

MACRS

SERIOUS AND WILLFUL MISCONDUCT

Denial of an ADR Application Because the Injury Resulted from the Serious and Willful Misconduct of the Applicant



Kenneth Hill | Sr. Associate General Counsel | PERAC

October 3, 2016

MACRS 2016 FALL CONFERENCE

M.G.L. c. 32, §7(1)

- “...who is unable to perform the essential duties of his job and that such inability is likely to be permanent...by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties... **without serious and willful misconduct on his part...**” (Emphasis added).

Workers' Compensation

M.G.L. c. 152, § 28

- “If the employee is injured by reason of the **serious and willful misconduct** of an employer... the amounts of compensation hereinafter provided shall be doubled.” (Emphasis added).
- Lays the foundation for double compensation under WCA.
- Retirement systems have looked to this law to give meaning to the phrase “serious and willful misconduct” in § 7.

“Serious and Willful Misconduct”

- “...is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or wanton and reckless disregard of its probable consequences.” *In re Burns*, 218 Mass. 8, 10 (1914).

Fact Intensive

- Whether one is guilty of such misconduct is a question of fact. (*Jones v. Weymouth Ret. Bd.*, CR-04-181)(CRAB Sept. 30, 2005).
- Consideration should be given to all of the immediately attending circumstances.

History

- Not many cases.
- Very high standard to prove.
- Often, focus moves to whether the member was injured while in the performance of his duties, or whether the incident in question was the proximate cause of the disabling injury.
 - So the “serious and willful misconduct” question is never answered.
 - Argument is often dropped.

Recent Cases

- Two recent DALA decisions, both on appeal to CRAB, have affirmed a board's denial of ADR to members due to their "serious and willful misconduct."
- Look at some prior cases where the "serious and willful misconduct" issue was addressed, and then examine the two recent DALA cases.

General Categories of Cases

- Pre-employment medical statements.
- Violence/aggression.
- Substance abuse.
- Violation of a statute or regulation.
- Imprudence.
- Some cases fall into more than one category.

Kallas v. Quincy Ret. Bd.

- **CR-00-1165** (DALA, 8/3/01, aff'd CRAB 1/18/02)
- August of 1997, applied to be a custodian.
- On Physical Examination Form, omitted and/or misstated several facts regarding his medical history.
- Hired. Started on Nov. 3, 1997.
- Nov. 10, 1997, injured his shoulder and back.
- 1999, applied for ADR.
- Board denied the application, and Kallas appealed.
- DALA: Deliberate misstatements constituted “serious and willful misconduct.”

Sargent v. Worcester Ret. Bd.

- **CR-07-953** (DALA: 10/22/10)
- Nov. 2001, applied to be a custodian.
 - Health History Questionnaire noted prior surgery for two herniated discs in 1990.
 - Actually - 1 surgery in 1990, 1 surgery in 2001.
- Worcester's doctor and her doctor, declared her "fit for the position sought" and she was hired.
- April of 2003, she injured her back lifting a trash container, and applied for ADR.
- Board denied her request for a medical panel: her failure to disclose the surgery in August of 2001 constituted "serious and willful misconduct."

Sargent v. Worcester Ret. Bd. (continued)

DALA disagreed. Found that she did not fail to disclose the 2001 surgery; she told the examining doctor and he mistakenly wrote that both discs were removed in 1990.

- Board argued that this case was similar to *Kallas*
- DALA: facts entirely different. Unlike in *Kallas*, Ms. Sargent:
 - Was cleared by her own doctor;
 - Was examined and cleared by her employer's doctor;
 - Performed the job duties for 18 months; and
 - Disclosed the prior surgeries.

Beamud v. Cambridge Ret. Bd.

- **CR-09-355** (DALA: 6/21/13)
- 1989, injured left and right knees. Separate surgeries.
- 1993, applied to be a police officer in Cambridge. No mention of knee problems or surgeries.
- 1994: Hired. While at Police Academy, injured his left knee. Surgery. Intermittent knee pain.
- 2006: injured left knee chasing a suspect.
- Applied for ADR. Board denied, and Beamud appealed.

Beamud v. Cambridge Ret. Bd. (continued)

- DALA reversed.
- Failure to reveal the prior knee surgeries did not constitute “serious and willful misconduct.”
 - “This clause refers to serious and willful misconduct that resulted in the Petitioner’s injury. The Petitioner was not engaging in any misconduct when he jumped over the fence and chased a fleeing suspect.”
 - Would *Kallas* be entitled to ADR?

Burek v. Montague Ret. Bd.

- **CR-08-258** (DALA: 11/6/09)
- 1980: started work for town as tree warden, then custodian.
- 2007: while traveling between job sites, he “blacked out” and struck a tractor trailer truck.
- He sustained significant injuries, and applied for ADR. Medical panel unanimously affirmed.
- Board denied: his injuries were the result of his serious and willful misconduct - driving a vehicle knowing that he had a history of seizures. Burek appealed to DALA.
- DALA: Mr. Burek failed to prove that a job-related event was the “natural and proximate cause” of his injury. He was injured as a result of a car accident that occurred because he blacked out. Nothing job-related led to the black out.
 - Instance where DALA avoided the “serious and willful misconduct” issue.

