

CHAPTER 1

OVERVIEW OF CALIFORNIA WORKERS' COMPENSATION PRACTICE

1.1 CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITY, GENERALLY

1.1.1 CONSTITUTIONAL AUTHORITY

CALIFORNIA CONSTITUTION, ARTICLE 14, SECTION 4 provides in pertinent part:

“The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers’ compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party.” [Cal. Const. Art. 14, Sec. 4]

The California Workers’ Compensation system is a constitutionally mandated process which delivers benefits to workers who suffer injuries arising out of and occurring in the course of their employment, without the necessity of having to prove fault. [Cal. Const. Art. 14, Sec. 4; Lab.C. §§2801, 3600(a)]

The Workers’ Compensation Act was enacted pursuant to constitutional grant of plenary power to the California Legislature to establish a complete and exclusive system of workers’ compensation, including full provision for vesting power, authority, and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation. [*Crawford v. WCAB* (1989) 213 CA3d 156, 163, 259 CR 414, 418-419, 54 CCC 198*]

➤ ***Paralegal Pointer:** Note that case citations in this manual, in addition to citing the California Appellate Reports and the California Reporter, will often include the Workers' Compensation Appeals Board ("WCAB") citations (e.g., California Compensation Cases ("CCC")). Many cases in this manual may only contain a reference to the "CCC" citation because the WCAB decisions to which the cases pertain were never heard (on petition for review, for example) by a higher court.

1.2 STATUTORY AND REGULATORY AUTHORITY

The right to workers' compensation benefits is statutorily based and not derived from common law. [*DuBois v. WCAB* (1993) 5 C4th 382, 388, 853 P2d 978, 980, 58 CCC 286; *Graczyk v. WCAB* (1986) 184 CA3d 997, 1002-1003, 229 CR 494, 497, 51 CCC 408; see also, *Hustedt v. WCAB* (1981) 30 C3d 329, 342-343, 178 CR 801, 808-809]

Thus, the California Workers' Compensation system is governed by the California Labor Code and the rules and regulations of the State of California Department of Industrial Relations, Division of Workers' Compensation. [Title 8 of the California Code of Regulations ("CCR")]

"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..." [Lab.C. §3600(a); *South Coast Framing, Inc. v. WCAB* (2015) 61 C4th 291, 297, 188 CR3d 46, 50 CCC 489]

1.2.1 BROAD SCOPE OF LEGISLATIVE POWER

The Legislature's broad power over workers' compensation matters has been repeatedly affirmed. [*Bautista v. State of California* (2011) 201 CA4th 716, 725, 133 CR3d 909, 915, 76 CCC 1282]

The grant of "plenary power" gives the Legislature complete, absolute, and unqualified power to create and enact the workers' compensation system. [*Facundo-Guerrero v. WCAB* (2008) 163 CA4th 640, 647-650, 77 CR3d 731, 736-737, 73 CCC 785 – intent behind section 4 "was...to endow [the Legislature] expressly with exclusive and 'plenary' authority to determine the contours and content of our state's workers' compensation system."]

Nearly any exercise of the Legislature's plenary powers over workers' compensation is permissible so long as the Legislature finds its action to be "necessary to the effectiveness of the system of workers' compensation." [*Greener v. WCAB* (1993) 6 C4th 1028, 1038, 25 CR2d 539, 545, 58 CCC 793; *Stevens v. WCAB, Outspoken Enterprises, et al.* (2015) 241 CA4th 1074, 194 CR3d 469]

1.3 PURPOSE AND POLICY OF WORKERS' COMPENSATION

The underlying premise behind this statutorily created system is the "compensation bargain," under which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort as against the employer. [*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 C4th 800, 811, 102 CR2d 562, 573, 65 CCC 1402]

It has been stated that the purpose of the workers' compensation statutes is to ensure that an employee injured on the job, and the employee's dependents, have adequate means of sustenance while the employee is unable to work.

A complete system of workers' compensation includes adequate provisions for the comfort, health and safety, and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also:

- Full provision for securing safety in places of employment; full provision for such medical, surgical, hospital, and other remedial treatment as is requisite to cure and relieve from the effects of such injury;
- Full provision for adequate insurance coverage against liability to pay or furnish compensation;
- Full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund;
- Full provision for otherwise securing the payment of compensation; and

- Full provision for vesting power, authority, and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government. [Cal. Const. Art. 14, Sec. 4 “LABOR RELATIONS”; see also, Lab.C. §3600(a)]

1.3.1 PROVISION OF “PROMPT MEDICAL CARE”

In addition, the laws are aimed at helping the employee receive prompt medical care to promote recovery for an industrial injury, so that he or she can return to productive employment.

