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THE FIRST REPORT

WORKERS' COMPENSATION INSIGHTS FALL 2020

CONTROVERTING CLAIMS? BETTER GET TO KNOW *HAMBY*!

BY: ZAIN HAQ

Dealing with a controverted workers' compensation claim often seems straightforward. In most areas of workers' compensation law, however, there is usually a precedent or two that may throw a wrench in your plans. In the case of a controverted claim, *Hamby* is that wrench. Correctly navigating the requirements of *Hamby* could be the difference between a successfully controverted claim and a controvert gone awry.

The rules governing the filing of a controvert are different depending upon the time of the desired filing. The time to controvert starts running on the date of employer knowledge, and the relevant time periods for controverting are within 21 days, within 81 days and after 81 days. Controverting within the first 21 days is relatively straightforward. A WC-1 or WC-3 is filed, stating the grounds upon which the right to compensation is controverted. *Hamby* comes into play when dealing with a controvert within 81 days from the date of employer knowledge.

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If a decision is made to controvert after 21 days, but within 81 days, the employer/insurer may do so on any grounds as long as a Form WC-2 documenting suspension of benefits and a Form WC-3 indicating the reason the claim is being controverted are filed. In order for this controvert to be valid, it is essential the employer/insurer comply with all the requirements laid out in *Cartersville Ready Mix Co. v. Hamby*. Often, this is easier said than done.

In *Hamby*, the claimant contended he sustained a back injury at work and the employer initiated income benefits. However, instead of paying benefits weekly, the employer paid one lump sum for five weeks without a 15% penalty. Subsequently, after 21 days from the date of knowledge, but before 81 days, the employer/insurer filed a notice of controvert and suspended benefits.

The Court of Appeals of Georgia indicated, pursuant to O.C.G.A. § 34-9-221, unless an employer controverts a claim within 21 days of notice, it must commence benefits and continue to pay all compensation owed to the employee under the statute through the date of filing of the controvert. The court indicated the legislative intent behind O.C.G.A. § 34-9-221 was to minimize hardship on the claimant by requiring the employer/insurer to act quickly in either controverting a claim or initiating benefits while they investigate more closely.

The court held the term "compensation" included all accrued income benefits including penalties for late payment. The court therefore concluded, although the claim might otherwise have been controverted on valid grounds, because the employer/insurer failed to pay late penalties, their controvert was invalid. In addition, even if the employer/insurer were to pay the penalties due to the claimant after the controvert, the controvert would still be invalid because they did not comply with the statutory requirements prior to suspending benefits.

If this opinion appears somewhat strict, the dissenting opinion appears more realistic. It noted the employer/insurer who files a notice to controvert where compensation is being paid without an award cannot always know whether a defense of improper compensation will subsequently arise. Even where an employer/insurer attempts in good faith to comply with the statute by promptly commencing benefits, their otherwise valid controvert would, under the majority decision, be held invalid despite there being a sound basis for the controvert. In many cases, an employer/insurer may

not even become aware of these issues until they are revealed in pre-hearing discovery or later raised in a hearing before the judge, the dissent pointed out.

Practical Considerations

While the *Hamby* requirements may be strict, here are a few strategies for mitigating risk:

1) Agree to an average weekly wage in writing at the outset. This way, you will be able to fend off any arguments that the average weekly wage was incorrect.
2) Include a 15% late penalty on late payments.
3) Err on the side of caution. In some cases, it may be difficult to come to an agreement on the average weekly wage or ascertain exactly whether a late penalty should be paid. When this situation arises, it may be worthwhile to pay indemnity benefits for a few extra weeks, a higher compensation rate or disputed late penalties. The additional payments may save you from finding out that a later controvert will be invalid under *Hamby*.

Be confident your controvert will not be attacked for failing to comply with O.C.G.A. § 34-9-221 . . . get to know *Hamby*!

WHERE IS YOUR PAPER TRAIL? A PRIMER ON THE IMPORTANCE OF SAFETY RULE ENFORCEMENT AND DOCUMENTATION

BY: KAYLA WASHINGTON

The Alabama Workers' Compensation Act provides that when an injury or death arises out of and in the course of a person's employment, he or she is entitled to compensation from the employer, provided the employee's injury or death was not caused by his or her own willful misconduct. Ala. Code § 25-5-31. Employers facing an injured employee's claim for workers' compensation benefits may want to assert the affirmative defense of willful misconduct. Specifically, Ala. Code § 25-5-51 bars an injured employee from recovering compensation (money) benefits under the Workers' Compensation Act, where the injury was caused by the employee's willful misconduct.

