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## Identifying the Workers' Comp third-party crossover case

Key pointers for pursuing a crossover case to help maximize your client's recovery through Workers' Comp and tort claims

The article provides a roadmap for practicing attorneys on identifying and pursuing a potential type of case that often gets overlooked, the Workers' Compensation third-party crossover case (a "crossover case").

Simply put, a crossover case exists whenever there is a situation where your client gets injured while in the course and scope of his employment, and the at-fault tortfeasor responsible for those injuries is not solely his employer. The reason these cases often go overlooked, and are under-pursued, is that many people assume that when workers are injured while on the job, their exclusive remedy is to go through the Workers' Compensation system. This is a common misconception; there may be a viable personal-injury case for the injured party in addition to the Work Comp claim.

### The Exclusive Remedy Doctrine

In order to better understand the crossover case, it's important to get a little background on the Exclusive Remedy Doctrine. The Exclusive Remedy Doctrine is set forth in California Labor Code section 3600, which stands for the position that, absent an exception, if a party suffers injury while in the course and scope of his employment, and his employer has Workers' Compensation insurance, then that party's exclusive remedy against his employer is the Workers' Compensation system. California Labor Code section 3600, subdivision (a) says, "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury

proximately causes death, in those cases where the following conditions of compensation concur."

The key takeaway from the above is that Labor Code section 3600 applies *only* to bar a cause of action *against the employer* of an injured employee, but does not bar a claim against any other potential tortfeasor that may share some fault for the employee's injuries. (Note that, exceptions to section 3600 do exist, and allow claims against an employer outside of the Work Comp system. But the purpose of this article is to show how you can pursue a personal-injury case even if those exceptions don't apply. For those exceptions see Lab.Cod, §§ 3602, 3706, and 4558).

The list of these potential tortfeasors in a crossover case comes from many factual scenarios including (1) multi-employer industrial worksite cases; (2) product-liability cases; (3) dangerous conditions of public property cases; (4) premises-liability cases, and even; (5) the standard motor-vehicle collision case. Below we will discuss each of these categories, how to recognize a potential crossover case, what to look out for in each type of situation, as well as some pitfalls to be aware of when pursuing the crossover case.

### Multi-employer worksite

One of the most common areas that you will see a crossover case in is situations involving an injury suffered at a multi-employer worksite. The majority of this article will focus on this type of a situation. A multi-employer worksite definition includes a broad range of situations, but simply put, a multi-employer worksite scenario exists whenever there is a workplace environment in which multiple employers and/or trades are working in close proximity to each other. Understandably this can apply to a wide variety of scenarios including but not

limited to, a large construction project, an industrial work place, a joint operation between multiple companies, and virtually any situation in which individuals working for different employers are carrying out their duties in close proximity to each other.

Often in these situations your client's injuries may be due to the negligent actions of many other parties other than his or her employer. In such situations, your client will have a viable Workers' Compensation case to pursue because he was injured while on the job; however, he or she will also be able to pursue a personal-injury cause of action against those other at-fault third parties. (Note: There are limitations for situations at issue in *Privette* and its progeny, see discussion below.)

An example of this comes from a case in which an electrician was working on a multi-employer construction site at a college. While in the course and scope of his duties, he was injured by drywall that he tried to move out of his way. The drywall had been negligently and improperly stored vertically on a mobile cart by the drywall subcontractor who was also working on the project. We were able to successfully pursue a third-party action against the drywaller, defeat summary judgment, and obtain a recovery for our client. As one might imagine, there are many factual situations where a multi-employer worksite injury can present a viable third-party case.

### How to handle OSHA

Often when your client is injured on the job, and especially at a multi-employer worksite, there will be an investigation by the Occupational Safety and Health Administration (OSHA). There is both a State OSHA arm (Cal-OSHA) and Federal OSHA. Whether your case falls under state or federal jurisdiction will

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determine which of these entities, or possibly both, are involved.

However, for the purposes of this article, Cal-OSHA and the applicable regulations will be discussed. Cal-OSHA regulations are found in Title 8 of the California Code of Regulations, and the most important ones to research in a crossover case are located in Chapter 4: Division of Industrial Labor. (Federal OSHA regulations can be found in Title 29 of the Code of Federal Regulations and is broken down into four major categories, (1) General industry 29 CFR 1910, (2) Construction 29 CFR 1926, (3) Maritime 29 CFR 1915-19, and (4) Agriculture 29 CFR 1928).

The regulations under this chapter are divided by types of industry, and are a valuable tool for you to reference in investigating potential grounds for third-party liability in a crossover case as they set forth a number of duties and rules that must be complied with by each of the many different professions. In any multi-employer worksite crossover case you should always utilize these regulations as a tool.

