There was a CT scan performed which showed a possible herniated disc. **This treatment was only one year prior to the work accident.** The court in Rosson stated:

> The record in this case supports the WCJ's finding that Rosson willfully and deliberately made false statements about his medical history. The transcript shows that the question about prior treatment for neck or back injuries at the V.A. Hospital was straightforward and not subject to any misinterpretation by Rosson. When confronted with his false statement, Rosson failed to offer a satisfactory explanation, and it is difficult to believe that Rosson simply forgot about visits to the V.A. only one year before his accident." Rosson at 328.

NO REQUIREMENT THAT THE EMPLOYER BE PREJUDICED BY THE MISREPRESENTATION.

Section 1208 has no requirement that the employer be prejudiced by the willful misrepresentation. In many cases, section 1208 fraud is based on the employee's misrepresentation regarding prior medical problem and/or treatment. Under the Workers Compensation Act you take the employee as you find them. So, if the employee had been honest and told the adjuster/defense attorney about all their pre-existing health problems, it would likely have little or no effect on the compensability of the claim. If, on the other hand, the injured worker lies about their prior medical history, the effect of the misrepresentation is total forfeiture of all past and future benefits. The theory behind such a stiff penalty is that if the employee is willing to lie about his prior treatment, it is reasonable to assume they are being dishonest about the extent of their current disability or pain.

INADVERTANT VERSUS SIGNFICANT MISREPRESENTATION

In Boise Cascade Corp. v. Ernest L. Dean, 2000 WL 546454 (La. App. 3d Cir. 05-03-00), all three of the requirements of Section 1208 must be met for finding fraud for the purposes of La. RS 23:1208. Specifically, the false statement must be made for the purpose of obtaining or defeating any benefit or payment. In this case, the claimant was injured while shutting down a machine at the end of the day. After receiving treatment at the hospital, the claimant tested positive for marijuana use. The claimant made a false statement in his deposition when he stated that he had not used marijuana since 1985. claimant later told his attorney about this false statement and his attorney then mailed a letter to the compensation carrier explaining that the claimant did in fact smoke marijuana on weekends three to four times a month. The Third Circuit found that, while the first two elements of the Resweber requirements were not in dispute, claimant's misrepresentation of his history of marijuana use, while it was incorrect and was done willfully, was not done for the purpose of obtaining workers' compensation benefits, and fraud under La. R.S. 23:1208 had not been proven.

***Question*:** What about an affirmative defense of intoxication? In this case there was no evidence that the accident was caused by intoxication. If for example, the employee was injured in a single car accident, would the outcome be different? Likely, yes, if the employee tested positive for alcohol at a level in excess of the legal limit, and he testified that he did not drink on the night of the accident, he would probably be found to have violated section 1208, in addition, the affirmative defense of intoxication would apply. There is a fundamental difference between lying about illegal drug use, and lying about contemporaneous alcohol consumption.

A trier of fact understands a witness's reluctance to admit to illegal activity in a deposition, as opposed, to willful misrepresentation for the purpose of obtaining compensation. Extreme examples of misrepresentation no being fraud would include questions in a deposition such as:

Have you ever cheated on your taxes?

Have you ever hit your wife?

Have you ever hit your child in anger?

Have you ever failed to repay a debt?

Have you ever cheated on a school test?

I am not suggesting that everyone hits their spouse, but it the type of question that will elicit a misrepresentation. The following is an example of "white" lies not amounting to fraud.

In Fuselier v. Kaough & Associates, 00-1750 (La. App. 3d Cir. 5/2/01), 784 So2d 830, the court reviewed the various misrepresentations and noted that that were not related to any prior neck injury, and they were not substantial enough to lead anyone to believe that

they should report them to their physician. "The alleged misrepresentations occurring early in the history of the proceedings included Mr. Fuselier's reporting to both Dr. Bernauer and Dr. Vaughn that he had no prior neck injuries. While the claimant may have reported a lack of any such injuries, there is no compelling evidence presented by the employer indicating that he had, in fact, ever sustained an injury of this nature of such a quality that a patient would feel it either appropriate or necessary to report it to the physicians. The evidence produced by the employer in this regard was a petition filed in 1988 instituting a suit for damages related to a slip and fall accident he suffered. The petition alleges injuries to his neck and back. The claimant, however, testified that he never knew suit was filed after the incident and denied having sustained this type of injury. No medical records were produced from that period indicating that he had, indeed, sustained neck injuries. Rather, the emergency room record from the visit on August 31, 1988, the date of the slip and fall at issue in the petition, indicates only complaints of back pain." *Id.*