Ala. Code § 25-5-51 states:

> [N]o 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 . . . .

Please note this bar is only applicable to compensation benefits and an employer still remains liable for medical benefits. Further, Ala. Code § 25-5-36 places the burden of proof on the employer to establish willful misconduct by the employee. Although there are different forms of willful misconduct, this article focuses on the defense of willful misconduct that arises where an employee violates his or her employer's known safety rule.

What should be realized at the outset is that a mere violation of a safety rule is insufficient to bar compensation, as the failure or refusal must be willful. A conscious and intentional violation of a known, reasonable rule is willful conduct under Ala. Code § 25-5-51. *Sloss-Sheffield Steel & Iron Co. v. Greer*, 113 So. 271 (Ala. 1927). Willful misconduct also encompasses all conscious or intentional violations of definite law or definite rules of conduct where obedience is not discretionary. *Sloss-Sheffield Steel & Iron Co. v. Nations*, 183 So. 871 (Ala. 1938).

The court in *Musgrove Construction, Inc. v. Malley*, 912 So. 2d 227 (Ala. Civ. App. 2003), lays out the requirements for establishing willful misconduct due to the violation of an employer's rule or regulation. Under this case, an employee commits willful misconduct when, "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." *Id.* at 235. In *Musgrove*, the court found the employer failed to prove its employee, a journeyman who worked on or near powerlines, committed willful misconduct when he failed to wear rubber gloves and was electrocuted.

On the other hand, the decision in *Ex parte Bowater, Inc.*, 772 So. 2d 1181 (Ala. 2000), illustrated an instance where an employer successfully proved willful misconduct. In *Ex parte Bowater*, the employee sued his employer for benefits after he injured his hand by reaching into a conveyer belt to dislodge a piece of wood. The employer asserted the affirmative defense of willful misconduct. It had a safety rule known as the "lock out" procedure that required the worker to shut down the machine and padlock it before performing maintenance. The employee received a handbook describing this procedure, was instructed on the mandatory procedure at safety meetings and was consulted regarding revisions to the procedure. The employee even admitted he was supposed to lock out the machine prior to performing maintenance. Accordingly, the Supreme Court of Alabama concluded substantial evidence existed to support

the trial court's finding that the employee's conduct was willful and, therefore, his claim for workers' compensation was barred under Ala. Code §25-5-51.

In another case dealing with a violation of an employer's safety rule, the court in *McWane, Inc. v. McClurg*, 59 So. 3d 56 (Ala. Civ. App. 2010), distinguished *Ex parte Bowater* and determined a mere violation of an employer's safety rule will not bar compensation under the Act. The employee in *McWane* worked as a maintenance electrician for his employer, a company producing cast-iron pipe. He was injured after being crushed between a pipe aligner and a pipe while inspecting it. The employer asserted the willful misconduct defense, arguing the employee violated its "lockout/tagout" procedure when he reached over a guardrail and failed to lock out the energy sources supplying the pipe aligner. However, the court determined this violation amounted to mere negligence as the employee's act did not involve the type of obvious risk involved in *Bowater*. *Id.* The court's reasoning in *McWane* was influenced by the fact the employee pressed an "E-stop" button prior to inspecting the pipe aligner, believing it would prevent it from operating.

In assessing a willful misconduct defense, keep in mind that should an employer raise the issue of willful misconduct by an employee, the employer (or the employee) may demand a jury to determine the issue under Ala. Code §25-5-81(a)(2). Naturally, as with any considerations involving a potential injury, employers should discuss the pros and cons of same with counsel before making such a demand.

Given the statutory and case law, it is apparent the outcome of a claim for workers' compensation benefits will depend on the specific facts of each case. Employers can better defend workers' compensation claims involving willful violations of known safety rules by maintaining documentation regarding all aspects of its safety measures. Employers should develop clear, written safety policies and ensure these policies are distributed to its employees upon hire. Acknowledgment forms should also be given to employees in conjunction with an employee's receipt and acknowledgment of all safety policies, as well as all safety meetings, briefings and materials. Employers should also conduct regularly scheduled safety meetings to remind employees of the importance of safety compliance and to provide additional training when a safety procedure changes. Lastly, employers should try to consistently enforce safety rules and document when deviations occur. Failure to consistently enforce safety rules only opens the door to undercut a potential willful misconduct defense for violation of a known safety rule.

As a willful violation of an employer's safety rule or policy requires an intentional or conscious violation of same by the employee, proving an employee's advance knowledge that certain safety rules or policies must be followed becomes critical for this defense to succeed. By maintaining a safety "paper trail" at each step, an employer can better show that an employee was aware of a safety rule or policy and understood the risks involved when he or she decided to disregard it.

