

When an Absolute Bar Isn't Absolute

By Denis F. Alia
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Understanding how courts have dealt with the “exclusive remedy” defense will give defense counsel an edge.

Tort Suits Seeking to Circumvent Workers' Compensation Exclusivity

In most states, the workers' compensation statutes provide an absolute bar against civil actions brought against an employer for occupational diseases and injuries. In some jurisdictions, however, courts have allowed plaintiffs to

avoid a complete bar by pleading that their exposure to an employer's allegedly hazardous product, or to a dangerous chemical or material used in their employment, also occurred outside of the scope of employment. Nevertheless, several state and federal appellate courts have held that the “exclusive remedy” provisions of workers' compensation statutes do not permit a plaintiff to pursue separate tort claims for cumulative exposure injuries that are “indivisible.”

In this article, we explore several recent decisions that highlight the range of judi-

cial responses to plaintiffs' attempts to circumvent the “exclusive remedy” afforded by workers' compensation statutes and discuss ways that defense counsel can best protect their clients' interests in high-stakes personal injury litigation.

When alleging exposure outside the standard employment context, plaintiffs will undoubtedly seek to minimize or disclaim any substantial exposure to a chemical, material, or product encountered as part of the individual's work environment, and to amplify the amount of nonoccupa-

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tional exposure. It is likely that a plaintiff will amplify his or her nonoccupational exposure through the discovery process, including witness depositions, document production, and expert testimony. So, it is imperative that defense counsel act at the earliest possible stage in the litigation to identify the nature of the employee's claims and determine if the alleged injury is one that could result from "cumulative exposure" to the same type of agent both within and outside the occupational setting.

In any case involving a tort suit brought by a former employee against an employer, the first line of defense involves carefully considering how a plaintiff's claims might be dismissed through application of the "exclusive remedy" provisions of the relevant workers' compensation statute, even where there is some nonoccupational exposure. While a growing number of courts recognize that claims for diseases such as cancers caused by exposure to carcinogenic agents over many years cannot be "split" into separate causes of action, defense attorneys must exercise caution when asserting this defense if the nonoccupational exposure far outweighs exposure that occurred during the course of employment. Other considerations to employing this defense at trial include whether the court can adequately shield a jury from hearing or considering testimony about certain "barred exposures" (*i.e.*, exposures that occurred during employment) when assessing the fault of a particular defendant, or provide sufficient limiting instructions when such evidence becomes part of the judicial record.

Workers' Compensation System Intended as the "Exclusive Remedy"

Practitioners who routinely handle personal injury litigation are well aware that workers' compensation statutes enacted by state legislatures typically prohibit direct tort actions against a current or former employer for injuries sustained in the course of employment. Such statutes are generally intended to provide an "exclusive remedy" to employees alleging occupational injury or disease. *See, e.g., Dale v. S. Cent. Illinois Mass Transit Dist.*, 17 N.E.3d 229, 233 (Ill. App. Ct. 2014); *Eischeid v. Dover Const., Inc.*, 265

F. Supp. 2d 1047, 1052 (N.D. Iowa 2003); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 110 (2003). These statutes serve to relieve workers of the uncertainties of trial by providing a faster avenue to recovery, regardless of fault, and in exchange, to provide employers with "a limited and determinate liability." *In re Chatham Woods Holdings, LLC*, 184 Vt. 163, 169 (2008). *See also Bi-State Dev. Agency v. Watson*, 40 S.W.3d 403, 405 (Mo. Ct. App. 2001). Workers' compensation statutes are also broadly construed and liberally interpreted to favor the inclusion of claims. *See, e.g., Ihara v. State Dep't of Land & Nat. Res.*, 141 Haw. 36, 404 P.3d 302 (2017); *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015); *Concert Sys. USA, Inc. v. Weaver*, 33 So. 3d 1186, 1189 (Miss. Ct. App. 2010); *Zitterkopf v. Aulick Indus.*, 16 Neb. App. 829, 832, 753 N.W.2d 370, 373 (2008).

