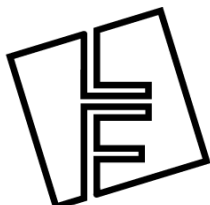


WORKERS' COMPENSATION LAW CURRENT DEVELOPMENTS

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CURRENT DEVELOPMENTS

A. Workers' Compensation Benefits

1. Notice of Claim

The Alabama Workers' Compensation Act requires that a claimant provide timely notice to the employer of a work-related injury. *Ala. Code* § 25-5-78 (1975) provides as follows:

“For purposes of this article only, an injured employee or the employee’s representative, within five days after the occurrence of an accident, shall give or cause to be given to the employer written notice of the accident. If the notice is not given, the employee or the employee’s dependent shall not be entitled to physicians or medical fees nor any compensation which may have accrued under the terms of this article, unless it can be shown that the party required to give the notice had been prevented from doing so by reason of physical or mental incapacity, other than minority, fraud, or deceit, or equal good reason. Notwithstanding any other provision of this section, no compensation shall be payable unless written notice is given within 90 days after the occurrence of the accident or, if death results, within 90 days after the death.”

Pursuant to this statute, an employee is required to give notice to the employer within 90 days of the alleged accident. *United Auto Workers Local 1155 v. Fortenberry*, 926 So.2d 356 (Ala. Civ. App. 2005); *Wal-Mart Stores, Inc. v. Elliott*, 650 So.2d 906 (Ala. Civ. App. 1994). The failure to give notice within 90 days of the alleged accident statutorily bars the claim. *Ex parte Big Four Coal Mining Co.*, 213 Ala. 305, 104 So. 764 (1925); *Equity Group – Alabama Division d/b/a Keystone Foods v. Harris*, ___ So.3d ___, (Ala. Civ. App. 2010). 2010 WL 2225047 (June 4, 2010).

Equity Group – Alabama Division d/b/a Keystone Foods v. Harris, ___ So.3d ___, (Ala. Civ. App. 2010). 2010 WL 2225047 (June 4, 2010).

The Alabama Court of Civil Appeals affirmed a determination that the employee was entitled to workers' compensation benefits, despite strong evidence that the employee never provided notice of the alleged accident until after it was determined that surgery was required.

Rodney Harris injured his back while working at Keystone Foods on July 6, 2007, 15 minutes before his final shift of the work week was scheduled to end. That day was the last day that Harris was scheduled to work before taking a week-long vacation. Harris testified that he continued to experience pain during the week of his vacation and visited his personal doctor on two occasions. Harris testified that he told the doctor on both occasions that he injured his back at work, but neither record revealed the same. Harris's wife, April, testified that she called Harris's supervisor, Joseph Jenkins, on Monday, July 16, 2007, and told him that Harris was unable to report to work that day because of his back pain from an injury on July 6, 2007. Jenkins testified that April never told him that Harris was injured at work. On that same day, April also spoke with another one of Harris's supervisors, Pam Stone. Stone testified that April did not tell her that the accident happened at work.

Harris then went to a neurosurgeon, who testified by deposition that Harris told him that he was not injured at work. Both Harris and April disputed the doctor's testimony and claimed they informed him that the injury was work related. Harris is legally deaf and claimed to have difficulty communicating with the neurosurgeon. On September 10, 2007, Martha Jacobs, the safety manager for Harris's employer, completed an accident investigation report about Harris's injured back. The report listed the date of injury as unknown, but had

a notation in the margin indicating that Harris had filed a disability claim with the union on August 23, 2007.

In February 2008, Harris filed suit seeking workers' compensation benefits. The trial court entered a judgment finding that Harris had injured his back at work on July 6, 2007, and that the employer received sufficient notice of the injury. On appeal, the Alabama Court of Civil Appeals opined that Harris provided sufficient notice of the injury. The trial court, within its discretion under the *ore tenus* rule, found April's testimony to be the most credible. In essence, when she informed Harris's supervisors that he had sustained a work-related injury, notice was provided. "Knowledge on the part of a supervisory or representative agent of the employer that a work-related injury has occurred will generally be imputed to the employer." *Wal-Mart Stores, Inc. v. Elliott*, 650 So.2d 906, 908 (Ala. Civ. App. 1994).

