

The power press exception to the WC exclusive-remedy rule

These can be easy claims to bring if you understand the intricacies of the statute, and defendant employer has the proper insurance. There are very significant injuries leading to high damages.

By James G. Butler

In 1982, the legislature enacted the power press exception, a narrow exception to the exclusive-remedy rule. Labor Code section 3600 provides that the employee's sole and exclusive remedy against their employer is workers' compensation in all cases unless an exception applies. Workers' compensation remedies are limited and are far less than those available in civil actions. Workers' compensation benefits only provide for temporary disability (up to approximately $1,625 per week limited to 104 weeks), permanent disability (paid at $290 per week), past and future medical treatment and vocational rehabilitation (valued at a maximum of $11,000).



The Labor Code

ARTICLE 1. General Provisions [4550-4558] (Article 1 enacted by Stats. 1937, Ch. 90.)

4558.

(a) As used in this section:

(1) "Employer" means a named identifiable person who is, prior to the time of the employee's injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.

(2) "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 at the time of acquisition, installation, or manufacturer-required modification of the power press.

(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.

(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.

(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.

(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

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(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.

(Added by Stats. 1982, Ch. 922, Sec. 12.)

The exceptions to the rule

There are various statutory exceptions to the rule of exclusivity; Labor Code section 4558 governing power press injuries is one of those. In some cases, employers modify the design of a power press by removing a point-of-operation guard or failing to install one per manufacturer guidelines at the point of operation. A reason for removing the guards is to increase the speed of workflow, which may speed up production and concurrently increase profits.

To be a power press, the machine must be a material-forming machine that uses a die in the manufacture of other products. Further, a power press is any material-forming machine that uses a die to press, impact, punch, stamp or extrude materials (Labor Code § 4558, subd. (a)(4)). These are used in a multitude of industries.

Courts have held that the following are not power presses; circular saws (*Ceja v. J R Wood* (1987) 190 Cal.App.3d 1372, 1377), printing press (*McCoy v. Zahniser* (1995) Cal.App.4th 107, 111), molding machines that cut but do not impart an image or use a cutting head. These items are by definition not a power press. (See *Rosales v. De Puy Ace Medical Co.* (2000) Cal.4th 279, 283.)

The knowledge required is "actual awareness" by the employer rather than merely constructive knowledge. A worker must prove the employer knew a guard was required to prevent the probability of serious injury or death. It is not sufficient merely to show that injury was negligently and proximately caused by absence of the guard. (Labor Code § 4558, subd. (b).) This can be proven under Labor Code section 4558. The employee must prove that the employer knew that a guard was required to prevent the probability of a serious injury or death. Typically, the injuries seen are loss of fingers, hands, or crush injuries to upper extremities.

In *La Friel Mfg. Co. v. Superior Court* (2012) 55 Cal.App.4th 883, 889, the Court of Appeal affirmed that a point-of-operation guard is any device intended to keep a worker's hands outside a point of operation. The "point of operation" is the die in which the material is formed by stretching, pressing or punching the material which passes through a die.

In *Saldana v. Globe Weis Systems* (1991) 233 Cal.App.3d, 1505, the Court of Appeal affirmed that there is no liability absent evidence that the manufacturer required or otherwise provided by specification for the attachment of guards on the power press and conveyed this information to the employer in some manner. (Labor Code § 4558, subd. (c).)

Practice pointer: *In these cases, it is beneficial to join the manufacturer of the product in the civil action. This is an excellent mechanism to elicit evidence of all notice to the employer about the product. You can use the product-liability evidence to prove your case.*

According to Labor Code section 4558, subd. (a), the statute requires that the machine must be a material-forming machine that utilizes a die designed for use in the manufacture of other products. Whether a part is a die is a factual question for the jury. (*Islas v. D&G Manufacturing* (2001), 120 Cal.App.4th, 408.)

A die is not used to simply cut material in the manner of a blade. (*Bingham v. CTS* (1991) 231 Cal.App.3d, 56.) Examples of guards include light curtains, palm buttons, or any type of physical barrier that makes the point of operation inaccessible to a hand or other body part while the machine is in operation.

The next question is: Who can be liable under Labor Code section 4558? Independent contractors are excluded. Only the employer can be held liable.