In this way, the burden of caring for an injured worker and the worker’s dependents is shifted from society to industry which assumes the responsibility as a cost of doing business. [See generally, *Bussear v. WCAB* (1986) 181 CA3d 186, 226 CR 242, 51 CCC 240; *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 C3d 341, 256 CR 543, 54 CCC 80; *Westbrooks v. WCAB* (1988) 203 CA3d 249, 252 CR 26, 53 CCC 157]

1.4 LIBERAL CONSTRUCTION

An overriding theme expressed in the California Labor Code and followed by the judges of the Workers’ Compensation Appeals Board is that the workers’ compensation law of California “...shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.” [Lab.C. §3202] The rule of liberal construction applies to factual as well as statutory construction. [*Write v. State* (2015) 233 CA4th 1218, 1230, 183 CR3d 135, 143, 80 CCC 157]

➤ **Paralegal Pointer:** *The “liberal construction” policy is often instrumental in deciding close decisions by the Appeals Board on disputed issues regarding employee status, medical treatment, and other determinations.*

1.4.1 LIBERAL CONSTRUCTION FINDING INJURY AROSE OUT OF EMPLOYMENT

The Workers' Compensation Act must be liberally construed in the employee's favor. All reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of awarding compensation to the injured employee. [*Write v. State, id.*, 233 CA4th 1218 at p. 1230]

1.4.2 LIBERAL CONSTRUCTION PROVIDING COVERAGE OR PAYMENTS

If a provision may be reasonably construed to provide coverage or payments that construction should usually be adopted, even if another reasonable construction is possible. [*Write v. State, id.*, 233 CA4th 1218 at 1230]

1.5 GENERAL BURDEN OF PROOF

All parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law." [Lab.C. §3202.5]

1.5.1 PREPONDERANCE OF EVIDENCE STANDARD

"Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence." [Lab.C. §3202.5; see generally, *McAllister v. WCAB* (1968) 69 C2d 408, 71 CR 697, 33 CCC 660]

1.6 OVERVIEW OF WORKERS' COMPENSATION JUDICIAL SYSTEM

The Legislature is vested with the power to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. [Cal. Const. Art. 14, §4]

The Legislature may combine in one statute all the provisions for a complete system of workers' compensation. [Cal. Const. Art. 14, §4]

1.6.1 DEPARTMENT OF INDUSTRIAL RELATIONS

The State of California agency which has been legislatively granted the power and administrative duties over the state's workers' compensation system is the Department of Industrial Relations, which is part of the Labor and Workforce Development Agency. [Lab.C. §50]

One of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment. [Lab.C. §50.5]

1.6.2 DIVISION OF WORKERS' COMPENSATION

One of the divisions of the Department of Industrial Relations is the "Division of Workers' Compensation." [Lab.C. §56]

The Division of Workers' Compensation, including the Administrative Director and the Appeals Board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code. [Lab.C. §5301]

1.6.3 WORKERS' COMPENSATION APPEALS BOARD

The Workers' Compensation Appeals Board ("WCAB"), created by the Legislature (Lab.C. §111), is a tribunal of limited jurisdiction, meaning that the judges are limited in the scope of their authority to determining and deciding issues in disputed workers' compensation cases.

Jurisdiction to resolve disputes concerning workers' compensation claims is vested with the courts, commissioners, presiding workers' compensation judges and workers' compensation administrative law judges of the Workers' Compensation Appeals Board. [Lab.C. §111 and 8 CCR §10305(z)] The Workers' Compensation Appeals Board, consisting of seven members, *shall exercise all judicial powers vested in it under this code.* [Lab.C. §111, *emph. added*]

The Legislature has granted to the WCAB exclusive jurisdiction over certain matters. Under Labor Code section 5301, the Board is vested with full power, authority, and jurisdiction to try and decide matters in proceedings for:

- (1) The recovery of compensation, or concerning any right or liability arising out of or incidental to the recovery of compensation (Lab.C. §5300(a));
- (2) The enforcement against the employer or an insurer of any liability for compensation imposed by the Act in favor of the

injured employee, his or her dependents, or any third party (Lab.C. §5300(b));

- (3) The determination of any question as to the distribution of compensation among dependents or other persons (Lab.C. §5300(c));
- (4) The determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of the Act (Lab.C. §5300(d));
- (5) Obtaining any order the Board is authorized to make (Lab.C. §5300(e));
- (6) The determination of any other matter, jurisdiction over which is vested by the Act in the Division of Workers' Compensation, including the Administrative Director and the Board. [Lab.C. §5300(f)]

