The power press exception to Workers' Comp

Finding exceptions to the Workers' Compensation exclusive remedy doctrine in workplace injuries

By Andje Medina
The Veen Firm, PC

Power press injuries are most often serious and debilitating injuries. The Legislature carved out a special power press exception to the workers' compensation exclusivity rule recognizing that employers have an incentive to remove machine guards to increase production speed. This bad behavior unfairly exposes workers to significant risk. Recognizing this incentive, the California legislature enacted Labor Code section 4558 to shift the risk back to the employer for this bad conduct and provide a remedy to the injured worker outside of the no fault workers' compensation system.

If a client comes into your office missing a finger – or even a hand – due to an injury from a machine that lacked a point-of-operation guard, answer the eight-question checklist on page 34 (Figure 1) to see if the client has a civil remedy in addition to workers' compensation. (See Labor Code § 4558(b); *Burnelle v. Continental Can Co.*, (1987) 193 Cal.App.3d 315 – remedies are cumulative, but employer is entitled to an offset or credit against civil judgment or settlement for monies paid in workers' compensation benefits.)

When running through the checklist you will see that many of the elements are straightforward and easy to establish. The ones that require a more thoughtful analysis are addressed below.

Power press

To be a power press, the machine must be a material-forming machine that utilizes a die in the manufacture of other products. (See Labor Code § 4558(a)(4).) Courts have held the following machines are not power presses – circular saw (See *Ceja v. J.R. Wood* (1987) 196 Cal.App.3d 1372, 1377); printing press (See *McCoy v. Zahniser Graphics* (1995) 39 Cal.App.4th 107, 111); notching lathe that cut, but did not impart image (See *Rosales v. Depuy Ace Med. Co.* (2000) 22 Cal.4th 279, 283); molding machine with cutting heads that did not determine the shape of the product formed (See *Graham v. Hopkins* (1993) 13 Cal.App.4th 1483, 1489).

The Point of Operation Guard

The "point of operation" is the die space where the material is formed by striking, pressing, or punching the material, which poses a serious risk of crush injuries." (*LeFiell Manufacturing v. Sup. Ct.* (2014) 228 Cal.App.4th 883, 895.) It's the "strike zone." (*Gonzalez v. Seal Methods* (2014) 223 Cal.App.4th 405, 408.) Whether machine parts constitute a "die" is a question for the jury. (*Islas v. D & G Mfg. Co.* (2004) 120 Cal.App.4th 571, 579.)

Defendants frequently challenge whether a safety device is a *point of operation guard*. *Bingham v. CTS* (1991) 231 Cal.App.3d 56 does a thorough analysis of how to determine whether a safety feature is a point of operation guard.

In *Bingham*, plaintiff was injured after his supervisor had moved dual hand controls used to activate a power press away from the point of operation and installed a foot pedal so the machine could be activated by foot. (*Bingham, supra,* 231 Cal.App.3d at 60.) Plaintiff's wrist was crushed when he accidently pressed the foot pedal while his hands were in the point of operation. (*Id.*) The defendant employer argued that dual hand controls on the power press might be "point-of-operation devices," but they were not "guards." (*Id.* at 62.) Defendant also argued that even assuming the dual hand controls were guards, the employer had not *physically removed* them; it only "moved the palm buttons away from Bingham so that he could not use them." (*Id.* at 68.)

The Court of Appeal for the Second District did not accept either argument, noting that the employer was trying to make a "literal, narrow or hypertechnical" purported variance between a point-of-operation safety "device" and a "guard" which was contrary to the legislative intent behind section 4558. (*Bingham, supra,* 231 Cal.App.3d at 65.) The legislative intent was to "protect workers from employers who willfully remove or fail to install appropriate guards on large power tools [citation]." (*Id.* at 64-65.) The court unanimously held that dual hand controls were point of operation guards under Labor Code § 4558. (*Id.*)

