Employer Ethics

The Ethical Obligation to Provide a Safe Place to Work and Serious and Willful Misconduct Benefits

Purpose of S&W Statutes

- In order to encourage **employers** to provide a safe and healthful place of employment for their employees, and to encourage **employees** to be more careful in performing their work, thereby resulting in fewer industrial injuries, the law provides a monetary penalty against each party if their respective actions, which result in injury, are **beyond the realm of negligence, or even gross negligence, but reach the point of conduct that may be considered quasi-criminal in nature**. *LaborC.Sec.4551 and 4553.*

S&W Penalties Apply to BOTH Employers and Employees

- It is not commonly understood that the penalty can apply to increase benefits (L.C. § 4553 - against the employer) or decrease benefits (L.C. § 4551 - against the employee).
- We will then discuss criteria for each
- We will discuss case examples where both sides of this penalty are applied.
- You will learn limitations that apply.
- You will learn how to apply for such benefits, the time limits, and other procedural issues.
- You must also know the exceptions that apply.

Penalties May Be More Than an Increase in Benefits....

•Substantial penalties may be assessed against employers who fail to provide a safe workplace for employees such as:

- Violations are punishable by imprisonment in the county jail for a period not to exceed six months, or by a fine not to exceed five thousand dollars ($5,000), or by both imprisonment and fine.
- Imprisonment in county jail for up to one year, or by a fine not to exceed fifteen thousand dollars ($15,000).
- If the violator is a corporation or a limited liability company, the fine prescribed by this subdivision may not exceed one hundred fifty thousand dollars ($150,000). *LaborC.Sec. 6423–6425.*

Failure to Disclose Penalty

- The Penal Code imposes severe obligations upon companies and managers (with serious penalties for violations as high as three years in prison or fines of $1million) to report serious concealed dangers in the workplace to various regulatory agencies and to affected employees of the danger within 15 days of knowledge. *Penal C.Sec.387*

Power Press Exception to Exclusive Remedy of WC

- 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 authorized by the employer under conditions known by the employer to create a probability of serious injury or death. *Labor C. Sec. 4558.*

I'm Okay. I Have Insurance! Right?

- As a matter of public policy, you cannot buy insurance for intentional misconduct. This public policy extends to S&W claims.
- The employer must pay the benefits awarded and cannot insure against this liability except for the cost of defending the suit.
- However, the employer's insurance carrier may insure for the expense of defending such a claim. *Ins.C.Sec. 11661.*

I am a Governmental Agency. You Cannot Penalize Me! Right?

- Governmental Agencies are funded at taxpayer expense. Thus, they are immune from some forms of penalties, such as civil punitive damages.
- The Work Comp Cases have side stepped this immunity by specifying that S&W benefits (and all other WC Penalties) are in the nature of increased compensation rather than punishment and therefore may be awarded against a governmental agency.

Okay, So What is S&W Misconduct Anyway?

The Supreme Court has indicated....

•It is not simple negligence.

•It is beyond gross negligence.

•It is an act that is deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless, and absolute disregard of its possibly damaging consequences.

Mercer-Fraser Co. v. *I.A.C.* (1953) 18 Cal. Comp. Cases 3 ; Hawaiian *Pineapple Co.* v. *I.A.C.* (1953) 18 Cal. Comp. Cases 94

The Conduct Must be Both "Serious" and "Willful"

- "Serious" generally refers to the consequences of the misconduct; that is, how great is the risk of harm to the employee, and how grave is the potential harm to the employee. *Dowden* v. *I.A.C.* (1963) 28 Cal. Comp. Cases 261 .
- "Willful" refers to the awareness of the danger and the state of mind at the time it acted or failed to act. (*Dowden*)
- The "danger" required may be actual, probable, or only possible

Who's Misconduct is Actionable?

The amount of compensation otherwise recoverable may be increased **one-half**, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured on or after January 1, 1983, by reason of the Serious and Willful Misconduct of any of the **persons** set forth in the paragraphs below.

1. The employer or his managing representative;
2. If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof; or
3. If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof. *Lab.C.Sec. 4553.*

Two General Theories of Employer S&W

- Failure to provide safe employment or a safe place of employment - Lab. Code §§ 6400-6407
- Violation of a safety order - Lab. Code § 4553.1
- This means that the employer must (1) know of the dangerous condition, (2) know that the probable consequences of its continuance will involve serious injury to the employee, and (3) deliberately fail to take corrective action.

1) Safe Employment and Place of Employment

- Every employer is required to furnish employment and a place of employment that is safe and healthful. Lab. Code §§ 6400-6405
- An employer is not a guarantor of the absolute safety of its employees. *Mercer-Fraser Co.* v. *I.A.C.* (1953) 18 CCC 3.
- Thus, the test for determining whether the employer has provided safe employment and a safe place of employment is what is reasonable under the circumstances.

