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# LEGAL BRIEFS

CASES & COMMENTS ON WORKERS' COMPENSATION

February 2007

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## WHO HAS THE BURDEN OF PROOF?

(AND WHY DO WE CARE?)

The term “*burden of proof*” has two common meanings in the law. The first has to do with the degree of certainty with which an issue must be proven. In criminal cases that burden is “beyond a reasonable doubt.” A criminal defendant must be acquitted if there is any reasonable doubt as to guilt, even though the vast bulk of the proffered evidence suggests otherwise. It is the most extreme requirement of proof anywhere in our legal system.

In civil cases and in Workers’ Compensation, however, the degree of certainty required is much less: We must establish a fact as true by the preponderance of the evidence, but reasonable doubt will not disprove an otherwise-established fact. It is merely required that the evidence relied upon be “substantial.” We will take a look at what constitutes substantial evidence in our next issue.

In preparing a case for potential litigation, and for that matter, for the process of evaluating a litigated case for its settlement value, it is important to understand *who* needs to prove *what*. Lawyers and judges often refer to this as the “*burden of proof*.”

This second meaning of “*burden of proof*” deals with the question of who is required to go forward with the evidence to prove or disprove a disputed fact or issue. As a defendant, understanding what burdens are placed upon your counsel by statute, and by reason of evidence offered on behalf of an applicant, will help you better understand the strengths and weaknesses of your case and the potential usefulness of discovery which your counsel may recommend.

The initial burden of proving eligibility to receive compensation benefits rests on the applicant. That burden is established by LC 3600, which

*Los Angeles*  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

*Orange*  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

*Inland Empire*  
268 West Hospitality Lane, Suite 210  
San Bernardino, CA 92408  
(909) 890-4386

lays out elements an employee must prove in order to obtain benefits: 1) At the time of the injury, both the employer and the employee are subject to the compensation laws; 2) at the time of the injury, the employee is performing service growing out of and incidental to (the) employment; and 3) the injury is proximately caused by the employment. If you read LC 3600 you will also find that there are 6 more stated conditions of eligibility, but due to the operation of another code section (LC 5705), once the employee establishes that the first three conditions exist, the burden of going forward with evidence to disprove eligibility for benefits shifts to the defendant.

LC 5705 requires that the burden of going forward with evidence is placed on the party holding the “affirmative of the issue.” In other words, whichever party needs to prove something has the initial requirement to produce evidence in support of whatever they are trying to prove. Once that party offers evidence in support of their position (sometimes referred to as *prima facie* evidence) the burden shifts to the other party to offer evidence in rebuttal.

LC 5705 makes certain defenses “affirmative defenses” meaning that, by statute, the initial burden of going forward on these issues rests with the defendant. These are enumerated as a challenge to employment status, intoxication, and willful misconduct of an employee causing the injury, aggravation of disability by unreasonable conduct of the employee, and prejudice to the defendant for failure to give notice.

In addition, LC 5705(a) shifts the burden of proof to the defendant to dispute eligibility wherever the applicant offers proof that, at the time of the injury, he or she was actually performing service for the alleged employer. This creates a second

set of affirmative defenses under LC 3600(a)(4)-(10), which includes intentionally self-inflicted injuries, suicide, and “initial physical aggressor” in an altercation.

It is important to realize that LC 5705 does not limit itself to conditions of compensability. Any *other* issue upon which the parties differ is subject to the same rule: The initial burden of going forward with evidence is on the party seeking to prove that issue. Therefore, the injured worker will offer evidence on job classification, earnings, nature and extent of disability, etc. Once that evidence is offered, the burden of going forward with contradictory evidence shifts to the defendant. Evidence that is not rebutted must be considered as true by the compensation judge.

Sometimes, the law places upon the parties certain *presumptions* that affect the burden of proof in certain instances. If a party has the benefit of a presumption, they are not required to go forward with additional evidence to prove the issue.

A presumption is either conclusive or rebuttable. The law does not permit us to rebut a conclusive presumption. For example, LC 3501(b) requires a conclusive presumption that, in a death case, a spouse is presumed to be wholly dependent for support upon the deceased employee if the spouse earned \$30,000 or less in the year preceding the employee’s death.

A rebuttable presumption may be rebutted with substantial evidence to overcome it. LC 5705(a) sets up a rebuttable presumption that one performing service for another is an employee, but it allows the presumption to be rebutted by evidence that the employee was an independent contractor. The labor code is liberally seasoned

Los Angeles  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

Orange  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

Inland Empire  
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San Bernardino, CA 92408  
(909) 890-4386

with all kinds of presumptions (far too many to enumerate here) but it is important to keep in mind whether a particular issue in any given case is subject to a presumption, and whether that presumption is conclusive or rebuttable.

The analysis of issues to be proved or rebutted in a litigated case should generally start with the Application for Adjudication of Claim. In that document, the employee will set forth a position on various issues including earnings, periods of disability claimed, the employment and the alleged mechanism of injury. The claims administrator will most likely be obtaining information from a variety of sources (including the employer) that should be repeatedly crosschecked against the application to determine which issues may be agreed upon, and which will be disputed and subject to the burdens of proof described above.

