



**Bradford & Barthel, LLP**  
**Affirmative Defenses**  
**(Use It or Lose It Cheat Sheet)**

<p><b>1. Independent Contractor: LC §§ 3353 &amp; 2750.5</b></p> <ul style="list-style-type: none"> <li>- Any person who: (a) renders service for a specified recompense for a specified result (b) under the control of his principal as to result of work only (c) not under control of principal as to the means of accomplishing the result</li> <li>- CASE-BY-CASE BASIS</li> </ul>	<p><b>2. Intoxication: LC § 3600(a)(4)</b></p> <p>Defense must prove:</p> <ol style="list-style-type: none"> <li>a. EE used <i>covered</i> intoxicant</li> <li>b. EE was intoxicated</li> <li>c. Intoxication was proximate causation of injury</li> </ol>
<p><b>3. Prejudicial Lack of Notice: LC § 5400</b></p> <ul style="list-style-type: none"> <li>- L.C. § 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..."</li> </ul>	<p><b>4. SOL: LC §§ 5402-5412</b></p> <ul style="list-style-type: none"> <li>- Purpose: Encourage prompt pursuance of legal remedies so evidence will be current/available.</li> <li>- IF <u>no</u> ben/comp/treatment furnished, APPLICATION must be filed within ONE YEAR FROM DATE OF INJURY</li> </ul>
<p><b>5. Felonious Act with Conviction: LC § 3600(a)(8)</b></p> <ul style="list-style-type: none"> <li>- Is the IW "in fact" <u>guilty</u> of the criminal activity causing the injury, then <u>may</u> be barred</li> </ul>	<p><b>6. Lack of WCAB Jurisdiction:</b></p> <ul style="list-style-type: none"> <li>- Exclusive Remedy – Work related claims adjudicated solely by the WCAB. L.C. §§ 5300-5301. But was this a railroad EE, or injury on recognized tribal land, subject to "water law", etc. etc. etc.?</li> </ul>
<p><b>7. Injury caused by IW's S&amp;W: LC§ 4551</b></p> <ul style="list-style-type: none"> <li>- L.C. § 4551 <b>Willful misconduct of injured employee.</b></li> <li>- <b>Foolish action</b> in jumping off a roof while supervisor went to get a taller ladder not S&amp;W: <i>Grant Joint Union (BUTLER) 72 CCC 1518</i></li> </ul>	<p><b>8. Willfully Self-Inflicted Injury: LC § 3600(a)(5)</b></p> <ul style="list-style-type: none"> <li>- Does <u>not</u> cover carelessness/negligence!</li> <li>- E.g.: Hit wall with fist in anger. Breaks finger Defensible? No. (Injury not intentional)</li> </ul>
<p><b>9. Willful Suicide: LC § 3600(a)(6)</b></p> <ul style="list-style-type: none"> <li>- ONLY covers where EE "willfully &amp; deliberately" caused own death!</li> <li>- not all suicides are covered! [L.C. § 3600(a)(6)]</li> </ul>	<p><b>10. Initial Aggressor: LC § 3600(a)(7)</b></p> <ul style="list-style-type: none"> <li>- L.C. § 3600: EE not entitled to compensation for injuries caused by "an altercation in which the injured employee is the initial aggressor".</li> </ul>
<p><b>11. "Going &amp; Coming" Rule</b></p> <ul style="list-style-type: none"> <li>- General Rule: injuries that occur going to or coming from work during a normal commute are non-compensable.</li> <li>- Many exceptions</li> </ul>	<p><b>12. Non-Salaried Partner: LC §§ 3351 &amp; 3360</b></p> <ul style="list-style-type: none"> <li>- L.C. §§ 3351 &amp; 3360:             <ul style="list-style-type: none"> <li>- Partners are not employees of each other</li> <li>- Ask: Did EE receive wages or salary regardless of performance/income of Co?                 <ul style="list-style-type: none"> <li>- If Yes: S/he is an EE (income not dependent on Co.) and Covered EE!</li> <li>- If No: S/he is a partner (income dependent on Co. so NO benefits!)</li> </ul> </li> </ul> </li> </ul>
<p><b>13. Employment Category Excluded from WC: LC §§ 3352 et seq.</b></p> <ol style="list-style-type: none"> <li>(a) persons employed by his/her parent, spouse, child,</li> <li>(b) who is "the owner or occupant of a residential dwelling",</li> <li>(c) "whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children," or</li> <li>(d) "whose duties are personal and not in the course of trade, business, profession, or occupation of the owner or occupant."</li> </ol> <ul style="list-style-type: none"> <li>- Many others expressly excluded by statute</li> </ul>	<p><b>14. Subrogation/Third Party Recovery: LC §§ 3850-3865</b></p> <ul style="list-style-type: none"> <li>- ER gets copy of EE's complaint vs 3<sup>rd</sup> party. L.C. § 3853.</li> <li>- ER has 1<sup>st</sup> right of recovery after IW &amp; ER's attorney fees (before IW). L.C. § 3856.</li> <li>- After expenses and attorney's fees, ER relieved from WC</li> </ul>