The Appeals Board is also vested with broad equitable powers with respect to matters within its jurisdiction. [*Dyer v. WCAB* (1994) 22 CA4th 1376, 1382, 28 CR2d 30]

These proceedings must be instituted before the Board, and not elsewhere, except as otherwise provided in the Act. [Lab.C. §5300] The Board's determination of the matters listed in Labor Code section 5300 are final, subject only to review by the courts under the Act. [Lab.C. §5301]

1.6.3.1 DISTRICT OFFICES

The District Offices of the WCAB which operate under the authority and regulations promulgated by the California Division of Workers' Compensation are currently located in Anaheim, Bakersfield, Fresno, Lodi, Long Beach, Los Angeles, Marina Del Rey, Oakland, Oxnard, Pomona, Redding, Riverside, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, San Luis Obispo, Santa Ana, Santa Barbara, Santa Rosa, and Van Nuys.

As of October 18, 2024, the Eureka District Office ceased operations. All cases venued in the Eureka District Office are now transferred to the Santa Rosa District Office of the Division of Workers' Compensation where the hearings will be held. (Division of Workers' Compensation Newslines Release number 2024-75, 9/18/2024).

These offices are where workers' compensation disputes are litigated before Workers' Compensation Administrative Law Judges. The District Offices act as the trial courts of the WCAB. [8 CCR §10305(h)]

1.6.3.2 ADMINISTRATIVE LAW JUDGES

Trial court proceedings in the WCAB are conducted by judges at the District Offices of the Board. These judges are officially known as "Workers' Compensation Administrative Law Judges" ("WCJ") and must subscribe to the Code of Judicial Ethics for the conduct of judges adopted by the California Supreme Court. [Lab.C. §§27, 123.6; 8 CCR §10305(aa)]

Under the authority granted the Board pursuant to Labor Code section 5309, the Board directs the judges to decide compensation cases.

In any case that has been regularly assigned to a WCJ for trial under Labor Code sections 5309 and 5310, the WCJ has full power, jurisdiction, and authority to hear and determine all issues of fact and law presented, and to issue such interim, interlocutory, and final orders, findings, decisions, and awards as may be necessary for a full adjudication of a workers' compensation case. [*Allison v. WCAB* (1999) 72 CA4th 654, 663, 84 CR2d 915, 921, 64 CCC 624; 8 CCR §10330]

Workers' Compensation Administrative Law Judges have the authority to administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing or proceeding in any part of the state. [Lab.C. §130]

Workers' Compensation Administrative Law Judges also have the authority to issue writs or summons, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. [Lab.C. §134]

Orders, findings, decisions, and awards issued by a WCJ are the orders, findings, decisions, and awards of the Board, unless reconsideration is granted. [Lab.C. §5309; 8 CCR §10330]

1.6.4 JURISDICTION TO HEAR APPEALS OF WCJ DECISIONS

If a party is aggrieved by a decision or order rendered by a Workers' Compensation Administrative Law Judge at a District Office of the WCAB, which is the equivalent of a trial court, that party has the right to seek judicial review of the decision by a panel of three (3) Appeals Board Commissioners who preside over the Appeals Board and are located in San Francisco.

Commissioners of the Workers' Compensation Appeals Board are appointed by the Governor of the State of California to sit as members of the Workers' Compensation Appeals Board and are given the authority to exercise all judicial powers vested in the Board under the Labor Code.

There are seven Commissioners of the Appeals Board (five of the members shall be experienced attorneys at law admitted to practice in the State of California; two need not be attorneys). [Lab.C. §§110, 111 & 112; see also 8 CCR §10305(b) for a definition of the term "Appeals Board."]

1.6.4.1 WORKERS' COMPENSATION JUDGES NOT BOUND BY STRICT RULES OF EVIDENCE

In all hearings and investigations, the Workers' Compensation Appeals Board or a workers' compensation judge shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. [Lab.C. §5708]

No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure. [Lab.C. §5709]

1.6.5 APPEALS FROM DECISIONS OF THE APPEALS BOARD

The Board's determination (i.e., on an appeal by an aggrieved party from a decision of a District Office Workers' Compensation Administrative Law Judge) of matters listed in Labor Code section 5300 are final, subject only to review by the courts as authorized under the Act. [Lab.C. §5301]

A party aggrieved by a decision of the commissioners of the WCAB may apply to the Court of Appeal or to the Supreme Court for a writ of review. [Lab.C. §5950]

