Workers' compensation and civil liability cross-over claims

Understanding exceptions to maximize your client's recovery

By Olivia K. Leary, Phil Johnson and Eustace de Saint Phalle

Most personal injury attorneys know that California's workers' compensation system is generally the exclusive remedy for those hurt at work. This article explores those unusual situations where an injury on the job can lead to more than a workers' compensation case. By reading the below, you can learn how to spot the scenarios from which your client may be able to recover above and beyond what the workers' compensation system typically provides.

Let's say you're a plaintiff's attorney who is meeting with a potential client for the first time. The client tells you that they were working to build a wall at their employer's place of business. To do so, they were using a saw that was designed and manufactured by their employer. This saw was owned and maintained by a subsidiary of the client's employer, who loaned it to the employee for their work. The saw malfunctioned, and the client was severely injured. Later on, you learn that the saw was designed without a safety guard that should have been part of the original design. Had the saw included this guard, the client believes they would not have been severely injured by the saw when it malfunctioned. The client is receiving workers' compensation benefits from their employer. The question is: Are your client's remedies limited to the workers' compensation system or do any paths potentially allow for civil recovery?

Introductory analysis of the exclusivity rule

Under California's workers' compensation system, a worker who is injured on the job is entitled to benefits, regardless of fault. These benefits include medical care, disability payments (temporary or permanent) and job displacement benefits. This system, established by the California Constitution Art. XIV, section 4, requires that all employers possess workers' compensation coverage for their employees. The specific provisions of the California workers' compensation law are laid out in the California Labor Code.

Labor Code section 3602, subdivision (a) establishes that workers' compensation is generally the exclusive remedy for an employee who is hurt while at work, subject to some important exceptions. Thus, an injured employee is usually foreclosed from bringing all other claims against an employer outside of the workers' compensation system, including any civil action. Although it may be the only option for an injured worker, the workers' compensation system often leaves much to be desired in terms of the quality of care and the benefits that the injured worker receives. As plaintiffs' attorneys, we work to obtain for our clients the best recovery possible. Because of the shortcomings of the workers' compensation system, a careful analysis of the various exceptions to the exclusivity rule and an exploration of other potential avenues that can maximize recovery is necessary every time a plaintiff and/or claimant attorney assumes representation of an injured employee.

Statutory expectations to the exclusivity rule

As stated, when an employee is injured in the course of their employment, workers' compensation is generally the exclusive remedy. However, the exceptions to this exclusivity rule should be explored each time you are representing an injured worker. The exceptions are described both in statute and case law and are codified within the Labor Code, discussed below:

(1) Willful Physical Assault: When an employee is willfully assaulted by an employer in the course of their employment, the employee can elect to bring a civil action or receive workers' compensation benefits for the intentional wrong. (Lab. Code, § 3602, subd. (b)(1).) The employee must choose which remedy to pursue and is foreclosed from bringing concurrent civil action and workers' compensation claim.

(2) Fraudulent Concealment by Employer: An employee is permitted to sue an employer when the employee's injury has been aggravated by the employer's concealment of said injury. This rare exception most frequently arises in asbestos-related injuries. For instance, when an employee working at an asbestos plant suffered aggravation of an asbestos-related illness, the exception was recognized when it was shown the employer knew of the connection between the employee's illness and the exposure to the employer's asbestos and then concealed knowledge of this disease from the employee, which worsened their condition. (Lab. Code, § 3602, subd. (b)(2).)

(3) Dual Capacity: The dual capacity exception arises when an employer and

employee have another different relationship beyond the employment relationship and this other relationship imposes different duties. However, this exception was limited in application after the Labor Code was amended in 1982. Under the current dual capacity exception, an employer can be civilly liable if, prior to or at the time of the injury, the employer does not occupy a dual capacity and then, *after* the injury, the employer proceeds to act in a capacity outside of the employee-employer relationship. The most commonly cited example of this exception concerns a nurse who was injured while in the course and scope of her employment at a hospital and was then treated for her injuries by a colleague-physician. This later treatment by the physician caused further injuries due to malpractice, creating the dual capacity of the physician as both employer and treater. (Lab. Code, § 3602, subd. (a).)

(4) Employer as Manufacturer of Defective Product: Additionally, a corollary statutory exception to the dual capacity doctrine recognizes potential civil liability on behalf of an employer if the employer also manufactures and sells, leases or otherwise transfers a defective product to a third party, and this defective product causes injury to its employee. (Lab. Code, § 3602, subd. (b)(3).)

(5) Power Press Machine Injury: Another very specific exception, this allows for a civil action against an employer when an employee's injury is caused by the employer's removal or failure to install a point of operation guard on a power press machine. (Lab. Code, § 4558, subd. (b).)

(6) Lack of Workers' Compensation Insurance: Should an employer fail to secure workers' compensation coverage as required by law, an injured employee may bring a civil action against the uninsured employer. (Lab. Code, § 3706.) This exception tends to arise commonly when a business is operated in an unlicensed manner, like when an owner or general contractor hires an unlicensed contractor. Due to their unlicensed status, often an unlicensed contractor will also fail to secure workers' compensation coverage for their employees, fulfilling this exception to the workers' compensation exclusivity rule.

