

Exceptions to the Workers' Comp exclusive remedy doctrine

Where the employer fails to secure workers' compensation coverage as required by law, the hirer may be liable for civil damages

By James G. Butler and Ramona Atanacio

Workers' compensation and civil litigation attorneys are aware that workers' compensation is the sole and exclusive remedy for most workplace injuries. Generally, an injured party is thus barred from bringing forth a claim against their employer in civil court. There are, however, several statutory exceptions to the exclusive remedy rule. One exception is where an injured worker is employed by an employer that does not have workers' compensation insurance. It is often the case that an uninsured employer is also unlicensed, which gives rise to presumptions against the employer. This can be one of the trickier areas when representing injured workers. This article discusses the legal remedies available to those who have been injured on the job while working for an uninsured employer.

Case – injured worker vs. uninsured employer

The moment this new client came to the office will never be forgotten. He was in a battered wheelchair and was quadriplegic. His employer did not have workers' compensation insurance. He was accompanied by his wife. They lived in an apartment on the third floor of an apartment building and there was no elevator. The wife had to carry him up and down the stairs to get him to the street or his home. They drove a dilapidated van with no lift for his wheelchair.

This new client had been trimming tree branches around a powerline and had made contact with the powerline with a long-handled branch trimmer. The only apparent remedy against an uninsured employer was the Uninsured Employers Benefits Trust Fund, which is set up to provide for injured workers where their employers do not have workers' compensation insurance at the time of injury. It turned out that after he fell and became quadriplegic, his employer took his wallet out of his back pocket to obtain his address so that the medical bills would be sent to the client rather than to the employer.

The client reported that he had been asked to trim trees on the property of a homeowner and that the homeowner had directed him which branches needed clearing. He was on a ladder and was trimming branches when he made contact with a high voltage utility line. He fell onto his back and could not move his arms or legs. It seemed like an uphill battle. The employer had no insurance, was judgment proof, and comparative fault and assumption of the risk could apply.

Pursuit of a claim in civil court

Under the California Labor Code, workers' compensation is the sole and exclusive remedy against the employer. (Lab. Code, § 3602 subd. (a).) The

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employee is entitled to benefits, regardless of fault. These benefits include medical care, temporary disability, permanent disability as well as job displacement benefits. California Constitution Article XIV requires that all employers possess workers' compensation coverage.

Exceptions to the exclusive remedy rule

There are exceptions to the exclusive remedy rule that allow an injured worker to pursue a claim in civil court. Below are some of the exceptions:

The first exception is where an employee is injured by a willful physical assault by an employer or by a co-employee that is ratified by the employer under Labor Code section 3602, subdivision (b)(1).

The second exception is where the employer is the manufacturer of a defective product wherein the employer manufactures, sells or leases or otherwise transfers a defective product for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person. (Lab. Code, § 3602, subd. (b)(3).) This is called the dual capacity doctrine; it applies when the employer manufactures a product which then injures the employee or when the employer serves a separate legal role. (Lab. Code, § 3602, subd. (b)(3); *Miller v. King* (1993) 19 Cal.App.4th 1732; *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223.)

The third exception to the exclusive remedy rule is where the employee is injured by a power press machine (Lab. Code, § 4558, subd. (b).) This exception occurs when the employer knowingly removes or fails to install a manufacturer-required point-of-operation guard.

The fourth exception pertains to fraudulent concealment by employers. This exception applies when an employer fraudulently conceals the existence of an injury or its connection to the employee. (Lab. Code, § 3602, subd. (b)(2); *Palestini v. General Dynamics* (2002) 99 Cal.App.4th 80; *Jensen v. Amgen* (2003) 105 Cal.App.4th 1322.)

The fifth exception applies where a co-employee's actions are beyond the scope of employment and cause injury (Lab. Code, § 3601, subd. (a); *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995.)

The sixth exception – the exception that will be discussed further below – applies where the employer fails to secure workers' compensation coverage as required by law. (Lab. Code, § 3706.)

The uninsured employer – Exception to exclusive remedy rule

Under Labor Code section 3706, "if any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." (Lab. Code, § 3706; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975 (*Huffman*).) This exception applied to the new injured client described above, whose employer did not obtain workers' compensation insurance. He could therefore seek remedies in civil court.

Labor Code section 3706 is designed to penalize anyone who hires uninsured people or businesses. (Lab. Code, § 3706; *Huffman*, *supra*, 84 Cal.App.4th 975.) As such, there are several presumptions against the uninsured employer.

First, and perhaps most importantly, there is a presumption that the injury was due to the negligence of the employer. Labor Code section 3708 shifts the burden of proof to the employer, who must rebut the presumption. The employer is barred from asserting a defense that the employee was also negligent or assumed the risk (Lab. Code, § 3708.) In addition, any judgment should include attorneys' fees as determined by the court (Lab. Code, § 3709.)

For the injured client described above, these statutes shifted the burden of showing negligence onto the employer, barred any arguments of comparative fault and assumption of the risk, and allowed for attorneys' fees from a judgment. Nevertheless, there still remained the possibility that a civil judgment against the uninsured employer would be inadequate.

