Affirmative Defenses aka Use It or Lose It

By Donald Barthel & Amir F. Adil
Bradford & Barthel, LLP

Bradford & Barthel

Bradford & Barthel, LLP

@bradfordbarthel

Bradford & Barthel

bradfordbarthelllp

2

TOOLS FOR YOU AT:
www.bradfordbarthel.com

COVID Questions?
covid@bradfordbarthel.com

BLOG Articles
bradfordbarthel.blogspot.com/

AMA Rating Department
bradfordbarthel.com/areas-of-practice/bb-ratings/

CE Videos
bradfordbarthel.com/education/

CE Webinars
bradfordbarthel.com/education/

3

Donald Barthel, Esq.
Founding Partner
dbarthel@bradfordbarthel.com

Tahmeena Ahmed, Esq.
Managing Partner/Client Relations
tahmed@bradfordbarthel.com

Amir F. Adil, Esq.
Senior Partner/Managing Attorney
B&B San Jose
aadil@bradfordbarthel.com

Eva Carrasco, Esq.
Partner
B&B Los Angeles
ecarrasco@bradfordbarthel.com

Robert Tomlin, Esq.
Associate Attorney
B&B Anaheim
rtomlin@bradfordbarthel.com

Daniel Stevens, Esq.
Associate Attorney
B&B Ventura
dstevens@bradfordbarthel.com

4

LC 5705 Burden of proof; affirmative defenses.

"The burden of proof resets upon the party…holding the ***affirmative*** of the issue. The following are ***affirmative defenses,*** and the burden of proof rests upon the employer to establish them":

a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer.
b) Intoxication of an employee causing his or her injury.
c) Willful misconduct of an employee causing her or her injury.
d) Aggravation of disability by unreasonable conduct of the employee.
e) Prejudice to the employer by failure to give notice, as required by Sections 5400 and 5401.

AFFIRMATIVE DEFENSES (codified)

Independent contractor: AB5; Proposition 22

Intoxication: LC 3600(a)(4)

Prejudicial Lack of Notice: LC 5400

SOL: LC 5402-5412

The injury was caused by the IW's commission of a felonious act for which he/she has been convicted: LC 3600(a)(8)

AFFIRMATIVE DEFENSES (non-codified)

Non-Salaried Partner

Employment Category Excluded from W.C. law
Subrogation/Third Party Recovery
Unreasonable Refusal to Submit to Treatment
Unreasonable Refusal to Submit to Examination

AFFIRMATIVE DEFENSES (non-codified)

Lack of WCAB jurisdiction
Injury caused by IW's S&W
Willfully Self-Inflicted Injury
Willful Suicide
Initial Aggressor
"Going & Coming" Rule

AFFIRMATIVE DEFENSES (non-codified)

- Horseplay
- "Rashly Undertaken Activity"
- Apportionment
- By carrier: lack of ins coverage; special general; site specific
- The claim is barred by a prior compromise and release executed by the IW. (*Johnson v WCAB* (1970) 35 Cal. Comp Cases 362.)
- Post Termination

Nearly 2 dozen defenses!!!

A lot to "waive good-bye" to:

EXCEPTION: jurisdiction*

*may be raised anytime before the decision becomes final

File an Answer...

WHY?

LC 5505: "Evidence upon matters not pleaded by answer shall be allowed only upon the terms and conditions imposed by the appeals board or [WCJ] holding the hearing."

File an Answer...

Reg 10484: "Evidence upon matters and ***affirmative defenses*** not pleaded by Answer will be allowed only upon such terms and conditions as the appeals board or [WCJ] may impose in the exercise of sound discretion."

In other words…

FAIL TO PLEAD AT YOUR

OWN RISK

The best defense ever….?

it-ain't-happened
dang Applicant made it up

Early California Foods v WCAB (Ellis) 56 CCC 137 (1991)

Facts: def failed to raise earning issue in Answer/Amended Answer

Held: precluded from raising earnings/TD overpayment at trial

aka

WAIVE GOOD BYE!

Filing & Service of Answer

ANSWER

WHEN?

