



# Alternative forums for discovery in third-party workplace injury cases

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In many third-party personal injury cases, the skilled advocate can take advantage of discovery available in workers' compensation and OSHA proceedings to get a jump on the defendants – sometimes even before the civil complaint is filed. As the saying goes, “knowledge is power,” and nowhere more so than in civil litigation. An attorney who is able to discover information relevant to a potential civil claim prior to his or her opponent wields significant power over that adversary.

## **Workers' compensation discovery mechanisms**

Because Workers' Compensation is a no-fault system, in most cases liability is not at issue. Unless the employer is challenging whether the injury arose out of, or in the course of, employment, discovery will be limited to damages. In workers' compensation cases, an employer is required to conduct an investigation into the incident. (See, 8 Cal. Code Regs., § 10109; Lab. Code, § 5402.) The injured worker is entitled to discovery of statements in this investigation file.

These statements may identify witnesses and important physical evidence, as well as provide the attorney with a good perspective on the incident. Additionally, the injured worker may also subpoena his own employment and medical records.

A civil lawyer can take advantage of workers' compensation discovery when there is an allegation of “serious and willful (S & W)” misconduct on behalf of the employer. (See, Lab. Code, § 3602.) In those circumstances, the employee must demonstrate that the employer knew or should have known that its conduct would likely result in harm to the worker. Because the worker must prove employer culpability, extensive discovery is allowed; including depositions of an employer's managers and officers as well as percipient witnesses to the facts surrounding the injury. This discovery can provide a valuable advantage, especially the testimony of management personnel.

Be aware that a petition for serious and willful misconduct in a workers' compensation case requires allegations of greater culpability than ordinary negligence against an employer. This position may be inconsistent with allegations against a third party in a civil case. While the allegations are probably not going to

be admissible at trial, an attorney must consider the tactical implications prior to the filing of an “S & W” petition.

## **Interested party status and OSHA discovery**

The California Division of Occupational Safety and Health Administration often issues citations for the violation of OSHA regulations when there has been a workplace injury. Where an employer has appealed a Cal-OSHA citation, the injured worker may request interested party status from the Appeals Board. (See, 8 Cal. Code Regs., §§ 354, 355, 371.) By doing this, the civil attorney can conduct discovery as a full party to the citation appeal.

This is significant, because Cal-OSHA relies on the California Code of Civil Procedure as a discovery mechanism. Thus, where your client has been granted interested party status in a Cal-OSHA appeal, full discovery under the Code of Civil Procedure is allowed. In the experience of The Veen Firm, underfunded and overworked Cal-OSHA offices welcome the active participation of an employee's civil attorney. Cal-OSHA's interests are substantially aligned with the interests of the injured worker, so they will often allow private



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attorneys to take the lead in deposing witnesses and even arguing appeals.

Discovery notwithstanding, the vigorous prosecution of an OSHA appeal is independently important because the violation of a Cal-OSHA safety order may provide the basis for alleging negligence per se in a civil suit. (See, *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927-929.) The diligent advocate should therefore take the necessary steps to support Cal-OSHA's prosecution of an employer's citations. Keep in mind that the citations may support actions against various employers. Labor Code section 6400, subsection (b), specifies that on multiemployer worksites, the employer who exposes his or her employees to the hazard; the employer who created the hazard; the employer who is responsible for safety and health conditions; and the employer who has the responsibility for correcting the hazard, are all subject to citation.

When conducting depositions as a Cal-OSHA party, keep in mind that civil defendants may object to the admissibility of the transcript or videotape if the defendants did not have an opportunity to attend the deposition, arguing that the employer did not share interests. Even if the testimony is inadmissible, getting the opportunity to discover the defendant's contentions in the OSHA case, both in deposition and during the OSHA appeal hearing, provides an excellent opportunity to nail down testimony that may later prove useful on cross-examination in the civil case.

**Conclusion**

Discovery in forums unrelated to civil exposure can help with strategies and tactics. Taking a free peek at an opponent's cards lets an advocate formulate a plan before his or her adversary even knows the game has started.

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