Other defendants – The unlicensed contractor and its employees are presumed the employees of the hirer

At a worksite, many players are involved. It can include a property owner, a general contractor, and a variety of contractors, subcontractors, employees, and day laborers. In civil cases for injuries occurring at a jobsite, there are oftentimes multiple defendants with varying degrees of involvement as well as differing employment and business relationships.

As discussed above, the badly injured client was hired by an uninsured contractor that was also unlicensed. The remedies available to him, against his employer, even though he was in civil court, were likely going to be inadequate. At this point, it was important to investigate additional avenues of recovery for him.

Under Labor Code section 2750.5, *an unlicensed contractor and their employees are presumed to be the employee of the hirer.* This section provides "a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to chapter 9 (commencing with § 7000) of the Business and Professions Code or who is performing such services for a person who is required to obtain a license is an employee rather than an independent contractor." (Lab. Code, § 2750.5) This means that the hirer of the contractor that hired the injured client, whether the property owner, general contractor, or another contractor, was presumed to be his employer.

When determining fault and the degree of fault, this section can defeat any claim by the owner, general contractor, or unlicensed employer that they were not in control of the work being performed by the independent contractor. Similarly, it can also defeat defendant's claim that

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they hired an independent contractor and that the contractor was responsible for the accident.

It is not at all unusual for property owners to do everything they can to cut costs. Property owners will seek out the lowest bidders and create situations where work is performed while saving the property owners money. Independent contractors will also pay workers the lowest wages they can get away with. The Legislature enacted Labor Code section 2750.5 to "help end the 'subterranean economy' where contractors hire unlicensed subcontractors and pay them in cash, resulting in the 'loss of large sums in taxes, employee social insurance contributions, and employee pension funds.'" (*Hunt Building Corp. v. Bernick* (2000) 79 Cal.App.4th 213, 222, quoting Assem. Com. on Labor, Employment & Consumer Affairs, Analysis of Assem. Bill No. 3249 (1977-1978 Reg. Sess.) p. 1.) *In these cases, the hirer is considered to be the owner or general contractor.*

The hirer of an unlicensed independent contractor, who will probably fail to provide worker's compensation insurance, is exposed to considerable risk if the unlicensed independent contractor or its employees are injured. The hirer is the worker's compensation provider for the injured worker. Applying Labor Code sections 3706, 3708, and 3709, the hirer can be sued directly, or their negligence is assumed, and there is no defense for assumption of the risk or contributory negligence. Further, the hirer is 100% at fault and must pay the injured worker, pay the attorneys' fees, or have their personal property attached to pay a judgment.

If the hirer of the uninsured contractor is insured itself, one should look into whether the injured worker worked fewer than 52 hours or earned less than $100 in the 90 days before the injury. If so, the worker may be considered an employee, but would not be eligible for workers' compensation benefits. (Lab. Code, § 3352, subd. (h).) In that situation, the hirer can still be brought to civil court if one can show negligence or other tortious conduct. (*Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72.)

Alternative remedy for injured workers – Uninsured Employer Fund (UEF)

It should be noted that while workers injured by illegally operating employers might get bigger judgments, they did not necessarily collect any money. Injured workers of uninsured employers were in as precarious a situation as any tort victim of an uninsured defendant, namely, winning is easier than collecting. There is an alternative remedy available from the state called the Uninsured Employers Benefit Trust Fund (UEBTF or UEF). The benefits paid to the worker by the UEF are identical to those paid to all other injured workers (temporary disability, permanent disability, medical treatment, and vocational rehabilitation).

The UEF was created to pay injured workers quickly, and then later collect the applicant's judgment from the illegally uninsured employer defendant. The UEF has huge resources to trace all assets and help with collections. The applicant would not have to wait for the UEF to collect the award from the employer before receiving payment because the state took over that responsibility.

In a civil case, the UEF will file for recovery of any and all benefits paid. That lien is not subject to reduction for employer fault or any other claim by the plaintiff. They are paid at 100 cents on the dollar. Once the plaintiff is paid by the civil defendants, the UEF has an absolute credit in the amount of plaintiff's recovery. The UEF has summary execution powers to take liens and impose judgments on the uninsured employer.

Conclusion

Although workers' compensation is intended to be the sole and exclusive remedy for an injured worker, there are exceptions that allow the injured worker to seek compensation against their employer through civil court. If the employer is uninsured, the employer can be sued civilly, is subject to a presumption of negligence, and barred from comparative fault and assumption-of-the-risk arguments. Furthermore, if the uninsured employer is also unlicensed, there is a presumption that the hirer of the uninsured employer is the employer of the injured worker. The hirer, if uninsured, is then presumed negligent and barred from arguments of comparative fault and assumption of the risk whether that hirer is insured or not insured. If the hirer is insured, and if the injured worker worked fewer than 52 hours or earned less than $100 in the 90 days before the injury, the hirer can still be brought to civil court if one can show negligence or other tortious conduct. In the case of the injured worker that came to the office seeking representation, while he ultimately became the recipient of a $4.5 million recovery, the decision to help him despite the hurdles boiled down to an innate desire to fight for fairness and justice for the injured worker, and to use all modes of creativity and diligence to get there.


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