The law that permits the use of these regulations can be found in *Elsner v. Uveges* (2004) 34 Cal.4th 915, 935. There the Supreme Court confirmed that the Legislature established that “plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party.” In doing so, the Court reinvigorated its opinion in *Porter v. Montgomery Ward & Co.* (1957) 48 Cal.2d 846, which held that the Cal-OSHA regulations are intended to protect and are for the benefit of *everyone*, not just employees. The principle raised in *Porter* was discussed in *Lehmann v. Los Angeles City Bd. of Ed.* (1957) 154 Cal.App.2d 256, 260-261, as follows:

It was thought for some time that the regulations of the Division of Industrial Safety were devised for the sole purpose of imposing duties upon employers for the exclusive benefit of their employees. Some of the decisions so held. It is now settled that the regulations have a broader purpose,

and that this could not be accomplished without construing them as applicable to the general public...

(*Ibid.*)

(*Id.* at 260-61)

Similarly, citing *Porter*, the court in *Gaw v. McKanna* (1964) 228 Cal.App.2d 348, 353-354, explained that an injured person could rely on a workplace safety regulation to establish negligence in an action against a property owner, “regardless of whether the injured person was employed by anyone.” (*Ibid.*)

Lastly, *Cappa v. Oscar C. Holmes, Inc.* (1972) 25 Cal.App.3d 978, 981, noted that cases had applied safety orders to the following classes of non-employee plaintiffs: business invitees, tenants, insurance inspectors, an employee’s son, deliverymen, and schoolchildren. (*Id.*, at p. 981, citing cases.) *Cappa* itself allowed the plaintiff, who was arguably a trespasser, to rely on the violation of a safety order to prove his negligence claim against a contractor who had failed to properly fence off an elevated portion of a parking structure from which the plaintiff fell while taking a shortcut.

If there is a Cal-OSHA investigation in your case, the end result is often a Cal-OSHA report. This report is an extremely important piece of information to obtain in a crossover case and should always be obtained. A few other key things to remember in receiving and reviewing this report is that while the Cal-OSHA regulations can be used as an extremely effective tool for establishing standards of care, the conclusions and findings of a Cal-OSHA investigator are inadmissible as a matter of law in any subsequent civil action. Labor Code section 6304.5 governs the admissibility of Cal-OSHA opinions in the context of this civil action and reads in pertinent part:

Neither the issuance of, or failure to issue, a citation by the division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer. Sections 452 and 669 of the

Evidence Code shall apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the division shall not be admissible as expert opinion or with respect to the application of occupational safety and health standards.

It is clear from the above that Labor Code section 6304.5 explicitly states that the testimony of Cal-OSHA employees is inadmissible as expert opinion in a civil matter and that the actions of Cal-OSHA employees, including findings, opinions and/or conclusions, the issuance of or failure to issue a citation and/or the results of Cal-OSHA investigations conducted, are inadmissible *for any purpose*. Therefore, do not be too excited or dissuaded by any conclusions that may be against your case, because they will rarely, if ever, be evidence in your client’s trial.

Additionally, when it comes to reviewing and utilizing the OSHA report during discovery it is important to understand that often the OSHA report may only have information discussing your client actions, and his employer’s liability, and not mention any of the actions of any third parties. Again, do not be dissuaded by this; a valid crossover case may still exist because Cal-OSHA only has a limited jurisdiction and authority to investigate certain types of employers for citable offences. See Title 8 of California Code of Regulations § 336.10, which reads in its pertinent part:

On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:

- (a) The employer whose employees were exposed to the hazard (the exposing employer);
- (b) The employer who actually created the hazard (the creating employer);
- (c) The employer who was responsible, by contract or through actual practice,

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for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer); or (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

Often what this means in practice is that the Cal-OSHA investigation may ignore other potential at-fault parties once it determines that there is no employee/employer relationship between that party and your injured client, and only focus on your client's employer. Therefore, the report may not list any third parties as being at fault or in violation of any regulations. But that omission does not mean that a third party does not share some liability, and may have violated Cal-OSHA regulations that contributed to your client's injury.

This is why it is so important to research the full Cal-OSHA regulations under Title 8 of the California Code of Regulations, Chapter 4, and not only rely on what is in the OSHA report.

### A look at the *Privette* doctrine

One final thing to always keep in mind when utilizing Cal-OSHA regulations for a basis of liability, is the *Privette* doctrine and the California Supreme Court case *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.

Generally speaking, the *Privette* doctrine governs the ability of employees of independent contractors to sue the party who hired the independent contractors, and restricts that ability unless the hirer concealed a preexisting dangerous condition or engaged in some other form of affirmative misconduct that contributed to the injury.

Before *SeaBright*, however, plaintiffs used to be able to rely upon Cal-OSHA regulations for certain non-delegable duties that would apply to a general contractor, or a landowner, as a basis for liability irrespective of *Privette*. That loophole is now closed, because the California Supreme Court extended the *Privette* doctrine in *SeaBright*, and held the non-delegable duties in the Cal-OSHA

regulations could, in fact, be delegated to the independent contractors.

Consequently, the general rule in *Privette* once again governs, and in order to pursue liability against a general contractor, or a landowner, if your client is injured by a third-party independent-contractor they hired, you need to be able to show the hirer concealed a preexisting dangerous condition, controlled the independent contractor's actions, or engaged in some other form of affirmative misconduct that contributed to the injury.