Granting or denial of a petition for writ of review is discretionary with the appellate courts. [*Maranian v. WCAB* (2000) 81 CA4th 1068, 1078 fn. 6, 97 CR2d 418, 426, 65 CCC 650; *Safeway Stores, Inc. v. WCAB* (1980) 104 CA3d 528, 534, 163 CR 750, 753, 45 CCC 410; *Kaiser Foundation Hospitals v. WCAB* (1978) 87 CA3d 336, 347, 151 CR 368, 375, 43 CCC 1300]

1.7 WORKERS' COMPENSATION CLAIM AS EXCLUSIVE REMEDY FOR ON-THE-JOB INJURIES

While enabling injured workers to seek monetary and medical benefits following a covered injury, the system also acts as the **exclusive remedy** for the injured worker against his or her employer, thereby, generally, shielding the employer from being sued for damages in a civil action.

Subject to certain exceptions, the right to recover compensation under the Workers' Compensation Act is "the sole and exclusive remedy" of the employee or his or her dependents against the employer *where the conditions of compensation under section 3600 are present*. [Lab.C. §3602(a); *Rymer v. Hagler* (1989) 211 CA3d 1171, 1177, 260 CR 76, 79; *Young v. Libbey-Owens Ford Co.* (1985) 168 CA3d 1037, 214 CR 400, citing *Johns-Mansville Products Corp. v. Superior Court* (1980) 27 C3d 465, 165 CR 858]

1.7.1 DERIVATIVE INJURY DOCTRINE

The Workers' Compensation system is also the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Examples of claims courts have barred under the Derivative Injury Doctrine include:

- Civil actions against the employer by non-dependent parents of an employee for the employee's wrongful death;
- Civil actions brought by the employee's spouse for loss of services or loss of consortium;
- Civil actions brought by an employee's spouse for witnessing the employee's injuries. [*Snyder v. Michael's Stores, Inc.* (1997) 16 C4th 991; *King v. CompPartners, Inc.* (2018) 5 C5th 1039; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 C3d 148, at 162-163]

► COMPARE: FAMILY MEMBER'S OWN INDEPENDENT INJURY NOT BARRED BY DERIVATIVE INJURY DOCTRINE

A family member's claim for her *own* independent injury, not legally dependent on the employee's injury, is not barred, even if both injuries were caused by the same negligent conduct of the employer. [*Snyder v. Michael's Stores, Inc.* (1997) 16 C4th 991, at 998; *Kuciemba v. Victory Woodworks, Inc.* (2023) 14 C5th 993, at 1007]

1.7.1.1 EXCEPTION: EMPLOYER DOES NOT OWE DUTY OF CARE TO PREVENT THE SPREAD OF COVID-19 TO NON-EMPLOYEES

An employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members. Although it is foreseeable that an employer's negligence in permitting workplace spread of COVID-19 will cause members of employees' households to contract the disease, recognizing a duty of care to nonemployees in this context would impose an intolerable burden on employers and society in contravention of public policy. These and other policy considerations lead us to conclude that employers do not owe a tort-based duty to nonemployees to prevent the spread of COVID-19. [*Kuciemba v. Victory Woodworks, Inc.* (2023) 14 C5th 993, at 1004.]

1.8 EXCEPTIONS TO EXCLUSIVE REMEDY

There are several exceptions to the "exclusive remedy" aspect of Workers' Compensation Claims which permit the employee to sue the employer civilly, potentially subjecting the employer to damages outside the jurisdiction of the Workers' Compensation Appeals Board, such as:

- Where the employer did not carry workers' compensation insurance coverage at the time of the injury. (See Chapter 12, for discussion of Uninsured Employers Benefits Trust Fund.)
- Where there has been deliberate conduct by the employer causing injury such as when an employer removes a power press guard that results in injury (*power press exception*).

NOTE: "An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically known by the employer to create a probability of serious injury or death." [Lab.C. §4558(b)]

The power press exception to the workers' compensation exclusivity rule in section 4558 is narrowly construed. [*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 C4th 275, 286, 145 CR3d 543, 550, 77 CCC 700]

EXAMPLES WHERE POWER PRESS EXCEPTION NOT APPLIED:

Worker who was injured by a notching tool while working on a small aluminum knob at one of 12 tooling stations on a lathe was found not to come within the power press exception.