"For the most part, the employer's argument presumes that a claimant is subject to forfeiture unless his or her history is reported to the physician in an all encompassing fashion, regardless of what the physician may be asking for or what the employee may *believe* the physician is asking for. Such a technical interpretation of the statute, or the jurisprudence, ignores the reality of a claimant's position, a claimant who may be lacking in education or a sophisticated understanding of the physician's questions. Additionally, the employee may feel that seemingly unexceptional aches, pain, or ailments experienced in the past could in no way be related to the information sought by the physician. For instance, in this case, during Mr. Fuselier's testimony he was questioned by the defendant's employer regarding a visit to the emergency room that he failed to reveal during his 1998 interview. When asked about the 1994 injury that occurred "picking up a garbage can at work injuring [his] low back[,]" Mr. Fuselier responded: "Come on. What's that got to do with this?" Many of the claimant's other emergency room visits that went unreported were for similar injuries, unrelated to the neck complaints sought to be remedied by the requested surgery. Applying the requirements of La. R.S. 23:1208 outlined in *Resweber*, the trial court was free to conclude that employer failed to prove that any misrepresentations made, even if willful, were made with the intent to obtain workers' compensation benefits." *Id.*

FORFETURE OF ALL BENEFITS, PAST AND FUTURE

A clear reading of Section 1208(E) provides that once a determination has been made that Section 1208 has been violated, the claimant, ". . .forfeit any right to compensation benefits under this Chapter." It does not state that the claimant only forfeits future benefits. Defendants further maintain that Section 1208(D), as it applies to restitution, is further evidence of the clear legislative intent that when a claimant violates Section 1208, all benefits are forfeited. The statute allows for restitution for benefits claimed or payments obtained through the date that the fraud is discovered, which is proof that the claimant is not to receive any benefits under the Act. Under this Section, the claimant must pay back all benefits paid until the time the fraud was discovered; and then benefits would be terminated because of the discovery of the fraud and the claimant would not get any benefits in the future. Hence, when looking at the statute in its entirety, the

restitution clause orders the claimant to pay back benefits (assuming they had been paid) until the fraud is discovered, and there is also a forfeiture for anything beyond that date. The net effect is zero benefits to the claimant. To interpret Section 1208 differently would be contrary to the clear legislative intent. If the only penalty is to lose benefits going forward, then a fraudulent claimant has nothing to lose by committing fraud.

Moreover, the Louisiana Supreme Court in the Resweber decision made it very clear that this legislature was getting tough on fraudulent conduct and wanted to make sure there were harsh penalties for same.

FORFETURE OF CLAIMS FOR PENALTIES AND ATTORNEYS FEES

Defendants further maintain that this includes all claims for penalties and attorney's fees. This was the holding of the 3rd Circuit Court of Appeal in KLLM, Inc. v. Reed, 2000-295 (La. App. 3rd Cir. 10/11/00), 771 So.2d 728, and the 4th Circuit Court of Appeal in ARD v. Orleans Material and Equipment, 98-312 (La. App. 4th Cir. 12/29/98), 727 So.2d 1183. These decisions held that once a Section 1208 violation is found and benefits are forfeited, the question is whether an employer was arbitrary in denying benefits or was untimely in paying benefits becomes moot.