DOIs 1/90 to 12/31/93 = filed & served w/in 6 days of service of App

DOIs pre-1/90 & o/a 1/1/94 = 10 days after service of DOR

Rule 10480; LC 5500

Filing & Service of Answer

PROCEDURAL REQUIREMENTS

"The Answer used…shall conform to a form prescribed and approved by the Appeals Board…"

"A general denial is not an answer within this rule…"

"Evidence upon matters and affirmative defenses not pleaded by Answer will be allowed only upon such terms and conditions as the [WCAB] or [WCJ] may impose in the exercise of sound discretion."

Reg. 10484

ANSWER ADVANTAGES:

1. avoids waiver
2. assures timely notice of defense issues (helps avoid continuances)
3. focuses discovery efforts

It's not like we're overworked with pleadings...

LC 5500: "No pleadings other than the application and answer shall be required..."

Filed an Answer that

Contains a Mistake?!?!?!?

All is not lost:

Bryant v. Staffmark Investment LLC, 2010 Cal. Wrk. Comp. P.D. LEXIS 172, (4/26/10)

FACTS:

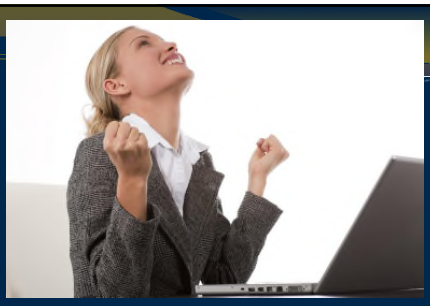
- Answer stip'd to AWW=$750
- later discovery EE was min wage earner
- At PTC, DA amended the earnings admission on the Pretrial Conference Statement…

"earnings were in dispute"

- WCJ held, Answer = "admission" (IW qualified for max TD/PD rates)

WCAB *reverses!*

*"[D]efendant's answer…was a pleading, which can be amended in later proceedings…before submission for deter*mination by the WCJ at trial."



"Labor Code section 5500 makes it clear that an answer is a form of pleading, which…may provide for 'the furnishing of **any additional information as the appeals board may properly determine necessary** to expedite its hearing and determination of the claim.' …The parties' execution of the stipulations and issues statement was sufficient to withdraw defendant's prior admi[ssion]."

Dynamex Operations West, Inc. v. Superior Court (4/20/18, CA Sup Ct)

I: Who is (and is not) an independent contractor (for purposes of wage orders adopted by the Industrial Welfare Commission)

H: there is a presumption that individuals are employees

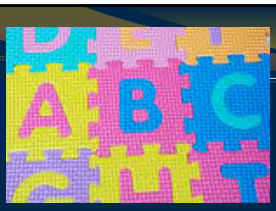
H: an entity classifying an individual as an independent contractor bears the burden of passing the "ABC test"

ABC Test?

ER must establish *each* of the following:

A. worker is free from control and direction of the hiring entity in connection with performance of the work, both under the contract for the performance of the work and in fact; *and*
B. worker performs work that is outside the usual course of the hiring entity's business; *and*
C. worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

In short, worker is in business for themselves!



Toughest factor to prove: "B (prove worker is an IC if perform work that is outside the usual course of the hiring entity's business)

And then came Assemblywoman Gonzalez

&

AB 5

Extends ABC test to nearly <u>all</u> ERS

September 18, 2019, Governor Gavin Newsom signs AB 5

(aka "ABC Test") into law for all ERs not specifically excluded:

Signing message: the ABC test...

"will help reduce worker misclassification . . . which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits."

Effective date: January 1, 2020

Under the caption, "when they say it's not about the money...,

it's about the money!!!"

Pre AB 5 cost CA $8 billion from payroll taxes

2. Intoxication

Employer liability…

LC 3600(a)(4) "Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance of the injured employee… 'controlled substance' shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code."

2. Intoxication

"Controlled Substance"—long list—includes:

- amphetamine
- coca leaves
- methadone
- marijuana
- Phenobarbital
- morphine
- opium

2. Intoxication

"unlawful use"—not necessarily improper/negligent use

2-pronged test: to determine whether controlled substance was

(a) obtained illegally, and/or
(b) was obtained legally but used in an unlawful manner

EX-1: doesn't have prescription (e.g., is properly prescribed, but for a different individual.)

