

2016 CLM Atlanta Conference  
May 19-20, 2016 Atlanta, GA

## **Products Liability and The Workers' Compensation Bar. Can I Really Sue My Employer?**

### **I. Black Letter Law**

It is almost a Black Letter law concept that an employee cannot sue his or her employer. Most states enacted statutory workman's compensation systems of recovery, removing claims against the employer out of the civil court system and placing those claims into administrative systems, or quasi administrative systems. Employers buy insurance coverage for the specific purpose of compensating injured employees, or employers can participate in state sponsored programs which allow for an employer to purchase coverage through a state qualified fund. It has long been thought that one injured on the job, can recover against his or her employer, under a very low or almost nonexistence level of proof, and in exchange accepts a reduced recovery or a codified recovery.

Many courts, however have found that in certain circumstances the workman's compensation bar, cannot be used by the employer as absolute bar against suit by the employee. Many states under a host of circumstances opened the doors of the civil court tort system to the employee injured on the job, and provided a direct cause of action to the employee against the his/her employer.

### **Exceptions**

The exceptions to the workman's compensation bar come in many forms. Primarily, states which allow an employee to proceed when an employer's conduct is willful, wanton, or grossly negligent. This conduct can be looked at from a number of perspectives, such as unsatisfactory on the job training, the machinery being used, the manner in which the employer disseminates information about the products being used on site, etc. There are also statutory exceptions, such as the Jones Act, US Longshoreman and Harbor Workers' Act or case involving rail road workers. A new body of case laws recently arose in long tail exposure claims, allowing employees whose workman's

compensation claims are time barred to bring suit directly against their employers in third party actions.

## **Defenses**

In the workman's compensations courts the employers' defenses may be few. However, in the civil courts, are the employers' defenses broadened by the mere fact of the change in forum. Can an employee's contributory negligence now become a jury issue, where in a compensation court, it could not be considered? Does the employer gain cross claims against other party defendants, which it would not have in the compensation courts? For example, can the employer argue design defect, against the manufacture of the product which caused injury, in a common law claim, where the employee sues both the product manufacture and the employer in the same suit?

## **II. Coverage**

### **A. Other Effective Demonstrative Aids may include 3D Printed Models, objects videos and Graphics**

Typically, an employer purchases Workman's Compensation Coverage, which is a policy separate and apart from it Comprehensive Liability Coverage. There are two (2) parts of to this coverage, part A, part B and Definitions. The type of claim will dictate the coverage triggered. This issue needs to be explored and assessed whenever an employer is sued. For example a policy may define the employer/named insured in different ways. There are statutory employers who will stand in the shoes of the actual employer. The definition of "bodily injury" and suit limitation periods contained in the policy itself. Part B coverage or Part II coverage is the section which provides for the employers liability coverage for bodily injury to an employee in the course of the employee's "employment". Part I or A is the section which provides the duty to pay expenses, medical bills, etc. However, looking a Part II or Part B, this is where the duty to defend the employer for claims brought against:

"for which you are liable to a third party, by reason or a claim or suit against you that a third party to recover damages...as a result of an injury to your employee....because of bodily injury to your employee that arises out of and in the course of employment., claimed against you in a capacity other than as an employer..." Part III of the coverage generally looks to coverage provide for work done in other states.

## **III. National Overall**

Analysis and discussion of various state law exceptions to the Workman's Compensation bar. Including when an employee can elect to proceed against his/her employer in common law courts, toxic tort actions, and matters involving sexual harassment.