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Denied: Closed door or open opportunity?

WHEN THE WC CARRIER DENIES COVERAGE, HERE ARE STRATEGIES ON USING THE RESULTANT ENHANCED DISCOVERY TO SECURE BOTH WC COVERAGE AND ENHANCE THE CIVIL CASE

Imagine the phone rings, and you have a call about a potential new client who needs your help. The injuries are catastrophic, and the liability is clear. Defendants appear to have ample insurance. But two words stick out from your conversation: "workers' compensation." What do you do? Do you take the case?

Even to a seasoned personal-injury attorney, workers' compensation cases can seem like a different animal. Different standards of proof, no general damages, and an alphabet soup of acronyms (TTD, PD, P&S, QME, AME, C&R, UR, IMR, etc.).

It can appear to be such a Byzantine system that many PI attorneys will try to avoid engaging with the workers' compensation system or their client's workers' compensation counsel, at all. Many avoid cases with workers' compensation components completely.

Let's challenge this conventional wisdom. By sharing knowledge and working together as co-counsel, workers' compensation and civil personal-injury attorneys can achieve even better results for their clients who are seriously injured at work.

While the benefits of working together are myriad, this article will focus on two specific areas how workers' compensation and civil personal injury counsel can work together to advance their clients' interest in discovery:

- Gaining OSHA party status for the injured worker; and
- Getting pre-litigation discovery through the workers' compensation case

OSHA party status

When an injury occurs to an employee, with some exceptions, the employer is required to report the injury to Cal/OSHA. (Lab. Code, § 6409.1, subd. (a).). Many times, this report triggers an investigation by Cal/OSHA, possibly leading to the issuance of a citation against the employer, or other parties involved in the incident.

By law, an employer, or other cited entity, may file an appeal of these citations. (Lab. Code, § 6601; 8 Cal. Code Regs., § 347, subd. (b), subd. (d).) There is an administrative-law system in place to hear these appeals. Appellants can provide documentary or testimonial evidence in support of their position, and if the appeal is not resolved with the Cal/OSHA attorneys, the matter can be tried with an administrative law judge.

This whole process can be a treasure trove of discovery in the pre-litigation stage of a civil case. Your client's workers' compensation attorney has the tools to collect it.

Legally, the injured employee of a cited employer has the right to party status in the OSHA appeal. (Cal. Code Regs., tit. 8, § 354, subd. (b), subd. (e).). To obtain party status, an injured work, or their representative, may file and serve on all parties a Motion for Party status. (Cal. Code Regs., tit. 8, § 354, subd. (b), subd. (e); Cal. Code Regs., tit. 8, § 371, subd. (c)(1).).

Once granted party status, an injured worker, and/or their representative, are entitled to all discovery between the parties and to be included in settlement discussions. (Cal. Code Regs., tit. 8, § 354, subd. (h).). The practical effect of this is that you get an early look "behind the curtain" at the facts and legal arguments future civil defendants may use, along with pertinent documents (and investigation photos) related to the incident.

Additionally, as a party, the injured worker, or their representative, is entitled to be a part of all hearings and settlement conferences. While these are not on the record, many times other parties to the appeal (i.e., potential civil defendants) will speak freely at these hearings, giving invaluable insight into their potential defenses, or their theories against other potential defendants. Remember, their focus during the OSHA appeal is finding a way to argue against a citation. With many parties pointing the finger at each other, having your client in the case as a party, and therefore having counsel present for all these hearings and discussions, can be invaluable.

Should the appeal proceed to trial, those proceedings are on the record, and the injured worker, or their representative, can cross-examine key witnesses. (Cal. Code Regs., tit. 8., §§ 376.1, subd. (a); 376.7.)

Notably, this all occurs in the pre-litigation stage of a civil case. If the workers' compensation counsel involved in this process is not one known to be involved in bringing civil lawsuits, that counsel can many times "fly under the radar" and obtain invaluable information and insight as to key defendants in a potential civil case.

When many parties are involved in a workplace accident (i.e., general contractor and multiple sub-contractors), conflicts often erupt during the OSHA appeal. With multiple parties blaming each other you have the great benefit of these technical experts in their given fields advancing factual reasons and arguments about why someone other than their own business is at fault. These positions and analyses, used to defend other parties in the OSHA appeal, can then serve as a roadmap to your civil complaint.

