

MAY 2013

Course and scope of employment

A look at the different tests for this critical issue

By Andje M. Medina and William L. Veen
The Veen Firm, PC

In every personal injury case, whether the plaintiff or defendant was acting in the course and scope of employment is a critical issue. A plaintiff found in the course of employment for Worker's Compensation coverage may maximize the pool of available benefits and resources. Conversely, a plaintiff found not in the course may pursue a civil action against her employer and avoid being barred by the Workers' Compensation exclusive remedy rule. And whether an individual defendant was in the course and scope can determine whether the defendant's employer is also a responsible party. Analyzing all course and scope issues is necessary to ensure you have left no stone unturned.

"Course and Scope"

Many seasoned attorneys do not realize there are two different course of employment tests: one for finding Workers' Compensation benefits (and precluding suit against an employer pursuant to the exclusivity rule), and another for finding *respondeat superior* liability against the employer of the civil defendant.

Presumption of Workers' Compensation coverage to plaintiffs on the job

The test for establishing course of employment for Workers' Compensation coverage is much less restrictive than the test for finding an employer liable for *respondeat superior* based on the negligence of an employee. (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458 (reviewed denied Nov. 30, 2005).) There is a presumption of coverage for plaintiffs injured on the job.

Presumption and *respondeat superior* liability

An employee can suffer a compensable injury under Workers' Compensation, yet his employer can escape liability for *respondeat superior* liability in many factual settings. (*Munyon v. Ole's Inc.* (1982) 136 Cal.App.3d 697.) How can this be the case? Shouldn't the course and scope of employment analysis be the same across the board?

Historically there have been great differences between the two tests. However, recent cases have expanded the circumstances when courts will find *respondeat superior* liability. So the rule is – be creative.

First analysis: Determine if client is covered by Workers' Compensation

In a civil case, do not assume that someone has already completed the course and scope analysis for Workers' Compensation benefits. Even if the case has been evaluated by another attorney or an employer – ask your client basic questions to identify whether these benefits are available. These questions will also identify exclusive remedy arguments you may face if suing an employer.

Consider a situation where your client was severely injured and needs major medical treatment. The third party that injured your client only has a 15/30 policy. Your client was walking home from work when she was injured. She has been told by non-lawyer friends that she is not entitled to Workers' Compensation benefits because she had left work. Your client does not know about the "work errand exception." She does not realize the mail she was carrying for deposit at the post office makes her eligible for comp benefits. Your duty is not just to recover the small auto policy in the civil case, but also to ask questions to help your client identify potential Workers' Compensation benefits that may be available.

Included on page 18 you will find 10 basic questions to get you started on your analysis of whether Workers' Compensation coverage is available. Each question will elicit a series of follow-up questions, but these broad topics should get you started on the right track. Following the questionnaire you will find an "attorney key" to guide you through the relevant cases for your analysis. Use the cases to find additional benefits or to identify potential Workers' Compensation exclusivity pitfalls.

Second Analysis: *Respondeat superior*

Do not assume that a defendant will be forthright about course and scope issues or that a defendant has the knowledge to identify them. It is up to you to ask the right questions to uncover liability against the defendant's employer.

> As a matter of policy, it is considered fair to allocate the costs of doing business a loss resulting from a risk that arises in the context of the employment enterprise.

(*Jeewarat v. Warner Bros. Entertainment* (2009) 177 Cal.App.4th 427, 434.)

Attorneys who establish a course and scope argument against a negligent defendant increase the pool of collectability. In cases where your defendant is underinsured, finding a viable course and scope argument can be the saving grace for your client.

Included also on page 18 are seven basic questions to get you started identifying course and scope arguments. Following the questions is an attorney key. Use the key to help craft your arguments.

Continues on Page 3

Copyright © 2013 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Client Questionnaire for Course & Scope

1. Were you on your work premises or near your work premises when you were injured?
2. Were you running an errand for your employer at the time of the incident?
3. Were you commuting at the time of your injury and does your employer reimburse you for your commute?
4. Were you on a business trip at the time you were injured?
5. Did fatigue contribute to your injury following an unusually extended work shift?
6. Were you making or receiving a work call, text or e-mail at the time of the incident?
7. Were you injured on living premises provided by your employer?
8. Were you injured in a vehicle your employer requires you to use?
9. Were you injured by a hazard you encountered due to your employment, even if you had not yet made it to work?
10. Were you traveling between two work locations?