Substance Abuse Case 1

CASE 1 (2004)

- 1978: Began work as a firefighter.
- Starting early 1990s, job duties changed. Soon thereafter, documented history of alcohol abuse and depression.
- 2002, found lying in the street outside the fire station. He had been drinking while at work. Placed on sick leave and then retired for ORD.
- 2002, filed for ADR, citing PTSD as the result of constant exposure to the hazards of firefighting. Board denied the application.
- DALA: he is not disabled solely by PTSD, but by alcoholism and depression as well. DALA concluded that the combination of these disabling conditions were not proximately caused by his constant exposure to the hazards of firefighting.
- Also determined that he stopped working not because he had psychological issues; stopped because he was found drinking alcohol on the job, which was deemed “serious and willful misconduct.”

Substance Abuse Case 2

CASE 2 (2015)

- 1994: Began work as a police officer.
- Numerous job-related incidents documenting back injuries.
- 2012: Following most recent incident, treated with illegally obtained prescription drugs.
- 2013: Returned to work. Four days into his return, he removed some pills from a bin located in police station lobby where citizens could drop off unused prescription drugs.
 - Theft was discovered, an investigation commenced, and he was placed on sick leave and taken to a drug treatment facility.
 - A few months later he retired. Soon thereafter, he applied for ORD/ADR benefits claiming he was unable to work because of back pain.

Substance Abuse Case 2 *(continued)*

CASE 2 (2015)

- Board denied the application: able to perform the essential duties of his job as of his last day of work. Work stoppage was not the result of the back injury.
- Appealed to DALA: Two reasons why he was not entitled to ADR:
 - He was not disabled on his last day of work; and
 - He did not stop working because of his back pain; he stopped because he stole prescription pain killing medication, which was “serious and willful misconduct.”

Substance Abuse Case 3

CASE 3 (2015)

- DPW worker. Involved in an accident while operating a street sweeper. Claimed neck and back injuries.
- At E.R., provided a urine sample. Positive for cannabinoids. Admitted to smoking marijuana 1-2 weeks earlier.
- Applied for ADR. Board denied without a medical panel because of the positive test, which was “serious and willful misconduct.”
- Member appealed to DALA and provided a toxicology expert who opined that the test did not demonstrate that he was under the influence at the time of the accident. Ordered a medical panel.
- Board denied. Argued that the accident was not the proximate cause of his injury. Pre-existing injuries. His recollection of the accident lacked credibility. His marijuana use was likely the cause of the accident.

Azevedo v. State Ret. Bd.

- **CR-06-612** (DALA: 3/22/07)
- Corrections Officer.
- Throughout career, numerous conflicts with co-workers and superiors. Disciplined frequently for his behavior.
- Filed for ADR in 2005, claiming that the work environment, constant harassment, false accusations and multiple assaults caused stress that led to hypertension and advanced his renal failure.
- ADR denied. Mr. Azevedo appealed.
- DALA: The stress he relied upon did not satisfy the definition of “personal injury,” because he could not corroborate any of the alleged assaults. Lack of reports made no sense to the Magistrate.
- Even if the incidents occurred as he claimed, his aggressive and threatening responses escalated the outcomes. His pride in being able to assault alleged co-workers was so “out of line with proper conduct for a CPO that he should not be able to rely on these assaults as the sole cause of his stress at work.”
 - His actions constituted serious and willful misconduct.

Jones v. Weymouth Ret. Bd.

- **CR-04-181** (DALA: 5/12/06)
- Heavy equipment operator/laborer.
- 2002: co-worker accused him of harassment.
 - Berated while he loaded his truck with supplies.
 - Co-worker kicked the driver's door into Jones' shoulder.
- Applied for ADR. Board denied medical panel: not in the performance of his duties.
- DALA: the totality of the facts showed that Jones did not engage in serious and willful misconduct, because he did not provoke the attack but, rather, was a victim.

Zinkowsky v. Southbridge Ret. Bd.

- **CR-99-161** (DALA: 3/3/00)
- 1988: Started as maintenance man/laborer.
- Several documented incidents through 1994, where he allegedly injured his back while in the performance of his duties.
- Oct. 1994: Instructed to lift a hand-roller from the back of a truck. Injured his back once again.
- 1996: Applied for ADR.
 - Medical Panel unanimous YYY.

Zinkowsky v. Southbridge Ret. Bd.

(continued)

- SRB: denied application. Determined that his injury resulted from his own willful misconduct; bad practice for him to attempt to lift the hand-roller off the truck by himself, especially in light of his history of back problems.
- DALA reversed: although it may have been more prudent for him to request assistance, his actions did not constitute “serious and willful misconduct.”

