The 5 exceptions to the workers' compensation exclusive remedy

Rules that every PI attorney must know to avoid inadequate compensation to injured workers

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California's workers' compensation laws generally provide that workers' compensation is the exclusive remedy against an employer for an employee's injury or death that arises during the course and scope of employment. Labor Code section 3600 provides all of the essential conditions that must exist for the exclusive remedy rule to apply. As with many rules of law, there are often exceptions. Under some circumstances, the exclusive remedy rule does not apply and an injured employee may assert a civil claim against his or her employer for a work-related injury.

It is important for attorneys representing injured workers to be familiar with these exceptions because civil claims greatly broaden the compensation available to clients. While the workers' compensation system provides medical care and disability benefits, its remedy is limited as a compromise of it being a no-fault system. By contrast, civil claims litigated in superior court require evidence of the defendant's fault. Once an injured worker establishes his or her employer's negligence by a preponderance of the evidence, the worker may recover items of damages not specifically provided for or compensated in the workers' compensation system. Available damages from a civil claim include past and future loss of earnings and earning capacity, medical expenses, and loss of household services.

The worker may also recover damages for pain, suffering, loss of enjoyment, and other general damages, which can be significant. Additionally, the injured worker's spouse may assert and recover on a claim for loss of consortium.

Exceptions to the exclusive remedy rule for actions against the injured worker's employer include: (1) dual capacity; (2) fraudulent concealment; (3) employer assault or ratification; (4) power press; and (5) uninsured employer. If one of these exceptions applies, the worker has a right to maintain a civil suit against the employer concurrently with a workers' compensation action. Where an injured employee receives workers' compensation benefits and recovers civil damages under one of the exclusive remedy exceptions, the employer is entitled to a credit against the civil settlement or judgment for the compensation it has already paid to prevent an employee's double recovery. (Lab. Code, §§ 3600, subd. (b), 3709.5.) Following a civil settlement or judgment, the employer is relieved of its obligation to pay any further compensation up to the amount of the net judgment or settlement. (*Ibid.*)

Dual capacity

The dual capacity exception recognizes the fact that employers may have multiple duties towards their employees whether based on common law or statute. Workers' compensation is a worker's exclusive remedy only in those cases where the injury arises out of conditions of employment, as defined in Labor Code section 3600. Otherwise, the worker may pursue a civil claim against the employer based on a duty that the employer has which arises independently of the employment relationship.

The dual capacity exception applies in one of two scenarios. First, an employer that manufactures a product that injures its employee bears civil responsibility where the following conditions are present: (1) the employer manufactured a defective product; (2) the defective product was the proximate cause of the employee's injury or death; (3) the defective product was sold, leased, or otherwise transferred to an independent third person for valuable consideration; and (4) the product was thereafter provided to the employee for use by a third person. (Lab. Code, § 3602 subd. (b)(3).)

Second, the dual capacity exception applies where the employer serves a separate legal role or assumes an obligation that is not normally imposed by the employer-employee relationship. For example, in *Miller v. King* (1993) 19 Cal.App.4th 1732, the plaintiff was injured after she slipped and fell at a restaurant where she worked. The plaintiff sued the individuals who owned the restaurant property based on a premises liability theory. The owners brought a motion for summary judgment on the grounds that the exclusive remedy rule barred the plaintiff's claim because they were the shareholders of the corporation that employed plaintiff at the restaurant. The trial court granted the motion for summary judgment. The appellate court reversed on the ground that the employer was a corporation, and as a corporation, the employer was an entity that existed separately from the individuals whom plaintiff had sued.

In *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, the plaintiff had injured her foot in the course and scope of her employment. While the plaintiff was off of work and receiving workers' compensation benefits, she went to the hospital where she was employed to receive medical treatment related to her work injury. As the plaintiff was on her way to have films taken, she slipped and fell on a liquid substance in the hospital hallway which resulted in an aggravation of her pre-existing work injury. The plaintiff filed a premises liability claim against the hospital for her injuries resulting from the slip and fall. The hospital filed a motion for summary judgment based on the workers' compensation exclusive remedy. The plaintiff argued that the exclusive remedy rule did not apply because the hospital was acting in its capacity as a medical provider instead of as an employer and that she was on the premises as a patient rather than as an employee. The trial court agreed with the hospital who contended that its duty to the plaintiff to maintain a safe premises was the same whether she was there as a patient or an employee. The appellate court reversed finding that the hospital failed to establish that the injury resulting from the slip and fall occurred as part of her employment which Labor Code section 3600 requires.

Fraudulent concealment

The fraudulent concealment exception applies where an employer fraudulently conceals a worker's injury and its connection to employment whereby the concealment results in an aggravation of the injury. There are three necessary elements: (1) the employer concealed the existence of the injury; (2) the employer concealed the connection between the injury and employment; and (3) the injury was aggravated following the employer's concealment. (Lab. Code, § 3602, subd. (b); *Jensen v. Amgen* (2003) 105 Cal.App.4th 1322, 1325; see also, *Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80.)

The fraudulent concealment exception more typically arises in situations involving exposure to asbestos, mold, or a toxic chemical. (See, e.g. *John-Manville Products v. Sup. Ct.* (1980) 27 Cal.3d 465.) It is a very limited exception that requires actual knowledge by the employer and a lack of awareness by the worker of the injury and its relationship to employment.

Under this exception, the employer's liability is limited to those damages proximately caused by the aggravation of the injury that results from the employer's concealment. The employer bears the burden of proof on how damages should be apportioned between the injury and any subsequent aggravation by the employer.