The California Supreme Court held that the Legislature specifically intended the power press exception to protect workers using a device that typically forms or cuts the material by use of high pressure strong impact of the die against or through the material because of the risk of crush injuries through the stamping process. [*Rosales v. Deputy Ace Mechanical* (2000) 22 C4th 279, 285-286, 92 CR2d 465, 468-469, 65 CCC 150]

EXAMPLE:

A hand-held circular saw did not qualify as a power press. [*Ceja v. J.R. Wood, Inc.* (1987) 196 CA3d 1372, 242 CR 531, 52 CCC 572]

1.8.1 NOTE THE FOLLOWING FURTHER LABOR CODE SECTION 3602 EXCEPTIONS

- Where the employee's injury or death is proximately caused by a willful physical assault by the employer. [Lab.C. §3602(b)(1)]
- Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. [Lab.C. §3602(b)(2)]
- Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person. [Lab.C. §3602(b)(3)]

1.9 PARTIES TO A WORKERS' COMPENSATION CLAIM

1.9.1 THE APPLICANT

The injured worker in a workers' compensation proceeding is referred to as the "applicant." [E.g., Lab.C. §5503; 8 CCR §10305(d)]

The applicant is generally the person who initiates a claim seeking benefits. In most instances, the applicant is the injured worker/employee. The applicant is similar to a plaintiff in a civil matter. In certain circumstances, the applicant may also be a lien claimant or even an employer or insurance carrier.

For example, if the applicant is other than the injured employee, then the injured employee shall also be joined as a party. In such instances, the Application for Adjudication of Claim shall include the injured employee's address or, if not known, a statement of that fact. [8 CCR §10380] The Application for Adjudication of Claim will be more fully discussed in Chapter 8 of this manual.

CCR §10305 (d) defines an applicant as "Any person asserting a right to relief under the provisions of Labor Code section 5300."

8 CCR §10382 (a) provides that "Any person in whom in any right to relief is alleged to exist may appear, or be joined, as an applicant in any case or controversy before the Workers' Compensation Appeals Board."

1.9.2 THE "DEFENDANT"

The defendant in a workers' compensation proceeding is the employer and its workers' compensation insurance carrier. [See, generally, Lab.C. §§3750 et seq.]

CCR §10382 (b) provides that "[a]ny person against whom any right to relief is alleged to exist may be joined as a defendant."

CCR §10305 (f) defines a defendant as "...any person against whom a right to relief is claimed."

1.9.3 "EMPLOYER" DEFINED

An employer is defined as:

- The State and every State agency. [Lab.C. §3300(a)]
- Each county, city, district, and all public and quasi-public corporations and public agencies therein. [Lab.C. §3300(b)]

- Every person including any public service corporation, which has any natural person in service. [Lab.C. §3300(c)]
- The legal representative of any deceased employer. [Lab.C. §3300(d)]

An employer means any employer within the meaning of Labor Code section 3300, including but not limited to, any of the following:

- An uninsured employer and the Uninsured Employers Benefits Trust Fund (UEBTF) pursuant to Labor Code section 3716;
- An insured employer;
- A self-insured employer; and
- A lawfully uninsured employer. [8 CCR §1(q)]

1.9.4 DUAL EMPLOYERS

Some industries use a “labor contractor” (such as a temporary employment agency) to supply workers to perform the services needed for the business enterprise.

The labor contractor is an individual or entity that supplies, either with or without a contract, a client employer, with workers to perform labor within the client employer’s usual course of business.

Under these circumstances, the “client employer” shall generally (with exceptions) share with the “labor contractor” all civil legal responsibility and civil liability for workers supplied by that labor contractor in connection with any workers’ compensation claims by the labor contractor’s employees.

This includes responsibility for claims payments, as well as liability for failing to secure valid workers’ compensation coverage as required by Labor Code section 3700. [Lab.C. §2810.3; see also, Ins.C. §11663]

The possibility of dual employment is well recognized in the case law. Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers – his original or “general” employer and a second “special” employer.

In such a dual employment situation, the injured employee can look to both his general and his special employer for workers’ compensation as his or her exclusive remedy, and be barred from suing either of his employers in tort.

[*Kowalski v. Shell Oil Co.* (1979) 23 C3d 168, 174-175, 151 CR 671, 675, 44 CCC 134; cf: *Marsh v. Tilley Steel Co.* (1980) 26 C3d 486, 162 CR 320, 45 CCC 93 – where court finds a “special employment” relationship exists, a general employer may be liable in tort.]