Due to the exclusivity provisions in most workers' compensation statutes, courts lack subject matter jurisdiction to hear claims covered by this "no-fault" system for adjudicating employment-related injuries. *See, e.g., Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 223–24 (S.C. Ct. App. 2008). Thus, whether a worker prefers to litigate his or her claim in a judicial forum is immaterial, because workers generally cannot opt out of the statute. *See Minish v. Hanuman Fellowship*, 214 Cal. App. 4th 437, 470, 154 Cal. Rptr. 3d 87, 113 (2013).

Although workers' compensation statutes are intended to provide the sole and exclusive remedy for workplace-related injuries and diseases, enterprising plaintiffs' counsel may still look for opportunities to litigate their clients' occupational injury claims in court in an effort to get a larger damages award. *See Edwin L. Felter, Jr., Sarah A. Hubbard, Erosion of the Exclusive Remedy in Workers' Compensation*, Colo. Law, Dec. 2002, at 83.

To maintain a tort claim against a direct employer and bypass the workers' compensation system, plaintiffs may allege some exposure to an employer's hazardous products at home or some other non-occupational setting (*see, e.g., Melendrez v. Ameron International Corp.*, 193 Cal. Rptr. 3d 23, 29–30 (Cal. Ct. App. 2015)), while employed by another entity at a premises or worksite owned or controlled by

the employer (*see, e.g., Campbell v. Lockheed Shipbuilding Corp.*, 115 Wash. App. 8, 9 (Wash. Ct. App. 2002)), or through environmental exposure to a hazardous substance that extends beyond the employer's premises to a nearby residential area (*see, e.g., Shelly v. Johns-Manville Corp.*, 798 F.2d 93, 99 (3d Cir. 1986)).

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of courts recognize that claims for diseases such as cancers caused by exposure to carcinogenic agents over many years cannot be "split" into separate causes of action, defense attorneys must exercise caution when asserting this defense if the nonoccupational exposure far outweighs exposure that occurred during the course of employment.

Judicial Responses Rejecting Attempts to Pursue Tort Claims Against Former Employers

Some courts view the workers' compensation system as the only avenue for employees to pursue remedies for cumulative exposure injuries, and they adhere to certain principles, including that cumulative exposures result in "indivisible injuries," employment only need be a contributing cause, and plaintiffs cannot purposefully exclude direct employment-related exposures to maintain a court action.

Cumulative Exposures Result in “Indivisible Injuries”

Some courts have expressly rejected plaintiffs’ attempts to litigate cumulative exposure claims as standard tort claims, holding instead that these “indivisible injuries” should be handled through the workers’ compensation system as intended by the legislature. In *Melendrez v. Ameron*

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where a plaintiff has *only* alleged exposure outside his or her employment, courts may also examine whether the plaintiff has chosen to omit employment-related exposure and whether a claim should nonetheless have been asserted through the workers’ compensation system.

International Corp., the California Court of Appeals held that where a plaintiff alleged exposure to asbestos-containing pipe through his employment and from “scrap” pipe that he brought home, his occupational exposure was a “substantial contributing cause of his injury” and therefore covered by California’s Workers’ Compensation Act. *Melendrez*, 193 Cal. Rptr. 3d 23, 29–30, 33. The *Melendrez* court held that the employee’s home exposure did not create a separate injury outside of workers’ compensation coverage. *Id.* Further, the court held that plaintiff had offered no evidence to show the extent to which his home exposure to asbestos contributed to his development

of mesothelioma separate and apart from his workplace exposure. *Id.* In denying his right to proceed against his employer in tort, the court found that the home exposure may have contributed to the plaintiff’s disease along with the workplace exposure, but the contribution of home exposure “does not create a divisible, separate injury.” *Id.* at 33.