EX-2: IW doesn't have a valid prescription (e.g., a prior prescription has expired and/or has been materially altered.)

2. Intoxication

Defense requires proof IW:

a) **used a *covered* intoxicant**

note: statutory defense does not cover 1991 or later injuries caused by IW's lawful use of a controlled substance or use of any uncontrolled substances other than alcohol

b) **was intoxicated**

c) **proximate causation***

*proximate cause = bar (got it?!?)

EX: Drunk in hotel room and roof collapses.

3. Prejudicial Lack of Notice

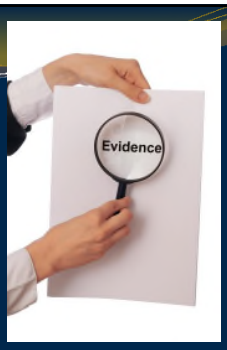
LC 5705 Burden of proof; affirmative defenses.

"The burden of proof rests upon the party…holding the ***affirmative*** of the issue. The following are ***affirmative defenses,*** and the burden of proof rests upon the employer to establish them":

e) Prejudice to the employer by failure to give notice, as required by Sections 5400 and 5401.

LC 5400 "…no claim to recover compensation…shall be maintained unless within thirty days after the occurrence of the injury…there is served upon the employer notice in writing, signed by the person injured or someone in his behalf…"

4. SOL (LC 5400-5412)



STATUTES of LIMITATION

Purpose: Encourage prompt pursuance of legal remedies so evidence will be current/available.

STATUTE OF LIMITATIONS

IF no benes/comp/treatment furnished, APPLICATION must be filed within

ONE YEAR
FROM
DATE OF INJURY

STATUTE OF LIMITATIONS

IF benes/comp/treatment furnished, APPLICATION must be filed within

ONE YEAR
FROM
LAST PAYMENT/BENE

What kind of benes/comp/treatment count?

ANY!

EX: Pain pills, wages during disability, etc.

NOTE:

Years may go by and, if some form of treatment is given, the one year within which to file is counted from that date.

PRACTICE POINTER: Employers may inadvertently breathe new life into a claim that would otherwise be barred by the SOL.

Example: file closed due to SOL

* Adjuster fails to notify treating doctor of file closure
* Unsuspecting treater provides treatment

Holding: By giving physician authorization to treat, carrier makes doctor its agent; if agency not terminated by specific notice, doctor's actions may continue to extend SOL

PRACTICE POINTER: Give written notice to EE and Dr when benes have terminated w/a specific statement that no further treatment is to be given w/out prior authorization.

90 DAY CLOCK

Speaking of SOLs,
When does the
90 Day Clock
REALLY

Start Ticking!?!?!?

90 DAY CLOCK

Honeywell v. WCAB (Wagner)
(2005, CA Sup Ct)

Facts:

7/98: IW complains of work stress

10/98: psych hospitalization

Honeywell

FACTS:

wife notifies ER…

…asserts "work stress" is cause…

…asks for "disability" form…

Er provides unemployment forms, not DWC-1

1/15/99 (6 MONTHS *after* first complaints of work stress): DWC-1 received

3/31/99 (75 days later): Claim denied

Honeywell

ISSUE: Is a denial that issues 75 days after DWC-1 is received—but 8 MONTHS after notice of work injury—LATE?

Honeywell

WCJ Held:

- ER breached duty to provide claim form in a timely manner;
- Claim wasn't denied w/in 90 days of the breach, and, thus;
- Injury *presumed compensable* under LC 5402(b) ("If liability is not rejected within 90 days after the date the claim form is filed…,the injury shall be presumed compensable…")

Honeywell

WCAB *En Banc* Held: LC 5402's 90-day period begins when

- EE files the claim form, or
- ER is "reasonably certain" an injury was suffered or is being claimed and breaches the duty to provide a DWC-1,

ON REMAND, WCJ found ER "reasonably certain" as of 10/98 and, thus, *presumed compensable*

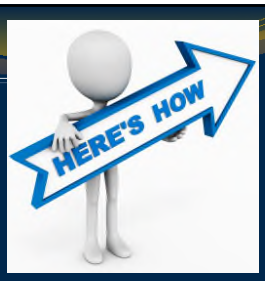
Honeywell

Supreme Court says…

"**reasonably certain**" ain't in the statute!!!!