Thus, for example, where an application claims earnings at an amount that differs from the employer's report, the assumption is the employee will testify to (and perhaps present documentary evidence of) an earnings rate with which the defendant does not agree. The burden will then fall on the defendant to produce documentation of the correct earnings by way of pay records or other competent evidence. Failure to produce evidence to meet that burden would require a judge to accept as true any un-rebutted evidence proffered by the applicant (which may only be testimony the judge believes to be credible).

This is the analysis that should be ongoing during the life of a file. What are the unresolved economic issues in the case, who has the burden of proof on the issue, and (if the burden is on us) do we have evidence to offer sufficient to sway a judge to our viewpoint on that issue if we have to

go to trial? If not, what do we need to do in order to get that evidence? Wage statement? Job analysis? Deposition? Defense Witnesses? When, as often happens, defense counsel recommends you engage in some area of additional discovery, you should have an idea of how that activity will help you resolve a disputed issue and whether you expect the result of that discovery to favorably impact the value of your case.

During the life of the case your defense counsel should be regularly communicating with you to identify those issues to which the parties still do not agree, and to analyze whether you have appropriate evidence to go forward with whatever burdens the law and the facts place upon you to prove your position. In most cases the number of unresolved economic issues in each case should be relatively few, and they should become fewer as discovery progresses. You will want to objectively look at the evidence you have in support of your burden of proof, and the evidence the applicant will offer, in order to determine the probable outcome and the economic impact of that outcome on the case value (more about that in the next article).

Ideally, you should have an idea of what the economic impact of all the issues is on the value of your case, during every stage of the case. Coupled with an analysis of the evidence you have (or expect to obtain) on each unresolved issue, you will be in a good position to determine settlement value as early as possible in the life of the case. Understanding who has the burden of proof, and what type of evidence is needed to meet the burden, will keep you in a good position to negotiate early resolutions, or to have the best possible preparation for litigation if that becomes necessary.

*Los Angeles*  
5990 Sepulveda Blvd. Suite 600  
Van Nuys, CA 91411  
(818) 997-2100

*Orange*  
1700 West Katella Ave.  
Orange, CA 92867  
(714) 288-1700

*Inland Empire*  
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San Bernardino, CA 92408  
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## FROM CAAA

Last month we indicated we would bring you the latest insights from the winter installment of the California Applicant's Attorney Association convention held in San Diego. Interestingly, we did not find very much to be particularly noteworthy.

Not surprisingly, one area of discussion dealt with cases we covered in the last *Legal Briefs*, and that is the impact of *Smith v. WCAB* and *California Youth Authority and Amar v. WCAB and Mel Clayton Ford*, B190054 and B190655, (1/16/07). Applicant's attorneys are looking for ways to squeeze additional attorney fees out of cases, preferably not at the expense of their clients. Thus, we are already seeing a push by applicant's counsel to obtain stipulated awards on interim issues in cases, even after the issue has been informally resolved by the parties. The supposed purpose of this stratagem is to then await some perceived breach by the defendant and to allow the applicant attorney to go to the WCAB to "enforce" the interim award and (last but not least) claim an attorney fee at a high hourly rate payable by the defendant. Forewarned is forearmed.

We frankly also heard a lot of representations on various issues without much (or any) authority to back those representations up, including an evidenced misunderstanding by some speakers of the correct application of the *AMA Guides* and the circumstances under which pain can be used to increase an impairment rating. Mostly, for now, it appears to be business as usual in the applicant's bar.

## FROM THE COURTS

In a startling *en banc* decision that might be described as "commissioner nullification," the WCAB took a hard swipe at a major provision of SB 899 by interpreting LC 4660(d) to require the use of the old rating schedule whenever temporary disability has been paid on a case prior to 1/1/05. Utilizing a very creative argument proposed by an even more creative applicant attorney from up north, the WCAB reasoned in a 4/3 split decision in the case of *Pendergrass v*

*Duggan Plumbing and SCIF*, (1/24/07) that the mere payment of temporary disability invokes a legal obligation, at some unknown future point in time, to issue a statutory notice under LC 4061 when the last TTD payment is made, and therefore *any* payment of TTD in 2004 mandates use of the old schedule under the terms of LC 4660.

We understand the defendant is attempting to appeal the decision. However, for now, since the decision of the WCAB was *en banc* (meaning all the commissioners participated) the decision binds all trial judges in the state, and will have a major impact on the economic value of many cases with dates of injury prior to 1/1/05 unless, and until, the decision of the WCAB is overturned.

This decision makes moot many cases currently in the appellate process that turn on the existence or sufficiency of a 2004 medical report relied upon to trigger use of the old schedule over the new. In most of those cases TTD was paid prior to 1/1/05, so the inquiry over the medical reports now has little bearing on which schedule to use.

For now, there are a significant number of cases that need to be re-evaluated in light of this decision, where the date of injury was prior to 1/1/05 but we thought the *AMA Guides* applied because there was no comprehensive med/legal report and no treating report evaluating PD prior to 1/1/05.

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Los Angeles  
5990 Sepulveda Blvd. Suite 600  
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