The employer needs to be someone with the authority to direct and control the acts of the employee. In addition, the employer needs to specifically authorize or direct the removal or fail to install the guard from the power press. The removal or failure to install must be specifically authorized by the employer, under conditions known by the employer to create a probability of serious injury or death. (Labor Code § 4558, subd. (b); *McCoy v. Zahniser, infra.*)

Physical removal of a guard designed and manufactured for use on a power press is one way to hold an employer liable outside workers' compensation. Removal means physical elimination of a point-of-operation guard from a power press that is installed by the manufacturer or installed by the employer pursuant to the manufacturer's requirements or instructions despite knowledge that the guard was provided or is required to prevent a real probability of serious injury. (Labor Code § 4558, subd. (a)(5).) This conduct by the employer must be specifically authorized as an affirmative instruction to remove the guard given by the employer prior to the injury or demise of the worker. It does not mean a subsequent compliance or ratification by the employer. (Labor Code § 4558, subd. (a)(6).)

Under section 4207, subdivision (a)(4) of the California Code of Regulations, physical removal means that "[a] hand tool such as a box, open end or adjustable wrench, socket or key wrench shall be required to remove the guard." Physical removal, for the purpose of liability under Labor Code 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. (*Bingham v. CTS Corp., infra.*)

As is referenced above, the first question which must be answered is whether the injury-causing machine is a power press according to Labor Code section 4558, subdivision (a). That section

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requires that the machine must be a material-forming machine that utilizes a die designed for use in manufacture of other products. Whether a part is a die is a factual question for the jury. (*Islas v. D&G Manufacturing, infra.*)

A die has been referred to as a tool that imparts shape to material by pressing on or impacting against or through the material by punching, stamping, or extruding material. (*Rosalia v. Depuy Ace Medical Co., infra.*) A machine with a die that is not used to manufacture another product or does not meet any of these other specifications is not a power press.

A second basis for holding an employer liable under the power press exception is where the employer fails to install a point-of-operation guard when the attachment is required by the manufacturer and made known to the employer at the time of acquisition, installation, or manufacturer required modification of the power press. (Labor Code § 4558, subd. (a)(2).)

Practice pointer: *It is beneficial to petition for Serious and Willful misconduct pursuant to Labor Code § 4553.1 in the workers' compensation case. In doing so the client pays lower attorneys' fee on the money recovered. The WC attorneys' fee on a Serious and Willful case is between 15% and 33%, while the rate in a civil case is often 40% or more. Additionally, this allows an alternative means of discovery, which can document physical removal or omission to install a guard. This kind of discovery can be a goldmine. A Serious and Willful workers' compensation case, and civil case can be simultaneously litigated.*

The third question which must be answered is: Did the injury occur due to the lack of a guard? This will be a fact-specific inquiry, focusing on the testimony of plaintiff and the expert evaluation of the absence of a guard.

A subsidiary question that must be answered is, was the notice conveyed to the owner of the press or to a supervisor having managerial authority to direct and control the acts of the employees? (Labor Code § 4558, subd. (a)(1).) It must be demonstrated that the conduct of the employer in removing or failing to install the guard was due to an act taken by the supervisor. Removal means to render a safeguarding apparatus, whether a device or a point-of-operation guard, dysfunctional or unavailable for use by the operator of the machine. (*Bingham, infra.*)

Knowledge must originate with the manufacturer of the machine and be conveyed to the employer by the manufacturer. (Labor Code § 4558, subd. (b).) The conveyance is only satisfied by showing that the manufacturer required installation of guards and conveyed knowledge via product literature to the employer. (Labor Code § 4558, subd. (c).)

Practice pointer: *In bringing a power-press case, one needs to be aware that many policies of insurance do not cover these claims. There are some polices that have a rider allowing for coverage, and discovery is important on the insurance coverage in order to successfully litigate these claims.*

In power-press cases, it is essential to retain a well-versed expert early on. This expert can be used to help obtain the evidence necessary to prevail. Liability under the power press exemption shows that the employer failed to comply with the series of steps outlined above by the law.

The intent and purpose of Labor Code section 4558 is to protect workers from employers who willfully remove or fail to install appropriate guards on large machines. These machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to serious injury. The act of putting profits above work safety subjects employees to hazards that are beyond the ordinary risks of employment. This is why the legislature stepped in to level the playing field. In an appropriate case, the criterion can be fully complied with and the worker can obtain a just result. The worker can prevail.



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