

Workers' Compensation: Determining When It Is Truly the "Exclusive Remedy"

In evaluating the claims of an injured worker, the analysis necessary to determine the available and best course of action for the worker and the corresponding liability exposure for the employer is essentially the same. At the outset, one must first determine whether workers' compensation provides a potentially viable and available remedy, given the facts and circumstances surrounding the accident. If the answer to this initial inquiry is "no," the comparative analysis ends, and both parties must look beyond workers' compensation to common law based civil remedies.

However, if the answer to this initial question is "yes," one finds herself presented with a myriad of issues which must be considered in determining the next appropriate step. Has the employer ensured compensation so as to gain the benefits of the exclusivity bar? Does the worker have the ability to elect her remedy, be it workers' compensation benefits or damages in a traditional personal injury action? If the worker either has the ability to elect her remedy or such selection of remedy is imposed on her by law, does the pursuit or receipt of such remedy forever bar any further claims against the employer? If there is not a complete bar, what other potential claims exist?

BACKGROUND ON WORKERS' COMPENSATION

Workers' compensation became a reality for U.S. employers and workers in 1911.¹ Although the provisions vary from state to state, workers' compensation statutes generally require an employer to secure payment for the care and lost wages of employees injured, disabled or killed in the course and scope of their employment. Workers compensation benefits can include (1) payment of medical/rehabilitation expenses; (2) payment in the form of income replacement for disabled workers; and (3) survivors' benefits for workers killed in the course and scope of employment, typically encompassing both income replacement and payment of certain funeral expenses.² At their core, workers' compensation laws exist to ensure that an employee injured during the course and scope of her employment "receives the right to swift and sure compensation."³

Workers' compensation laws undoubtedly provide substantial benefits to those people injured in the workplace. In the absence of workers' compensation, injured workers would be left to pursue traditional civil remedies against the employer, often waiting many months or years to recover damages for medical expenses incurred and wages lost. Also, workers' compensation allows an injured worker to recover for medical expenses and lost wages despite the fault of the worker in bringing the injuries upon herself. However, as with most things in life, the benefits afforded to workers through workers' compensation come at a cost; namely, the amount recovered by an injured worker through workers' compensation proceedings (especially where the injury in question is fatal or catastrophic in nature) is typically far less than could otherwise be obtained in a traditional tort action against the employer.

While workers' compensation schemes were primarily enacted to ensure the protection of injured workers, these laws also provide meaningful benefits to employers. As a general matter, the employer is given great control over the medical treatment of its injured worker. Further, workers' compensation laws generally limit the amount of money that may be recovered by an injured worker to levels far below that which may be awarded in a separate civil proceeding. This affords an employer a certain sense of predictability and security in conducting its business operations. However, these benefits also come at a cost; namely, the employer is responsible for payment to workers injured or killed on the job, regardless of whether the employer played any role in causing the injury, and despite any comparative fault of the employee.

THE INITIAL INQUIRY: DOES WORKERS' COMPENSATION APPLY?

Before an injured worker can depend on workers compensation to provide a remedy for her workplace injury, and before an employer can start to rely on said scheme to foreclose its potential liability exposure for said injury, one must first determine that the workers compensation scheme properly applies to the injury

in question. This, in turn, involves a consideration of three basic questions.

First, is the injured worker an “employee” of the alleged employer? Second, is the “injury” one which falls within the class of injuries that workers’ compensation laws were intended to address? Finally, was the worker injured in the “course and scope” of her employment? If, and only if, the answer to each of these questions is “yes” can the injured worker and employer properly look to workers’ compensation to provide a remedy between the parties. However, if the answer to any one of these questions is “no,” both parties must look beyond workers’ compensation laws to traditional and common law based civil remedies.

Importantly, a lack of a workers’ compensation remedy may be affirmatively used as a sword by the worker to pierce the tort immunity typically afforded to an employer through the exclusivity provisions of a workers’ compensation act. In such circumstance, an injured worker may bring an independent civil action against the employer which, although likely resulting in relative delays in obtaining payment for medical expenses and lost wages, provides a venue for greater monetary recovery. Eliminating one of the elements necessary to bring workers’ compensation in to play is the simplest manner in which a worker may attempt to maneuver around the exclusivity and tort immunity typically afforded to employers by the workers’ compensation scheme. Put simply, there can be no exclusivity remedy so as to prohibit separate civil claims when no workers’ compensation remedy is available in the first instance.

