



Presents

Affirmative Defenses

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Affirmative Defenses

In all cases the burden of proof rests upon the party holding the affirmative on the issue CA Labor Code 5705

Labor Code 5705 outlines the defenses to a claim where the burden shifts from the applicant to the Employer

Affirmative Defenses

- 5705
 - Independent Contractor Status
 - Intoxication
 - Statute of Limitations
- Other Affirmative Defenses
 - Self Inflicted Injury
 - Suicide
 - Initial Aggressor
 - Horseplay
 - Coverage

Initial Physical Aggressor

No compensation is payable for Injuries arising out of an altercation in which the injured employee is the initial physical aggressor LC Section 3600(a)(7)

Constitutional despite an analysis of who is at fault
Mathews v. WCAB 37 CCC 124 (1974)

What is a physical aggressor? The first person to engage in conduct that a reasonable person would perceive to be a real, present and apparent threat to bodily harm
Martinez v. WCAB 41 CCC 51 (1976)

Initial Physical Aggressor Continued

- Verbal Aggression vs. Physical Aggression
 - Requirement of an overt act
 - intent and ability to cause bodily harm
 - No need for actual physical contact

Initial Physical Aggressor Continued

Does not apply when

- no intent for bodily harm (horseplay, prank)
- action poses no real danger
- acted to restrain another to avoid violence
- disproportionate retaliation

Subject matter of dispute – AOE

An injury sustained in an altercation due to animosity *unrelated to the* employment does not arise out of the employment

Horseplay

An injury suffered by an employee who initiated or is a willing participant in horseplay is non compensable

Horseplay – non work related *activities* which have an *inherent potential for injury*

Horseplay is distinguished from an “altercation” by an **absence of animosity or a willingness to inflict bodily harm** Matthews v. WCAB 37 CCC 124

Horseplay Continued

An innocent bystander employee injured during horseplay is not barred from recovery

The horseplay defense does not apply when the employer condones the horseplay

Hodges v. WCAB 43 CCC 879 (1978)

Intoxication

An injury caused by intoxication by alcohol or the unlawful use of a controlled substance is non-compensable LC 3600(a)(4)

“Controlled substance” shall have the same meaning as described in section 11007 of Health and Safety Code

Intoxication Continued

Must show actual intoxication, not merely a trace or simple presence of alcohol or controlled substance in the employees system at time of injury

Factual analysis to determine whether someone was intoxicated:

- what was taken
- how much
- size of person
- person's actions

Intoxication Continued

Defense Requires Showing of Proximate Cause

i.e. did the intoxication *cause* the injury

A finding that the intoxication was a “substantial factor” in causing the injury was found to be sufficient *Smith v. Ed Smith Welding* (1981) 46 CCC 1053

Self Inflicted Injury

- Self inflicted injuries are not compensable LC 3600 (a)(5)
- “Self Inflicted”
 - Action was intended by the employee
 - Employee intended to injure self when acting

No benefits due even if the injury is greater than they originally intended

Self Inflicted Injury Continued

- Must show intent was to injure oneself and not simply an impulsive act
 - “Employees who merely act rashly or impulsively neither expect nor intend to necessarily hurt themselves nor are their resulting work related injuries automatically non-compensable.” Smith v. WCAB 65 CCC 277

Suicide

- Willfully and deliberately causing ones own death is non compensable LC 3600(a)(6)
- Must show that the suicide was a voluntary act
 - Did the deceased employee have the ability to resist the impulse to commit the act *Beauchamp v. WCAB* (1968) 33 CCC 112
 - Ability to resist impulse is a medical question, pain and extreme job stress have both been found to be industrial factors leading to an irresistible impulse

Suicide Continued

- Suicide Defense Does Not Apply When Compensable Consequence Suicide is Found
 - Suicide that results from an underlying compensable injury
 - Underlying compensable injury creates irresistible impulse
 - Without the underlying injury there would have been no suicide Ballard v. WCAB (1979) 36 CCC 34 (en banc)