CASE LAW UPDATE: *FRETT V. STATE FARM*

BY: KAREN LOWELL (WITH CONTRIBUTIONS FROM CHAD HARRIS)

Imagine: It's January 2020, and you are blissfully unaware a global pandemic is just months away. You are at work, and it is lunch time. You clock out for your mandatory, unpaid 45-minute lunch break. In a last-ditch effort to follow your 2020 New Year's Resolutions of eating healthier, you walk to the employee break room to reheat last night's salmon and broccoli (to your co-workers' displeasure). As you exit the break room to enjoy the mild January weather on a bench in the courtyard, you unexpectedly slip and fall. Is your accident compensable under Georgia's Workers' Compensation Act? According to the Court of Appeals of Georgia's 2018 decision, the answer was, "No." Unsurprisingly, however, 2020 has brought change to more than just our social lives.

Under the Court of Appeals' 2018 decision in *Frett v. State Farm Employee Workers' Comp.*, 348 Ga. App. 30, 821 S.E.2d 132 (Ga. Ct. App. 2018), the court decided to abolish the ingress and egress rule as it applied to the scheduled break defense because it produced "anomalous and arbitrary results." As a result, the Court of Appeals concluded Frett's injury did not arise out of her employment, but out of an individual pursuit. The court went on to say, "any decision to apply the ingress and egress rule to the scheduled break exception should be made by our Supreme Court, particularly because the Supreme Court has never expressed its view on the ingress and egress rule generally."

The Supreme Court agreed and heard the case in 2020. Justice Keith Blackwell authored the lengthy opinion, which included an analysis of the "conflict in case law" with respect to how the "ingress and egress

rule" is applied at the beginning and end of a workday compared to a scheduled break scenario. Despite the employer/insurer's argument the current case law was workable with the administrative law judge's position as the ultimate fact finder, the court determined the alleged "mishmash of arbitrary rules and exceptions" surrounding scheduled breaks needed to be clarified. To do so, the court opined they must first overrule their 1935 opinion that created the scheduled break defense in *Ocean Acc. & Guar. Corp. v. Farr*, 180 Ga. 266, 178 SE 728 (1935), because they determined it incorrectly applied the "arising out of" and "in the course of" framework.

> "The analysis now turns on whether the employee's act during the scheduled break was 'incidental' to her employment.

As part of overruling *Farr*, the court held the compensability of an injury on a scheduled break no longer hinges on whether the employer exercised any modicum of control over the employee or whether the employee was on an "individual pursuit." Rather, the analysis now turns on whether the employee's act during the scheduled break was "incidental" to her employment. These "incidental" acts include using the restroom, getting coffee, getting ice or eating lunch on premises during a scheduled break. The court borrowed this concept from the wholly separate "personal comfort" doctrine utilized in large measure for traveling employees rather than focusing primarily on the proposed question of whether the ingress/egress applies during a scheduled lunch break. However, the reason a lunch break is covered for a traveling employee versus one who is not turns on employer control versus employee choice, insofar as the employer required a traveling employee be out of town as a necessary element of their job. In *Frett*, there was no such scenario, as she alone retained the choice about where to be and what to do during her break.

In light of this analysis from the Supreme Court of Georgia, it is not surprising it went on to find Frett "was injured on the premises of the employer, in the middle of her workday, while preparing to eat lunch. This activity being reasonably necessary to sustain her comfort at work, was incidental to her employment and is not beyond the scope of compensability under the Act." The court went stated, "The fact that Frett was not paid during her lunch break, or that she was free to do other tasks during that time, is not dispositive of whether her preparation to eat lunch was 'in the course of' her employment." The court opined the focus should generally be on the nature of her activity at the time of the injury. Therefore, because she was preparing a meal, which the court deemed incidental to her employment, it was immaterial whether she was on a scheduled break.

Through this new analytic framework, the court hopes to eliminate the unworkability and "mishmash of arbitrary rules and exceptions" surrounding the application of the ingress/egress rule to the scheduled break defense. However, there are presumably limits of when an "incidental" act of employment during a scheduled break becomes a "purely personal mission." As such, by retaining parts of the scheduled break doctrine, parties must now determine how far this doctrine reaches in different factual scenarios. For example, what if, instead of heating her lunch in the employee break room, Frett decided to work out in the building's basement gym?

For now, the scheduled break defense survives. But like the current state of our pandemic lives, it is a lesser version of its former self, and the future of it remains to be seen.

EVENTS

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November 4 — 1-2 p.m. ET

Webinar: Case Law Update and 2021 Expectations
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