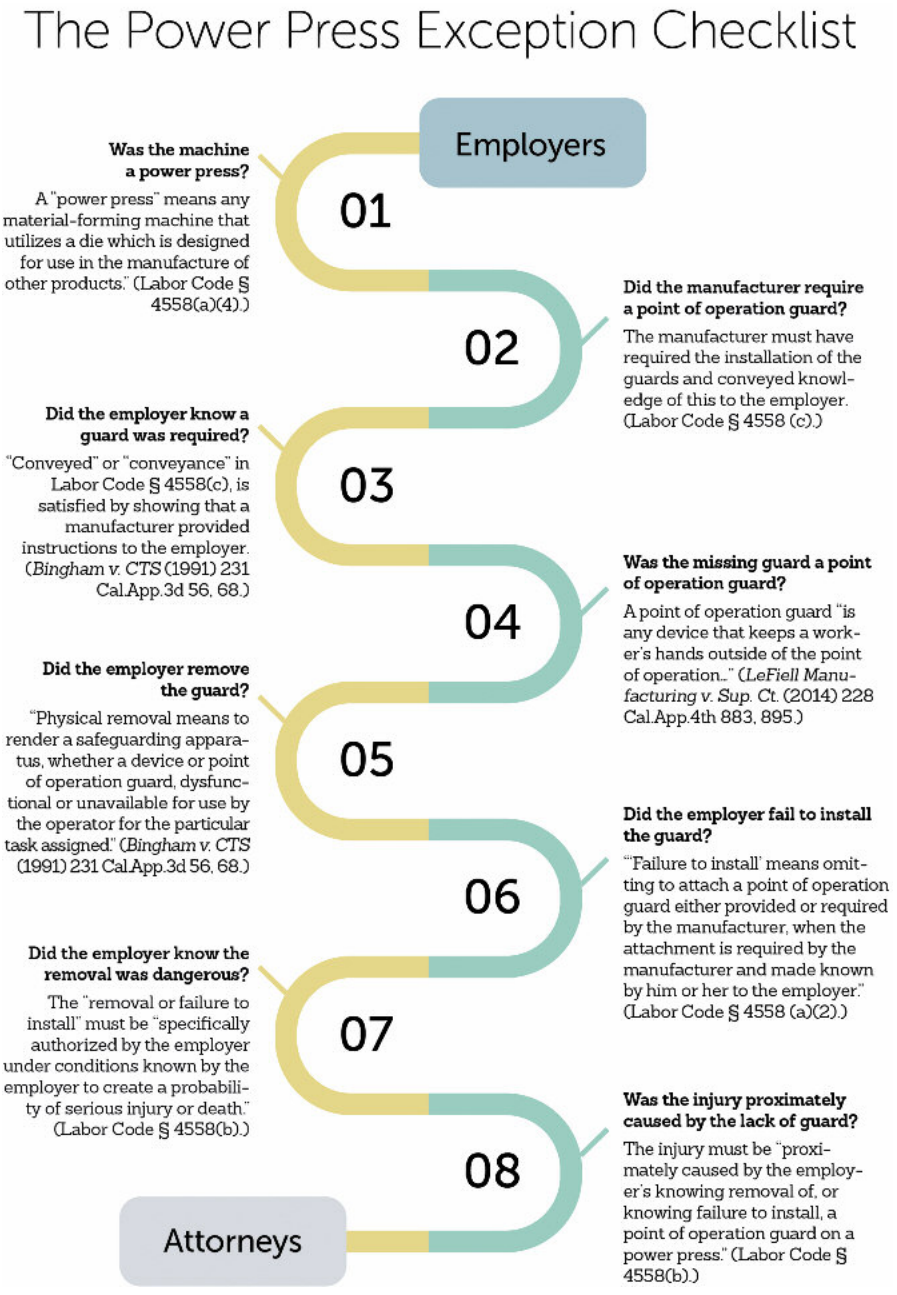

Figure 1

The power press in *Bingham* was also equipped with a light curtain that had fifteen light sensors so that the machine would not activate if the lights were disrupted. The defendant deactivated seven of the fifteen light sensors so that plaintiff could use his hands to change parts at the point of operation without deactivating the machine. The court found that the light curtain feature was intended to keep the operator's hands out of the point of operation and qualified as a point of operation guard as intended by Labor Code § 4558. (*Bingham, supra,* 231 Cal.App.3d at 65.)

Accordingly, the *Bingham* jury was properly instructed that a guard "as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending." (*Bingham, supra,* 231 Cal.App.3d at 65.)

The *Bingham* decision was heavily relied on in the recent case of *LeFiell, supra,* 228 Cal.App.4th at 883, where the court solidified that a point of operation guard "is any device that keeps a worker's hands outside of the point of operation…" (*Id.* at 895.)

