



# Food processing – A dangerous place to work

*The machinery used to process food products may present products liability opportunities in addition to the WC remedy*

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Food processing equipment injuries can result in permanent and disfiguring disabilities and death. Understanding how and why these products-liability injuries occur can help maximize a client's recovery against a manufacturer and develop facts supporting liability against additional tortfeasors, overcoming the barrier of the exclusive workers' compensation remedy.

## **Equipment causes serious injuries and death**

Food processing has a higher rate of injury than most industries.<sup>1</sup> Overall, the food processing worker injury rate is almost twice as high as for workers as a whole.<sup>2</sup> These employees suffer more fatal injuries than any other manufacturing sector. (BLS, p. 5.) Regarding nonfatal injuries in manufacturing, only metal fabrication workers suffer more than food processing employees.<sup>3</sup>

Not only are food processing injuries more frequent, but workers suffer more severe injuries than those in other industrial occupations. These include chronic conditions arising from their workplace, as well as acute injuries from equipment that was defectively designed or failed to have adequate warnings about hazards.

Food processing injuries can be sudden and catastrophic. Although one might expect that slaughterhouse and meat packing workers face life-threatening risks from knives, temperature extremes and falling objects, more genteel food-processing industries have no

shortage of serious life-safety hazards. These include suffocation arising from entering confined spaces like wine fermenters, entrapment in bread rising containers, and being buried alive in the quicksand of a grain silo.<sup>4</sup>

Amputation and near-amputation injuries are not uncommon. Many sectors of the food industry use machines with improperly guarded pinch points or points of operation, and these injuries occur in a wide range of production facilities like pie making, doughnut glazing, and ketchup bottle labeling.<sup>5</sup> My practice includes three pending cases like this that arise from three very different types of moving machinery — a winery grape conveyor, a citrus packing machine, and an industrial pasta maker.

Ammonia is widely used as a refrigerant and can leak, causing serious chemical burns.<sup>6</sup>

Electric shocks can present a serious risk even for well-established companies.<sup>7</sup>

## **Importance of occupational chronic injuries to catastrophic injury claim**

Defectively designed equipment (and workplaces) may cause or exacerbate repetitive stress musculoskeletal injuries. These conditions include tendinitis, carpal tunnel syndrome, thoracic outlet syndrome, and sciatica.<sup>8</sup> Their occurrence rates are higher in food manufacturing than the average of other manufacturing industries. (BLS, p. 3.)

It is important to evaluate your client's pre-existing injuries, even if they might have resulted from employer fault for which workers' compensation provides

the exclusive remedy, for at least three reasons. First, regarding foreseeability, a manufacturer that designs machines to be used in the real world knows (or should know) the conditions under which a typical user will use its machine. (See, e.g., *DeLeon v. Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336, 344 ["although the designer may contemplate cleaning will be by a safe method built into the machinery, it may be foreseeable that workers will resort to alternative, less safe means because of the time or trouble involved in using the 'safe' way"].) When 42 percent of poultry processing workers exhibit carpal tunnel symptoms (NIOSH, p. i), a jury may find that a manufacturer should foresee this condition in designing machines to be used safely.

Second, an employer that lacks workers' compensation coverage may be an additional target defendant. (Lab. Code, § 3706.)

Finally, understanding the nature and extent of these injuries may help you prepare your client to answer defendant's deposition questions that attempt to blame the victim. Also, if your client qualifies for workers' compensation benefits, encourage the client to seek approval for counseling.

## **Target defendants, scope of actionable conduct, and comparative fault**

More than a manufacturer can be responsible for a defective product; e.g., an equipment dealer may also be liable. (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 263.) Identify importers, distributors, and dealers who may have profited from the sale of equipment to your



client's employer. Review their product literature, including operations manuals and marketing materials, to identify the extent to which they failed to warn of hazards. Request copies of communications between the manufacturer and others in the stream of commerce; these may discuss prior incidents, warranty and repair claims, or causation for the type of injury your client suffered.

#### •Repairers

One who is hired to perform a discrete repair generally has no duty to warn about an unrelated hazard that caused an injury. (*See v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1203-1204.) However, discovery should attempt to identify equipment maintenance contracts, because these may give rise to a duty to warn if the repair company "agrees for a fee to [1] keep a piece of equipment in repair, [2] perform all work necessary for the safety and maintenance of the equipment, and [3] make periodic inspections of the equipment [citations]." (*Id.* at p. 1204.) If the manufacturer issued a repair bulletin for a relatively common but unpublicized defect, and a repair company with a service contract failed to inspect for this condition, then both may be liable for your client's injuries. Also attempt to discover evidence that a repairer may have voluntarily assumed a duty to inspect equipment before the incident occurred. (*See id.* at pp. 1204-05.)