MISREPRESENTATION ABOUT TRAVAL EXPENSES

Prior to December 4, 2002, there was a split between the appellate court decisions as to whether mileage reimbursement fraud would trigger complete forfeiture of benefits under §1208 or whether the claimant would only forfeit his or her right to mileage reimbursement. In Johnson v. Basic Industries, No. 97-1136 (La. App 3d Cir. 04-15-98) 711 So.2d 843 and Heckle Lodging v. Pruitt, 2000 WL 563046 P.2 No. 33-314 (La. App. 2d Cir. 05-10-00), the appellate courts found that mileage reimbursement fraud resulted in complete forfeiture of all benefits under §1208(E). The reasoning was that a claim for mileage reimbursement constituted a claim for "benefits" under the Act, and as such, making a willful misrepresentation for purposes of obtaining these benefits resulted in a complete forfeiture under §1208. However, in Ledet v. Burger King/Sydran, 2000 WL 486730, P. 1 No. 99-1380 (La. App. 3d Cir. 04-26-00) and St. Bernard Parish Police Jury and Travelers v. Duplessis, 2000-CA-2667 (La. App. 4th Cir. 01-03-02), the courts found that mileage reimbursement fraud only results in a forfeiture of an employee's right for mileage reimbursement, but does not result in forfeiture of all benefits under the Worker's Compensation Act.

The Louisiana Supreme Court in St. Bernard Parish Police Jury v. Duplessis, 02-632 (La. 12/4/02), 831 So.2d 955 makes it clear that when a claimant violates Section 1208, there is a forfeiture of all benefits the claimant would otherwise be entitled to receive. In Duplessis, the claimant committed mileage reimbursement fraud. The question before the court was whether the claimant would only forfeit his mileage reimbursements or whether he would forfeit all of his compensation benefits under the Act. The Supreme Court stated that a claim for mileage reimbursement was a "claim for benefits," and as such, once a determination is made that Section 1208 has been violated, the claimant forfeits "all of his compensation benefits." Relying upon its earlier decision in Resweber, the Supreme Court in Duplessis noted:

> The Louisiana Legislature has made it clear: false statements that are willfully made for the purpose of obtaining worker's compensation benefits constitutes and attempt to defraud the worker's compensation system. Therefore, once it is determined that a claimant has willfully made a false statement for the purposes of receiving any benefit or payment, the plain language of the statute mandates that the 'right to compensation benefits' under the Worker's Compensation Act are forfeited. Thus, the only remedy for a willful misrepresentation made for the purposes of obtaining worker's compensation benefits is found within the Worker's Compensation Act and, therefore, cannot be abridged by this Court.

VIDEO "CURE"

In Trapani v. Domino Sugars, No. 95-2529 (La. App. 4th Cir. 06-05-96), the claimant made false representations concerning her physical capabilities. This testimony was contradicted by videotape surveillance. The hearing officer found that the videotape clearly refuted the claimant's testimony and showed that she was capable of engaging in vigorous activity. However, the hearing officer held that the videotape taken on October 27, 1994 could not refute that the claimant was disabled prior to that date. Therefore, the hearing officer ruled that the claimant forfeited any and all benefits after October 27, 1994, but she awarded benefits to the claimant prior to that date. The Fourth Circuit reversed, stating that the hearing officer incorrectly applied section 1208. In reversing the hearing officer, the Fourth Circuit stated that the trial court held that claimant's credibility became an issue only from the date of the tape, "as though she was suddenly cured when the tape was made." The Fourth Circuit held that this was an erroneous application of section 1208 and held that the claimant forfeited her right to all benefits, past and future.

SECTION 1208 FRUAD VERSUS 1208.1 FRUAD

The Workers Compensation Act also provides that the employer can inquire into an employee medical condition, and if the employee fails to disclose a pre-existing condition, it is possible that the employee may forfeit his or her right to workers compensation benefits. There are two major differences between 1208 and 1208.1 fraud; employee knowledge and employer prejudice. A third significant difference is that section 1208.1 has no criminal penalty. As we discussed, 1208 does not require the employee have knowledge that the misrepresentation will result in the forfeiture of workers compensation benefits. Section 1208.1 has very stringent notice requirements. Likewise, section 1208 does not require that the employer be prejudiced by the misrepresentation. Section 1208.1 requires the employer to prove that the misrepresentation prevented it from obtaining second injury relief.

