DISCOVERING THE HIDDEN THIRD PARTY CLAIM IN YOUR WORKER'S COMPENSATION CASE:

When evaluating a worker's compensation claim, it is important to keep a look out for third party defendants and alternative methods to maximizing your client's recovery. Being familiar with the law and the different ways it can benefit your client, can often lead to maximizing your client's recovery in an injury claim.

Everyone is familiar with the stereotypical third party case that begins with a work related injury: Applicant is driving a car and is struck by a third party driver. Third party claims, however, are much more than just car accident cases. Failing to look at the details that gave rise to the incident may end up costing your client a lot of money.

MULTI-EMPLOYER JOB SITES:

Any work related injury that occurs on a multi-employer job site needs to be looked at closely. Multi-employer job sites, like construction sites, often lead to injuries caused by one company's employee to another company's employee. If the two parties involved in the incident work for different trades (i.e. plumber, electrician, carpenter) they most likely work for different companies. The Applicant can pursue a third party claim against the company that caused the incident. The following are some things to look for when speaking to the Applicant during the intake:

- Who caused the incident?
- Was the worker that caused the incident working for a different company?
- Was the equipment involved in the incident owned/operated by a different company?

In many situations, the Applicant may not know the answer to some of these questions. These answer, however, may be contained in the employer's incident report or the Cal OSHA report. If the injuries are significant, it may be worth hiring an investigator to go out to the job site and take witness statements.

LABOR AGENCIES:

In today's labor market, many companies choose to hire labor or employment agencies to provide workers for fluctuating supply and demand cycles. If a worker, who works for Labor Company A, is sent to perform work at another company, Company B, and is then injured by either Company B's employee or equipment, the worker may have a third party claim against Company B. This is in addition to whatever recovery the worker may have through the workers compensation system.

When speaking to the Applicant, it is important to determine which of the

two companies was responsible for (a) paying the worker; (b) training the worker; (c) supervising the worker; (d) what company controls the worker's scope of work; and (e) what company has the right to fire the worker. All of these terms are important when a worker is involved in an accident. This is because in California a worker may be barred from pursuing a third party claim if he or she is determined to be a "special employee" of the negligent company.

Specifically, *Labor Code* Section 3601(a) provides that workers' compensation is "the exclusive remedy for injury or death of an employee against ... the employer acting within the scope of his or her employment ... " *Lab. Code* § 3601 (a). The workers' compensation exclusivity rule applies to any injury sustained by an employee that is within the scope of workers' compensation coverage. *Angelotti v. Walt Disney Co.* (20 11) 192 Cai.App.4th 1394, 1403.

Courts instruct that "[a]n employee may have two employers for purposes of workers' compensation." *Angelotti, supra,* 192 Cal.App.41 at 1403. Where an employer sends an employee to do work for another person, and both have the right to exercise ... control. .. that employee may be held to have two employers- his original or 'general' employer and a second, the 'special' employer.'" *Kowalski v. Shell Oil Co*. (1979) 23 Cal.3d 168 (quoting *Miller v. Long Beach Oil Dev. Co*. (1959) 167 Cal.App.2d 546,549). In such cases, both employers are shielded from civil claims. "Thus where there is dual employment the work[er] is barred from maintaining an action for damages against either employer." *McFarland v. Voorheis- Trindle Co*. (1959) 52 Cal.2d 698, 702.

In order to recover for personal injuries, the worker must show that he is not a "special employee" of Company B. The following are some of the factors to be considered when determining if the worker qualifies as a "special employee" of the negligent company: (a) who trains the worker; (b) supervises the worker (c) provides the worker with tools; (d) controls the worker's scope of work; and (e) has the right to fire the worker. *Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.

Each case should be evaluated on an individual basis as the above factors vary from case to case. Simply because the case meets some of the factors does not mean the worker is precluded from filing a personal injury claim. The Court will look at the totality of the circumstances in order to determine whether the worker should be considered a "special employee" of the negligent company for purposes of recovery.

UNINSURED EMPLOYER

If the injured worker was employed by a company who failed to secure workers compensation insurance, that worker has the right to bring a civil lawsuit against his own employer. *Labor Code* Section 3706. These are called "second-party" cases.

The fact that an injured worker is able to collect compensation benefits

through the Uninsured Employers Benefits Trust Fund (UEBTF) does not hinder his ability to pursue a second party case.

FINDING A "DEEP POCKET" IN YOUR AUTO CASE

Another way to maximize your client's third party auto case is to ensure you are exploring all avenues of recovery. Simply because the defendant driver disclosed his personal insurance coverage does not mean that you are limited to his policy.

In California, a driver may be in the course and scope of employment even if he is driving his personal vehicle. As a result, his employer will be vicariously liable for any damages caused by the employee. Situations where the driver can be found to be in the course and scope of his employment, despite driving his personal vehicle, are as follows:

- special errand for employer;
- uses his personal vehicle for work;
- on his way to a work event;

Professionals like sales people, realtors, lawyers, researchers and some doctors use their personal vehicle to attend work related meetings, events and errands. As a result, their driving is within the course and scope of their employment. *Moradi vs. Marsh USC Inc.* (2013) 219 Cal.App.4th 886 (2013).

Additionally, many companies like Uber and Amazon hire drivers to make deliveries in their personal cars. These delivery drivers, whether they know it or not, are covered by the corporate insurance policies which often times have multiple layers of coverage.

When evaluating the potential coverage for an incident, consider what the defendant driver does for a living and where he was going at the time of the accident. That can make the difference between settling your case for $250,000 or $14,000,000.

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