

Litigation Tips by Hon. Pamela Pulley
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Disclaimer

This material and the opinions expressed are my own and do not represent the position of the DIR, the DWC, the WCAB or any Judge within the DIR or DWC.

This presentation is not intended to be used as legal advice and each case or circumstance is unique. The outcome is dependent on its own set of facts.

Tip #1 If You Can't Prove It, Remove It: Narrowing Your Issues, Understanding your burden of proof and making your case

Narrowing your issues at the time of the settlement conference forces you to review your file, helps avoid confusion and duplication of issues. and streamlines your case for the trial Judge. It is generally a good idea to thin out your issues.

Burden of Proof

LC §5705 states, in pertinent part, that the “**burden of proof** rests upon the party or lien claimant holding the affirmative of the issue.

Translation: If you need to prove an issue in your case, it is your burden to prove it. Your opponent need not respond until you have carried your burden of proof.



Burden of Proof

- ❑ Who bears the burden?
 - Case in chief – the applicant
 - Lien trials – the lien claimant
 - Defendant- when an affirmative defense is raised
- ❑ What is the standard used?
 - Burden must be met by a preponderance of the evidence
Labor Code §3202.5, Evidence Code §115
 - The court will apply Labor Code §3202
- ❑ Defendant must be ready to prove up defense

Affirmative Defenses

Affirmative defenses, such as Statute of Limitations, are waived if not raised. LC Section 5409.

LC section 5705 lists additional affirmative defenses:

- (a) that the applicant is an independent contractor,
 - (b) that the injury was caused by intoxication
 - (c) that the employee's willful misconduct caused the injury
 - (d) aggravation of an injury caused by employee's unreasonable conduct and
 - (e) prejudice to employer by failure to give notice as required by 5400 and 5401.
- Such affirmative defenses should specifically raised or defendant runs the risk of waiver.

Burden of Proof: case study #1

Facts: A tree trimmer was up in a tree, performing his U&C when a tree branch broke, causing him to fall over 15 feet, sustaining serious orthopedic injuries. There was evidence that he had been drinking earlier that morning and that his blood alcohol level was sufficient to prove legal intoxication.

Question: Is this sufficient for defendant to prevail?

☞ Answer: It is not enough to prove that the applicant was intoxicated. Defendant must show that the intoxication was a proximate or substantial cause of injury, not necessarily the sole cause. Cheryl Smith v. WCAB, 45 CCC 1053 (1981).

☞ In the case of the tanked tree trimmer, if there was no causal link drawn between the broken tree branch and the applicant's intoxication, then it is unlikely that the defendant would prevail in its affirmative defense

Burden of Proof Case Study # 2

Facts: Applicant, a carpenter, got into an altercation with a co-worker following a discussion about religion. Defendant denied injury and asserted that the applicant was the initial aggressor.

At trial, it was determined that the applicant acted in response to a threat of physical violence, since the co-worker invited him to “take it outside”.

Who wins?

In the case of the quarreling Catholics, nobody wins. Defendant failed to realize that there is an exception to the initial aggressor rule where the applicant, fearing for his own safety, strikes first as a protective measure. Mathews v. WCAB, 6 Cal.3d 719, 100 Cal.Rptr. 301, 493 P.2d. 1165, 37 CCC 124 (1972).

Applicant also failed to establish injury AOE/COE since the subject matter of the dispute was not connected to the employment and the resulting injury therefore was not industrial. Kaiser Co. v. I.A.C., 65 Cal.App. 2d 218, (1944).

Tito Torres v. AJC Sanddblasting 77 CCC 1113 (2012):

- ***The WCAB en banc decision finding that the lien claimant failed to prove by preponderance of the evidence all of the elements necessary to establish the validity of its lien.***
- * ***The Board also held that [Labor Code § 5813](#) sanctions, attorney's fees, and costs for bad faith actions or tactics that are frivolous may be imposed against lien claimant, its attorney(s) and/or hearing representative(s), individually or jointly and severally, when party or lien claimant proceeds to trial with evidence that is indisputably incapable of establishing its claim or affirmative defense***

Tip #2: Amending pleadings at trial

Generally speaking, pleadings may be amended at the time of trial. Either party may request leave to amend OR the judge may amend the pleadings to conform with the evidence presented. CCR Section 10492

Beckstead v. WCAB 62 CCC 1646 (1997) the WCAB abused its discretion by **not** construing the applicant's claim as being for a CT and for finding no injury AOE/COE based solely on the fact that the applicant claimed a specific injury instead of a CT, where the medical evidence supported a finding of CT injury.

Tip #3: Petitions for Disqualification

Is not the same as a Petition for Removal. “Removal” does not remove the judge. A Petition For Disqualification might.

- **Authority:** Per §5311 Any party to the proceeding may object to the reference of the proceeding to a particular workers’ compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board. Affidavits may be read and witnesses examined as to the objections.