Uninsured employers may be sued independently in civil court

The uninsured status of an employer can be particularly useful in maximizing your client's recovery. Should the employer fail to obtain workers' compensation coverage, particularly common in unlicensed businesses or other poorly operated enterprises, the employer can be held civilly responsible under Labor Code section 3706. In addition, the hirer of an uninsured individual or entity may also be sued civilly. This exception to the workers' compensation exclusivity rule is particularly designed to punish hirers who hire uninsured people or businesses.

In order to achieve this goal, the below statutory presumptions act to further increase the consequences for uninsured employers. These presumptions can be used in conjunction to maximize a plaintiff's recovery against an employer who fails to secure workers' compensation insurance:

- An injured employee may bring a civil action against such employer for damages. (Lab. Code, § 3706.)
- There is a presumption that the injury was due to negligence of the employer. The burden of proof is shifted to the employer to rebut the presumption of negligence. (Lab. Code, § 3708.)
- The employer is foreclosed from asserting as a defense that the employee was also negligent or assumed the risk. (Lab. Code, § 3708.)
- Judgment will also include attorneys' fee as determined by the court. (Lab. Code, § 3709.)

Thus, when used in conjunction with other related Labor Code provisions, Labor Code section 3706, exception to the workers' compensation exclusivity rule, can be a powerful tool to allow for, and increase the likelihood of, a civil recovery for an injured worker.

Recognizing a third party? Sister corporations and/or dual capacities of an employer

If the actions of a third party are a cause, wholly or partly, of the injured worker's damages, the injured worker may bring a civil claim against the third party. The fact that the injured worker may also be receiving workers' compensation benefits from an employer for an on-the-job injury does not prevent that employee from suing a third party for damages for the same injury. Labor Code section 3852 provides statutory authority for that proposition: "The claim of an employee … for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer." (Lab. Code, § 3852.)

However, recognition of a third party may be overlooked without careful analysis of the specific situation at issue. Third parties may be recognized even if the worker's harms were caused by a parent corporation, sister corporation or other related legal relationship to your client's employer. California law holds both sister and parent corporations are not confined to the exclusive remedy doctrine when an independent direct theory of liability for the plaintiff's injuries is present. As long as these related entities are not considered an employer of the injured worker, the worker may bring a separate action against a parent or sister corporation arising out of independent tort. (*Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 598-599.)

A case example is helpful in demonstrating when third-party liability may be found with related entities. In *Gigax*, an employee was injured while at work by a defective conveyer belt. The belt was manufactured by the parent company of the employer company. The employee

brought civil suit and alleged negligence and product liability against the parent company/manufacturer. The court held that plaintiff could maintain the theory of liability against the parent company. (*Gigax v. Ralston Purina Co., supra,* 136 Cal.App.3d 598.) The court's reasoning was based on the recognition that the corporate parent/manufacturer was not the direct employer of the plaintiff and therefore would have different duties owed to the injured person.

In *Gigax*, the parent company initially claimed immunity from civil tort liability for the injuries to the employee of its related corporation under the exclusive remedy rule. The parent company asserted they were akin to the injured employee's employer and therefore workers' compensation was the injured worker's exclusive remedy.

The *Gigax* court held that in order to determine whether a related entity should be treated as an employer or a third party, "the preeminent factor to be considered in determining the factual question of the employer-employee relationship is 'the right of control.'" (*Gigax v. Ralston Purina Co., supra,* 136 Cal.App.3d 598.) The "right of control" is an analysis of various factors to examine whether one corporation is separate from the other in terms of an employment relationship. The factors include whether the corporations are separate in function and identity, whether they have separate books of account and profit-loss statements, whether the parent controls the subsidiary's operations or employees, whether the parent directs the details of the subsidiary's work and whether the parent paid the employee's wages. (*Id*. at pp. 600-602, 605, 606.)

Thus, based on the holding in *Gigax*, separate (but related) individuals or corporate entities can be held civilly liable if there is an independent basis for negligence, beyond the employment relationship, and the individual or entity is not the plaintiff's direct employer. "This basic precept of the law is not negated by the fact that the 'person other than the employer' is not a stranger but has entered into a consensual legal relationship with the employer." (*Gigax v. Ralston Purina Co., supra,* 136 Cal.App.3d 600-602, 605, 606.)

Whether an employee living on their employer's property and is injured there can seek civil recovery against their employer turns on a similar analysis of roles and duties that may exist between the parties beyond an employment relationship. Whether the workers' compensation exclusivity rule applies to bar a civil action in this scenario requires an in-depth analysis of the specifics concerning the injured employee's lodging, the terms and duties of their employment and whether their injury arose during the course of their employment.