Employer assault or ratification

An employer is not vicariously liable for any injury or death caused by a physical assault by one of its employees against another employee. (Lab. Code, § 3601, subd. (a); *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489-1490.) However, an employee may bring a civil suit against his or her employer where the employer has acted affirmatively by either willfully assaulting the employee or ratifying the assault of the employee by a co-employee. (Lab. Code, § 3602, subd. (b)(1).) The rationale is that an intentional assault by an employer or its ratification is not an inherent risk or condition of employment. Employer ratification of the assault may be express or implied based on the employer's conduct, including conduct which is inconsistent with any reasonable intention other than intending to approve or adopt the assault. (*Fretland v. County of Humboldt*, *supra*, 69 Cal.App.4th at pp. 1490-91.)

Power press

Some employers modify the design of a power-press machine by removing a guard or failing to install one at the point of operation. Such employer action is usually aimed at increasing productivity and efficiency, but it comes at the cost of worker safety. When a necessary guard is missing, the worker operating the machine risks serious damage to the hand or arm, including severe nerve damage and amputation.

A power press is any material-forming machine that uses a die to press, impact, punch, stamp, or extrude material and not simply to cut material in the manner of a blade. (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 286.) A guard is any apparatus whose purpose is to keep the workers hands outside the point of operation whenever the ram is capable of descending. (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65.) Examples of a guard include dual palm buttons to operate the machine, a light curtain, and any type of physical barrier that makes the point of operation inaccessible to a hand or other body part during operation.

When the employer knows and ignores the fact that the manufacturer of a power-press machine required a guard, the employer is civilly responsible where it causes injury to an employee by its "knowing" removal or failure to install a manufacturer-required point of operation guard on the power press. (Lab. Code, § 4558.) The employer must give an affirmative instruction or authorization to remove a required guard or to not install a required guard prior to the employee's injury. Thus, employer ratification after the employee's injury is insufficient to impose liability under this statutory exception.

Because a "knowing" removal or failure to install a required guard is a necessary element, the court cannot impute knowledge or impose constructive knowledge of a required guard on the employer. (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1516-17.) For example, the mere existence of a hole in the machine which signified that a safety device was missing does not satisfy the statute's requirement that the manufacturer had conveyed the knowledge to the employer that a guard was required. (*Bryer v. Santa Cruz PastaFactory* (1995) 38 Cal.App.4th 1711, 1714-15.) The key is to find evidence that the manufacturer of the machine designed, installed, required, or otherwise provided for the attachment of the guards and communicated this to the employer. It is therefore important to obtain the owner's manual, product instructions, product warnings, and warning labels in discovery.

Uninsured employer

An employee injured during the course and scope of employment may bring a civil claim against his or her employer who had failed to secure workers' compensation coverage as of the time of the injury. (Lab. Code, § 3706.) In California, an employer may satisfy the requirement of securing workers' compensation coverage by either purchasing a policy from an authorized insurer or by obtaining from the state a certificate of consent to self-insure. (Lab. Code, § 3700.) In dual employment situations, the employer also has the option to enter an agreement with the co-employer in which the co-employer agrees to obtain and actually does obtain workers' compensation coverage for the shared employee. (Lab. Code, § 3602, subd. (d).)

Do not automatically assume that the exclusive remedy rule applies just because your client has received workers' compensation benefits from some source; the benefits must have been provided by the worker's employer. (See, *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975.) "The price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy." (*Id.* at p. 987.) When you bring a civil claim against an uninsured employer, be sure to include in the complaint allegations of employer negligence and the employer's failure to secure workers' compensation insurance under Labor Code section 3706 as authority to bring suit to avoid a demurrer.

California's workers' compensation laws provide favorable presumptions and benefits that the plaintiff may use against the uninsured employer, including: (1) a presumption of the employer's negligence (Lab. Code, § 3708); (2) the abolition of the defenses that the employee was contributorily negligent, assumed the risk, or was injured by a co-employee's negligence (*Ibid.*); (3) a presumption of negligence per se based on an OSHA citation issued to the employer (Lab. Code, § 6304.5); (4) the attachment of the employer's property upon or after the filing of the action to secure the payment of any judgment ultimately obtained (Lab. Code, § 3707); and (5) the allowance of reasonable attorney's fee fixed by the court as part of a judgment (Lab. Code, § 3709).

During litigation, keep in mind that an employer has non-delegable duties under the Labor Code related to workplace safety and that these statutory duties

are greater than the duty of care imposed under common law principles. (*Levels v. Growers Ammonia Supply Co.* (1975) 48 Cal.App.3d 443, 451-52; Labor Code, § 6400; *Conner v. Utah Constr. and Mining Co.* (1964) 231 Cal.App.2d 263, 271-72.) An employer's duty to maintain a safe workplace encompasses many responsibilities, including the duty to inspect the workplace to discover and correct dangerous conditions and to adequately train and warn of their existence. (*Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023.) An employer is also required to provide all necessary safety devices and safeguards for their employees. (Lab. Code, §§ 6401, 6402, 6403.)

Conclusion

While workers' compensation benefits are certainly better than no benefits, this remedy is limited and often inadequate to compensate injured workers for all of the harms and losses they have suffered. It is therefore essential for personal injury attorneys to recognize other potential avenues of recovery for their clients. While third-party actions against someone other than the employer are more common, do not overlook those occasions where an injured employee can avoid the workers' compensation exclusive remedy rule and maintain a civil personal injury action against his or her employer.


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