However, even in a circumstance where workers’ compensation does not apply, the potential benefits do not fall solely to the worker. Rather, the employer may also use the absence of one or more of these critical elements as a shield to avoid no-fault payments on behalf of an

injured worker, forcing the worker to establish fault through typical tort claims utilizing comparative fault principles.

IS THE WORKER AN “EMPLOYEE” OF THE CLAIMED EMPLOYER?

The test for determining whether a worker is an “employee” varies from state to state. Further, not all states have provided guidance on this issue specifically as it pertains to workers’ compensation, although typically addressed in connection with other employment issues. As such, it is critical to look to applicable law to reach a reasoned and supportable conclusion of this inquiry. However, for purposes of this article and as a general matter, any such analysis may involve consideration of one or more of the following non-exhaustive factors:

1. The employer’s right of control of the worker’s performance;
2. Whether the employer furnishes the equipment used by the worker;
3. The length of time the worker has held a relationship with the employer;
4. The method of payment of the worker (i.e., hourly or job based), including any withholdings and provision of employment benefits; and
5. The parties’ classification and intentions with respect to their relationship.⁴

The evaluation of whether a worker qualifies as an “employee” is a fact intensive inquiry, with the ultimate conclusion often determined by those factors considered to be determinative under applicable law. Importantly, the “employee” classification inquiry also affords both injured workers and businesses an arena in which to attempt to avoid workers’ compensation laws, and their respective benefits and burdens, in exchange for traditional civil actions. In these circumstances,

attempts are typically made to classify the worker may as an independent contractor or an employee of another entity/person.

This issue may be further complicated in situations of joint or special employment. For example, it has been stated that an entity may be classified as a special employer, and thereby liable for workmen’s compensation (and entitled to tort immunity under said scheme) if (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work.⁵ A joint employment relationship may also exist where a worker:

1. Is under contract with both employers;
2. Is under the simultaneous control of both employers;
3. Performs services simultaneously for both employers; and
4. The services performed for each are the same or closely related.⁶

Typically, an injured worker utilizes principles of joint or special employment to provide an additional or alternative source of workers’ compensation benefits. In comparison, businesses typically rely upon these concepts to create an additional level of protection to affiliated companies or businesses involved in joint ventures. Under these circumstances, these companies argue that they are immune from separate civil actions under the exclusivity provision of the workers’ compensation scheme based upon a relationship with the worker and the true employer of the worker.

For example, a driver of commercial vehicles may be a designated employee of a given employer. However, such company may also be affiliated with motor carriers to which it essentially leases the driver for use in operating the motor carrier’s equipment. In such circumstances, the motor carrier may seek

to benefit from the tort immunity afforded to the designated employer under these doctrines. In such circumstances, it is important to not only look to the factors described hereinabove, but also, any agreements between the two claimed employer to determine how they, themselves, have classified a given worker for their business services.

IS THE “INJURY” COMPENSABLE UNDER THE ACT?

As a creature of statute, workers’ compensation laws only afford a remedy to an injured worker (and in turn, protection to an employer) for those injuries falling within the purview of the Act. As such, workers’ compensation generally does not serve to bar claims beyond personal injuries sustained in the workplace, thereby excluding other tort claims such as defamation⁷ and certain forms of emotional distress.⁸

As such, an injured worker may look to limit her claims or classify her injuries in a manner to fall outside of the purview of a workers’ compensation act, and thereby avoid the employer’s immunity afforded by the Act’s exclusivity provision. Similarly, the employer may seek to avoid no-fault payments to the injured worker, especially where the elements of the claim for such injuries require specialized pleading and proof.

DID THE INJURY “ARISE OUT OF” AND IN THE “COURSE AND SCOPE” OF EMPLOYMENT?

There must be a sufficient nexus between the employment and the injury for an injury to call into question workers’ compensation. In the vast majority of jurisdictions, this nexus is established only when the injury-causing accident must arise out of and in the course of employment.⁹ The “arising out of” requirement is typically satisfied when the injury’s origin lies in some risk related to the employment.¹⁰ A risk

may be incidental to the employment when it is part of the worker’s duties or relates to an activity connected with employment.¹¹ An injury may occur in the course of employment even though it does not occur in the scope of employment.¹² An injury arises in the course of employment when it happens within a period of employment, at a place where the employee may reasonably be, and while the employee is doing work or something incidental to employment.¹³

For example, in *Skinner v. Ogallala Public School Dist. No. 1*,¹⁴ the Nebraska Supreme Court held that a teacher’s injuries did not arise in the course of her employment, and therefore that workers’ compensation exclusivity did not apply, where she fell through a trap door in the band director’s office when school was not in session while assisting her husband, the band director.