1.9.4.1 WHERE “SPECIAL RELATIONSHIP” ARISES

A special relationship may arise when one employer lends its employee to another employer and relinquishes to the borrowing employer all right of control over the employee’s activities. In such a situation, the borrowing employer may be found solely liable under the doctrine of respondeat superior for the employee’s job-related torts. When an employer is found to be a special employer, it may also avail itself of the protections provided by the exclusive remedy rule so that an injured worker would be barred from suing the special employer civilly for damages. The injured worker’s exclusive remedy against the special employer would be workers’ compensation.

1.9.4.1.1 FACTORS WHICH MAY SUPPORT FINDING OF SPECIAL EMPLOYMENT RELATIONSHIP

Certain characteristics and factors may be considered in evaluating whether a special employment relationship exists, such as:

- Whether the borrowing employer’s control over the employee and the work he is performing extends beyond the mere suggestion of details or cooperation;
- Whether the employee is performing the special employer’s work;
- Whether there was an agreement, understanding, or meeting of the minds between the original and special employer;
- Whether the employee acquiesced in the new work situation;
- Whether the original employer terminated its relation with the employee;
- Whether the special employer furnished the tools and place for performance;
- Whether the employment was over a considerable length of time;

- Whether the borrowing employer had the right to fire the employee; and
- Whether the borrowing employer had the obligation to pay the employee. [*Caso v. Nimrod Productions, Inc.* (2008) 163 CA4th 881, 889, 77 CR3d 313, 319; *Riley v. Southwest Marine, Inc.* (1988) 203 CA3d 1242, 1250, 250 CR 718, 721-722]

1.9.4.1.2 EXAMPLE: CASES FINDING SPECIAL EMPLOYMENT RELATIONSHIP

TV stuntman held to be special employee barred from suing director and stunt coordinator under exclusive remedy rule. [*Caso v. Nimrod Productions, Inc., supra*, 163 CA4th 881 at p. 889, 77 CR3d at pp. 319-320]

EXAMPLE:

Applicant, a material coordinator for Irwin Industries, Inc., was assigned to work at the defendant Mobil Oil Corporation's refinery. He suffered an admitted injury to his lungs, nervous system, psyche, and memory loss.

Mobil was found to be the "special employer" of the applicant and thus was shielded from a civil suit by the exclusive remedy of workers' compensation when applicant had several jobs for Irwin at the Mobil refinery, and where Mobil controlled the details of applicant's work when he was a material coordinator, and where applicant had no contact with Irwin personnel at the beginning of his shift, and applicant was required to follow the directives of Mobil personnel, and applicant was to provide material to the workers at Mobil's refinery, and applicant received performance reviews from Mobil personnel, and applicant used Mobil's computers and Mobil had the right to control the details of applicant's work. [*Petroleum Casualty Company v. WCAB (Barrios)* (2014) 80 CCC 45]

EXAMPLE:

Applicant was hired by Remedy Select Staffing aka Remedy Temporary Services, a temporary agency that placed applicant as a janitor at Custom Building Products. While on the premises of Custom Building Products (CBP), applicant suffered an industrial injury to his back and left knee.

Before starting his work at CBP, applicant was required to have a job interview with someone from CBP, he was approved by CBP, his supervisor was an employee of CBP, his hours worked were reviewed and signed off by an employee of CBP and he did the work of CBP, not Remedy.

CBP could not fire the worker, but could ask him to leave the premises. Appeals Board upheld finding of general/special employment status. [*American Home Assurance v. WCAB*, 2012 WL 4892864 (Cal.App. 2 Dist.), 77 CCC 984]

1.9.4.1.3 FACTORS WHICH MAY NEGATE FINDING OF SPECIAL EMPLOYMENT RELATIONSHIP

- The employee is not paid by and cannot be discharged by the borrower;
- The employee is a skilled worker with substantial control over operational details;
- The employee is not engaged in the borrower's usual business;
- The employee is employed for only a brief period of time;
- The employee is using tools and equipment furnished by the lending employer.

[*Caso v. Nimrod Productions, Inc.*, *supra*, 163 CA4th 881 at p. 889, 77 CR3d at pp. 319-320]

1.9.5 LIEN CLAIMANT IS A PARTY

A lien claimant is any person or entity claiming payment under the provisions of Labor Code section 4903 et seq., including a claim of costs filed as a lien. [8 CCR §10305(o)] Lien claims will be discussed in further detail in other chapters of this manual.