Practically, how this plays out in a crossover case today, can be explained using the example above of the electrician and the drywall company. In this example, you can and should rely upon the Cal-OSHA regulations as a basis to show the drywall's actions were negligent. But if you also wanted to show that the general contractor or land owner who hired the drywall company was also responsible, you could not rely solely on the Cal-OSHA regulations as a basis of establishing non-delegable duties owed to your client. Instead, you will have to have evidence that the general contractor played some active role in controlling the drywall company employees' actions, and either directed them to improperly store the drywall, required it to be stored that way, or took some form of affirmative misconduct that led to the drywall violating Cal-OSHA regulations. Absent this, you will be restricted to pursuing a third-party case against the drywall company.

As discussed at the opening of this article, multi-employer worksite situations are not the only types of crossover cases you are likely to encounter in your practice. Discussed below are additional situations you may encounter in your practice that could provide a basis for a viable crossover case.

### Products liability cases

Another scenario in which a crossover case can exist is when employees are injured by a defective product while acting in the course and scope of their employment. The product may be owned and operated by the client's employer, and he or she may have been

using it while on the job, or it could be completely separate from the employer. Either way, there may be a viable products-liability case. We have encountered these cases involving multiple types products, including but not limited to, industrial equipment, automobiles, safety equipment, consumer products, machinery, warehouse vehicles, and more.

Our office recently resolved a case in which a defective cement mixer was being cleaned and inadvertently activated causing severe injuries to the worker cleaning it. His employer had responsibility for a failure to have proper cleaning procedures in the Work-Comp case, but we were also able to successfully pursue a products liability case on his behalf against the manufacturer of the defective product.

### Premises liability and dangerous-condition cases

Another potential basis for a crossover case can come from a situation when your client is injured in the course and scope of employment, but while on either public or private property not owned by his or her employer; for example, a driver delivering goods to a grocery store. While dropping off cases of water the driver slips on a wet slippery surface in the aisle and suffers injury. The surface was left wet without any warning signs after being mopped by a store employee. In this example the driver is able to pursue a Workers' Compensation claim, and he can also maintain a personal-injury claim against the store whose employee was negligent in mopping the floor.

A simple example of a dangerous condition of public property crossover case can be illustrated using the same delivery driver. Change the situation to one where the driver doesn't slip and fall at the store, but instead makes the delivery and while on the way back to the office loses control of the delivery truck due to a dangerously designed roadway and gets into a collision. In this case, the driver again can pursue a Work-Comp case with the employer, and at the same time pursue a government-claim case for

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the dangerously designed roadway. Like most crossover cases, dangerous conditions and premise-liability crossover cases come in many forms, but the common questions to ask in evaluating them is, does the owner of the land where the injury occurred bear any fault for a dangerous condition that existed on that land/property? And did that condition either cause or contribute to the plaintiff's injuries?

### Motor vehicle collisions

One final category of crossover case to always keep an eye out for is any time your client gets into a motor-vehicle collision with another party while on the job. Your client may likely have a third-party claim against the other parties involved in the collision, even though they may also pursue their Workers' Compensation claim.

### Working with Workers' Comp

A final point to always keep in mind when you are pursuing a Work-Comp crossover case, is that it is important to assist your client in retaining competent Workers' Compensation counsel, and to keep in touch with that attorney to best navigate through the Workers' Compensation system and the third-party case for the best benefit to your client. How to litigate the crossover case as a team could fill an article on its own, but for the purposes of this piece we have included a few key pointers to keep in mind.

First, it is important to keep an active role in overseeing your client's medical treatment in the Work-Comp

case. Through Work-Comp coverage, your client will likely be assigned a case manager and you will want to collaborate with the Work-Comp attorney to make sure your client is properly being evaluated and taken care of. Furthermore, you need to communicate to your client the need to document in detail all complaints, injuries and needs so they get the most out of the care they are entitled to. This way, in the event your client is not receiving adequate care and evaluation, you will be involved and can assist in getting further evaluation.

Second, you will want to keep in touch with your client's Workers' Compensation attorney in order to best position your case and maximize your client's recovery in the event of a settlement. The law provides that in a crossover case your client's Workers' Compensation insurance can assert a lien for the benefits it has paid to your client. But this lien is reduced by the percentage of fault assigned to your client's own employer. The negotiations in this circumstance can be interesting and varied, and must not be neglected.

Lastly, your client may be entitled to future medical benefits through his or her Workers' Compensation case, which can be affected by a settlement in their third-party personal injury case. Often you can utilize the future medical benefits as a tactic to help negotiate the amount of a past lien asserted and maximize your client's recovery. Whether this will be good for your client's case depends on a number of factors and is another reason to work with the Workers' Compensation counsel to reach the best

decision. Consequently, you will want to stay closely involved with your client's Workers' Compensation attorney to best position the case as a team in regards to when and how you resolve both cases in order to maximize your client's recovery.

### Conclusion

Crossover cases come in many forms and styles, and can provide an additional source of recovery for your clients. It is important to always keep an eye out for clients who were injured in a situation that may have crossover-case potential so you can maximize your client's options.

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