SUPREME COURT OF LOUISIANA

No. 97-C-0684

LARRY D. WISE

versus

J.E. MERIT CONSTRUCTORS, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, OFFICE OF WORKERS' COMPENSATION ADMINISTRATION, DISTRICT EIGHT

TRAYLOR, J., dissenting.

Today, the majority effectively rewrites La. R.S. 23:1208.1, changing the statute's clearly articulated employee's duty to disclose into the employer's duty to discover. The majority also overlooks a significant portion of that statute which would mandate affirming the lower courts. Therefore, I respectfully dissent.

I dissent primarily based on the majority's interpretation of "failure to answer truthfully" contained in La. R.S. 23:1208.1. The majority, after noting that we must strictly construe the statute, then interprets this language to mean "affirmatively state a falsehood." The language of "failure to answer truthfully" clearly refers to an omission - a failure to answer - as well as to an affirmative misrepresentation. The statute at one point uses the language, "failure to answer" without including "truthfully." Such clear language cannot be interpreted to include only the commission of an affirmative misrepresentation.

The statute uses that precise language twice, along with the one instance omitting "truthfully," removing any doubt as to its intentional inclusion. The language of the statute clearly places a duty to disclose upon the prospective employee. The opinion judicially rewrites the statute and places a duty to discover upon the prospective employer.

Here, the employee in question clearly failed to answer truthfully by failing to answer as to "arthritis." As to his scratched out "no" regarding knee problems, he nonetheless failed to answer that

question truthfully by not marking the "yes" block.

The statute provides for forfeiture upon failure to answer truthfully "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." La. R.S. 23:1208.1 (Emphasis added). The majority spends a great amount of effort dealing with employee Wise's knee problem and whether it satisfies the "directly related" prong of the statute, virtually ignoring the second, "or affects the employer's ability to receive reimbursement . . ." prong. Because of this second prong and the use of the disjunctive "or," we need not digress into his previous knee problems or what constitutes directly related under the statute. Here, the employee's failure to answer truthfully as to arthritis has affected the employer's ability to recover from the second injury fund, thus satisfying the alternative second prong of the statute.

Arthritis is one of the conditions listed within La. R.S. 23:1378(F) which give rise to the presumption that the employer considered the condition to be a permanent partial disability (PPD). The employer's knowledge of the same will result in reimbursement from the Second Injury Fund provided the condition merges with a current compensable disability. La. R.S. 23:1378(A)(1). While acknowledging the presumption of arthritis as a PPD under Subsection (F), the majority then brushes it aside arguing that Merit was not prejudiced because "there has been no showing on the record that the claimant's arthritis merged . . ." Op. at 14. While it is correct that there was no showing of merger on the record, this argument overlooks that Merit, already successful on other grounds, was not required to make any such showing.[1] Most significantly, Merit never had the opportunity to show merger with respect to the arthritis because the employee's failure to answer as to the arthritis robbed Merit of the knowledge of the condition and the accompanying presumption which would have given Merit the opportunity to apply to the Second Injury Fund under La. R.S. 23:1378(A)(1). Had employee Wise answered truthfully by simply checking "yes" on the form, Merit, armed with the prerequisite knowledge of a presumed PPD, could then apply to the Fund based on that disability where Merit would then have to show merger to succeed in obtaining reimbursement. The lost opportunity to obtain reimbursement certainly prejudices the employer.

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[1]As the undisclosed arthritis affected the same later-injured knee, there is a possibility of merger.

Therefore, because employee Wise failed to answer truthfully as to his arthritis and because such failure has in fact affected the employer's ability to receive reimbursement, I would affirm the forfeiture.