A lien claimant is a party. [8 CCR §10305(q)(3)]

1.9.6 THE INSURANCE CARRIER

The Insurance Code provides for Workers' Compensation as a class of insurance. [Ins.C. §100(9)]

Workers' compensation insurance includes insurance against loss from liability imposed by law upon employers to compensate employees and their dependents for injury sustained by the employees arising out of and in the course of the employment, irrespective of negligence or of the fault, of either party. [Ins.C. §109]

The insurance carrier is the responsible payor of benefits under policies of insurance which employers in the State of California are required to carry to cover them for claims under the provisions of the Workers' Compensation Act. Every employer in California except the state is required to secure the payment of compensation for industrial injuries. [Lab.C. §3700]

1.9.7 THE CLAIMS ADMINISTRATOR

An applicant's claim will be administered and tracked by the insurance carrier through their "claims administrator," who has prescribed responsibilities and duties under the code to administer the claims process. [See, e.g., 8 CCR §1(i); Lab.C. §138.4]

A claims administrator is an entity that reviews or adjusts workers' compensation claims on behalf of either (1) an insurer or (2) an employer that has secured a certificate of consent to self-insure from the Department of Industrial Relations, whether employed directly or as a third party. [8 CCR §10305(e)]

A claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit. [8 CCR §10109(a)]

1.10 EMPLOYERS' DUTY TO SECURE PAYMENT OF COMPENSATION

Labor Code section 3700, subdivisions (a) & (b) identify the two primary ways that an employer shall secure the payment of compensation:

- (1) By being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in the State of California.
- (2) By securing from the Director of Industrial Relations a certificate of consent to self-insure.

1.10.1 FAILURE OF EMPLOYER TO HAVE WORKERS' COMPENSATION INSURANCE

If an employer fails to secure workers' compensation insurance coverage, the employer loses the protections of the exclusive remedy provisions of the workers' compensation system and subjects themselves to damages in a civil action.

Labor Code section 3706 provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

The employer may also be subject to criminal penalties for the failure to secure compensation.

(a) "The failure to secure the payment of compensation as required by this article by one who knew, or because of his or her knowledge or experience should be reasonably expected to have known, of the obligation to secure the payment of compensation, is a misdemeanor punishable by imprisonment in the county jail for up to one year, or by a fine of up to double the amount of the premium...." [Lab.C. §3700.5]

1.10.1.1 OFFICERS AND BOARD MEMBERS

All officers and members of boards of directors who work for a corporation for pay will be covered under workers' compensation unless the individual (1) owns at least 15 percent of the issued and outstanding stock of the corporation and (2) executes a sworn waiver of rights under the Labor Code stating that he or she is qualified for the exemption. The legislation further provides that working members of a partnership or LLC receiving partnership or LLC wages will be covered employees unless they qualify as (1) a general partner of a partnership or a managing member of a LLC and (2) sign a waiver of the type just mentioned. [Lab.C. §§3351(c) & 3352(a)(16)(A)-17(A)(B)]

1.10.2 PRESUMPTION OF EMPLOYER NEGLIGENCE

If an employer fails to secure workers' compensation insurance coverage and an injured employee brings a civil action against the employer, there will be a presumption of employer negligence in that civil action.

"In such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant." [Lab.C. §3708]

➤ **Paralegal Pointer:** *Since the paralegal is often tasked with calendaring the statute of limitations for a claim, they should be aware of the following:*

If an employer is uninsured, a civil matter may be brought by the employee against the employer.

The applicable statute of limitations (i.e., two years from date of injury on a negligence claim) should be calendared for the filing of such an action.

1.11 GENERAL ROLE OF PARALEGALS IN WORKERS' COMPENSATION PRACTICE

In workers' compensation practice, paralegals play a vital role in nearly every aspect of processing the claim, including, where necessary, appearing at hearings before the Workers' Compensation Appeals Board on disputed issues. These and other important functions of the paralegal will be discussed in further detail throughout this manual.

1.11.1 PARALEGALS ON APPLICANT'S SIDE

Thus, paralegals on the applicant's side are often responsible for matters, including, but not limited to, the following:

- The initial client interview
- Opening the file and serving notice of the claim

- Filing the Application for Adjudication of Claim with the Workers' Compensation Appeals Board, District Office
- Scheduling medical appointments with the Primary Treating Physician, Agreed Medical Evaluators or Panel Qualified Medical Evaluators
- Objecting to determinations of the Primary Treating Physician
- Conducting discovery, such as subpoenaing medical records
- Requesting a hearing, by preparing and filing a Declaration of Readiness to Proceed
- Preparing for a hearing by preparing a draft Pre-Trial Conference Statement and an Exhibit and Witness List
- Appearing at Conferences and/or trials
- Preparing post-trial petitions such as a Petition for Reconsideration.

