MARTINEZ V. DRIVER MECHENBIER, INC., 1977-NMCA-031, 90 N.M. 282, 562 P.2d 843 (Ct. App. 1977)

David MARTINEZ, Plaintiff-Appellant,
vs.
DRIVER MECHENBIER, INC., and Sentry Insurance Company, its insurer, Defendants-Appellees.

No. 2742

COURT OF APPEALS OF NEW MEXICO

1977-NMCA-031, 90 N.M. 282, 562 P.2d 843

March 22, 1977

COUNSEL

Thomas E. Jones, Albuquerque, for plaintiff-appellant.

John A. Klecan, Klecan & Roach, P.A., Albuquerque, for defendants-appellees.

JUDGES

SUTIN, J., wrote the opinion. HERNANDEZ and LOPEZ, JJ., concur.

AUTHOR: SUTIN

OPINION

*{*283}* SUTIN, Judge.

{1} A hearing was held to determine whether plaintiff was entitled to workmen's compensation benefits arising out of defendants' claim that plaintiff falsified his employment application.

{2} The trial court found that plaintiff knowingly and willfully made false representations as to his physical condition; that the employer relied upon the false representations, a substantial factor in hiring plaintiff; that a causal connection existed between the false representations and the injury claimed.

{3} The trial court concluded that plaintiff was not entitled to workmen's compensation benefits and entered judgment that plaintiff's complaint be dismissed with prejudice. We affirm.

{4} The findings were supported by substantial evidence.

{5} This appeal is not meritorious because plaintiff did not comply with Rule 9(d), Rules of Appellate Procedure [§ 21-12-9(d), N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)]. In pertinent part, it reads:

The brief must set forth an attack on any finding in accordance with these rules or such finding shall be conclusive.

{6} Plaintiff failed to attack any findings in his brief which were challenged. This is insufficient to raise an issue on appeal. **Perez v. Gallegos**, 87 N.M. 161, 530 P.2d 1155 (1974). However, denial of recovery of workmen's compensation benefits arising out of a falsified employment application is a matter of first impression. We must determine the factors essential to bar recovery in order to decide whether the trial court's findings meet the test.

{7} The only case in New Mexico that approaches the problem is **Gray v. J. P. (Bum) Gibbins, Inc.,** 75 N.M. 584, 408 P.2d 506 (1965). Here, defendants contend that plaintiff's employment was fraudulently procured. The trial court found that (1) plaintiff did **not** knowingly or willfully make a false representation as to his physical condition, and (2) the employer did **not** rely upon the questionnaire as a condition of plaintiff's employment. Upon these findings, workmen's compensation benefits were awarded. The case was affirmed on appeal.

{8} To bar recovery, three essential factors must be present: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury." 1A Larson, Workmen's Compensation Law, § 47.53 (1973); **Federal Copper & Aluminum Company v. Dickey**, 493 S.W.2d 463 (Tenn.1973); **Cooper v. McDevitt & Street Company**, 260 S.C. 463, 196 S.E.2d 833 (1973); **City of Homestead, Dade County v. Watkins**, 285 So.2d 394 (Fla.1973); **Air Mod Corporation v. Newton**, 9 Storey 148, 59 Del. 148, 215 A.2d 434 (1965).

{9} The trial court found each of these factors present.

{10} Affirmed.

{11} IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.