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<p><b>15. Unreasonable Refusal to Submit to Treatment: LC § 4056</b></p> <ul style="list-style-type: none"> <li>- Disability caused or aggravated by refusal to submit to medical treatment</li> </ul>	<p><b>16. Unreasonable Refusal to Submit to Examination: LC § 4053</b></p> <ul style="list-style-type: none"> <li>- Failure or refusal to submit to examination at employer's request.</li> </ul>
<p><b>17. Horse Play</b></p> <ul style="list-style-type: none"> <li>- Definition:             <ol style="list-style-type: none"> <li>EE's <i>personal activities</i> are acts of convenience</li> <li>that have an <i>inherent potential for injury</i>, and</li> <li>injury occurs (though was not intended)</li> </ol> </li> <li>- Can involve one or several employees</li> </ul>	<p><b>18. Rashly Undertaken Activity: <i>Beatty vs. WCAB</i> 43 CCC 444</b></p> <ul style="list-style-type: none"> <li>- Aggravation of earlier industrial injury by "<i>rashly</i>" undertaken activity causing additional disability.</li> <li>- "<i>rashly</i>" = <u>very</u> negligent????</li> </ul>
<p><b>19. Apportionment: LC §§ 4663 &amp; 4664; <i>Escobedo vs. Marshalls</i> (2005) 70 CCC 604</b></p> <ul style="list-style-type: none"> <li>- PD is Applicant's burden; Apportionment is Defense's burden</li> <li>- Defense must prove PD not "directly caused" by work</li> </ul>	<p><b>20. By Carrier: Lack of Coverage, Site Specific; Special-General</b></p> <ul style="list-style-type: none"> <li>- General is normally responsible</li> <li>- <b>Special Employer</b> may be <i>jointly &amp; severally liable</i></li> </ul>
<p><b>21. Claim Barred by Prior C&amp;R: <i>Johnson v WCAB</i> (1970) 35 CCC 362</b></p> <ul style="list-style-type: none"> <li>- Prior C&amp;R must be referenced in Answer</li> </ul>	<p><b>22. Post Termination: LC § 3600(a)(10)</b></p> <ol style="list-style-type: none"> <li>IW learns of Termination</li> <li>Then ER (2nd in time) learns of injury claim.</li> </ol> <p>Note: Often trumped by:</p> <ul style="list-style-type: none"> <li>- IW alleging CT (not complete ban to defense)</li> <li>- Pre-termination medical records corroborating injury</li> <li>- ER had knowledge of claim prior to IW learning of termination</li> </ul>
<p><b>23. Good Faith Personnel Action: LC § 3208.3(h)</b></p> <ul style="list-style-type: none"> <li>- Need to establish:             <ol style="list-style-type: none"> <li>lawful,</li> <li>nondiscriminatory, AND</li> <li>good faith personnel action</li> </ol> </li> </ul>	<p><b>24. 6 Month Bar to Psych Claim: LC § 3208.3(d)</b></p> <ul style="list-style-type: none"> <li>- L.C. § 3608.3(d): "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."</li> </ul>
<p><b>25. Factual Denial: "It ain't happened, period."</b></p> <ul style="list-style-type: none"> <li>- Variation on employer-based investigation requiring:             <ul style="list-style-type: none"> <li>- Witnesses to prove you do not own the Golden Gate Bridge</li> <li>- Love thy employer</li> <li>- If possible, point to more plausible source of injury (like on basketball court)</li> </ul> </li> </ul>	

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