#### •Employer liability under exceptions to Workers' Compensation exclusive remedy

As a general rule, workers' compensation provides employees with their exclusive remedy against their employer for personal injuries sustained on the job. (Lab. Code, § 3602(a).) However, it is worth examining whether any exceptions to exclusivity may apply. Five of these exceptions may be important here. First, an employer that fails to obtain workers' compensation coverage is subject to tort liability. (Lancaster, 2014 Exceptions to Exclusive Remedy Rule [citing Lab. Code, § 3706] (hereafter Lancaster).) Under this exception, the employer's negligence is

presumed, it has the burden of proof to rebut the presumption, and the affirmative defense of comparative fault is not cognizable. (Lab. Code, § 3708.)

Second, employers that lend or borrow personnel must have a "valid and enforceable agreement" that designates the "borrowed employees as intended beneficiaries of" workers' compensation coverage. (Lancaster [citing, inter alia, *Infinet Marketing Services, Inc. v. American Motorist* (2007) 150 Cal.App.4th 168, 172-74].) This is particularly important for the food industry, because many processing companies rely on subcontracted labor and temporary workers. (Cal/OSHA, p. 5.) Counsel should conduct discovery to identify parties and their roles, explore the complex nature of these relationships, and implead newly-discovered Doe defendants. If any of these defendants is an uncovered employer then it is presumptively negligent, and evidence of comparative fault is inadmissible as discussed above. (Lab. Code, § 3708.)

Third, under the dual capacity doctrine, an employer that also manufactures a product that subsequently injures an employee may be subject to tort liability under certain circumstances. (Lancaster [citing Lab. Code, § 3602(b)(3); *Miller v. King* (1993) 19 Cal.App.4th 1732; *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223].)

Fourth, under the power press exception, liability may rest with an employer that "knowingly removes or fails to install a manufacturer-required point of operation guard." (Lancaster [citing Lab. Code, § 4558].) This exception is important, because even equipment like a commercial pasta machine may meet the expansive definition of a "power press." (Lab. Code, § 4558(a)(4); Cal. Code Regs., tit. 8, § 4189; *see generally Bryer v. Santa Cruz Pasta Factory* (1995) 38 Cal.App.4th 1711, 1714-15.) If so, a plaintiff may be able to file a cause of action for violation of Labor Code section 4558. However, under this exception, tort causes of action against the employer that sound in negligence or strict liability are unlikely to be

cognizable. (*Award Metals, Inc. v. Sup. Ct. (Hernandez)* (1991) 228 Cal.App.3d 1128, 1134.) The litigation may also grow more complex, because the employer's carrier may decline coverage. The insurer may determine that the tortious conduct is outside the scope of its workers' compensation policy or excluded because it is intentional, so the company may file a declaratory relief action.

Finally, an employer faces tort liability if it fraudulently conceals the existence of an injury or that it arose from employment. (Lancaster [citing, inter alia, Lab.Code, § 3602(b)(2)].)

#### Scope of actionable conduct and apportionment of fault

Food processing equipment should not be evaluated in isolation, because a plant's machines are often linked together in a production line or system. Even if each piece works perfectly well standing alone, a manufacturer may be liable for a design defect or failure to warn about injuries that arose based on where the equipment was placed. (*See Rawlings v. D.M. Oliver, Inc.* (1979) 97 Cal.App.3d 890, 894 [manufacturer of kelp drier "may be liable for product defects based on negligence or strict products liability even where the product is manufactured in accordance with the owner's plans"]. Whether a warning is adequate is usually a question of fact. (CACI No. 1205, com. [citing *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320].)

To prove a prima facie case, the plaintiff must produce evidence that his or her injury occurred while using the product "in an intended or reasonably foreseeable manner." (CACI No. 1205, com. [citing *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678].) Regarding apportionment of fault, counsel must evaluate the proper scope of responsibility that can be reasonably attributed to the target defendant(s) and plaintiff. (*See DeLeon v. Commercial Manufacturing & Supply Co., supra*, 148 Cal.App.3d at p. 344. ["even if plaintiff's acts constituted misuse of the product, if her acts were



foreseeable, [defendant manufacturer] is not absolved of blame [citation]”]; *see* CACI No. 1207A [liability may still rest with manufacturer even if plaintiff or third party product misuse or modification was a substantial (but not sole) causative factor].)