Given the application and exclusivity provisions of workers’ compensation laws, an employee generally may not bring separate tort claim against her employer for failing to provide a safe workplace. This is true even where the employer failed to take corrective action, institute safety measures, or warn employees of the risks and dangers involved.¹⁵ However, multiple legal doctrines exist which allow injured workers to look beyond workers compensation to separate civil actions against their employers. The vast majority of these exceptions to employer immunity fall in situations where the (1) employer holds an additional relationship with the employee, or (2) injury causing event was more than a failure of the employer to provide a safe workplace.

Dual Capacity and Dual Persona Doctrines

One such exception is known as the dual capacity doctrine, wherein the employer has a relationship with an employee in addition to that of employer-employee. This could include circumstances where

the employer is the manufacturer of equipment or vehicles used by the employee in the course and scope of their employment. In such situations, a worker injured by such equipment or vehicle may seek to bring separate civil claims against the employer under product liability theories. Although recognized in a few jurisdictions, this doctrine been criticized as amorphous and overbroad, and outright rejected in multiple jurisdictions.¹⁶

A separate and distinguishable exception from the dual capacity doctrine is the dual persona doctrine. Similar to the dual capacity doctrine, this exception has been recognized in a few jurisdictions but rejected in others. This doctrine provides that an employer may become vulnerable to a tort action by its employee if the employer has a second persona so completely independent from and unrelated to its status as employer that it is considered a separate legal entity.¹⁷

Intentional Act or Misconduct by Employer

Injured workers may also look to utilize the nature of the conduct causing the injury to overcome the tort immunity typically afforded to employers by the exclusivity of workers’ compensation schemes. Workers’ compensation generally does not serve as a bar to separate civil claims for injuries resulting to employees from the employer’s intentional tort or misconduct.¹⁸ To arise from a level within the purview of workers’ compensation, the act or misconduct must exceed mere negligence or carelessness. The intentional conduct doctrine is the exception adopted by the majority of states.¹⁹ To establish a claim under the intentional conduct doctrine, there must be more than a mere allegation that there was an intentional injury; there must be facts alleged which, if true, show a deliberate intent to bring about an injury.²⁰

A minority of states employ a similar, although less stringent,

exception to tort immunity generally known as the substantial certainty doctrine.²¹ The substantial certainty doctrine does not impose as rigorous a standard as the intentional conduct doctrine. However, it still requires that the alleged conduct or a condition permitted by the employer caused a situation knowing it was substantially certain to cause serious injury or death to an employee.²²

WORKERS' COMPENSATION COULD APPLY, BUT WILL IT?

Even if one determines that workers' compensation could apply to the claims of the injured worker, the inquiry is not complete. Rather, one must determine whether workers' compensation will in fact apply, and if so, whether this remedy will serve to foreclose all other claims that an injured worker may have against her employer.

FAILURE TO ENSURE COMPENSATION

To determine whether workers' compensation actually provides a remedy to an injured worker, one must first determine whether the employer took steps necessary to ensure compensation and thereby avail itself to the tort immunity afforded by workers' compensation law. This is typically accomplished by obtaining workers' compensation insurance coverage that will extend to the extent of the employer's business operations.

To the extent a business conducts operations that are consistent over time and limited in substantive nature or geographic scope, the steps to obtain and maintain workers' compensation coverage are relatively uncomplicated and serve to stand the test of time. However, where employees cross state lines or the nature of the business in which the employer is engaged varies from time to time, an employer may encounter situations where it has no workers' compensation applicable to a given injury, despite having workers' compensation coverage as a general matter.

In the typical tort action, the absence of applicable insurance coverage ultimately serves to the detriment of the injured party. However, in the context of workers' compensation, "an employer who refuses or neglects to secure payment within the workers' compensation scheme becomes liable in an action at law."²³ Thus, the absence of applicable workers' compensation coverage may place an injured worker in the enviable position of maintaining a separate civil action to redress a workplace injury in a situation where workers' compensation should otherwise apply to preclude the claim. The injured worker may also gain additional benefits otherwise not found in a traditional civil action; namely, an employer who has lost its tort immunity for noncompliance with the workers' compensation laws often may be precluded from defenses such as the employee's assumption of risk, a coemployee's negligence, or negligence on the part of the injured worker.²⁴ In other words, through the failure of the employer to ensure compensation, the employer not only opens the door to a separate civil action, but one akin to a workers' compensation proceeding from a comparative fault perspective of the employee, all without any corresponding benefit to the employer.

