



Danger on the docks

Where there is an injury or death on the waterfront, drugs or alcohol are too often involved. Learn how to handle discovery for a third-party injury/death case against a stevedore company

By Rahul Ravipudi

Lashers, swingmen, longshoremen, teamsters ... Sound like characters from Marlon Brando's *On the Waterfront*. Indeed, these are some of the people you come across if you're by the docks. What are "the docks"? The docks are the waterfront terminals where shipping containers are loaded and unloaded from freight ships and subsequently loaded onto trains or semi-trucks to be delivered. This process is called stevedoring (pronounced "steve-uh-door-ing") and is performed by stevedore companies who own all of the equipment and operate the terminal.

The loading and unloading process occurs with the help of heavy equipment: top-handlers, transtainers, hammerhead cranes, heavy forklifts, and so on. International Longshore and Warehouse Union members ("longshoremen") direct

and operate equipment weighing tens of thousands of pounds, moving tons of containers around the dock. There is no doubt that the consequences of the actions of these longshoremen are a matter of life and death, both to themselves and to third parties: the truckers who come to the docks to pick up or drop off a container.

In order to ensure the safety of anyone working around the docks, the Terminal Operators and the Longshoremen developed the Pacific Coast Marine Safety Code ("PCMSC") – a *mandatory* set of safety protocols that the longshoremen must abide by at all times while working on the docks. The PCMSC can be found online at www.pmanet.org under "contract documents" and are essential in defining the standard of care. (*Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, 478.)

The mantra set forth at the beginning of the PCMSC is: "In a question of convenience vs. safety, safety first. In a question of comfort vs. safety, safety first. In a question of tonnage vs. safety, safety first."

While undoubtedly safety must come first, history has shown that it doesn't. In a question of drugs and alcohol vs. safety, drugs and alcohol have come first. In fact, OSHA superintendents in the high hazard division who have dealt with over 1200 injuries at the terminal independently concluded that there is a problem with drugs and alcohol at the terminal. Long Beach Harbor Patrol routinely responds to problems arising out of the consumption of alcohol by longshoremen in the terminal parking lots. Drive by a terminal parking lot and you may find

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empty rum bottles, beer cans, and remnants of marijuana use.

Predictably, what follows are catastrophic injuries or death for truckers entering these terminals. When presented with a case involving a trucker's injury/death at a terminal, rest assured that drugs and/or alcohol likely played a role; rest assured that the longshoreman tortfeasor likely had a history of on and off the job problems/discipline; and rest assured that the terminal operator and the longshoreman could have prevented the injuries to your client.

The employment of longshoremen is pursuant to the Pacific Coast Longshore Contract Document ("PCLCD"), also available at www.pmanet.org. The PCLCD was negotiated by the International Longshore and Warehouse Union ("ILWU") on behalf of the longshoremen and the Pacific Maritime Association on behalf of the stevedoring companies. The hiring, scope of work, and firing of longshoremen is governed by the PCLCD.

Pursuant to the California Labor Code, a longshoreman working at a terminal is an employee of the stevedoring company. Therefore, an issue you will not have to deal with is establishing that the stevedoring company is vicariously liable for the actions of its longshoremen. This is important because most of the stevedoring companies have significant insurance coverage – likely a \$20 million primary policy – which will, in most cases, cover all available damages. Regardless, the stevedoring companies have significant assets making punitive damages a viable recovery in the appropriate circumstances.

Historical data compiled by the Pacific Maritime Association ("PMA") reveals that there are several thousand injuries per year at the terminals on the West Coast. (See *Every Choice Counts General Safety and Security Training VI, Participant Guide* at page 3, authored by the PMA.) Having personally taken nearly 100 depositions of officers, general managers, terminal managers, superintendents, safety managers, labor relations personnel, longshoremen and busi-

ness agents, I have developed a special and significant knowledge base for effectively litigating these cases. The purpose of this article is to provide you with a roadmap of the documents and other information you can accumulate in discovery.

Drug and alcohol test documents

Oftentimes, when someone is injured at the terminal, the stevedoring defendant may evaluate the longshoreman involved and request that a drug and alcohol test be performed. The protocol followed in requesting a drug and alcohol test is set forth in the PCLCD. Essentially, the stevedoring company must take the position that there is a reasonable suspicion that the longshoreman is under the influence which triggers the right to request the longshoreman to submit to a drug/alcohol test. If the longshoreman refuses, the stevedoring defendant is permitted to presume the longshoreman was under the influence and can act accordingly in disciplining or firing the longshoreman.

If the longshoreman consents, officer/agents of the stevedoring defendant will complete a drug testing authorization form that states the reason for the testing, e.g., "reasonable suspicion." These admissions of "reasonable suspicion" will be highly relevant in addressing the issue of why a stevedoring defendant allowed a person who was reasonably suspected to be under the influence of drugs or alcohol to continue working at the terminal, thereby causing catastrophic injuries or death.

