

The Workers' Corner

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*Three rules of work:
Out of clutter, find simplicity;
From discord, find harmony;
In the middle of difficulty lies opportunity.*

—Albert Einstein

If you represent injured workers in our fractured WCAB system, you daily encounter clutter, discord, and difficulty as you attempt to "assist injured employees in obtaining full and just benefits." California Applicants' Attorneys Association Constitution, Article III.

You are already following up on late total disability (TD) payments, challenging the list of "company doctors" offered for medical care, and generally managing your client's case. The real question is, "Is there anything else I can do to obtain full and just benefits for my client?" The answer is that one thing to do, where justified, is to file a petition for serious and willful misconduct of the employer.

A *serious and willful petition* is a petition filed in a workers' compensation case to punish the employer "where the employee is injured by reason of the serious and willful misconduct of...the employer or his managing representative." Labor Code section 4553. Generally, the employer's WCAB insurance policy does not cover serious and willful misconduct. It is a claim directly against the employer and one the employer will have to pay directly out of the company proceeds. The advantage to your client is that a serious and willful misconduct claim increases the benefits of compensation by one-half, together with costs and expenses not in excess of \$250. Labor Code section 4553.

Some say that serious and willful misconduct claims are difficult to prove because you can file such a claim only where you allege that the OSHA safety order was known to and violated by a particular managerial employee. Labor Code section 4553.1. This actual knowledge requirement has been described as onerous because the only punishment is for actual knowledge, and ignorance is encouraged. In other words, if an employer is ignorant of a safety order and the reasonableness and foreseeability that it is going to injure someone, presumably a serious and willful claim cannot prevail.

The statute of limitations for a serious and willful petition is one year. The petition itself must be artfully crafted in order to fulfill the requirements of the Labor Code, in that there must be proof of the following:

- The specific manner in which the safety order was violated
- That the violation of the safety order was the legal cause of the injury, including the specific manner in which the violation caused the injury

- That the safety order and the conditions making the safety order applicable were known to and violated by an executive, managing officer, or general superintendent of the employer.

Labor Code section 4553.1.

Some practitioners are concerned about the effect that filing a serious and willful claim against the employer in a WCAB action will have on a third-party civil case. However, if there is sufficient evidence in a WCAB case to prove a serious and willful claim against the employer, any well-trained civil defense lawyer will find that evidence and use it in the civil case in any event, to prove comparative fault against the employer. From a practical point of view, an applicant's attorney should file a serious and willful claim where warranted, even if a civil claim is anticipated.

The real question about a serious and willful claim is: where do you get the evidence to prove it? The place to start is in discovery in the WCAB case. Whether by subpoenas or depositions, the applicant's attorneys need to learn all they can about the machinery, process, and overall safety plan at the place of employment. Every employer in California is required to have an injury and illness prevention program (IIPP) (Labor Code section 6401.7). This is a written program that must have very specific identifiable components, some general and some specific to the activity that employer has performed. In some instances it is the actual absence of an IIPP that gives rise to the serious and willful misconduct claim. You always need to know what an employer's IIPP is, whether it is written, and whether it is implemented, and you need to get all the records concerning it.

Another obvious place for discovery of evidence for a serious and willful claim is the material gathered by the third-party civil litigator in the civil case. The same information you would gather through the workers' compensation case can be gathered through the civil case, and those cases must be coordinated.

One area often overlooked by practitioners is the California Department of Industrial Relations (OSHA) case. OSHA comprises three entities. One is the Division. That is the entity you normally interact with. It has investigators who investigate accidents, events, and conditions for the purpose of issuing citations against the employer's safety environment and even levying penalties against the employer's safety environment and even levying penalties against the employer. The second entity making up OSHA is the OSHA Appeals Board. This is the judiciary body of the OSHA process. Administrative law judges sit and hear appeals of citations in the form of an evidentiary trial to determine whether appeals are appropriate and the penalties are lawful. The final entity is the Standards

Board, which actually issues the standards used in Title 8 to establish workplace safety rules.

In a normal workplace injury case an OSHA investigation will occur. This is a logical place to learn what the nature of the place of employment is—how many previous injuries there were, whether the industrial safety orders were violated, and so on. You can get a copy of the OSHA investigation by way of a letter.

The Division issues three kinds of violations against an employer's conduct: a general violation, a serious violation, and a willful violation.

A general violation is

a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

8 CCR section 334(b).

A serious violation is one in which

there is a substantial probability that death or serious physical harm could result from the [violation], including, but not limited to, circumstances where there is a substantial probability that [a condition exists which] could result in death or great bodily injury.

8 CCR section 334(c), Labor Code section 6432.

Finally, a willful violation

is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

8 CCR section 334(e).

The general OSHA process is pretty straightforward. The Division cites the employer for violating some OSHA regulations. The employer files a timely appeal. Very limited discovery takes place. Some pre-trial/appeal conferences may occur. Then a very truncated trial takes place, where the Division, in conjunction with attorneys representing the injured worker, offer evidence to support the violation of the regulation. The interested party (affected employee) is entitled to participate fully, as well as offering evidence. As such, the affected employee's representatives can fulfill the state's burden of proof. See *Goodwill Industries of Orange County, California*, CAL-OSHA Appeal 00-3871, denial of petition for reconsideration (November 13, 2001); see also *Dey Laboratories, Inc.*, CAL-OSHA Appeal 93-2742, decision after reconsideration (March 28, 1995).

Therefore, when the Division cites an employer and the employer appeals, you, as the injured worker's representative, can file what is called *interested party status* in the OSHA case.

This allows you to participate fully in discovery, interact with OSHA legal counsel about legal theories and evidence, and fully participate in the trial of the matter, which usually takes a couple of days. To participate in that process, the affected employee or the employee's authorized representative must file a motion with the OSHA Appeals Board. 8 CCR section 354 provides for this party status to all proceedings before the Appeals Board. A simple letter to the Board identifying the code section and status of your client in the litigation, along with proof of service on the Division, the employer's representative, and OSHA legal counsel, will suffice. In an odd legislative turn, if the employee has been killed (rather than merely injured), the OSHA Appeals Board has denied party status. However, you can file to intervene in the trial/appeal pursuant to 8 CCR section 354.1.

It is important to find an OSHA violation and have it stick, especially given the express provision of Labor Code section 6304.5 that the issuance of a citation is evidence "as between an employee and his or her own employer."

The evidence you need in your serious and willful claim is also extremely important to the third-party civil attorney. Although evidence regarding issuance or failure to issue a citation is inadmissible in the civil case, it is helpful for proving negligence, *per se*, against a host of parties. Labor Code sections 6304.5, 6400; *Elsner v. Uveges*, 34 Cal.4th 915 (2004). The practical point is to get a third-party attorney involved early in analyzing a possible civil claim and to have that attorney participate in the OSHA appeal. It will be helpful to you and your client.

In the middle of the clutter, discord, and difficulty of an applicant attorney's practice, using a third-party civil attorney to gather evidence for a serious and willful misconduct claim can simplify your practice, harmonize the remedies available to your client, and provide you the opportunity to assist injured employees in obtaining all the benefits they are entitled to receive.

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