Specific Employer Responsibilities

It is the responsibility of all California employers:

1. To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.
2. To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.
3. To do every other thing reasonably necessary to protect the life, safety, and health of employees. *Lab.C.Sec.6403.*

Slow Employer Example

- The Employer failed to replace a defective tool which injured an employee. The evidence showed that the employer was negligent in proceeding too slowly to remedy the situation, and did not establish that the employer had turned its mind to a known danger and thereafter acted in reckless disregard of the circumstances.
- What was the finding by the WCAB?
- *Mason* v. *W.C.A.B.* (1989) 54 CCC 43 (writ denied).

Robbery Example

- An operator of a check cashing business was located in an area where there had been prior robberies in the community. The employee complained that she felt unsafe. Yet the employer took no steps to prevent that danger.
- The employer had no knowledge of a specific danger to this employee.
- What was the result?
- *De Seive* v. *WCAB*. (2004) 70 CCC 51 , 52-55 (writ denied).

More Examples (O'Brien, P 793)

1. Requiring a massage therapist to work on an oily tiled floor where she slipped and fell and evidence showed her employer knew that the slippery floor presented a dangerous condition and other employees had informed management about the condition on several occasions. Within the past month, five employees had fallen on the floor because of its condition yet the employer failed to take actions to correct the dangerous condition. Further evidence showed that the employer had reprimanded the therapist for destroying aesthetics of the tiled floor by covering it with extra towels and bath mats to prevent her falls.
2. Requiring an employee to perform work using highly combustible lacquer to remove residue from floor tiles near an electric fan and halogen lamp resulting in a spark from the fan or lamp to the lacquer causing serious burns to the employee.
3. Permitting a bartender to work in an area where the floor was often wet resulting in foot fungus and headaches.

More Examples (O'Brien, P 793)

4. Failure to remedy the slippery shower floor at a fire station causing applicant to slip and injure lower part of his body.
5. Permitting a sales person to work in an area that had just been mopped (no warning signs in the area) where she had slipped in the same area and where two other employees had slipped, and the store manager was aware of the earlier slipping incidents.
6. Permitting an employee to work in temperatures up to 96 degrees Fahrenheit digging a ditch for three hours without a break causing him to suffer heat stroke and later die. The employer's failure to provide a break violated construction industry and Cal/OSHA standards. The Board found that the employer's assertion of lack of actual knowledge of the danger was not a defense.
7. Permitting an employee to use stairway to employer's premises that had cracked and broken stairs, full of debris, resulting in employee falling to her knees injuring her knees and left arm.

Examples *continued*

8. Permitting an employee to work under 67,000 volt power lines in knowing violation of a safety order requiring ten feet clearance under such wires, resulting in injury to the employee when the crane he was working on came in contact with the wires.
9. Permitting a lot attendant to work at a parking lot without providing a cash register or other place to store money (money stored in cash in his pockets) where employer knew of a previous robbery attempt and a previous robbery in another of employer's garages, resulting in the attendant being injured while being beaten during a robbery.
10. Permitting an employee to work around an unguarded sprocket, having knowledge of the dangerous condition, thereby resulting in the employee's leg getting caught in the sprocket.
11. Permitting an employee to drive a bulldozer after the employee reported the brakes defective on two occasions and the employer made several good faith attempts to fix them, thereby resulting in the brakes failing, causing the bulldozer to slide down an 85-foot slope injuring the employee.

Yet More Examples

12. Permitting a laborer to clean a noodle machine while it was running, thereby causing his right hand to become caught in rollers of the machine.
13. Permitting a press break operator to operate a 500-ton mechanical press where the employer had knowledge, for over a year, that the press was malfunctioning, resulting in the press pinning the operator's hands in the press when the press ram came down off its own weight onto the operator's hands.
14. Permitting a machinist to use a defective adaptor plate on an 80-ton hydraulic press with knowledge by the employer that the defective plate was capable of serious injury, resulting in the plate breaking under high pressure and causing a fragment to strike the machinist's stomach. The adaptor plate had caused two accidents the week before the injury to the machinist.
15. Permitting a co-employee to operate a truck with knowledge by a supervisor that the brakes on the truck were defective resulting in the truck rolling backward and injuring an employee.