As an example, co-counsel and I recently resolved a traumatic-brain-injury case that occurred on a job site for a high-seven figure settlement. Being part of the OSHA appeal process gave me and co-counsel access to thousands of pages of key documents before filing suit. Further, during pre-trial status conferences and negotiation in the OSHA appeals process, arguments and liability theories were advanced by experts in the field that clued us into other theories of liability

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and target defendants in the civil lawsuit. This early discovery guided us on the path to identifying the key facts, theories of liability, and defendants in the civil case, which led to the result we ultimately obtained for the client.

A denied workers' comp case presents opportunities

Beyond entering the OSHA appeal case, another way workers' compensation and personal-injury attorneys can work well together is through discovery on denied workers' compensation claims.

When an on-the-job injury occurs, the claim is submitted to the workers' compensation insurer. The workers' compensation insurer then has 90 days to determine if it will accept the claim and pay benefits, or if it will deny the claim. Should a denial occur, that is by no means the last word. In fact, a case being denied is a great opportunity to work closely with your client's workers' compensation counsel to obtain great results.

As it pertains to discovery, the Workers' Compensation Appeals Board ("WCAB") is not generally bound by the Code of Civil Procedure. (Lab. Code, § 5709). Rather, the Labor Code allows the WCAB to adopt its own rules on a variety of matters concerning litigation, including discovery (Lab. Code, § 5307, subd. (a).).

These more relaxed rules (which the Supreme Court has called an "Informal System of Discovery" (*French v. Rishell* (1953) 40 Cal.2d 477), include provisions to allow for the subpoenaing of witnesses and documents (Lab. Code, § 130); depositions of witnesses (Lab. Code, § 5710); and mandatory service of all medical reports (Cal. Code of Regs., tit. 8, § 10635). Written discovery of the variety typically seen in civil matters (i.e., interrogatories) are expressly forbidden. (*French v. Rishell*, *supra*.)

As an example, last year I was working on the workers' compensation part of a case where the claim was denied. The basis of the denial was that the employer was claiming that the injured worker was an independent contractor, not an employee. My client was injured while replacing the roof on a fixed-structure greenhouse. He fell through the roof, suffering catastrophic injuries. If he were to be found to be an independent contractor, he would not be entitled to workers' compensation benefits.

This position advanced by the employer, through its insurer, opened the door to a much broader scope of discovery in the workers' compensation case. It was a gift that the employer, through its insurer, denied the claim in this case. As a practical matter, if a claim is admitted, the WCAB judge will narrow the scope of discovery, as the broader scope is no longer needed to obtain benefits for your client. With the claim denied, and since there was more to prove up in my case, I was allowed to gather more in discovery. Even better, the workers' compensation carrier pays all costs for this discovery. While they would be entitled to reimbursement through their credit on the third-party matter, it is convenient not to have to front the costs on a multitude of subpoenas in document-intensive cases.

As to my recent specific case, once the claim was denied, I quickly set the depositions of the two owners of the employer (who was denying an employment relationship). I also made a written request, in letter form, to the workers' compensation defense attorney, for production of all relevant documents. These were produced very quickly under the informal rules delineated above. No written objections, no meet and confer letters, no motion to compel. Just very salient, documentary evidence emailed to my inbox within a week or so of asking.

While it worked smoothly in this example, if there is any type of delay in getting these documents produced, or depositions of employer witnesses set, the workers' compensation attorney can quickly file for a hearing, known as a status conference. This expeditiously gets the discovery issue in front of a WCAB judge. No motion needed!

Given the permissive discovery backdrop I outline above, WCAB judges typically do not respond well to delay in production of documents or employer witnesses for deposition. Many times, at this status conference, with the judge's assistance, the defendant will stipulate to produce documents or witnesses rather than proceed to a formal hearing on the issue and face sanctions. Should it be necessary, a WCAB judge can issue an order for documents or witnesses to be produced.

While the scope of workers' compensation discovery is limited, like in a civil case, to be reasonably calculated to lead to the discovery of admissible evidence, quite a bit can be obtained by the workers' compensation attorney that advances the client's interests in both their workers' compensation and civil cases.