Recent ADR Application

- PERAC has final approval of ADR applications, pursuant to M.G.L. c. 32, § 21(d).
- Questioned whether member sustained his injury while engaged in “serious and willful misconduct.”
- Dangerous job; high voltage electricity.
- Record noted several instances where co-workers expressed concerns related to the member’s job performance and safety issues.
 - Member acknowledged personal issues affected his focus at the job.
 - Took brief time off the job.
- Approximately three months later, involved in a serious incident wherein he sustained relatively minor physical injuries.
- Could have been catastrophic for him and co-workers.
 - Investigation: Accident caused by the member’s failure to follow standard procedures that he knew or should have known, and failed to follow basic safety guidelines.
 - Suspended from work for three days without pay.

Recent ADR Application *(continued)*

- Member applied for ADR for PTSD following the incident.
- Medical Panel unanimous for ADR, and Board approved it.
 - Question for PERAC: were his actions “serious and willful misconduct?”
- Looked to the definition:
 - “...is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or wanton and reckless disregard of its probable consequences.”
- PERAC did not believe his actions rose to that level.
 - Actions appeared to be negligent or grossly negligent, and neither intentional nor quasi-criminal.
 - PERAC approved the ADR application.

Burek (once again)

- Regarding the MRB’s “serious and willful misconduct” finding, DALA need not address it, but did.
- No serious and willful misconduct here. He intentionally drove the vehicle, but without knowing it was likely to result in serious consequences or with a reckless disregard for consequences. (No evidence of seizure during 26 years of work).
- RMV regulations: even if presume that he failed to abide by RMV regulations, that fact (alone) should not result in a denial of ADR. “A violation of a law or regulation does not constitute serious and willful misconduct in the absence of an admonition or contrary instruction.” (*Citing Drumm’s Case*, 74 Mass. App. Ct. 38 (2009)).
 - Worker’s compensation line of cases.

Sanko v. Worcester Reg. Ret. Bd.

- **CR-12-659** (DALA: 7/10/15; currently on appeal to CRAB).
- 1997: Heavy Equipment Operator for Highway Dept.
- 2007: injured right shoulder when slipped on fuel while getting out of truck (surgery).
- 2008: Operating town-owned dump truck in a rain/snow storm. Truck broke down. Supervisor sent out mechanic in a loader to repair it.
- Supervisor instructed them to connect the dump truck to the loader with chains.
- Instructed Mr. Sanko to stay in cab of dump truck in order to operate the steering and brakes. Common practice.
- At one point, the brakes malfunctioned and the dump truck rammed into the front end loader, throwing Mr. Sanko to the floor where he re-injured his right shoulder. His seatbelt had not been buckled.
- Underwent surgeries, returned to work, persistent pain.
- Filed for ADR in 2012. WRRB denied a medical panel. DALA affirmed.

Sanko v. Worcester Reg. Ret. Bd.

(continued)

- DALA determined that he was involved in “serious and willful misconduct” when he sustained his injury:
 - Riding in a vehicle while it is being towed violates M.G.L. c. 90, § 13. Dangers of doing so are self-evident. Risks increase in bad weather.
 - Not wearing a seatbelt violates M.G.L. c. 90, § 13A.
- “...acted with deliberate indifference to probable grave injury...”
- ON APPEAL TO CRAB.

Fritze v. Worcester Reg. Ret. Bd.

- **CR-13-16** (DALA: 7/17/15; currently on appeal to CRAB).
- 1988: Mechanic/Heavy Equipment Operator for the Highway Dept.
- 2009: While driving a town vehicle, he rear-ended a school bus.
 - Crash reconstruction revealed:
 - He was travelling at 44 miles per hour at the time of the crash. No evidence that he applied his brakes.
 - Bus was stopped and had activated its flashing lights.
 - Fritze had 10.45 seconds to stop his vehicle.
 - Fritze was not paying attention to the road for this 10.45 seconds. (He had been reaching for his cell phone).
 - Fritze was NOT wearing his seatbelt.
- Sustained multiple injuries to right leg, hip, knee. Underwent several surgeries.
- 2012: Applied for ADR. WRRB declined a medical panel.
 - Injury sustained as a result of serious and willful misconduct.

Fritze v. Worcester Reg. Ret. Bd. **(continued)**

- Mr. Fritze appealed to DALA.
- DALA: His actions constituted “serious and willful misconduct.”
 - In violation of 720 CMR 9.06 (inattentiveness to a roadway), and M.G.L. c. 90, § 13A (failure to wear a seatbelt).
- DALA: “The violation of a rule or statute is not in and of itself serious and willful misconduct, but will bar receipt of accidental disability retirement benefits if done with the intent to cause serious injury or death to oneself or another, or with reckless and wanton indifference to the consequences.”
- Fritze argued that, although he drove thoughtlessly and carelessly, his conduct was not quasi-criminal in nature.
- DALA: Must look to the totality of his actions, which is more egregious. He intentionally ignored the road, was not wearing a seatbelt, and disregarded myriad warnings related to the use of cell phones while driving.
 - Such actions illustrated reckless and wanton indifference to the consequences, and constituted “serious and willful misconduct.”
- ON APPEAL TO CRAB.

Near Future

- What is next?
- Is a failure to not wear a seatbelt on its own “serious and willful misconduct?”
- Is texting while driving “serious and willful misconduct?”
- What happens if Mass. passes a “hands-free” cell phone bill?
 - What if receiving directions from a supervisor?