Statute of Limitations

- LC 5400 et seq.
- Statutes of Limitations are liberally construed in favor of employees Granite Construction Co. v. WCAB (2003) 112 Cal. App. 4th 1453

Statute of Limitations Continued

Establishing proper notice of rights to workers' compensation

- Signage/Wall Posting LC 3550
 - Employee Handbook with signature
- Employers duty to give claim form and notice of workers' compensation rights LC 5401

Employer notice fulfilled when applicant knows injury was work related and of right to file

Kaiser v. WCAB (1985) 39 Cal. 3d 57, 64-65.

Statute of Limitations Continued

- One year SOL for claims LC 5405
- Later of:
 - Date of Injury
 - Specific Injury LC 5411
 - Date of Incident
 - CT LC 5412
 - Knew or should have known it was work related
 - Date of last indemnity payment
 - Date of last furnishing medical benefits

Statute of Limitations Continued

- Claims Barred:
 - Employee knows injury caused by work and aware of rights
 - Doctor informing employee that injury work-related
 - Knowledge of WC procedures from prior claims
 - Acknowledgment by applicant

Statute of Limitations Continued

- Claims Not Barred:
 - Lay belief of industrial causation because injury happened at work
 - General awareness of work comp system
 - Retention of Attorney, Attorney knowledge not imputed
 - Existence of Doctor's report re: injury if employee unaware of report
 - Treatment with non industrial treater

Statute of Limitations Continued

- Statute of Limitations for various claims
 - S&W LC 5407 1 year from DOI
 - Not extended by payment of benefits/filing of application
 - LC 132a 1 year from date of discrimination/termination
 - New and Further Disability LC 5410 5 years from DOI
 - Death Benefits LC 5406 1 year from date of death or last benefit
 - Liens 3 years from last DOS if last DOS PRE 7/1/13, 18 months for last DOS AFTER 7/1/13 LC 4903.5

Independent Contractor

- Any person who renders service for a specified amount for a specified result, under the control of his principal as to the **result of his work only** and not as to the means by which the result is accomplished LC 3353
- Independent Contractor status is liberally construed in favor of finding the injured individual to be an employee LC 3202
- Any person rendering service for another, other than an independent contractor, is presumed to be an employee LC 3357

Independent Contractor Continued

“The right to control the means by which the work is accomplished is the most significant test of the employment relationship”

Tieberg v. Unemployment Ins. App. Bd. (1970)
2 Cal 3d 493

Independent Contractor Continued

- Questions to Ask When Determining Status:
 - Is the person in question engaged in a distinct occupation or business?
 - Is the kind of work being performed usually done by a specialist without supervision?
 - What is the skill level required in the particular occupation?
 - What is the length of time the services are being performed?
 - What is the method of payment, is it by time or by job?
 - Is the work part of the regular business of the employer?
 - Who provides the tools/instrumentalities?

S.G.Borello & Sons, Inc. v. Department of Industrial Relations
(1989) 48 Cal.3d 341

Independent Contractor Continued

Deemed an Employee:

Cleaning Person

- worked for apartment manager, duration, payment

Tax Preparer

- no independent clients

Golf Caddie

- club supervised, dress, behavior, types of service

Sharefarmers

- in spite of contract as independent contractor, control

Independent Contractor Continued

Deemed an Independent Contractor:

Gardener

- worked for many clients, no one told him how to do the job

University Student

- injury assisting professor in field, not “rendering services”

Truck Driver

- equipment, lump sum payment, paid with 1099, no taxes withheld

Recommendations

- Affirmative Defenses Require Fact Specific Investigation
 - Witness statements (Attorney v. Investigator)
 - Deposition of Applicant
- Raise the Defense in the Denial Notice/Answer
- Set for AOE/COE Trial ASAP



THANK YOU

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