HELD: 90-day period for denial begins from *the date EE files a claim form,* "not from the date the [ER] receives notice or knowledge of the injury or claimed injury."

Honeywell



EE's burden: notify ER of injury [unless notice is unnecessary b/c ER already knows of the injury/claimed injury from other source(s)]

ER's burden: inform EE of his/her possible rights and provide DWC-1

Honeywell

EE's burden: to decide when/whether to file DWC-1 w/ER

ONLY WHEN DWC-1 IS FILED DOES ER HAVE NEW BURDEN:

ER(Insurer) must conduct 90 day investigation

90 Days runs from the date EE files the claim form,

NOT

"from the date the [ER] receives notice or knowledge of the injury or claimed injury."

Honeywell

ER will be **ESTOPPED** from denying the period began before the filing date IF:

ER, ***knowing*** EE had suffered or was asserting an industrial injury, ***refused*** to provide a DWC-1, or ***misrepresented*** the availability of or need to file a DWC-1; and

EE was ***actually misled*** and failed to file a claim *for that reason;* and

because of this reliance, EE suffered some loss of benefits or setback as to the claim.

DEATH CASES & SOL

Dependent(s) must file any App. for death benefits:
(a) w/in 1 year from the date of EE's death AND
(b) w/in 240 wks from the DOI

LC 5406: No proceedings for death benefits "may be commenced more than one year after date of death, nor more than 240 weeks from the date of injury."

*Note: Under 5402, upon receiving notice of knowledge of a claim of injury (or, as under *Reynolds*, facts which would put an ER on notice of a possible claim of injury) resulting in death, ER **must** give EE's dependents notice that they may be entitled to death benefits.

DEATH, ASBESTOS & SOL

Death benes proceedings must be commenced w/in one year from the date of death (regardless of the date of injury)! (LC 5406.5)

Can you guess why?

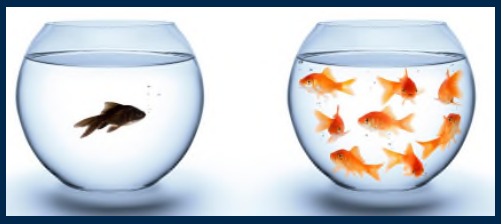
S&W Misconduct SOL

AGAINST ER: must be filed w/in "twelve months from the date of injury." (LC 5407)

note: 12 months are <u>not</u> extended by:

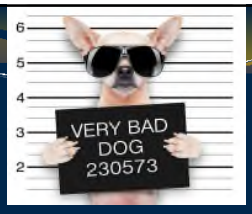
a. payment of benes/comp, and/or
b. any agreement to pay, and/or
c. filing an App. for "normal" benes

132a (Discrim. Because of Claim)



"Proceedings…are to be instituted by filing an appropriate petition…not…more than one year from the discriminatory act or date of termination of the employee."

5. Felonious Act



"Is your criminal activity causing you heart burn?
Call CAAA! … Operators are standing by."

Is the IW "in fact" ***guilty*** of the criminal activity.. then ***may*** be barred.

Instead of bar to benefits—Possible reduction of IW's benefits (EE's S&W).

Felonious Act

Non-compensible ***IF***

a. injury occurs during commission of felony,

b. for which IW is convicted

Affirmative Defense (non-codified)

Lack of WCAB jurisdiction

Competence de la competence

Exclusive Remedy – Work related claims adjudicated solely by the WCAB. LC §§ 5300-5301.

What work related injury is not exclusively w/in WCAB's jurisdiction?

Lack of WCAB jurisdiction (con't)

SOME EXAMPLES

Federal railroad employees and the Federal Employers' Liability Act

Injury on federally recognized tribal land (sovereign immunity for ER that is a federally recognized Indian tribe)

Lack of WCAB jurisdiction (con't)

Admiralty maintenance or Jones Act and a seaman's separate exclusive remedies under federal and state courts.

- EE is a seaman with relationship to vessel
- Maritime activities
- navigable boat or is it on dry land getting services/overhauled?