Section 23:1208.1 states as follows:

> Nothing in this Title shall prohibit an employer from inquiring about previous injuries, disabilities, or other medical conditions and the employee shall answer truthfully; failure to answer truthfully shall result in the employee's forfeiture of benefits under this Chapter, provided said failure to answer directly relates to the medical condition for which a claim for benefits is made or affects the employer's ability to receive reimbursement from the second injury fund. This Section shall not be enforceable unless the written form on which the inquiries about previous medical conditions are made contains a notice advising the employee that his failure to answer truthfully may result in his forfeiture of worker's compensation benefits under R.S. 23:1208.1. Such notice shall be prominently displayed in bold faced block lettering of no less than ten point type.

There are a number of restrictions on the application of section 1208.1. First, the Americans with Disabilities Act (ADA) restricts inquiry by the employer into a "potential" employee pre-existing disabilities. Once an employee is hired, however, the employee can be required to fill out, what is commonly known as, the post-employment second injury questionnaire. The section 1208.1 inquiry has three parts:

1.) False statement;

2.) Notice; the form must contain a warning in ten point type in bold print stating that failure to answer truthfully may result in the forfeiture of workers compensation benefits.

3.) Prejudice; Section 1208.1 differs from Section 1208, in that it requires that the misrepresentation prejudice the employer. The employee's misrepresentation must affect the employer's ability to receive reimbursement from the second injury fund. To cause the forfeiture of benefits for the employee, their misrepresentation must cause the employer to fail in the knowledge portion of the burden of proving a second injury claim. In other words, if the employee had answered truthfully, the employer would have had the necessary knowledge of the employee's permanent partial disability to win a second injury claim.

The false statement requirement is self-explanatory. The Louisiana Supreme Court addressed a conflict in the appellate courts regarding the notice provision and held:

> We have carefully considered the opinions of the third and fourth circuits and note the fact specific circumstances of each case may have influenced the decisions as rendered by the respective courts. The claimant in **Grayson** had strained his back on a job in February 1996. Although he was treated by a physician who placed him on light duty status for a very brief period of time, he never missed work or filed a compensation claim. In connection with his

> employment by Vernon Moving and Storage, Grayson completed a second injury fund questionnaire on which he indicated that he never had an injury or strain to his knee, back, or neck. During September 1997, he injured his back in a work related accident and filed a workers' compensation claim. The workers' compensation judge found Grayson provided false information on the form, but also found the notice on the form signed by Grayson deficient because it did not include the word forfeiture. **Grayson**, 99-230 at 4-5, 746 So. 2d at 123.

By contrast, the claimant in the Boh Bros. Construction Co. case failed to disclose an earlier neck injury that required surgery and resulted in temporary partial disability, a workers' compensation claim, unemployment for two and a half years, and a successful tort claim. Additionally, the claimant's testimony that he had been released to work when he applied for employment with Boh Bros. was contradicted by that of his treating physician. Under these circumstances, the court found claimant's failure to answer truthfully was significant and forfeiture was an appropriate remedy. The court held that use of denial in the notice was sufficient. Boh Bros. Construction Co., 2000-2233 at 11, 800 So. 2d at 905.

> Because of the split in the circuits, we are required to focus on the language of the statute to determine the adequacy of the notice and to provide guidance as to what constitutes proper notice.
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> Claimant argues in this court that the statute is clear and unambiguous; therefore, a resort to legislative intent is wholly inappropriate. Claimant further suggests that the solemn expression of legislative will is circumvented by allowing the use of the word denial in the notice. According to the claimant, use of any word other than forfeiture fails to give the employee proper notice of the serious and severe consequences resulting from an untruthful answer on the medical history questionnaire.
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> However, we find the decision of the fourth circuit in Boh Bros. Construction Co. to be the better reasoned approach. Absent legislatively mandated language, use of denial in the notice provides an employee with sufficient warning of the consequences of not answering in a truthful manner. The word "denial" is short, simple, concise, and sufficiently clear to put an employee on notice that workers' compensation benefits could be lost if the employee fails to answer the questionnaire truthfully and such untruthfulness causes prejudice to the employer. The form used in this case put the employee on notice that there were consequences in the nature of workers' compensation benefits being denied, if the employee failed to answer truthfully. The employee was fully and adequately informed that a failure to answer truthfully could result in benefits being adversely impacted.
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> The Louisiana Workers' Compensation Act contains an anti-fraud provision, LSA-R.S. 23:1208.1, that applies to employment-related questioning of an employee or prospective employee by an employer