### Developing food processing product liability evidence

As with other product liability cases, obtain a copy of the Cal-OSHA file and secure the equipment. Retain engineering experts to inspect, photograph, and possibly test the machinery. A human factors’ expert may be needed to inspect the premises where the incident occurred to determine if the siting of the equipment was a contributing factor, and if so, which target defendants participated in that decision. It may be possible to do these before filing if you have a good working relationship with your client’s employer’s counsel and know that the workers’ compensation exceptions do not apply.

Search public records and media to attempt to identify prior similar incidents. If the manufacturer had notice of a serious problem that caused your client’s injury, it may have an uphill battle to explain why it sat on its hands instead of issuing a recall or repair notice. (*See generally DeLeon v. Commercial Manufacturing & Supply Co., supra*, 148 Cal.App.3d at p. 348 [“it is reversible error to refuse expert testimony concerning the necessity and feasibility of certain design changes to enhance the safe operation of machinery [citation]”].)

#### • Informal investigation

Examine company Web pages (current and prior versions if stored on the Internet archive “wayback machine,”

<https://archive.org/web/>) and social media to search for operation manuals, service bulletins, and advertising claims about the product’s features, safety, and prior incidents. Determine if updates were made after prior incidents, and whether the company disclosed the need to repair or replace parts that could have caused your client’s injuries.

#### • Former employees

Former employees who are not represented may informally provide you with an understanding of the company’s (lack of) emphasis on safety as a factor in product design and manufacturing. They may be able to discuss design or engineering problems that were presented to persons who could have chosen to fix them or roll the dice with litigation.

#### • Product literature and industry data

Examine whether the hazard that caused the incident was properly identified in the operator’s manual and on the machine itself. Have the warnings changed over time? Should the manufacturer have foreseen the incident based on information available from industry trade associations or other sources?

### Conclusion

Food processing is a dangerous industry for workers. Using the right tools and information can help get your catastrophically injured clients a measure of justice.

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### Endnotes

<sup>1</sup> U.S. Bureau of Labor Statistics, Injuries, Illnesses, and Fatalities in Food Manufacturing, 2008 (Jan. 21, 2011), p. 1 (hereafter BLS); California Department of Industrial Relations, Cal/OSHA Consultation Service, Ergonomics in Action (2003), p. 2.

<sup>2</sup> (Cal/OSHA, p. 2.)

<sup>3</sup> <http://www.bls.gov/news.release/pdf/osh.pdf>, Table 2 [as of July 14, 2014].

<sup>4</sup> [http://www.winebusiness.com/content/file/Aug09\\_ToxicGasDetect.pdf](http://www.winebusiness.com/content/file/Aug09_ToxicGasDetect.pdf) [as of July 14, 2014]; [https://www.osha.gov/pls/imis/accidentsearch.accident\\_detail?id=201203387](https://www.osha.gov/pls/imis/accidentsearch.accident_detail?id=201203387) [as of July 14, 2014]; <https://www.osha.gov/SLTC/grainhandling/index.html> [as of July 14, 2014].

<sup>5</sup> [https://www.osha.gov/pls/imis/accidentsearch.accident\\_detail?id=202550232](https://www.osha.gov/pls/imis/accidentsearch.accident_detail?id=202550232) [as of July 14, 2014]; [https://www.osha.gov/pls/imis/accidentsearch.accident\\_detail?id=200774297](https://www.osha.gov/pls/imis/accidentsearch.accident_detail?id=200774297) [as of July 14, 2014]; [https://www.osha.gov/pls/imis/accidentsearch.accident\\_detail?id=201085495](https://www.osha.gov/pls/imis/accidentsearch.accident_detail?id=201085495) [as of July 14, 2014].

<sup>6</sup> <https://www.osha.gov/Publications/OSHA3108/osa3108.html> [as of July 14, 2014]; <http://www.foodproductiondaily.com/Safety-Regulation/Ammonia-leak-injures-three-food-processing-employees> [as of July 14, 2014].

<sup>7</sup> [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=25119](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=25119) [as of July 14, 2014]; [https://www.osha.gov/pls/imis/accidentsearch.accident\\_detail?id=202543427](https://www.osha.gov/pls/imis/accidentsearch.accident_detail?id=202543427) [as of July 14, 2014].

<sup>8</sup> Cal/OSHA, p. 2; National Institute for Occupational Safety and Health, Evaluation of Musculoskeletal Disorders and Traumatic Injuries Among Employees at a Poultry Processing Plant, Report No. 2012-0125-3204 (Mar. 2014), p. 28 (hereafter NIOSH). ☒