1. Notice can be provided in writing, orally, or through information which requires the employer to investigate whether an employee has sustained a work-related accident.

2. Require written notice of all accidents from the employee.

2. "Willful Conduct" and Violation of Safety Rules

An employee's conduct can, in certain instances, result in the preclusion of compensation for an injury in the workplace. *Ala. Code* § 25-5-51 provides as follows:

"No compensation shall be allowed for an injury or death caused by the willful misconduct of the employee, by the employee's intention to bring about the injury or death of himself or herself or of another, his or her willful failure or willful refusal to use safety appliances provided by the employer or by an accident due to the injured employee being intoxicated from the use of alcohol or being impaired by illegal drugs."

When appropriately pleaded and proved by the employer, the willful misconduct of the employee exonerates the employer from liability for compensation notwithstanding that the injury may have arisen from an accident in the course of the employment. “To summarize over 75 years of law on the willful misconduct bar, a worker commits willful misconduct involving a violation of an employer’s rule or regulation when the worker knows that rule, he understands the consequences of disobeying that rule, he deliberately chooses to disobey the rule, and his choice to disobey that rule is unreasonable under the circumstances” *Musgrove Construction Company, Inc. v. Malley*, 912 So.2d 227 (Ala. Civ. App. 2003) (willful misconduct defense did not apply since employer failed to prove removal of safety gloves caused electrocution); see *Ex parte Bowater, Inc.*, 772 So.2d 1178 (Ala. Civ. App. 1999) (reversed on other grounds, 772 So.2d 1181 (Ala. 2000) (willful misconduct defense applied to injury caused by employee deliberately disobeying the lockout procedure mandated by the employer). To establish the willful misconduct defense, the employer must present substantial evidence of the violation. *Ex parte Bowater, Inc.*, *supra*.

An employer’s enforcement of the applicable safety rule is necessary for the willful misconduct defense. When a rule is habitually disregarded with the knowledge and acquiescence of the employer, the violation of the rule will not support a willful misconduct defense. See *Pruitt v. Kirkland*, 440 So.2d 1105 (Ala. Civ. App. 1983). An employer who fails to enforce safety rules provide a basis for an employee to assert that the employer has waived the defense.

The determination of whether an employee is guilty of willful misconduct is determined on a case-by-case basis. As a consequence, the courts have reached inconsistent results for similar safety violations. In *Ex parte Bowater, Inc.*, *supra*, the willful misconduct defense barred the recovery of compensation benefits to an employee who was found to have deliberately disobeyed the lock-out-tag-out procedure mandated by the employer. In *McWane*,

Inc. v. McClurg, ___ So.3d ___ (Ala. Civ. App. 2010); 2010 WL 1170081 (March 26, 2010), the employer likewise asserted that the employee was barred from recovery of compensation by failing to follow the employer’s lock-out-tag-out procedure. Although the factual circumstances indicated that the employee violated the procedure, the employee was awarded compensation based on the finding that the employee’s actions were not “in unreasonable character and disregard of any known or obvious risk that was so great as to make it highly probable that harm would follow.” As evidenced by the differing results in these similar cases, the facts, and the trial court’s conclusions drawn on the facts, are significant.

- 1. Make employees aware of safety rules.**
- 2. Confirm the employee’s understanding of safety rules in writing.**
- 3. Consistently enforce safety rules.**

3. Impairment by Illegal Drugs

A separate, but related, misconduct defense is the employee’s impairment by alcohol or illegal drugs. Impairment by illegal drugs is addressed in § 25-5-51 as follows:

“A positive drug test conducted and evaluated pursuant to standards adopted for drug testing by the U.S. Department of Transportation in 49 C.F.R. Part 40 shall be a conclusive presumption of impairment resulting from the use of illegal drugs. No compensation shall be allowed if the employee refuses to submit to or cooperate with a blood or urine test as set forth above after the accident after being warned in writing by the employer that such refusal would forfeit the employee’s right to recover benefits under this chapter.”

