

## What is the Burden of Proof in a Derivative Claim?

In the case of *Robinson v. United Airlines*, the Appellate Court was faced with the issue of whether the trial Judge misapplied the burden of proof and misunderstood the standard for expert testimony.

Here, the employee sustained a compensable injury to the wrist. She claimed while receiving therapy she sustained a derivative injury to the shoulder. After hearing testimony from her, the therapist, employee's expert (Dr. Rosen) and the employer's expert (Dr. Levitsky), the trial Judge found that the employee had not proven that her rotator cuff tear was caused or exacerbated by her work conditioning therapy. The Judge found the therapist's testimony and logs corroborated there was no injury and that when the employee first saw her doctor she did not report an injury. While the employee did tell her doctor she had discomfort while lifting a bar, the therapist testified this activity was never done in the sessions. Further, the Judge found Dr. Levitsky's opinion credible, logical and both medically and factually well supported that the mechanism of injury did not make sense. He found Dr. Rosen's opinion to be speculative and without reason.

The Appellate Division affirmed the trial Judge's decision. It held that the issue was not whether the accident was in the course and scope of the employment, but rather whether the shoulder injury was occasioned or aggravated by therapy, or whether it was the progression of a pre-existing injury. The employee argued that the employer was arguing that the shoulder issues were idiopathic and since the underlying injury and the reason for the therapy was work related the burden of proof that the shoulder was not work related shifted to the employer.

The Court disagreed and concluded that causation of the derivative claim was a burden of proof that remained with the employee. On the second issue of applying the incorrect standard for testimony, the Court also disagreed. It noted the Judge's "credibility determinations, as well as his findings of fact, could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge. . . their credibility." It noted the Judge's findings were grounded in credible evidence supported by the record.

**Comment:** The Appellate Division again has given the trial Judge the weight when evaluating credibility of witnesses, both lay and expert. Here, the therapist's notes and testimony gave additional credibility to Dr. Levitsky, compared to Dr. Rosen who relied on the employee's unsubstantiated testimony. The attempt to shift the burden of proof to the employer in a derivative claim allegation was clever, but fortunately it failed.

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