The core principle relied on by the *Melendrez* court is that “employment need only be a ‘contributing cause’ of [an employee’s] injury,” not the sole cause. *Id.* at 32 (citation omitted). Further, it was enough that “the employee’s risk of contracting the disease by virtue of the employment [was] materially greater than that of the general public.” *Id.* at 32–33 (citation omitted). The *Melendrez* court also noted that the broad scope of the California Workers’ Compensation Act could not be altered simply because a plaintiff believed that he could establish negligence on the part of his employer and bring a civil suit for damages. *Id.* at 35. Such laws, the court held, are to be construed liberally “in favor of awarding work[ers]’ compensation, not in permitting civil litigation.” *Id.* (citation omitted).

In another recent California case involving asbestos exposure, *Rudolph v. Rudolph and Sletten, Inc.*, the plaintiff allegedly contracted mesothelioma from his father’s work for a general contractor when he was a child, and from his own employment for the same company as an adult. No. A152601, 2018 WL 3526652 (Cal. App. Ct. July 23, 2018) (unpublished). Adhering closely to its reasoning in *Melendrez*, the California Court of Appeals again held that mesothelioma is a “single, indivisible injury to which all asbestos exposures over a person’s lifetime causally contribute,” and a plaintiff cannot “recover damages for that single, indivisible injury from [his or her employer] in tort, even if it was negligent in a separate way that also causally contributed to that injury and was outside the course and scope of his later employment.” *Id.* at *2. Accordingly, because the plaintiff “alleged his injury was caused by exposure to asbestos at home and at work,” the court found that a “substantial contributing cause of [his] injury was his occupational exposure,” and thus “his injury

[was] covered by workers’ compensation, even if another, nonindustrial cause also substantially contributed to the injury.” *Id.* at *4. The court’s decision in *Rudolph* did not hinge on the timing of the asbestos exposure, but rather on the well-settled principle that where an employee suffers an injury compensable by the California Workers’ Compensation Act, the exclusivity doctrine applies. *Id.*

Employment-Related Exposures Cannot Be Willfully Excluded

As the above cases from California demonstrate, when a plaintiff alleges exposure in both an employment and nonemployment context, the “indivisible” nature of the injury should bar the claims in tort. However, in cases where a plaintiff has *only* alleged exposure outside his or her employment, courts may also examine whether the plaintiff has chosen to omit employment-related exposure and whether a claim should nonetheless have been asserted through the workers’ compensation system.

For example, in *Campbell v. Lockheed Shipbuilding Corp.*, 115 Wash. App. 8 (Wash. Ct. App. 2002), the plaintiff alleged that he contracted mesothelioma from asbestos exposure at the defendant’s shipyard as a direct employee, and while working at the shipyard for a subcontractor. *Id.* at 9. The plaintiff acknowledged that he could not recover against the defendant in tort for injuries arising out of his direct employee–employer relationship, but he argued that the workers’ compensation provisions of the Longshore and Harbor Workers’ Compensation Act preserved his tort claim because his suit did not expressly “seek compensation” for any exposure sustained while employed by the defendant. *Id.* at 13. The Washington Court of Appeals rejected this claim, holding that because the shipyard owner was already liable under the Longshore and Harbor Workers’ Compensation Act, the plaintiff’s separate tort claim for asbestos exposure from his employment for a subcontractor was barred as a matter of law. *Id.* at 9. The *Campbell* court based its decision on a determination that asbestos-related diseases are “indivisible” and therefore could not be allocated among several tortfeasors. *Id.* at 14.

Aggravation of a Preexisting Condition

Another scenario that can result in the workers' compensation bar is when a pre-existing condition is aggravated through exposure during employment. See *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008 (5th Cir. 1981). Similar to the cases discussed above, the concept of "indivisible injuries" should prevail and protect an employer defendant from tort liability. In *Fulks*, the plaintiff worked as a welder for the shipyard defendant from 1952 until 1968. *Id.* at 1010. He was hospitalized in 1966 for a form of pulmonary tuberculosis called "atypical mycobacteriosis," an infection of the lungs caused by a type of germ found in southeastern United States, which is capable of lying dormant in the lungs for extended periods. *Id.* After several treatments, the plaintiff returned to work, but his disease reactivated and rendered him unable to work, and ultimately, the plaintiff ended his employment. *Id.* After the matter was brought before it for review, the court found that the plaintiff's preexisting disease was aggravated by his work exposure to water-based free silica crystals, thus his claim was covered by the Longshoremen's and Harbor Workers' Compensation Act. *Id.* at 1012.