Longshore and Harbor Workers' Compensation Act: Local contacts

- More local contacts on land = WCAB
- Less local contacts = increased chances for Longshore Act

Lack of WCAB jurisdiction (con't)

SOME EXAMPLES

Outer Continental Shelf Lands Act (OCSLA)

Death on the High Seas Act (DOHSA)

Independent Cause of Action, e.g., Pregnant EE's fetus directly injured by ER's actions like negligence can sue in civil court

Lack of WCAB jurisdiction (con't)

Vehicle Code § 17150: negligent operation or loaning of a motor vehicle means the OWNER of the car has civil liability outside of WCAB jxn. EEs were able to sue owner of car (owner was not their ER) in *Galvis v. Petito* (1993) 58 Cal.Comp.Cases 75.

ADR— LC 3201.5 — As part of a CBA, some claims are carved out of the WCAB*

*Appeals still go to Recon Unit

7. Injury caused by IW's S&W

LC 4551 Willful misconduct of injured employee.

"Where the injury is caused by the *serious and willful misconduct* of the injured employee, the compensation otherwise recoverable therefrom shall be reduced by one-half, except:

a) Where the injury results in death.

b) Where the injury results in [PD] of 70 percent or over.

c) Where the injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the Division of Occupational. Safety and Health, with reference to the safety of places of employment.

d) Where the injured employee is under 16 years of age..."

7. Injury caused by IW's S&W

Foolish action in jumping off a roof while supervisor went to get a taller ladder was deliberate:

Grant Joint Union (BUTLER) 72 CCC 1518, quoting WCAB,

"Applicant did not leap with reckless abandon from the roof, without considering the consequences. Applicant's hesitation, conversations with witnesses, and preparations show, not wanton and reckless disregard of the consequences, but a process of deliberation and, unfortunately, miscalculation. Poor judgment, yes; serious and willful misconduct, no."

ON THE OTHER HAND…

"…it is questionable whether conduct that is merely "**rash**" will bar employee's recovery for injuries consequential to an established industrial injury…"

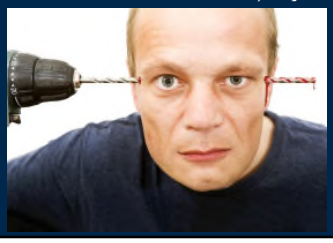
Sanchez 59 CCC 81

8. Wilfully Self-Inflicted Injury [LC 3600(5)]

Does not cover carelessness/negligence!

ER must prove:
(a) EE's actions were intentional, AND
(b) EE's behavior was not merely negligent, AND
(c) The injury was caused by the intentional act, AND
(d) (i) an injury was the intentional result of EE's intentional act, OR
(ii) the reasonably foreseeable or predictable result of the action taken by the EE is an injury, albeit a more minor injury than the one that was sustained.

EX: Hit wall with fist in anger.
Breaks finger
Defensible?

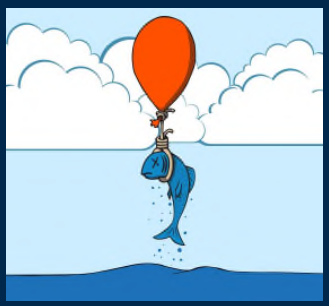


67

9. Wilful Suicide

ONLY covers where EE "willfully & deliberately" caused own death!

-not all suicides are covered! [LC 3600(a)(6)]



www.bradfordbarthel.com

68

9. Wilful Suicide

ER must prove:

- death was self-inflicted
- IW wanted to die and took deliberate steps to do so
- no connection between a previous industrial injury and the later suicide

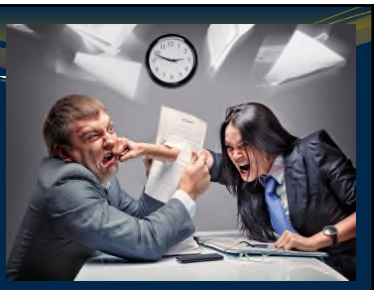
9. Wilful Suicide

If dependents argue "irresistible impulse", ER must disprove…that is, prove:

a. EE was capable of taking willful/deliberate action,
b. did so,
c. reasons were personal and independent of a prior industrial injury

Look for suicide note

10. Initial Aggressor



LC 3600: EE not entitled to compensation for injuries caused by "an altercation in which the injured employee is the initial aggressor".

