

Don't get tripped up on serious and willful claims

Intentional misconduct can result in increased WC benefits to the applicant

By Jessica E. Berlat

This article is going to explore what a practitioner can and should do when presented with a workers' compensation injury that was caused by an employer's intentional or reckless conduct.

The workers' compensation system is one of the nation's oldest social-insurance programs. It was created as a trade-off between employers and employees. The idea being that when employees were injured on the job, rather than having to proceed through the arduous civil litigation legal process, an employee could more expeditiously receive benefits though the workers' compensation system.

Designed as a benefit delivery system, a qualified injured worker is provided access to medical treatment, partial coverage for time missed from work due to their injury, compensation for permanent disability impairments, and potentially vocational rehabilitation benefits. Employers in turn, while giving up some common law defenses to civil actions, are able to limit their liability.

Many would argue that the workers' compensation system in practice, and especially today, does not achieve the goals it set out to accomplish. When an employee is injured on the job, they are preempted from filing a civil claim against their employer and must proceed through the workers' compensation system. Under California law, workers' compensation is usually the exclusive remedy against an employer. This is called the Workers' Compensation Exclusive Remedy Rule. (Lab. Code, § 3602.) There are limited exceptions to this rule, such as employer negligence, dual capacity, fraudulent concealment, etc.

As explained above, this was designed as a trade-off. The workers' compensation system is limited in the types of recovery available, but the discovery process and burden of proof is much less cumbersome than the traditional civil litigation route. This is because workers' compensation is viewed as being the responsibility, not the fault, of the employer.

When a practitioner is presented with a fact pattern where an employee sustains injury as the result of serious and willful misconduct of their employer a Serious and Willful Petition should be filed. Appropriately named, a Serious and Willful Petition pursuant to Labor Code section 4553, is an additional pleading that can accompany a workers' compensation application. While much more difficult to prove than the underlying workers' compensation case, this petition allows for a greater recovery to the applicant when circumstances demonstrate deliberate, reckless or grossly negligent behavior on the part of the employer.

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What constitutes serious & willful misconduct?

A Serious and Willful Petition is limited to very specific factual circumstances and is not an appropriate companion pleading to the majority of workers' compensation cases. This petition can be very difficult to prove. For liability to be imposed, an employer's actions must demonstrate a deliberate action or inaction that would be contrary to safety regulations.

The California Supreme Court in *Mercer-Fraser Co. v. Industrial Acc. Com.*, wrestled with the standard of what amounts to serious and willful misconduct. Specifically, the substantial difference between negligence and willful misconduct. (*Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d. 102.) In the Supreme Court's lengthy discussion, they review many prior decisions in respective cases in order to define serious and willful conduct versus negligence.

The Court, in summarizing prior decisions states, "willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences." (*Id*. at 117.) "Willful misconduct means something different from and more than negligence, however gross. The term serious and willful misconduct as described… as being something much more than mere negligence, or even gross or culpable negligence and is involving conduct of quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences… the mere failure to perform such duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute willful misconduct there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." (*Ibid*.)

OSHA violations

Practitioners should be especially mindful of injuries that have occurred due to a violation of Cal/OSHA rules, violations of OSHA guidelines, lack of proper training, ignoring a known safety violation, repeat violations of orders, disabling or removing safety equipment, forcing workers to break the law, ignoring prior injuries. All of these scenarios would present factual situations that would potentially give rise to an allegation of serious and willful misconduct.

As outlined above, there is a high bar to meet in terms of what amounts to serious and willful misconduct. As such, these petitions are difficult to prove and the burden of proof lies with the employee. However, if an employee meets their burden, their award would be much greater than what they would obtain from their workers' compensation claim alone.

How it may impact compensation awarded to the injured worker

Labor Code section 4553 provides that the amount of compensation otherwise recoverable shall be increased one-half. The courts have interpreted that one-half increase to mean the value of an employee's entire number of benefits recovered to be increased by one-half. This includes, not just indemnity, but potentially large medical bills that could be part of that calculation.

In *Ferguson v. Workers' Comp. Appeals Bd*., the Court of Appeal found that the increase of one-half benefits applied to both indemnity and non-indemnity benefits. "…we are persuaded the legislative scheme contemplates that an award for increased compensation due to the serious and willful misconduct of an employer under section 4553 must be calculated with reference to 'every benefit or payment conferred by Division 4 upon an injured employee,' as broadly defined in section 3207 to include medical treatment payments, medical-legal fees and vocational rehabilitation costs, as well as all indemnity benefit payments."

A Serious and Willful Petition offers benefits that far surpass anything an injured worker can obtain from a stand-alone workers' compensation claim. When a practitioner is presented with facts that demonstrate behavior or conduct that rise above mere negligence on the part of the employer, a petition should be filed.

Something that a practitioner should be aware of is that pursuant to Labor Code section 4551, the employer can also file a reverse Serious and Willful Petition against the employee; arguing for reduction of compensation due to misconduct of the employee. This is an affirmative defense that an employer must plead and prove.

Civil and workers' compensation attorneys need to be aware of unintended consequences

All civil litigation and workers' compensation attorneys should also be mindful of the affirmative defenses of superseding cause and intervening force when there is also a potential third-party lawsuit. A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is substantial factor in bringing about. (Rest. 2d Torts, § 440.) An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed. (Rest. 2d Torts, § 441.)

What is the Labor Code limitations period for bringing a claim?

There is a strict timeline for filing a Serious and Willful Petition of one year within the date of injury for underlying workers' compensation injury. Labor Code section 5407 provides an applicant must commence proceedings for the collection of compensation on the grounds of serious and willful misconduct within 12 months from the date of injury. Further, "[t]his period should not be extended by payment of compensation, agreement therefor, or the filing of

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application for compensation benefits under other provisions of this division."

Conclusion

With a strict deadline for filing a Serious and Willful Petition, if there are enough facts to support a petition, one should be filed promptly. This timeline can be challenging given that most injured workers do not seek representation at the outset of their injuries. Therefore, attorneys should be mindful of any facts that lend themselves to a Serious and Willful Petition during the client intake process.

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