

Joinder: Setting the Table for Resolution of Cumulative Trauma Claims

By Lauren Coleman, Esq.
Nasir F. Adil, Esq.

Law Offices of Bradford & Barthel, LLP



**Certificates for 1 hour
of CE/MCLE**

Sent via email w/in 24 hrs



PowerPoint & Video

<https://bradfordbarthel.com/training/>



Next Webinar – 4/19/23

Estimating Permanent Disability
for Reserving & PD Advances



COVID Questions?

covid@bradfordbarthel.com

AMA Rating Department

<https://bradfordbarthel.com/areas-of-practice/ama-analysis-rating/>

CE Videos & Webinars

<https://bradfordbarthel.com/training/>

BLOG Articles

<https://bradfordbarthel.com/blog/>



Meet our Presenters

Lauren Coleman, Esq.

B&B Oakland

Office: (510) 268-0061

lcoleman@bradfordbarthel.com



Nasir F. Adil, Esq.

B&B Oakland

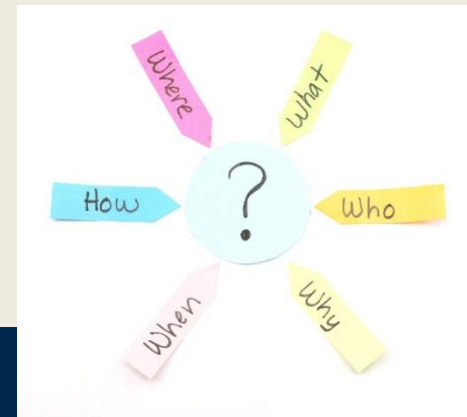
Office: (510) 268-0061

nadil@bradfordbarthel.com



Joinder Overview

- Cumulative Traumas (CTs) with more than one defendant
 - Multiple employers and/or insurance carriers
- Joinder allows all employers and insurance carriers with liability within the one-year CT liability period to become parties
- Labor Code §5500
- Contribution



Questions to Ask When Settling a CT

1. Are there multiple defendants?
2. Was there an election?
3. Are all defendants signing the settlement documents?
- 4. Are there any potential additional defendants that have yet to be joined?**
5. Has a Petition for Contribution been filed?



Why Join?



- Contribution
 - Labor Code §5500(a) limits liability for a cumulative trauma claim to one year immediately preceding either the date of injury
- If our client does not have insurance coverage for the entire alleged cumulative trauma period discovery should be completed ASAP to identify other co-defendants to be joined
- Avoids discovery-related delays and litigation

Elections



- Labor Code §5500.5(c) allows an injured worker to elect to proceed against any one or more employers in any claim for occupational disease or cumulative trauma resulting from more than one employment or insurance policy
- Once an election is made, settlement of the case with the elected defendant resolves liability for all *defendants*
 - An election only applies to defendants joined as parties at the time of settlement
- Whether an applicant has elected against the settling insurer will often determine whether a settlement resolves an entire cumulative claim or only a portion of the claim. *Ventura v. Dana Point Cleaners*, 2019 Cal. Wrk. Comp. P.D. Lexis 114, *See Rodriguez*, 2015 Cal. Wrk. Comp. P.D. Lexis 480.

Who to Join?



- CCR §10382 allows the appeals board to order the joinder of additional parties not named in the application whose presence is necessary for the full adjudication of the case.
- Any person against whom any right to relief is *alleged* to exist may be joined as a defendant. This includes any employers or insurance carrier who *might* have liability during an alleged cumulative trauma.
- When in doubt, join all potential co-defendants
 - Including those outside the one-year liability period if the DOI is in dispute

When to Join?



- As soon as possible
 - There is no prescribed timeframe for filing a Petition for Joinder
 - A Petition for Joinder should be filed as soon as the details of the new party are known, particularly the name and addresses of any additional employers or insurance carriers
- All potential co-defendants should be joined prior to the submission of a settlement
 - Ensures all defendants are jointly and severally liable for the terms of the settlement, if there is an election
- In rare cases, the WCAB has allowed for joinder in contribution proceedings after the case in chief has resolved.

Timing and Joinder



- Only defendants joined prior to the first hearing may participate in discovery and the proceedings
- If joined after the first hearing, Defendants can only conduct discovery to obtain information regarding the time, place, and duration of the alleged employment only
 - Any further discovery is limited until after the case-in-chief is resolved
- If your client is only liable for a small portion of a cumulative trauma period, a Petition for Joinder should be filed before a hearing is requested
 - Ensures that newly joined party can conduct discovery, participate in the proceedings, and be elected against

How to Join?



- Petition for Joinder
 - Must be served on the party(ies) to be joined
 - Subject to 10-day notice requirement and an opportunity for the party to joined to be heard
- Often results in judges setting a status conference
- While technically only an allegation of liability is required to justify joinder of a party, is good practice to offer some degree of proof of liability of the new party
 - Printout from the WCIRB insurance coverage website
 - Testimony from the applicant's deposition



Defenses Against Joinder

- Defenses are limited
- Most common defense against joinder is a lack of employment and/or insurance coverage during the alleged cumulative trauma.
- The WCAB will most often grant joinder of a defendant and issue a dismissal of the party upon petition if proof of lack of employment or insurance coverage is discovered.



Dismissal as a Party

- The WCAB is generally hesitant to dismiss a defendant when it leaves the applicant without a defendant to provide benefits
 - Joining a co-defendant who has coverage during the cumulative trauma period increases our odds of being dismissed from the case quickly
- Generally, all dismissals are without prejudice, so parties can be re-joined if new evidence is discovered showing they actually share liability in the cumulative trauma



Unjoined Defendants

- Expressed intent to settle liability only applies to parties to the case at the time of settlement
- In *Ventura v. Dana Point Cleaners*, a defendant, Wasco, included language in the settlement documents expressly reserving the defendant’s “right to contribution from any and all agents/assignees/TPAs, Insurance Co. during CT period, including but not limited to Zenith.”
- The WCAB determined the language was insufficient to reserve contribution rights against Zenith because Zenith was not yet joined as a party defendants at the time of settlement. However, Wasco may still be able to seek reimbursement under Labor Code §5500 generally
- **When in doubt, file a Petition for Joinder**



Resources for Joinder



WCIRB Coverage Research:

<https://www.wcirb.com/products-and-services/coverage-research-service>

- Provides insurance coverage information for employers
- Limitation on how far back you can research, so research early
- Formal reports for dates further back can be requested at a cost

CA Dept. of Insurance:

<http://www.insurance.ca.gov/>

- Lists the designated person to receive service of documents for each insurance provider
 - Ensures service of a Petition for Joinder is valid



Reference Sheet

- **Cumulative Traumas:** Labor Code §5500
- **Joinder:** Labor Code §5500.5
- **Joinder Procedures:** CCR §10382
- **Elections:** §5500.5(b)-(c)
- **Joinder After Award:** *See Lim v. Twelve Signs, Inc., 2014 Cal. Wrk. Comp. P.D. LEXIS 409.*





Contact Us!

Lauren Coleman, Esq.

B&B Oakland

Office: (510) 268-0061

lcoleman@bradfordbarthel.com



Nasir F. Adil, Esq.

B&B Oakland

Office: (510) 268-0061

nadil@bradfordbarthel.com



Certificates

Sent via email w/in 24 hrs

PowerPoint & Video

<https://bradfordbarthel.com/training/>

Next Webinar – 4/19/23

Estimating Permanent Disability
for Reserving & PD Advances