More Examples

17. Permitting an employee to attempt to un-jam a scrap baling machine by kicking at the scrap that was jammed, while the foreman turned on the baling machine controls resulting in the baling machine rams retracting, thereby trapping and injuring the employee's right foot.
18. Permitting and ordering a roofer to get into a lift truck containing seven tons of gravel, which was to be elevated to its full height of approximately 14 feet, when the load and the ground under the truck were unstable and where the foreman knew that work under such conditions would likely result in serious injury resulting in the truck toppling over and injuring the employee.
19. Permitting and instructing a window cleaner to use a weakened scaffold that had been burned in a fire and had an eight inch hole on one side which the supervisor knew posed an inherently serious danger to anyone using the ladder.
20. Permitting an employee to work in a truck with a defective floor which caused a load of chickens to fall on the employee.

Examples of NO S&W

1. Failing to protect a school teacher from being attacked by an abusive and violent student, after numerous threats, causing injury to the teacher because the teacher should have considered the student as an educational challenge.
2. Where an employee fell on a slippery floor and there was insufficient evidence that the employer knew of the dangerous condition.
3. Failing to prevent a robbery by not installing surveillance cameras resulting in injury to the employee's psyche where no evidence that cameras would have prevented the robbery.
4. Unsuccessful temporary repairs to a torn carpet causing applicant to trip and fall.
5. Failure to prevent applicant from wearing gloves while using heavy equipment resulting in gloves being caught in moving equipment.
6. Failure to correct "soft brakes" where there was no evidence of a serious defect of the tractor's brakes.
7. Assault by student on teacher where employer did not have knowledge that student's aggressive behavior created a danger of serious bodily injury to its employees and had taken other precautions.

More Examples of NO S&W

8. Permitting an employee to work in an environment where harassment (stress) allegedly occurred but where applicant failed to show conduct by the employer that was quasi-criminal in nature.
9. Permitting an employee to use a bathroom with a wet floor where there was no evidence that employer knew of the wet bathroom floor on which applicant slipped and fell.
10. Permitting a carpenter to ride on a rolling scaffolding, without guard rails, while it was being moved. There was a violation of safety order but no evidence that the construction manager and foreman on the job knew of the existence of the safety order or its violation. Further, there was no evidence that the construction manager and foreman knew that the scaffolding was used without proper guard rails.
11. Permitting an employee to clear a tea bag reclaim machine because some paper was clogging it, even though its guard was insufficient for which the employer was issued a citation for the violation by Cal/OSHA, because applicant failed to show that the condition making the safety order applicable were either known to the employer or were obvious.

More Examples of NO S&W

12. Permitting a truck driver to drive a truck with defective brakes where both the employee and a supervisor tested the brakes and were satisfied they were fine and employer had no knowledge of the condition of the brake line resulting in the brakes failing on a hill causing the employee's death.

13. Permitting an employee and 19 co-employees to attempt to manually raise a completely constructed wall weighing 3,677 pounds resulting in the employee being injured when the wall fell, where there was insufficient evidence to establish that the employer knew the wall would fall and had successfully used this manual method with similar weights in the past.

- ***Note: See the O'Brien Text Book for additional Examples and Citations used throughout this presentation.***

2) Based Upon Violation of a Safety Order

The Appeals Board must specifically find all of the following:

The specific manner in which the order was violated;

1. That the violation of the safety order did proximately cause the injury or death, and the specific manner in which the violation constituted the proximate cause; and
2. That the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences. *Lab.C.Sec. 4553.1.*

Perils Must Be Considered

- The minimum level of conduct demanded of an employer before he or she will be found guilty of serious and willful misconduct for violation of a safety order is not a constant factor, but is increased as the peril being regulated by the order increases.
- *Grason Elec. Co.* v. *I.A.C.* (1965) 238 Cal. App. 2d 46, 52, 47 Cal. Rptr. 439, 30 CCC 363

Reasonable Standard Applies

- Violation of a safety order is not serious and willful misconduct per se. The purpose of the safety order and the circumstances of the injury will determine whether the employer's actions will be found to lie within the realm of conduct for which increased benefits should be awarded
- See *Bethlehem Steel Co.* v. *I.A.C. (Brinkley)* (1944) 23 Cal. 2d 659, 662-664, 145 P.2d 583, 9 Cal. Comp. Cases 45

Effect of Cal-OSHA Findings

- The Appeals Board has held that a decision by a Cal-OSHA Administrative Law Judge that found serious and willful misconduct by the employer, for the purpose of issuing an OSHA citation, was not dispositive of the issue of whether the employer's conduct constituted serious and willful misconduct under the workers' compensation law
- *Bosell* v. *W.C.A.B.* (2002) 67 CCC 447, 449 (writ denied).

