

REFINEMENT OF THE BURDEN OF PROOF: NOTICE AND INTENT

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A. The subject

Practitioners know that a claimant has the burden of proof to establish all elements of a compensable claim, and that an employer has the burden of proof to establish affirmative defenses. Three recent Commonwealth Court Opinions address issues of a claimant's burden on notice and the employer's burden on intentional act, providing insight into what it means to present substantially competent evidence in support of the burden of proof on these issues.

B. The cases

Intent: **Penn State University v. WCAB (Smith), #630 C.D. 2010 (February 22, 2011)**

The Commonwealth Court reversed the grant of a Claim Petition.

Mr. Smith was employed by the University as a cook and in housekeeping. He was provided with a one half-hour unpaid lunch leave to dine on campus using the University's meal plan. While walking to lunch, Mr. Smith decided to follow through on a previous urge to jump down a flight of 12 steps. On doing so he sustained fractures of the right distal right tibia and talor dome fracture of the ankle as well as fractures of the left distal tibia and the talus of the ankle.

The employer argued that Mr. Smith was engaged in horseplay which caused these injuries, taking him outside the course of employment. Mr. Smith said he jumped the flight of steps on a whim. He admitted to thoughts of jumping down the steps prior to the day he did so. A co-worker testified to Mr. Smith's earlier verbalization of this 'whim'. The co-worker told Mr. Smith in that conversation that the point was not whether he could make the jump but where he would land.

The WCJ reasoned that the claimant's actions in jumping down the steps was not so outside the realm of his work activities that it constituted a direct or intentional violation of a positive work order against horseplay. The WCAB affirmed.

The Commonwealth Court closely analyzed intent in this horseplay context, reversing the WCAB and finding that Mr. Smith was intentionally in violation of a work rule which resulted in his injury. The Court distinguished Baby's Room v. WCAB (Stairs), 860 A. 2d 200 (Pa., Cmwlth. 2004), app. denied 871 A. 2d 193 (Pa., 2005). In Baby's Room, the claimant "spontaneously" jumped to touch the rim of a basketball hoop after finishing a delivery of furniture to a residence. Falling backward, he hit his head on the pavement,

sustaining traumatic brain injury. The Commonwealth Court, in Baby's Room, held that the activity was spontaneous and therefore not an intentional act for purposes of barring compensability, distinguishing the injury incurred here by Mr. Smith as intentional within the meaning of the Act.

It appears that the Commonwealth Court may have been silently applying the tort doctrine of assumption of the risk in its analysis in Smith, distinguishing the spontaneous act without a great deal of forethought in Baby's Room - and an action without a great deal of foreseeable risk - from an act involving premeditation, obvious risk and assumption of that risk. The Court explicitly characterized Mr. Smith's conduct as inherently high risk sufficient to remove him from the course of employment.

Notice: Shawn Morrison v. WCAB (Rothman Institute), #43 C.D. 2010 (November 23, 2010)

The Commonwealth Court affirmed the denial of a Claim Petition.

Mr. Morrison was employed at the Rothman Institute for some three years before he was discharged for cause on January 19, 2007. The time line reflects that the employer filed a Notice of Workers' Compensation Denial June 6, 2007 acknowledging an April 4, 2006 injury in the nature of a lumbar sprain/strain while denying disability as a result of that injury. The Claim Petition asserted injury to the low back and right leg, with resulting disability.

Mr. Morrison agreed that he continued working for the employer without accommodation until he was terminated from employment.

The medical history to the treating physician (physician #1) reflected that Mr. Morrison denied any injury, reporting instead chronic recurrent low back pain which began insidiously and worsening over the preceding six months. An MRI reflected disc herniation at two levels, with stenosis but apparently no nerve root impingement. The claimant submitted a May 16, 2007 note from physician #1: "This [the alleged work injury] was initially not reported in his evaluation on May 24, 2006". Mr. Morrison offered a January 9, 2008 report from another physician (physician #2) opining a work injury and causation.

The employer presented deposition testimony of its Director of Human Resources. The claimant received several warnings about adhering to a work schedule, insubordination, and non-work-related internet usage prior to the termination of employment. On receiving a telephone call post termination from physician #1 stating a work injury, this witness reviewed Mr. Morrison's personnel file, discovering an incident report pertaining to this alleged injury. The witness was not certain who provided that report or when it was submitted; further noting that it was not submitted on the form typically used to report a work injury and was not signed by a manager. The employer's Director of Operations testified that she interacted with Mr. Morrison regularly and that he never notified her of a work related injury or a need for physical accommodation.

The employer submitted unemployment compensation records showing that the claimant was charged with a fault overpayment with a recommendation of prosecution.

The employer's medical evidence consisted of a report from a Board-certified orthopedic surgeon (i.e., an IME) reflecting a normal clinical examination with a lack of correlation to the MRI findings. Mr. Morrison did not inform this physician of the history of chronic pain mentioned in the initial history to the physician #1.

The WCJ accepted the employer's evidence as credible and persuasive. The WCJ rejected the claimant's medical evidence because physician #1 was given a history of no specific injury and instead was given a history of chronic back pain, and because the report of physician #2 was based on a history provided by the claimant where the WCJ rejected the testimony of the claimant.