Employer complaint

In addition to demanding a drug/alcohol test after an injury-causing incident, a stevedoring defendant's recourse under the PCLCD is to terminate the longshoreman for cause. This termination is communicated verbally on the date of the incident and followed up in writing with an Employer Complaint filed with the Labor Relations Committee for adjudication. This Employer Complaint identifies the exact sections of the PCLCD and the PCMSC the stevedor-

ing defendant admits its longshoreman violated in causing the harm at issue. These are important party admissions which should be obtained immediately. The person who prepared the Employer Complaint should be deposed so that you can confirm the bases for the termination and what the stevedoring defendant considered in claiming each PCLCD and PCMSC violation. Keep in mind that the Employer Complaint is often amended by the stevedoring defendant after further investigation to include more serious violations or other information. So during discovery you should request both the hard copy filed with the Labor Relations Committee and the electronic copy.

Joint Labor Relations Committee minutes and results

Once the Employer Complaint is filed with the Labor Relations Committee, a "Special Meeting" is conducted with the Joint Longshore Labor Relations Committee ("JLLRC") and the accused longshoreman. The JLLRC is comprised of officers of the stevedoring defendant and officers of the local ILWU for which the accused longshoreman is a member. During this meeting, the local ILWU acts as the representative for the accused longshoreman and addresses the charges, sometimes disputes the charges, and negotiates the punishment when charges are stipulated to. A meeting of the minds amongst the members of the JLLRC will likely contain additional admissions which will assist in establishing liability.

Getting the personnel file

The Court of Appeal in *Diaz v. Carcamo* (2010) 182 Cal.App.4th 339, confirmed that while an employer's admission of course and scope for the actions of its employee may subsume an allegation of negligent entrustment, it does not eviscerate a negligent hiring and retention cause of action. This takes this discoverability of the employee's personnel file and driving history outside of the *Jeld-Wen v. Superior Court* (2005) 131 Cal.App.4th 835 analysis and continues to be relevant in establishing direct liability.

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ity against an employer for this separate cause of action of negligent hiring/retention.

Don't let the defendants play "hide the ball" with the personnel file. What you may hear is that longshoremen are dispatched through the local union hall, so you have to go to the local ILWU union to get the information. The ILWU will say that the file is kept with the Pacific Maritime Association, the entity that cuts the paychecks to many longshoremen. The PMA, in turn, will refuse to produce anything absent a court order. What is important to know is that the stevedoring defendant has access to the PMA data online relating to the employment history and disciplinary data for each and every longshoreman. Therefore, the information you seek is in the possession, custody and control of the stevedoring defendant and, therefore, must be produced. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771.) Not only is obtaining these records from the stevedoring defendant the path of least resistance, but it is also important in establishing that the stevedoring defendant knew of the longshoreman's history of mishaps in successfully litigating the cause of action for negligent hiring and retention.

Incident Reports and photos

Stevedoring defendants prepare incident reports and take photographs after each and every injury-causing event. These reports will contain witness statements, potential admissions, and possibly sketch diagrams similar to those contained in a Traffic Collision Report. Depending on the situation, the steve-

doring defendant may claim attorney work-product or attorney client privilege and refuse to produce the documents. Assuming a privilege did exist at some time, note that any privilege may be waived as these reports are often provided to Cal-OSHA and other investigating agencies. Like the Employer Complaint, these Incident Reports are valuable in that they contain information gathered at the time of the incident, before individuals have an opportunity to change their position.

In addition to Incident Reports, depending on the severity of the incident at issue, presentations may be given on a quarterly basis to all members of the stevedoring defendant to address the cause of the incident and how to prevent it from happening again. These presentations are oftentimes detailed PowerPoint presentations, contain some sort of accident reconstruction, and contain conclusions as to the cause of the incident. Like the Employer Complaint, these presentations contain extremely valuable admissions which will assist in establishing liability.

Homeland Security surveillance footage

The marine terminals fall under the jurisdiction of the Department of Homeland Security, and therefore, need to abide by a litany of security rules and regulations. One of these is to ensure adequate surveillance footage of the terminal operations. From an accident investigation perspective, this means that it is more likely than not that the incident at issue was captured by one or more surveillance cameras. It is impera-

tive that you make a request for this information immediately – even before filing any lawsuit. The risk in delay is that the defendant stevedoring company may not retain all of the surveillance footage or all of the camera angles.

All of the surveillance footage for the day which would capture the movements of the tortfeasor longshoreman should be requested – from the time he/she enters the parking lot up until the time of the incident. If drugs or alcohol are involved, it is the parking lot and entrance into work footage that will capture the alcohol consumed or drugs taken before work.

Conclusion

Given the volume of discovery and the available sources of highly relevant and valuable evidence, it is imperative that your discovery plan be developed and implemented at the very beginning of litigation. Expect the need to file motions to compel to get the information you need.

The key in litigating against a stevedoring defendant is to know the policies and procedures, the types of available documents, and the custodians of those documents. This allows you to quickly and effectively obtain all of the admissions and admissible evidence available and obtain the best result for your client.

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