Courts have held the following devices are not point of operation guards – removable blocks not capable of being permanently installed onto the power press (See *Gonzalez v. Seal Methods* (2014) 223 Cal.App.4th 405); die access door not intended to keep operator's hands out of the point of operation (*LeFiell, supra,* 228 Cal.App.4th at 895.)

Removal or failure to install

To be successful, you must show that the employer failed to install or removed the required guard. Liability turns on the (in)actions of the "employer," which includes "supervisor[s] having managerial authority to direct and control the acts of employees." (Lab.Code, § 4558 (a)(1).)

"'Failure to install' means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer." (Lab.Code, § 4558 (a)(2).)

"Removal" means "physical removal." (Lab. Code, § 4558(a)(5).) "Physical removal . . . means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra,* 231 Cal.App.3d at 68.)

As noted above, the defendant in *Bingham* claimed that it did not "remove" the dual hand controls; it simply "moved" them and made them inaccessible. (*Bingham, supra,* 231 Cal.App.3d at 68.) The court was unpersuaded by the employer's hypertechnical explanation and found that moving the dual hand controls satisfied the "physical removal" requirement.

Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point-of-operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned. When the Regulations are read as a whole, we believe this is the most reasonable inference which can be derived from them in conjunction with section 4558. (*Bingham, supra,* 231 Cal.App.3d at 68.)

Manufacturer must require the guard

The manufacturer must have required the installation of the guards and conveyed knowledge of this to the employer. (Lab. Code §, 4558 (c).)

Proof of the manufacturer's "conveyance" of this information to the employer may come from any source. (Lab. Code, § 4558(c).) Authorities that have addressed the definition of "conveyed" or "conveyance" in Labor Code section 4558(c), have noted that a manufacturer conveyed information by providing instructions to the employer. (See *Bingham v. CTS* (1991) 231 Cal.App.3d 56, 68 – "the manufacturer conveyed the requirement for use of these safeguarding measures to [employer] CTS through its literature.") *Bingham* also noted that reference to a dictionary definition is proper when explaining the meaning of a word that is not a specific legal term of art. (*Id.* at 65.) Merriam-Webster states that to "convey" means "to make (something) known to someone. (http://www.merriam-webster.com/dictionary/convey.)

To satisfy this element, you must show that the employer had actual knowledge. You cannot argue that the employer should have known a guard was required. (See *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505.) Although it is reasonable to believe that the existence of a hole in the machine implies that a safety device is missing, that is not enough to prove actual knowledge. (See *Bryer v. Santa Cruz Pasta Factory* (1995) 38 Cal.App.4th 1711.) Additionally, mere knowledge of the OSHA regulations that require guards is insufficient to show specific knowledge that a manufacturer required a guard on a specific machine. (See *Swanson v. Matthews Products Inc.* (1985) 175 Cal.App.3d 901, 907.)

Loss of consortium/wrongful death

The power press exception to workers' compensation exclusivity is only available for the injured worker where the worker's injuries are not fatal. (Lab. Code, § 4558(b).) The spouse of an injured worker does not have a derivative claim for loss of consortium pursuant to Labor Code section 4558(b). (See *LeFiell, supra,* 228 Cal.App.4th at 282.) However, if the worker's injuries are fatal, the statute has carved out a valid claim for dependents. (*Id.* at 289.)

Andje Medina is an attorney at The Veen Firm, PC, *in San Francisco. Her practice focuses exclusively on catastrophic personal injury. She frequently handles third-party workplace injury claims and suits against employers that fall outside of the Workers' Compensation exclusive remedy doctrine. She was recently named by the* Daily Journal *as one of the Top 40 Attorneys under 40 and was an SFTLA 2017 Trial Lawyer of the Year Finalist. She has been included on the Best Lawyers in America list the last two years. She has been recognized as a Rising Star by Northern California Super Lawyers every year since 2012 and is rated AV Preeminent by Martindale Hubbell. She is also included on the Top 100 Trial Lawyers and Top 40 Under 40 lists by The National Trial Lawyers. In 2012, she received the Distinguished LRIS Panel Member Award, for the largest recovery in the history of the Bar Association San Francisco's Lawyer Referral Service Program. In 2011, she obtained a verdict that was included in "California Top Verdicts of 2011."*

Medina