In my case, given that the employer and workers' compensation carrier were claiming my client was an independent contractor instead of an employee, the scope of discovery was quite broad. With employment denied, much more was discoverable. The main goal of deposing the two business owners, as it related to the workers' compensation case, was to establish my client was in fact their employee so he would be covered by workers' compensation insurance. An ancillary benefit of this discovery would be helping to build up a civil case against other at-fault parties. Remember, an employer is shielded from civil suit by the exclusive remedy doctrine. (Lab. Code, § 3602, subd. (a).)

Practically speaking, my client was an undocumented laborer who only had access to medical treatment through emergency Medi-Cal, and one year of state disability benefits through EDD. The limits of getting medical treatment under this fact pattern are great. Being able to win the employment issue and open the door to WC benefits was going to be life-changing for this client. As workers' compensation is a no-fault system, once I proved employment, all other aspects of the case would line up, and he would get access to no-cost medical treatment and be eligible for 104 weeks of temporary disability payments within five years of the injury date.

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Proving employee status

To prove employment, I turned to the Labor Code. Workers' compensation attorneys live and breathe the Labor Code and California Code of Regulation ("CCRs"). They contain seemingly unending statutes and regulations that help injured workers and their cases. Specific to the recent case I handled, section 2750.5 of the Labor Code creates a rebuttable presumption that someone performing work that requires a contractor's license is an employee of the hirer. The only way this employment presumption can be rebutted is if the person performing the work holds their own contractor's license as to the work that is being performed.

This is to say, if someone doing the work is unlicensed, and the work requires a license under California law, the Labor Code classifies them as an employee of the person or entity that hired them, *as a matter of law*. Further, this legal construct has been held by the Supreme Court of California to be applicable in all workers' compensation cases. (See *SCIF v. Meier* (1985) 40 Cal.3d 5). This is a very strong tool to use in a denied workers' compensation case.

Next, to determine if the work my client had been doing required a license, I thought critically about what work he was performing when he was hurt. As he was removing and replacing the greenhouse roof, my first thought was to research when a roofing license is required.

The California Contractors State License Board ("CSLB") is a great resource to determine what scope of work requires a license in California. Its website allows research to be done to determine what scopes of work require a license, and allows for a search of licensed contractors to determine what license (if any) they hold, and what workers' compensation carrier (if any) insures them. (www.cslb.ca.gov.)

A review of the CSLB website led me to California Code of Regulations, Title 8, section 832.39, which codifies when a roofing contractor license is needed. This regulation requires a license when work is done to install or repair surfaces that weatherproof structures when the total cost of the job is over $500.

Clearly, in my case, my client was doing this type of work by removing and replacing the plastic material that constituted the roof of the greenhouse. Further, per the quote the employer had prepared for this specific job (which I obtained during the workers' compensation discovery process), I had evidence that the job cost over $500. With that factual and legal backdrop, I proceeded to the deposition of the owners. In the depositions, I confirmed that they were aware my client did not have a contractor's license and that they knew a contractor's license was required for the job on which my client was hurt. I additionally confirmed my client was paid over $500 for the work (which cash was paid while my client was in an ER bed) and the total cost of the job matched the quoted price.

Beyond these facts used to prove my client's status as an employee pursuant to Labor Code section 2750.5, I also used the depositions to get many more facts about the general background of the job itself, and how other contractors conducted themselves and their scopes of work.

I gathered all this testimony, which not only supported the workers' compensation case, but also helped to build a pending civil claim, with very minimal pushback. At the time of the deposition, we were still in the pre-litigation time frame for the civil claim (these depositions occurred about four months after the incident), so the only other attorney at the deposition was the workers' compensation defense counsel.

Workers' compensation defense counsel are very capable and effective practitioners, but their concern begins and ends with the workers' compensation case. They have no concern as to what happens later, and what ramifications testimony from their covered employees may have on other, unrelated entities.

In the end, I got fantastic testimony to solidify my client's employment, and very salient documents produced within months of the incident occurring. After these two depositions, I sent one summary email to workers' compensation defense counsel and the insurer admitted employment. They then began paying benefits and providing medical treatment. For an undocumented individual with minimal medical insurance and a threadbare savings account, it is not hyperbole to call this result life-changing.

Beyond these results in the workers' compensation case, on the civil side, co-counsel and I effectively have a roadmap to victory, complete with deposition testimony from two very important witnesses, along with key documents, all before filing the complaint.

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