ELECTION OF REMEDIES

Whether the election of workers' compensation benefits or pursuit of a separate civil action serves to preclude other claims depends wholly on applicable law. In certain jurisdictions, an employee who brings a separate civil action against her employer waives any right to workers' compensation.²⁵ However, certain jurisdictions such as Idaho and Nevada allow an employee to pursue a tort claim and a workers' compensation claim concurrently.²⁶

In jurisdictions such as Iowa, Kentucky, and Massachusetts, the acceptance of workers' compensation payments constitutes an election that

estops the employee from resorting to any other remedy.²⁷ In comparison, in other jurisdictions such as Connecticut and Florida, an employee's acceptance of workers' compensation benefits does not constitute an election of remedies barring a tort action against the employer, thereby allowing an injured worker to seek an immediate remedy through workers' compensation and additional recovery in a separate civil suit.²⁸

Because the chosen course of action, be it pursuit or receipt of workers' compensation benefits or damages through a traditional tort claim, may serve to preclude all other remedies, it is important to fully evaluate the strength and potential recovery of all such claims prior to moving forward with either.

THE EXISTENCE OF MULTIPLE AND DISTINGUISHABLE CLAIMS

In a circumstance involving intentional acts or misconduct, an injured employee may be able to bring both a workers' compensation action and a separate civil action against her employer. However, in order to maintain both actions, the intentional act must be separate from the compensation claim and produce an independent injury.

INFRINGEMENT OF A PARTY'S ECONOMIC INTEREST IN A CLAIM AGAINST A THIRD PARTY

It is important to also note that actions of an employer outside of the context of providing a safe workplace may provide, such as failing to preserve or destroying evidence that may be used by a worker injured in the course and scope of his employment. This can include, but is not limited to, repair or destruction of equipment or vehicles that an injured worker were using at the time of her injury.

For those courts that have addressed the issue, each has concluded that a spoliation of the

evidence claim fell outside the purview of the workers' compensation scheme, and thus, no immunity was afforded to the employer. For example, in *Coleman v. Eddy Potash, Inc.*,²⁹ the Supreme Court of New Mexico held that neither an action for intentional spoliation nor negligent spoliation was barred by the state's workers' compensation act. The court noted an important qualification to immunity is that the injury must fall within the Act's coverage formula in order to preclude other remedies. In other words, the court stated that if an injury is not included within the Act's coverage formula (arising in the course and scope of employment), the exclusivity provisions do not disturb existing remedies.

The court further stated that if the Act is intended to compensate for personal injury and death, it has no relevance when an intentional interference with economic expectancies causes injury other than "personal injury or death" arising out of and in the course of employment. Ultimately, the court determined that the destruction of the manlift in which the injured worker was operating at the time of her and the injury to her economic interests had no relation in time, place and circumstances to her actual employment. In fact, the plaintiff had already sustained her personal injuries and was hospitalized at the time the manlift was dismantled and replaced.

Similar analysis and reasoning may be found in the opinions of the other courts addressing the issue. For example, in *Coca Cola Bottling Co. of Los Angeles v. Superior Court*,³⁰ the California Court of Appeals held that the exclusivity provision of that state's workers' compensation scheme did not preclude an action for spoliation of the evidence based on the employer's failure to

preserve pick-up truck involved in employee accident. The court found that the injury was the disappearance of evidence which the injured worker needed to prove against third parties, namely, the manufacturer of the vehicle. As such, the court found that this was not an injury (physical, emotional or both) to the *person* of the injured employee, but rather, an injury to the injured employee's *property* interests, i.e., an interference with a valuable probable expectancy of prevailing in their third party actions, particularly against the vehicle manufacturer.³¹

There are many issues to consider when an employee is injured on the job. Employers would be wise to secure the opinion of counsel when an employee files a workers' compensation claim. ☼