Although a positive drug test creates a conclusive presumption of impairment resulting from the use of illegal drugs, the employer has the burden of proving a causal relationship between the impairment by illegal drugs and the accident. To establish this causal relationship, the employer does not have the burden of proving that the impairment or intoxication

is the sole cause of the injury to the employee, only the proximate cause. *Collins Signs, Inc. v. Smith*, 833 So.2d 636 (Ala. Civ. App. 2001). Thus, as under general Alabama tort law, if the impairment or intoxication of the employee operates simultaneously with some other causative factor to cause a single injury, the impairment or intoxication may be considered the proximate cause. In the case of concurrent causes, the proximate cause requirement is established if the injury would not have occurred but for the impairment or intoxication. For example, if the use of illegal drugs adversely affects the ability of the employee to follow safety procedures, pay attention to hazards, or react to dangerous situations, and these mental impairments preclude the employee from avoiding an accident, the impairments will be considered a proximate cause of the injury.

The establishment of impaired physical coordination because of illegal drugs can be accomplished directly through eyewitness testimony from co-workers that the employee exhibited evidence of impairment. It can also be established indirectly through medical evidence that drug use causes impaired judgment or reaction time, accompanied by evidence of the employee's acts and facts which rebut other potential causes, such as a defective machine.

The establishment of impairment by illegal drugs is illustrated in several cases.

Parker Hanafin Corporation v. Harrell, 813 So.2d 875 (Ala. Civ. App. 2001).

Benefits to a drug-impaired employee awarded based on insufficient evidence that impairment proximately caused accident.

Harrell brought an action against his employer for workers' compensation benefits and for retaliatory discharge, alleging that he was injured during the scope of his employment. It was undisputed that Harrell tested positive for marijuana after undergoing a DOT drug test 2 days after the accident. Therefore, there was a conclusive presumption that Harrell was

impaired by illegal drugs. However, the employer was still required to prove that the impairment by the illegal drugs proximately caused Harrell's injury. In this case, Harrell admitted that he had smoked marijuana, but claimed that it was after the accident in an attempt to relieve his pain. None of the co-workers testified that Harrell exhibited symptoms of being "high," or under the influence of any drug. As a consequence, the court held that Harrell was not barred from recovery of compensation benefits, and awarded benefits for permanent and total disability.

Flowers Specialty Foods of Montgomery, Inc. v. Glenn, 718 So.2d 1137 (Ala. Civ. App. 1998).

Benefits to a drug-impaired employee awarded based on insufficient evidence that impairment proximately caused accident.

Glenn sought workers' compensation benefits because of a work-related accident. The employer denied liability based on Glenn's testing positive for marijuana use following the accident. However, Glenn was awarded compensation benefits based on the finding that his injury resulted from his baking mitt getting hung in a machine sprocket, which did not have a chain guard, and was not caused by impairment by illegal drugs. The claimant's supervisor testified that he had observed Glenn before the accident, and that Glenn did not exhibit evidence of being impaired.

Collins Signs, Inc. v. Smith, 833 So.2d 636 (Ala. Civ. App. 2001).

Award of benefits for a drug-impaired employee reversed based on evidence of effect of marijuana on reaction time.

Smith was awarded compensation benefits despite testing positive for marijuana following the accident. The Court of Civil Appeals reversed the trial court's award of benefits based on the employer's submission of medical articles which addressed the effect of marijuana use on an individual's reaction time. The articles stated that marijuana decreased reaction time and increased the number of initially incorrect responses to emergency situations. The article also found that the use of marijuana impaired memory, altered perception of the passage of time, and impaired performance in a wide variety of tasks. The Alabama Court of Civil Appeals found that Smith's testimony that he was aware that he was violating company policy at the time of the accident, that he could not tell that the sign was falling on him, even while it was moving, and that a co-worker warned him that the sign was falling, but that he did not attempt to move out of the way, was consistent with the article and evidenced impairment by use of illegal drugs.