On appeal, Mr. Morrison argued that the employer's Notice of Workers' Compensation Denial was untimely and served to acknowledge the work injury. The Court observed that in an original Claim Petition, a claimant bears the burden of proving all elements necessary to support an award of benefits. Disability means loss of earning power. The claimant's burden of proof to establish disability never shifts to the employer. The Court therefore stated that where a work injury is acknowledged but disability is disputed, the claimant maintains the burden to establish entitlement to wage loss benefits.

This holding may put to rest the argument made from time to time by the claimant's bar that the issuance of a medical only Notice of Compensation Payable admits an injury and places a claimant in a suspended status as to wage loss benefits.

**Notice: Robert Hershgordon v. WCAB (Pep Boys), #2031 C.D. 2010
(February 8, 2011)**

The Commonwealth Court affirmed the denial of the Claim Petition.

The time line reflects a February 28, 2005 start date, the termination of employment on October 23, 2007, and the filing of a Claim Petition on November 26, 2007 which alleged a work injury to the back and right foot incurred June 13, 2005.

The employer denied the claim on lack of notice and because the claimant did not lose time from work until discharged from employment. The Commonwealth Court observed: "[w]hether an employee has complied with these notice requirements is a question of fact to be determined by the WCJ".

There was a September 11, 2007 e-mail report of the alleged June 13, 2005 work injury, describing it as happening: "about two years ago". The employer's representative testified that he 'did not recall' the claimant sustaining an injury on June 13, 2005 or asking him to report the work injury. To this witness' knowledge, the claimant did not request medical treatment, and performed his regular job. This witness' successor

testified that he was aware the claimant took medication but did not know why. He knew that the claimant suffered “occasional bumps and bruises at work”, but was not aware of any work injury of June 13, 2005 or of any resulting restrictions on working. He recalled that the claimant performed his job without difficulty until discharged from employment on October 23, 2007. Another employer representative testified that there was no record in the employer’s reporting system of a June 13, 2005 work injury.

The medical records submitted by the employer included those of a treating physician for the Pathmark injury who continued to treat post settlement, reflecting no change in condition since January 2005 as of August 4, 2005 [i.e., encompassing the date of alleged injury]. Follow-up visits into 2007 mentioned nothing about a work injury of June 13, 2005. There was a prior work injury of July 19, 2002, at Pathmark – and also to the back and right foot. Treatment was paid for by Pathmark until that case settled in 2007. The employer submitted a November 10, 2007 IME report done at the request of Pathmark. The history therein did not reflect the alleged work injury.

The WCJ concluded that the claimant failed to demonstrate by substantial evidence that he provided notice of a June 13, 2005 work injury within 120 days, and failed to report any such injury until after he was terminated from employment. Importantly, the WCJ reasoned that given the uncorroborated allegation of [timely] verbal notice, it was the claimant who was required to follow up with his supervisors to assure that the injury was reported in the employer’s system – notwithstanding the ‘do not recall’ testimony from the employer on the [timely] notice issue. The Commonwealth Court did not question this reasoning and its inherent definition of substantial competent evidence sufficient to meet this burden of proof on the notice issue: “The WCJ deemed claimant’s testimony that he reported the June 2005 incident not credible, since he failed to follow up with his supervisors to assure the incident was reported in employer’s system”

C. Discussion

While a claimant has the complete burden of proof to establish all elements of a compensable claim, the quantum of evidence that satisfies that burden is a matter of great question across the various issues that are addressed in the typical litigation regarding a Claim Petition and basic compensability. These three recent cases of the Commonwealth Court present observations in common which suggest that the claimant’s burden of proof is not slight. Of particular significance, it seems that an employer is not required to prove a negative in the context of uncorroborated alleged verbal notice. A claimant may claim verbal notice of a work injury, but absent evidence of a claimant’s affirmative follow up and presumably documentation, an employer’s lack of recall of alleged verbal notice may indeed be legally sufficient - and perhaps presumptively sufficient under Hersh Gordon - to rebut an allegation of verbal notice.

Morrison is instructive in evaluating the interplay between the satisfaction of the burden of proof on the notice issue and its interplay with the medical evidence in determining the sufficiency of notice, as well as supporting the proposition that a medical only Notice of Compensation Payable does not place a claimant into a suspended status.

In the context of ‘spontaneous’ versus ‘intentional’ activity, foreseeability and assumption of the risk - doctrines generally considered foreign to workers’ compensation law - may shift the burden of proof or at least a burden of persuasion to a claimant on an employer’s affirmative defense of injury due to intentional act. Smith specifically considers the inherent danger in a given activity as at least potentially controlling the determination of whether an act resulting in injury is intentional or non-intentional.

D. Practical Implications

The determination of the quantum of evidence that is sufficient to be substantially competent to support a Finding of Fact appears to be in a state of flux, and somewhat dependent on the egregiousness of the facts in a given case. Mere uncorroborated verbal notice of a work injury may be insufficient to shift the burden of proof to an employer to prove a negative.

Whether an act rises to the level of intentional misconduct barring compensability may rise or fall not so much on prior utterances [i.e., premeditation] but perhaps more on a determination of the level of obvious assumption of the risk, a doctrine previously typically foreign to workers’ compensation law. Touching a basketball rim and jumping down a flight of steps are truly both volitional acts. We may eventually see the adoption of something akin to the high duty of care standard applicable to common carriers in tort cases as the standard to be utilized in determining whether an act is ‘intentional’ enough to bar compensability.