

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES & CLIENTS
FROM: W. JOSEPH TRUCE
DATE: November 14, 2001
RE: FAVORABLE SERIOUS & WILFUL MISCONDUCT CASE

In the case of *Frederickson v. Parr Lumber Company*, 29 CWCR 255 the Board rescinded a decision of a workers' compensation judge finding that the defendant was guilty of serious and wilful misconduct.

In holding that the applicant failed to meet the burden of proving all of the essential elements to establish serious and willful misconduct of the employer, the Board held that the evidence does not show that the employer had knowledge of the unsafe condition that caused the injury or that it willfully failed to enforce the applicable safety rules.

In the *Frederickson* case the Board established the ground rules for proving serious and willful misconduct on the part of the employer. In noting that an allegation of serious and willful misconduct can be based on either (1) the failure of the employer to provide a safe working area to the employee, or (2) violation of a safety order, the Board laid down the following rules of law:

FAILURE TO PROVIDE A SAFE PLACE IN WHICH TO WORK

Most S&W cases are predicated on a very vague and generalized allegation that the applicant's injury was caused by the employer's failure to provide a safe work area for the applicant. To establish serious and wilful misconduct on the part of the employer the Board stated in relevant part as follows:

"... in order to establish liability for serious and willful misconduct under Labor Code §4553, there must be proof that the employer (1) knew of the dangerous condition, (2) knew that the serious injury to the employee was probable, and (3) deliberately failed to take corrective action. . . . more than even gross or culpable negligence, serious and wilful misconduct involves conduct of a quasi- criminal nature, i.e., intentionally doing something either with knowledge that is likely to result in serious injury or with reckless and wanton disregard of its possible consequences. . . "

VIOLATION OF SAFETY ORDER

For the first time the Board, in the **Frederickson** case, sets forth the law with regard to the applicant's burden of proof in proving that a violation of a safety order constitutes serious and wilful misconduct. On this issue the Board stated in relevant part as follows:

". . . the WCAB must find: (1) the specific manner in which the order was violated, (2) the violation proximately caused the injury (the specific manner in which it did so must be described), and (3) the employer or a named representative, as defined in Labor Code Section 4553, knew of the safety order and the conditions making the safety order applicable and violated it, or the condition making the safety order applicable was obvious, creating a probability of serious injury and (4) the failure of the employer or representative to correct the condition showed a reckless disregard for the probable consequences . . . "

The Board's Decision in **Frederickson** is definitely a defense oriented decision and should be used as a guide in the defense of all S&W cases.

WJT
Enclosure - **Frederickson v. Barr Lumber Company**