- 1. Adopt a drug policy.**
- 2. Drug test following accidents.**

B. Medical Benefits

1. Waiver of Right to Select Authorized Treating Physician

The employer's obligation to provide medical treatment is codified in *Ala. Code* § 25-5-77, which states, in pertinent part, as follows:

“ . . . The employer . . . shall pay . . . reasonably necessary medical and surgical treatment . . . as the result of an accident arising out of and in the course of the employment . . . If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee may so advise the employer, and the employee shall be entitled to select a second physician from a panel or list of four physicians selected by the employer. If surgery is required and if the employee is dissatisfied with the designated surgeon, he or she may so advise the employer, and the employee

shall be entitled to select a second surgeon from a panel of list of four surgeons selected by the employer.”

An employer can lose the statutory right to select the authorized treatment if it fails to provide medical treatment to an employee whose claim is later determined to be compensable.

Equity Group – Alabama Division d/b/a Keystone Foods v. Harris,
___ So.3d ___, (Ala. Civ. App. 2010). 2010 WL 2225047 (June 4, 2010).

An employer was held to have waived the right to select the authorized medical provider by denying the compensability of the claim and refusing to provide treatment.

The employer denied the compensability of the claim and refused to provide medical treatment. The employee selected his own provider. After a hearing in which the trial court determined that the injury was compensable, an issue arose about the employer’s right to direct medical treatment. The trial court determined that Keystone Foods forfeited its right to select an initial treating physician, and that Harris’ current self-selected treating physician was deemed authorized. On appeal, the Alabama Court of Civil Appeals agreed that Keystone Foods forfeited its right to select an initial treating physician by denying medical treatment and that Harris’s current self-selected physician was thus authorized.

Consider providing medical treatment pursuant to Ala. Code § 25-5-56 for disputed claims to maintain control over medical treatment.

2. Right to Two Panel Selections

Ex parte Nicholas Kish, ___ So.3d ___, (Ala. Civ. App. 2010). 2010 WL 753351 (March 5, 2010).

Under certain limited circumstances, an employee can be entitled to both a panel of physicians and a panel of surgeons.

The employee, Nicholas Kish, suffered an on-the-job injury to his left knee, lower back, shoulder, and head. Following his injury, the employee was referred to various physicians for treatment of his injuries. In particular, Kish was referred to Dr. Dallas Russell, a neurologist, for his head injury, and Dr. Thomas Powell, an orthopaedic surgeon, for his left knee. Over the course of his treatment, the employee was granted a panel of four physicians to replace Dr. Russell.

Kish underwent multiple arthroscopic surgeries on his left knee performed by Dr. Powell. Kish continued to have problems with his left knee, and Dr. Powell scheduled him for an additional arthroscopic surgery. Kish was dissatisfied with the results of Dr. Powell's prior surgeries, and requested a panel of four surgeons to replace Dr. Powell. The employer denied this request since the employee had requested a previous panel to replace Dr. Russell.

The employee filed a motion to compel his employer to provide a panel of four surgeons. The trial court denied the employee's motion, stating the employee was only entitled to one panel of four physicians. The employee then sought mandamus relief.

The Alabama Court of Civil Appeals granted the employee's request for mandamus. The court distinguished its prior holding in *Ex parte Brookwood Med. Ctr., Inc.*, stating while an "employee has no statutory right to request a second panel of four physicians," the plain language of the act entitles an employee to select a second surgeon from a panel of four surgeons chosen by the employer. *See Ala. Code § 25-5-77(a)* (1975). After examining the

legislature’s intent, the court stated, “the legislature evidently concluded that when surgery is required, an employee deserves the additional security provided by a separate panel of four.” The court noted that “the statute differentiates between surgeons and physicians, and the two clauses at issue are not overlapping; they are supplemental to one another, intended to cover two different situations.” As such, the employee’s request for a panel of four surgeons was due to be granted.

Evaluate the reason for the second panel demand before denying the request.

C. Retaliatory Discharge

An employee may not be terminated solely because he files a claim to recover workers’ compensation benefits. *Ala. Code* § 25-5-11.1 states as follows:

“No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers’ compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of § 25-5-11.1”

A key factor in the avoidance of liability by the employer is establishing uncontradicted evidence of an independently sufficient basis for the discharge of the employee. This issue has been addressed with differing results in a number of recent decisions.

M&J Materials, Inc. v. Isbell, ___ So.3d ___, (Ala. Civ. App. 2010)
(May 7, 2010.)