1.11.2 PARALEGALS ON DEFENSE SIDE

Paralegals working on the defense side (i.e., for the employer or workers' compensation insurance carrier), similarly, will often be tasked with

- Preparing the answer to the application for adjudication
- Scheduling medical appointments with the Agreed Medical Evaluators or Panel Qualified Medical Evaluators
- Objecting to determinations of the Primary Treating Physician
- Preparing advocacy letters for the Agreed Medical Evaluator or Panel Qualified Medical Evaluator
- Conducting discovery, such as subpoenaing medical records, scheduling depositions of the applicant or witnesses
- Reviewing discovery and subpoenaed medical records
- Requesting a hearing, by preparing and filing a Declaration of Readiness to Proceed

- Preparing for a hearing by preparing a draft Pre-Trial Conference Statement and an Exhibit and Witness List
- Appearing at conferences and/or trials
- Drafting settlement documents
- Resolving lien claims.

1.11.3 PARALEGALS AS HEARING REPRESENTATIVES

A unique feature of Workers' Compensation proceedings is that paralegals working on either the applicant's side or the insurance defense side may appear at hearings and advocate on behalf of their clients. [8 CCR §10751(a)]

Paralegals who appear before the Workers' Compensation Appeals Board are referred to as "Non-attorney representatives" or commonly as "hearing representatives."

A "non-attorney representative" is a person who is not licensed to practice law by the State of California who acts on behalf of a party in proceedings before the Workers' Compensation Appeals Board as allowed by Labor Code sections 5700 and 4907. [8 CCR §10305(p)]

Except as prohibited by Rule 10445 (rule barring disbarred or suspended attorneys from appearing before the WCAB), a non-attorney representative may act on behalf of a party in proceedings before the Workers' Compensation Appeals Board if the party has been informed that the non-attorney representative is not licensed to practice law by the State of California. [8 CCR §10401(a)]

A hearing representative is held to the same standards of professional conduct as an attorney. Labor Code section 4907 provides: "Nonattorney representatives shall be held to the same professional standards of conduct as attorneys." [See also 8 CCR §10401(b)]

1.11.4 CONDITIONS IN ORDER FOR NON-ATTORNEY REPRESENTATIVE TO APPEAR BEFORE THE WCAB

1.11.4.1 NOTICE OF REPRESENTATION

A non-attorney representative shall file and serve a notice of representation before filing a document or appearing on behalf of a party unless the information required to be included in the notice of representation is set forth on an opening document. [8 CCR §10401(c)]

1.11.4.1.1 CONTENTS OF NOTICE OF REPRESENTATION

The notice of representation shall include:

- The name of the represented party (8 CCR §10401(c)(1)(A));
- The legal name, mailing and email address, telephone number and form of the law firm or other entity (8 CCR §10401(c)(1)(B));
- The name and mailing and email address of the law firm or other entity's agent for service of process (8 CCR §10401(c)(1)(C));
- The name of the person who entered into an agreement on behalf of the law firm or other entity with the party to provide non-attorney representatives (8 CCR §10401(c)(1)(D)); and
- The name of the non-attorney representative responsible for assuring that appearances are made on behalf of the party. [8 CCR §10401(c)(1)(E)]

1.11.5 ADDITIONAL REQUIREMENTS FOR NON-ATTORNEY REPRESENTATIVES

If a non-attorney representative is appearing as an individual pursuant to an agreement between the non-attorney representative and a party, the notice of representation shall include the name of the represented party and the non-attorney representative's name, mailing and email address and telephone number. [8 CCR §10401(c)(2)]

The name of the non-attorney representative and any entity responsible for providing a party with the non-attorney representative shall be set forth on the record of proceedings at all appearances and on any pleading, document or lien prepared or filed by a non-attorney representative. [8 CCR §10401(d)]

If an attorney is responsible for supervising a non-attorney representative, the attorney shall be identified in all documents. The supervising attorney's specific written authorization must be included with all Compromise and Release agreements and Stipulations with Request for Award. [8 CCR §10401(e)]

A non-attorney representative who has not been identified on a notice of representation shall file a notice of appearance that includes the full legal name of the represented party and the name, address and telephone number of the attorney or non-attorney representative and associated entity, if any. [8 CCR §§10401(f) & 10751(b)]

➤ **Paralegal Pointer:** *It is imperative that a paralegal be well-versed with the laws and procedures governing the workers' compensation system because beyond the traditional roles of a paralegal and the more administrative duties, a paralegal may be called on to appear in court proceedings and argue a case and be held to the same standards of conduct of an attorney. **This can be one of the most rewarding aspects of a paralegal's role in workers' compensation practice.***