concerning a prior injury, when there is no pending workers' compensation claim. Resweber v. Haroil Const. Co., 94-2708, p. 2 (La. 9/5/95), 660 So. 2d 7, 9. The statute results in the forfeiture of a claimant's workers' compensation benefits when (1) the claimant made false statements concerning a prior injury in response to such an inquiry, (2) the false statements are directly related to the medical condition for which the claimant is seeking benefits or to the employer's ability to receive reimbursement from the second injury fund, and (3) the employer has provided contemporaneous notice to the claimant that false statements made in response to the inquiry may result in forfeiture of workers' compensation benefits. Trench v. Harmony Const. Co., 95-1851, p. 4 (La. App. 1 Cir. 4/4/96), 672 So. 2d 330, 332, *writ denied,* 96-1130 (La. 6/7/96), 674 So. 2d 973.

In the instant case, plaintiff concedes that he made false statements on defendant's pre-employment questionnaire and health form regarding his medical history. Further, it is undisputed that defendant complied with the notice requirements of LSA-R.S. 23:1208.1, because both the questionnaire and the health form contained prominently displayed written notices advising plaintiff that his failure to answer truthfully may result in the forfeiture of his workers' compensation benefits. Plaintiff admitted at trial that the lower back and right leg pain for which he was seeking benefits was the same pain he had experienced in 1991, many years before he was hired by defendant.

The WCJ made a factual finding that plaintiff had made misrepresentations for purposes of obtaining workers' compensation benefits and that he had forfeited his right to benefits by violating LSA-R.S. 23:1208.1. Plaintiff argues that the WCJ's reference to "misrepresentations" was a finding that he had forfeited his right to benefits under LSA-R.S. 23:1208.1. After a careful reading of the WCJ's ruling, we disagree with plaintiff's interpretation. The WCJ specifically referenced LSA-R.S. 23:1208.1 in the judgment. The record clearly supports the WCJ's finding that plaintiff made false statements (i.e. misrepresentations) concerning his previous lower back injuries and treatments in response to defendant's pre-employment questionnaire and medical history health forms. The record also supports a finding that the false statements regarding the previous lower back problems directly relate to the medical condition (lower back pain) for which he now claims benefits. The existence of plaintiffs herniated disc at the L5-S1 level with radiating right leg pain before he was hired by defendant meant that plaintiff was susceptible to a subsequent aggravating injury at the L5-SI level. An aggravation of plaintiff's lower back condition was very likely to occur given plaintiff's medical history. Thus, defendant was prejudiced by the false statements in that plaintiff withheld information of his identical pre-existing medical condition. *See* Wise v. J.E. Merit Constructors, Inc., 97-0684, p. 6 (La. 1/21/98), 707 So. 2d 1214, 1217-18; Resweber, 660 So. 2d at 16. The fact

that the record also arguably supports the conclusion that plaintiff willfully made misrepresentations about his medical history to his treating physicians subsequent to the April 28th accident (evidencing a possible LSA-R.S. 23:1208 violation) is immaterial to the WCJ's finding that a pre-accident, LSA-R.S. 23:1208.1 violation occurred.

Forfeiture is a harsh remedy; therefore, La. R.S. 23:1208.1 must be strictly construed. Nabors Drilling USA v. Davis, 03-136 (La. 10/21/03), 857 So. 2d 407. Section 1208.1 provides for forfeiture if there is "(1) an untruthful statement; (2) prejudice to the employer; and (3) compliance with the notice requirements of the statute." Id. at 414. The employer must prove each of these elements to successfully avoid liability under the statute. *Id*.