The Alabama Court of Civil Appeals reversed a trial court’s denial of the employer’s dispositive motions in an employee’s retaliatory discharge claim under Ala. Code § 25-5-11.1, because the employee failed to rebut the employer’s showing that its termination of the employee’s employment was based, in whole or in part, upon the employee’s reported open possession of a firearm on the employer’s premises.

The employee suffered an on-the-job injury to his wrist. He was terminated 3 months later for taking his gun into the employer’s plant, against company policy requiring employees to keep weapons in their vehicles. The employee brought an action against the employer seeking workers’ compensation benefits and for retaliatory discharge. After the jury awarded the employee \$5,000 in compensatory damages and \$70,000 in punitive damages, the employer appealed, arguing that the reason for termination was because the employee brought a firearm on the premises.

For an employee to establish a *prima facie* case of retaliatory discharge, the employee must show: (1) an employment relationship, (2) an on-the-job injury, (3) knowledge on the part of the employer of the on-the-job injury, and (4) subsequent termination of employment based solely upon the employee’s on-the-job injury and the filing of a workers’ compensation claim. *Alabama Power Co. v. Aldridge*, 854 So.2d 554 (ala. 2002)(summarizing Ala. Code § 25-5-11.1).

The Alabama Court of Civil Appeals found that the employee failed to satisfy the fourth element. Emphasizing the stringent causation standard with the word “solely,” the Court reiterated its opinion in *Aldridge* that if there is uncontradicted evidence of an independently sufficient basis for the discharge, then the defendant is entitled to judgment as a matter of law. It was undisputed that the employee brought a firearm into the work site in violation of

company policy. There was no evidence that the employer applied its policy in a discriminatory manner. To the contrary, there was testimony that a temporary employee had been terminated for bringing a knife into the plant. Although a number of employees testified that they brought firearms onto the premises, there was no evidence that showed the employer's personnel with responsibility for hiring and firing were aware of this practice. The Court ultimately held that based on the above reasons, the employee failed to show that the employer's personnel terminated him solely on the basis that he had sought benefits under the act.

Ex parte Wood, ___ So.3d ___, 2010 WL 4272676 (Ala. 2010). (October 29, 2010).

The Alabama Supreme Court reversed the Alabama Court of Civil Appeals and upheld a jury's award of \$50,000 in the employee's retaliatory discharge claim because of a dispute over the reason for the termination.

The employee, Ray Wood, was a machinist for Black Creek. For several months, he suffered discomfort in his elbows and arms but did not indicate it was work related. After his doctor recommended surgery, he notified his employer that the injury was work-related. His employers' compensation carrier authorized the surgery. Following the surgery, Wood was released to a light-duty position. A number of disputes rose, including a discrepancy in the release date by the doctor, incomplete shifts because of appointments for physical therapy, a disputed disciplinary warning, a dispute concerning whether the light-duty job was consistent with the doctor's restrictions, and other disagreements. The critical incident was the employee allegedly using profanity and threatening to slap the HR manager. The employee was terminated following this incident. The employee subsequently brought a claim for workers' compensation benefits and for retaliatory discharge. A jury awarded Wood \$50,000 in damages, which the employer appealed to the Alabama Court of Civil Appeals. The Court of Civil

Appeals reversed the jury award on the grounds that the plaintiff admitted that he had mumbled comments with foul language, that foul language was against company policy, and that the employer applied its policies in a non-discriminatory manner. The Alabama Supreme Court then reversed the Court of Civil Appeals, finding that the Court of Civil Appeals had impermissibly re-weighed the evidence. The Alabama Supreme Court found that there was a dispute concerning the reason for Wood's termination, which made the retaliatory discharge claim an issue for resolution by the jury. Significantly, there was evidence from both the employee and the HR manager that Wood was not terminated for use of foul language. The HR manager testified that Wood was terminated because he voluntarily quit work by leaving early without permission. The Alabama Supreme Court stated that the employer's failure to immediately give the allegedly legitimate reason for termination was sufficient circumstantial evidence from which a jury might infer that the employer had fabricated the reason.

- 1. Evaluate the reason for termination before termination.**
- 2. Apply termination policies consistently and in a non-discriminatory manner.**