Attorney Key to the Questionnaire

1. **Work Premises and Adjacent Premises** – the employment relationship is said to begin when the employee enters the employer's premises, even if he or she has not yet clocked in or reached the ultimate work location (i.e. employee parking lot). (*Lewis v. Workers' Compensation Appeals Bd.* (1975) 15 Cal.3d 559.)
2. **Work Errand** – if the employee is on a special mission for the employer he is covered by Workers' Compensation. (*Hinojosa v Workmen's Compensation Appeals Board* (1972) 8 Cal.3d 150.)
3. **Paid Commute** – where the employment contract provides for payment for both the employee's travel expenses and travel time, commuting becomes part of the workday and is covered by Workers' Compensation. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, citing *Kobe v. Industrial Acc. Commission* (1950) 35 Cal.2d 33.)
4. **Business Trip** – an employee is considered in the course and scope the entire time he or she is on a sales trip. (*California Cas. Indem. Exchange v. Industrial Acc. Commission of Cal.* (1936) 5 Cal.2d 185.)
5. **Overworked Employee** – an employee who is overworked and fatigued and falls asleep while driving causing himself injury is entitled to Workers' Compensation benefits if there is a causal nexus between the employers' work demands and the injury. (*DePew v. Crocodile Enterprises* (1998) 63 Cal.App.4th 480, see also *Johnson v. Stratlaw, Inc.* (1990) 224 Cal.App.3d 1156.)
6. **Working Electronically** – an employee making a work-related phone call while driving on a vacation day may expose the employer to tort liability. (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055.) Because finding Workers' Compensation coverage for injured workers is much less restrictive than the test for finding *respondeat superior* liability, an argument can be made that electronic work can also bring a worker within comp coverage.
7. **Bunkhouse Rule** – if the employment contract contemplates or the work requires the employee to live on the employer's premises, the employee is performing services incidental to the employment during the time he is on the premises. (*Aubin v. Kaiser Steel Corp.* (1960) 185 Cal.App.2d 658.)
8. **Required Vehicle** – where the employee is required to use his personal vehicle for work and sustains injury in that vehicle after making a single work call that day, Workers' Compensation coverage was available. (*Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803.)
9. **Special Hazard** – where a special hazard is encountered during a commute that is incidental to the employment injuries caused by that hazard are covered by Workers' Compensation. (*Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585.)
10. **Dual Purpose Locations** – when the employee's home serves dual purposes and the home is considered a second jobsite, Workers' Compensation coverage may apply. There must be a requirement that work be done at home, beyond mere convenience to the employee. (*Bramall v. Workers' Comp. Appeals Bd.* (4th Dist. 1978) 78 Cal.App.3d 151.)

Discovery Questions for Defendant

1. Were you driving a vehicle that you also used at any time for your employment?
2. Were you on a business trip or running a work errand?
3. Had you made or received any work calls, e-mails or text messages while driving?
4. Were you commuting at the time of the incident and are you paid for your commute?
5. Do you have a designated work location or are you a traveling salesman?
6. Did fatigue or preoccupation with work contribute to the incident following an unusually extended work shift?
7. Were you exposed to a hazard at work that contributed to the accident?

Attorney Key to Defendant Questions

1. **Required Vehicle** – a defendant who used his personal vehicle for work purposes could subject his employer to tort liability when driving home from work. (*Lobo v. Tanco* (2010) 182 Cal.App.4th 297.)
2. **Special Errand** – a defendant who injured someone while driving home from a work conference exposed his employer to tort liability. (*Jeewarat et al. v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427.)
3. **Mobile Office** – an employee who made a work-related phone call while driving exposed his employer to tort liability. (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055.)
4. **Paid Commute** – when an employee's travel time is considered part of the workday and he is paid for his commute, the doctrine of *respondeat superior* applies to that commute. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956.)
5. **Traveling Salesman** – salesman's employer was liable to third parties from the time the salesman left his home to see clients outside the office. (*Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal.2d 236.)
6. **Overworked Employee** – an employee who is overworked and fatigued and falls asleep while driving, causing an accident may expose his employer to tort liability, but there must be a causal nexus between the employers' work demands and the injury. (*DePew v. Crocodile Enterprises* (1998) 63 Cal.App.4th 480.)
7. **Risks Created By Employer** – an employee who left work ill after being exposed to pesticide at work exposed her employer to liability when she injured another in a car accident while on her way home. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798.)

Copyright © 2013 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Remember the rule – be creative

The test for determining whether Workers' Compensation benefits are available is much less restrictive than the test for finding *respondeat superior* liability. If you have a case that establishes *respondeat superior* liability, you can use it to make an argument that Workers' Compensation benefits should extend to your client.

However, the reverse is not necessarily true. A case supporting the extension of Workers' Compensation benefits will not necessarily support an argument for *respondeat superior* liability. Workers' Compensation decisions are only persuasive, not controlling precedent, in tort actions. (*Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal.App.4th 254, 259.)

Nevertheless, the Supreme Court in the *Hinman* decision recognized at footnote 3 that both tort and Workers' Compensation cases can be cited interchangeably. (*Hinman, supra,* 2 Cal.3d 956, 962 footnote 3.) So remember the rule – be creative.


Medina

Andje Morovich Medina joined The Veen Firm *in 2010 and works on the Label Trial Team. Her practice focuses on catastrophic personal injury cases, including product liability, premises liability, motor vehicle collisions and construction site accidents. She is a member of the SFTLA, CAOC, Queen's Bench and AAJ.*

For more information please visit www.veenfirm.com.


Veen

William Veen founded The Veen Firm, P.C. *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*

Copyright © 2013 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**