Employee Ethics and S&W of the Employee

- When the injury is caused by the serious and willful misconduct of the injured employee, the compensation otherwise recoverable for that injury must be reduced by 50 percent. Labor Code § 4551

Exceptions to Employee S&W

Where the injury is caused by the Serious and Willful Misconduct of an injured employee, the compensation otherwise recoverable is **reduced one-half**, except:

1. Where the injury results in death;
2. Where the injury results in a permanent disability of 70 percent or more;
3. Where the injury is caused by the failure of the employer to comply with any provision of law or any safety order of the Division of Industrial Safety, with reference to the safety of places of employment; or
4. Where the injured employee is under 16 years of age at the time of injury. *Lab.C.Sec. 4551.*

Standards for Employee S&W

- The standard of serious and willful misconduct is the same for employer and employee. *Hawaiian Pineapple Co.* v. *I.A.C.* (1953) 18 CCC 94
- Thus the employee's conduct must consist of something more than mere negligence or even gross negligence.
- There must be a purpose or willingness to commit the act or make the omission with knowledge that it is likely to jeopardize the employee's safety or that of a fellow employee, or with wanton and reckless disregard of the possible danger.

Examples of Award Reductions

1. An employee injured in a company vehicle on company business excessively speeding (between 115 and 120 mph) resulting in an accident.
2. An employee injured while jumping from ship to dock instead of using the gangplank as instructed.
3. An employee injured while using a power (buzz) saw instead of a hand saw as instructed.
4. An assembly line worker injured while driving an electric truck to get parts from a store room had been specifically forbidden by his foreman to operate the truck.

Examples Where Awards Were Not Reduced

1. Where a female teacher injured her back while shoving aside a 415 lb. desk to retrieve a book from a bookcase.
2. Truck driver injured while attempting to pass an automobile at 25 mph on a straight road.

Increase 50% of What?

- The additional compensation payable as a result of Serious and Willful Misconduct is based upon **50 percent** of the amount of compensation otherwise recoverable, such as **temporary and permanent disability indemnity, medical treatment and value of rehabilitation benefits, provided the total benefit does not exceed the amount necessary to fully compensate the employee.**

What about Medical Costs?

1) The Supreme Court indicated that medical costs are not to be included in the 50% increase or decrease calculation. (*E. Clemens Horst. Co.* v. *I.A.C. (Hamilton)* (1920) 184 Cal. 180, 193 P. 105)
2) Later decisions have rejected this interpretation. (*Ferguson* v. *W.C.A.B.* (1995) 33 Cal. App. 4th 1613, 1616-1617, 39 Cal. Rptr. 2d 806, 60 Cal. Comp. Cases 275). The 50% increase against the employer may include medical costs.
3) Reductions against the employee may not include medical costs.

Employee Ethical Requirements

- We should mention in passing, that the injured worker did not have a clean ethical report card in the 1990s.
- Much of the legislation that applies to him/her is of the nature of anti-fraud provisions of the labor code that make it unlawfull to make a willful false statement to obtain (or defeat) the payment of WC Benefits.
- We have at this time an active system of investigation, (SIU Units) and prosecution of offenders.

Physician Ethical Requirements

- Physicians have their own unique code of ethics. Most of these deal with professional competence that applies in all systems of medical care delivery. (i.e. first rule "do no harm").
- They of course fall inside the anti-fraud bills enacted in 1993, and this outlaws any scheme they might have to defraud payers.
- Their reporting and treating abuses have been recently addressed by S.B. 899.

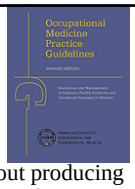
Self Referral Limitations

- L.C.139.3. (a) Notwithstanding any other provision of law, to the extent those services are paid pursuant to Division 4 (commencing with Section 3200), **it is unlawful for a physician to refer a person** for clinical laboratory, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, outpatient surgery, or diagnostic imaging goods or services whether for treatment or medical-legal purposes **if the physician or his or her immediate family, has a financial interest** with the person or in the entity that receives the referral

Medical Legal Limitation

- L.C. 4628 was amended to require the physician to conduct the examination and to prepare the report.
- To sign the report under penalty of perjury indicating that all facts are true.
- To disclose who participated in any aspect of the preparation of the report (that is how I found the psychologist in the fraud unit).

Over Treatment Limitations



- Physicians, with the help of willing applicants over treated injuries without producing a functional restoration or medical benefit.
- The response in recent legislation was to adopt a system of Utilization Review and to also adopt the ACOEM Guidelines.
- Chiropractic care and physical therapy was artificially limited to 24 visits.
- Medical control was shifted to employer MPNs.
- An example of how abuse triggers a radical solution.

Disability Evaluation Limitations

- The rating scheme in California before 2005 allowed some claimants with the help of physicians to overstate permanent disability
- The AMA Guides 5th Edition, was mandated by S.B. 899. This Guideline reduces the ability to abuse permanent disability.
- An example of how abuse triggers a radical solution.