The unplanned injury…EE *intentionally* assaults another person who retaliates and injures his aggressor.

10. Initial Aggressor

Two questions:

a. Who initiated the altercation or was the initial *physical* aggressor?

b. What was the subject matter of the dispute?

-to be compensable, injuries must be work-related

-if totally personal, injuries aren't compensable

10. Initial Aggressor

To qualify as "initial aggressor", must cause intended victim to:

a. have a subjective belief of endangerment,

b. that is objectively reasonable

Need not actually strike intended victim!

EX. assuming threatening tone and rapidly approaches another person while wielding a weapon

10. Initial Aggressor

Usually swearing contest: "He did it!"
"No. He did it"

Lots of finger pointing between combatants

DEFENSE STRATEGY: Admin Rule CR 10590 allows for consolidation of proceedings in "two or more related cases" for "the purpose of receiving evidence"

Thus, only one judge to ascertain truth!

Avoids unjust results: two winners or two losers

11. "Going & Coming" Rule

- General Rule: injuries that occur going to or coming from work during a normal commute are non-compensable.
- Logic:
  a) EE isn't rendering services to ER during commute
  b) theory: the employment relationship is suspended when EE leaves work until EE returns

Leaves EE lots of options:

More exceptions than...

...Swiss cheese has holes!

R: Injuries During Travel – Well, it kinda' depends! *[Argh!]*

1. Injured during travel for treatment → compensable. Laines v. WCAB (DCA, 1975)
2. Injured during travel for ML → Need to determine if already admitted or compensable.

MVAs/injuries while going to AME?

a. Industrial if claim admitted → Minarik v. Del Taco
b. Not industrial if nonindustrial → Evans v. San Joaquin Regional Transit District, 2014 Cal. Wrk. Comp. P.D. LEXIS 56 - Injuries in route to AME, who said claim was nonindustrial means does not have industrially related MVA.

12. Non-Salaried Partner of Def

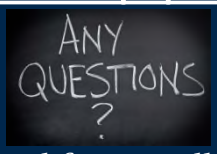
Why DRB should not get benes!!!

14. Credit for comp paid/3rd Party Recovery

EE & ER have an independent cause of action against a negligent 3rd party (LC 3852)

Any amount EE recovers from the 3rd party is subject to ER's right of reimbursement for sums already paid or credit against future comp to be paid to EE (or EE's dependents) (LC 3852, C.J.L. Construction, Inc. v Universal Plumbing, (1993) 58 CCC 543)

14. Credit for comp paid/3rd Party Recovery



Feel free to call:


Amir Adil


Tahmeena Ahmed


Peter Fitzpatrick


Scott Star


Louis Larres

15. Unreasonable Refusal to Submit to Treatment

LC 4056 Disability caused or aggravated by refusal to submit to medical treatment

Note: injury need not be "serious" rather, the unreasonableness of the employee's *refusal* must be proportionate to the *"seriousness of the injury"*

16. Unreasonable Refusal to Submit to Examination

LC 4053 Failure or refusal to submit to examination at employer's request.

"So long as the employee, after written request of the employer, fails or refuses to submit to such examination or in any way obstructs it, his right to begin or maintain any proceeding for the collection of compensation shall be suspended."

17. Horseplay

aka
"Skylarking"

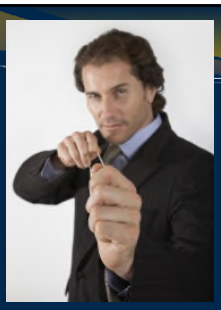
aka "Screwing Around"!