Judicial Responses Permitting Attempts to Pursue Tort Claims Against Former Employers

Some courts have allowed plaintiffs to pursue claims against employers for cumulative exposures in courts, adopting either what has been referred to as a "dual-capacity approach," or an exception to the "indivisible injuries" principle for equity and fairness reasons.

"Dual Capacity" as a Means to Avoid Workers' Compensation

Not all courts have rejected plaintiffs' efforts to circumvent the workers' compensation statutes' exclusivity provisions. Rather, some courts have adopted a "dual-capacity" approach, permitting claims to be litigated in a judicial forum in those instances where the employer acted in another capacity, such as when the employer is the manufacturer or distributor of a defective product, a provider of medical services, or an owner of real estate. See, e.g., *Smith v. Metropolitan Sanitary District*, 396 N.E.2d 524 (Ill. 1979) (holding that an employee injured by

an employer's leased truck with a defective emergency brake could bring suit under a strict liability theory); *Duprey v. Shane*, 249 P.2d 8 (Cal. 1952) (holding that an employee of a chiropractor injured in course and scope of employment could bring suit against the chiropractor for alleged malpractice during subsequent treatment); *Marcus v. Green*, 300 N.E.2d 512 (Ill. App. Ct. 1973) (holding that a carpenter injured during a scaffolding accident could bring suit against his employer since the employer was one of the owners of the building where the injury occurred). In the manufacturing context, some jurisdictions allow a plaintiff to bring suit against his or her employer if the defective product is sold to the general public, in addition to being provided to the employee for use.

Although some courts have adopted the dual-capacity doctrine, others have rejected the doctrine, particularly where it involves product liability taking form as allegedly defective products. See *Weber v. Armco, Inc.*, 663 P.2d at 1225-26 (Okla. 1983). The rationale behind such rejection is that one cannot logically separate into two distinct legal personas the employer, who has a duty to provide a safe working environment, from the product manufacturer, who has a duty to make safe machinery. *Id.*

Exception to the "Indivisible Injuries" Rule Based on Equity and Fairness

"Above all else, court-made law must be just." *Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky. 1984). This was the guiding principle for the Kentucky Court of Appeals in *Schneider Elec. USA, Inc. v. Williams*, No. 2018-CA-000866, 2019 WL 3763537, 5 (Ky. Ct. App. Aug. 9, 2019), where the court declined to allow an electrical equipment manufacturer to use the workers' compensation statute as a shield to avoid the plaintiff's tort claims. *Id.* at 1. In *Schneider*, the plaintiff alleged that she was directly exposed to asbestos when working at the defendant's manufacturing facility for one summer as a teenager, and that she was indirectly exposed to fibers from her father's clothing, which he brought home over many years as an employee. *Id.* The defendant argued that the plaintiff's sole remedy was through the workers' compensation system because she was an employee for a short period of time, and her injury

was "indivisible." *Id.* at 4. Ultimately, the court stated that if it allowed the defendant to evade all liability because of "one summer forty years ago," it would be a perfect example of "a small tail unjustly wagging a large dog." *Id.* at 5. Accordingly, the court concluded that "fundamental fairness" should allow the plaintiff to recover for her non-work-related injuries. *Id.*

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Employer as Trial Defendant and Allocation of Fault

Allowing an employer to be a defendant in a complex, multiparty personal injury case is fraught with hazards, particularly at trial where jurors must decide which parties are at fault for causing the plaintiff's injury. In a typical jurisdiction with joint and several liability, each defendant found to have contributed to the plaintiff's injury will be held liable along with all other defendants regardless of the percentage of actual fault. Thus, if a former employee pursues a claim outside the workers' compensation system, the employer may be liable for damages that are many times greater than what would otherwise be awarded for the same injury under a no-fault system.