Petitions For Disqualification

- Petition for Disqualification of a Judge
 - Labor Code §5311, Code of Civil Procedure §641, 8 Cal. Code of Regs. §10960*,
 - Petition must be in writing and supported by affidavit or declaration under penalty of perjury stating the grounds for disqualification,
 - Must be filed no more than 10 days after service of notice of hearing or after grounds for disqualification are known
 - Referred to and determined by a panel of three commissioners, the same as Petitions for Reconsideration

#4 Arbitration Tips

- ❑ ARBITRATION Labor Code §§5270-5278, 5500.5
- ❑ Types of disputes referred to Arbitration
 - Insurance Coverage – not which employer is responsible
 - Right to Contribution under Labor Code §5500.5
 - By agreement any issue arising under Div. 1(commencing with §50) or Div. 4 (commencing with §3200) may be submitted to arbitration for any DOI.
- ❑ Go to PJ or designee after completing the Arbitration submittal form.
- ❑ Select Arbitrator of have panel prepared,
Labor Code §5271
- ❑ Obtain order to Arbitration. If not ordered to arbitration no right to Appeal arbitrators decision. Title 8 CCR 10914*

Arbitration (continued)



Labor Code §5500.5 Arbitration

- Make sure all necessary parties are joined.
- Make sure verified Petition for Contribution filed within one year of C&R.



Payment of Costs Labor Code §5273

- Between employee and employer, employer pays all costs.
- Between employee and insurer, employer pays all costs.
- Between employee and employer, or employer and lien claimant parties split the costs equally.
- 5500.5 by the parties equally.
- By the dependents equally in a death case, where injury is not in dispute.
- Costs and fees for arbitration are exclusively within the Appeals Boards jurisdiction initially with the PJ. 8 CCR Section 10920*

Eligible Arbitrators listing, Labor Code §5270.5;
Selection of Arbitrator CCR Section 10910*
Disqualification of Arbitrator 8 Cal. Code of Regs.
§10912*.
Petitions for Reconsideration of Arbitrators
decision, 8 Cal. Code of Regs. §10990*; 10995*.
Mandatory (10900) versus Voluntary (10905),
Labor Code Sections 5270 through 5275

#5 Demystifying the Walk through process



Documents which may be filed on a walk through basis (Title 8 Cal. Code Regs, Section 10789*)

- * Compromise and Release
- * Stipulations with Request for Award
- * 5710 Petitions
- * Petitions to compel depo/medical
- * Petitions for Costs Pursuant to Rule 10545

Walk through documents

Settlements must have a proof of service; medial reports;

Walk through petitions shall include any supporting documentation and a proof of service on injured worker and defendant for 5710 fees and on injured worker, his/her attorney and all defendants for a petition to compel.

May only be acted upon by a WCJ at an office that has venue. Exception where IW has an existing cases in two or more offices, then can be walked through in any office with venue.

walk through documents

If a WCJ has taken testimony or previously issued an Order Suspending Action , any walk through document in that case must be acted on by the judge who took testimony unless the Presiding Judge Reassigns it.

Tip# 6: Sweat the Small Stuff: Look for the Overlooked Issues, Defenses and Causes of Action

Think outside of the box, advance a novel point of view; spot an issue that everyone else has overlooked. Be Horton.



Miscellaneous Tips

Labor Code Section 3600(a)(8) excludes from liability those injuries which occur as a result of the commission of a felony or a misdemeanor for which the IW has been convicted.

However, the case law distinguishes between situations where the employee is performing an unlawful act in the course of employment (non-compensable) and when the employee is performing his usual and customary duties in an unlawful manner (compensable).

Miscellaneous tips

Evidence Code 788 allows the applicant to be questioned about prior felony convictions for the purposes of attacking his/her credibility.

The Board has discretion to reopen an award normally barred by Labor Code Section 5803 on the basis of a conviction for insurance fraud and can bar the convicted worker from receiving further benefits stemming from the fraud. Labor Code Section 5804 Farmers Ins. Group v. WCAB, 104 Cal App 4th 684 (2002)

Snow v. Pegasus, ADJ200788 (Board Panel Decision): Applicant may still be eligible for the cost of attendant care while a patient in a nursing facility where it can be shown that the applicant's caregiver provided services similar to a nurse case manager.

Miscellaneous Tips

An employer or carrier may petition to reduce a final award of permanent disability.

Caveat: When a petition to reduce a final award of PD is denied, the WCAB may require the petitioner to pay any costs incurred by the employee for medical evidence. Labor Code Section 4555.5

When the employer or carrier unsuccessfully petitions to reduce or terminate an award of continuing benefits or an award for continuing medical treatment, the applicant is entitled to be reimbursed for attorney fees incurred in successfully resisting the petition. Labor Code Section 4651.3

Final thoughts

- Compromise is not failure
- Know your file....and your opponent.
- Be reasonable.
- Be prepared.
- Be professional.
- Keep your perspective.