17. Horseplay

Definition:

EE's *personal activities* are acts of convenience that have an *inherent potential for injury,* and injury occurs (though was not intended)

17. Horseplay



Examples:

Recreational activities that utilize ER's materials/property

(e.g., shooting rubber bands, spitting paper wads, flying paper airplanes, handstands on ladders, sniffing glue)

Activities performed on a dare

17. Horseplay

NO DOUBLE DOG DARE EXCEPTION

17. Horseplay

Examples:

- Inherently dangerous activities (e.g., diving off a roof; smoking in restricted areas)*

*Note: can also give rise to S&W (but only gives 50% reduction)

19. Apportionment

Keeping this simple:

PD is Applicant's burden Apportionment is Defense's burden
Apportionment is defendant's burden

Escobedo vs. Marshalls (2005) 70 Cal. Comp. Cases 604

In the final analysis, to save PD indemnity Defense must prove PD cause by LC 4663 "other factors"

20. By Carrier:

A. Lack of Ins Coverage of ER (DUH!)
B. Absence of Liability under General-Special Rule
C. Lack of coverage under Exclusionary Endorsement or Policy Provisions (DUH!)

A. Lack of Coverage

Subject to Mandatory Arbitration, per LC § 5275(a)

Caveat: Denying both Coverage AND Employment may mean both venues in both WCAB and Arbitration. Cumis fees may be awarded by the WCAB for ER's atty fees if carrier found liable.

91

B. General & Special Employer

'cause you just can't have enuf bosses

www.bradfordbarthel.com

92

NOTE:

Even if the **special** and **general** have a contract agreeing that the **general** will obtain w.c. ins,

any such agreements do not eliminate their joint & several liability.

Northrup Grumman Corp. v WCAB; CIGA, 75 CCC 537 (2010); *Miceli v. Jacuzzi, Inc.* (2006), 71 CCC 599

C. Site Specific

Burden on Insurer to *establish* Exclusion

WCIRB info correct?? Who knows

Pull building permit from supervising gov't entity

Show actual policy from underwriting or other carrier's policy

Get Declarations/Exclusions pages

C. Site Specific (con't)

- If possible, show "*other coverage*" designated for the site

War Story: I have even used a broker's email to client's underwriting dept. to get joinder against another carrier!

21. Prior C&R

Johnson v WCAB
S.Ct, 1970

Fact: IW into C&R on mandatory form
-form releases all claims of IW and his dependents
-C&R approved by WCJ
-IW dies
-WCJ dismissed widow's claim for death benes

Holding: WCAB erred in dismissing death benefit claim without first awaiting defendant's Answer

Reasoning: the assertion of a release is an affirmative defense
"If…insurer chooses not to raise the defense of release, that release might be deemed waived and petitioner thus collects death benefits."

GOOD FAITH PERSONNEL ACTION

LC 3208.3(h) provides:

"No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue."

Need to establish:

lawful,

nondiscriminatory, AND

good faith personnel action.

How to line up for the defense

2. Document everything. Witness names, performance issues, why the person was fired.

[Applicants may try to claim that the termination was in retaliation for claiming an injury (even if you don't know about it) so get your defenses ready before you fire them. If they did claim an injury, then the post-term defense doesn't apply.]

Psyche Exceptions

- only applies to compensable consequences of physical injury, not a direct injury
- victim of a violent act → compensable
- "catastrophic" physical injury → compensable

6 Month Bar to Psych

- LC 3208.3(d) provides:
  - "… no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months."

Note: Less than 6 months of work may be "trumped" by

IW having cumulative > 6 months of work (not consecutive) like:

- Working modified duties post-claim,
- Prior periods of work for insured,
- Even "unpaid" work before hired

Victim of violent act at work

Note: Less than 6 months of work may be trumped by

3. "Sudden and Extraordinary" Event like injury out of scope from IW's normal occupations hazards.
   - EX. 1: Tree trimmer falling out of tree may not have a compensable claim b/c falling out of tree is w/in foreseeable occupational hazard; however,
   - EX. 2: Your WC defense atty falling out of tree likely is compensable.

Donald Barthel, Esq.
Office: (916) 569-0790
Cell: (916) 996-1263
dbarthel@bradfordbarthel.com

Amir F. Adil, Esq.
Office: (408) 392-8202
aadil@bradfordbarthel.com

- Certificates will be emailed w/in 24 hours.
- Access today's PPT at www.bradfordbarthel.com
- A video recording of today's Webinar will be posted on our website.
- Register now for our next Webinar on **October 14, 2021 at 12pm with Ryan Alves & John Patrick Torres on Factual Denials.**