NOTES

1. See § 1:3. Analysis and guidelines—Background, Workers' Comp. Guide § 1:3.
2. See § 1:6. Analysis and guidelines—Benefits, Workers' Comp. Guide § 1.6.
3. *Harrell v. Pineland Plantation*, 523 S.E.2d 766, 772 (S.C. 1999).
4. See § 1:17. Analysis and guidelines—Tests for defining an employee, Workers' Comp. Guide § 1:17; § 106:2. Employee defined, 1 Modern Workers Compensation § 106:2.
5. *B & C Excavating Co. v. Hiner*, 207 Neb. 248, 298 N.W.2d 155 (1980).
6. *A. Mazzetti & Sons, Inc. v. Ruffin*, 437 A.2d 1120 (1981).
7. *Terrell v. Rowsey*, 647 NE2d 662 (Ind. App. 1995).
8. *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958 (Ind. App. 2001); *Stratemeyer v. Lincoln County*, 915 P2d 175 (Mont. 1996).
9. § 110:1. Work nexus is essential, 2 Modern Workers Compensation § 110:1.
10. See *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68 (Tenn. 2001).
11. See § 110:4. Arising out of requirement, 2 Modern Workers Compensation § 110:4.
12. See *Finnegan v. Industrial Com. of Arizona*, 157 Ariz 108, 755 P2d 413 (1988).
13. See § 110:5. In course of employment, 2 Modern Workers Compensation § 110:5.
14. 262 Neb. 387, 531 N.W.2d 510, 520 (2001).
15. See § 102:20. Failure to provide safe workplace, 1 Modern Workers Compensation § 102:20.
16. See § 102:9. Dual capacity doctrine, 1 Modern Workers Compensation § 102:9.
17. See § 102:10. Dual persona doctrine, 1 Modern Workers Compensation § 102:10.
18. See § 1:39. Analysis and guidelines—Injuries caused by accidents, Intentional injury not covered, 1 Workers' Comp. Guide § 1:39; § 102:13. Intentional torts, 1 Modern Workers Compensation § 102:13.
19. See *Larson*, Worker's Compensation Law § 103.03.
20. See *Larson*, Worker's Compensation Law § 103.04.
21. See *Larson*, Worker's Compensation Law § 103.05.
22. See § 1:39. Analysis and guidelines—Injuries caused by accidents, Intentional injury not covered, 1 Workers' Comp. Guide § 1:39.
23. See *Harrell*, 523 S.E.2d at 773.
24. See § 102:7. Damage suits—Defenses, 1 Modern Workers Compensation § 102:7.
25. See § 102:8. Damage suits—Suing as waiving right to workers' compensation, 1 Modern Workers Compensation, § 102:8.
26. See *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988); *Barjesteh v. Faye's Pub, Inc.*, 106 Nev 120, 787 P2d 405 (1990).
27. See § 102:7. Damage suits—Defenses, 1 Modern Workers Compensation § 102:7.
28. See § 102:7. Damage suits—Defenses, 1 Modern Workers Compensation § 102:7.
29. 120 N.M. 645, 905 p.2d 185 (1995).
30. 223 Cal.App.3d 1273, 286 Cal.Rptr. 855 (1991).
31. See also *Oliver v. Stimson Lumber Co.*, 297 Mont. 336, 344, 993 P.2d 11 (1999) ("injuries that trigger an exclusive remedy under the Act are internal or external harm to a worker's body. The loss of impairment of a person's ability to bring an action against a third party for spoliation of evidence is not an injury covered by the Act. Accordingly, we hold that an employees' claim against his employer for spoliation of evidence is not barred by the Act's exclusivity provision."); *Schusse v. Pace Suburban Bus. Div. of Transp. Authority*, 779 N.E.2d 259, 268 Ill.Dec. 645 (2002) (holding that exclusivity provision did not bar spoliation claim, stating "[a]lthough the measure of damages in a spoliation of evidence claim will be similar to that which could have been obtained in an underlying tort action, Illinois law makes it quite clear that the nature of and basis of liability for those damages are quite different."); *Townsend v. Conshor, Inc.*, 832 So.2d 166, 167-168 (Fla. App. 2002) (holding spoliation claim not barred, stating spoliation claim is "independent cause of action for negligence that does not arise until the underlying action is completed.").

David A. Brose practices law in the Lexington, Missouri, office of Langdon & Emison. As a former partner in a civil litigation defense firm, he defended companies in both personal injury and commercial litigation. He can be reached at dbrose@langdonemison.com.