Generally, an employee who is injured on an employer's property is constrained to recover only within the workers' compensation system. However, with regard to employees who reside on their employer's premises, a distinction is drawn between employees required to live on the premises per the terms of their employment and employees who elect to do so. This principle, known as the "bunkhouse rule," generally finds that when employees are required to reside on the employer's premises and suffer injury, their remedy is exclusively within the workers' compensation realm. When "the employee was expected or required to reside on the employer's premises by virtue of the employment relationship, and the 'landlord tenant relationship was entirely subsidiary and collateral to the basic employment relationship,'" the employee's recovery is limited to workers' compensation. (*Rosen v. Industrial Acc. Com.*, (1966) 239 Cal.App.2d 748, 750.)

For instance, in *Vaught v. State of California*, a park ranger was offered the opportunity to rent a house within the park promised by the State as an incentive for employment. Plaintiff lived in this home with his family, and was injured while he examined repairs occurring in the home. He brought civil suit against his employer. The court stated that whether the "bunkhouse rule" applied to foreclose civil suit depended on if the "employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer's premises." (*Vaught v. State of California* (2007) 157 Cal.App.4th 1538, 1545.) In this case, the court found that although Mr. Vaught was provided the choice to live in this house on his employer's premises and he paid rent for the home, the nature of his work required that he be on-call to respond to emergencies on the premises at all times. Thus, although Plaintiff was at home when this injury occurred, Plaintiff should be considered in the course of his employment at all times when on the premises for the purposes of the exclusivity rule. (*Id*. at p. 1546.)

Should the employee be injured while voluntarily residing on the employer's premises, not as a condition of their employment, and their injury occurs outside the course of their employment, the workers' compensation exclusivity rule does not apply. (*Wright v. State of California* (2015) 233 Cal.App.4th 1218, 1222.) For instance, in *Wright v. State of California*, a prison employee was provided the option to live on the prison grounds in apartments rented by his employer, San Quentin State Prison. He did so, and was injured as he left the apartment to walk to his post within the prison. Plaintiff brought suit for premises liability against his employer, asserting that his employer essentially functioned as a third party with regard to the rental property and the workers' compensation exclusivity rule should not bar civil liability. On appeal, the court found that Plaintiff's claim was not barred merely because he was injured while on his employer's property because he electively lived on that property and was not in the course of his employment when he was commuting to his work area. (*Ibid.*)

The nature of the employment relationship and the facts of injury dictate whether an injured employee is or is not excluded from pursuing civil remedy. It's important to note as plaintiff and claimant attorneys that when an employee is injured at work, this does not necessarily foreclose

all remedies beyond workers' compensation benefits. Instead, a careful analysis of the employer, its subsidiaries and the roles it takes with regard to the employee is often critical in determining whether civil remedies can be pursued against an employer and/or its subsidiary.

Analyzing the proceeding case example

Let's return to the client who was injured by the saw while building a wall for their employer. Although your client was injured at work, while clearly in the course of their employment, your client appears to have potentially viable third-party claims. Per the case facts, the defective saw was manufactured by their employer, and if this saw was sold, leased or otherwise transferred for some consideration, the manufacturer exception may apply to allow a civil action against the employer. (Lab. Code, § 3602, subd. (b)(3).) Additionally, this saw appears to have been owned and maintained by a subsidiary of the client's employer. Should this subsidiary not be akin to an employer of the client under the *Gigax* "right of control" test, the client may also be able to pursue civil claims against this entity. Therefore, although not readily apparent on its face, your client may be able to pursue civil actions against both the employer-manufacturer and the subsidiary as if these entities or individuals were third parties.

Conclusion

The exclusivity rule of the workers' compensation system is often poorly understood. It is important to understand what exceptions, both statutory and situational, may apply to insulate the injured worker from the conditions imposed by the California workers' compensation system. Although the language establishing the workers' compensation system may feel all inclusive, depending on the situation, a knowledgeable plaintiff's and/or claimant's attorney can identify whether civil action is a possibility. While statutory expectations may be narrow, creative counsel well-briefed in the interplay of the related principles can maximize an injured worker's recovery against all liable parties.

Olivia K. Leary is an associate in the Rains Lucia Stern St. Phalle & Silver, PC *Personal Injury Group. She represents people who have suffered serious injury as a result of negligence, including personal injury actions, intentional torts and whistleblower actions.*

Leary

Phil Johnson is an associate in the Rains Lucia Stern St. Phalle & Silver, PC *Personal Injury Group. Phil represents injured individuals and employees in state and federal courts, as well as in administrative hearings.*

Johnson

Eustace de Saint Phalle is a partner with Rains Lucia Stern St. Phalle & Silver, PC *in San Francisco. He manages the personal injury practice for the firm statewide. The firm's personal injury practice focuses on civil litigation in a variety of areas, including industrial accidents, product liability, exceptions to workers' compensation, premises liability, professional malpractice, auto accidents, maritime accidents and construction defect accidents. He is happy to provide additional materials for briefs or motions in limine upon request.*

de Saint Phalle