A different problem arises in jurisdictions that permit juries to allocate fault to defendants severally, or on an individual

percentage basis. In cases with numerous parties that have allegedly contributed to the plaintiff's injury, the defendants that need to "prove up" other parties' culpability may not be permitted to offer evidence about substantial exposures sustained during the employment period if the court will only allow the jury to consider exposure from a nonemployment timeframe due to the workers' compensation bar. Conversely, if the court were to allow the jury to hear such testimony, there is a significant risk that the jury will assign a far greater share of fault to the employer defendant, thereby depriving that party of the "exclusive remedy" that the workers' compensation statute was intended to provide.

When it is medically and scientifically impossible to isolate the exact cause of a particular disease, or to exclude certain exposures simply because they occurred in an occupational setting, the difficulty that a jury will face when trying to apportion fault is obvious. Indeed, in asbestos-related personal injury cases, it is a plaintiff's own experts who typically assert that diseases including asbestosis, lung cancer, and mesothelioma result from cumulative exposures over a person's lifetime. *See, e.g.,*

McMann v. Air & Liquid Sys. Corp., No. C14-5429 BHS, 2014 WL 6809246, at *4 (W.D. Wash. Dec. 2, 2014). While this issue is most prevalent in toxic tort cases involving asbestos exposure, it could easily occur in litigation involving cumulative exposures to substances that may cause cancer, including volatile organic compounds (VOCs), such as formaldehyde and benzene. Because these substances can cause damage to the human body over an extended period of time, and the dose can vary greatly depending on the exposure source, claims involving alleged carcinogens must be carefully analyzed to determine if the nonoccupational exposure is substantial, or if it is merely being asserted in an effort to sidestep the workers' compensation system.

Asserting "Exclusive Remedy" in Motion Practice

When an "indivisible" injury is at issue, it is virtually impossible for a court or a jury to determine whether a plaintiff's injury was due to occupational exposure and is thus barred by the workers' compensation statute, or due to nonoccupational exposure and is thus properly adjudicated in the tort system. Because state legislatures

intended workers' compensation statutes to be broadly interpreted to ensure that all workplace injuries and diseases are covered, courts should not permit plaintiffs to escape the statutes' provisions due to some allegation of nonoccupational exposure, particularly where it is scientifically impossible to determine that the nonoccupational exposure alone caused the alleged disease.

On receiving a complaint or other documentation indicating that a plaintiff was or may have been a prior employee, defendants should consider filing a motion to dismiss, arguing that the court lacks subject matter jurisdiction over the claim. To assert this defense, it may be necessary for the defendant to show that it was covered by the applicable workers' compensation statute at all relevant times. Such proof may be obtained from the workers' compensation agency in the state in which the employment took place, or from insurance coverage documents that are in the possession of the employer or its insurers.

The affirmative defense of subject matter jurisdiction can be raised in an answer or some other responsive pleading, or at any time in the litigation, and it is not waived if properly asserted. However, defendants must be aware that the discovery process can often result in testimony that could influence a court's decision, as seen in cases such as *Schneider*. Accordingly, defendants should consider making the argument in a motion at the earliest opportunity once there is a sound factual basis for doing so. In jurisdictions where the applicability of the "exclusive remedy" provisions of the workers' compensation statute to nonoccupational exposures is not clearly defined, such a motion may serve to educate the court about the inherent problems that will arise at trial should the plaintiff be allowed to pursue a former employer in tort for his or her personal injuries.

Conclusion

As plaintiffs' counsel continue to look for ways to litigate their clients' claims in the tort system to pursue the largest possible recovery, defense counsel who take a proactive approach to asserting the "exclusive remedy" defense will give their clients the best opportunity to ensure such claims are resolved as intended when the workers' compensation statutes were first enacted. 



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