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EXCEPTIONS TO THE "EXCLUSIVE REMEDY RULE" MAY BENEFIT EMPLOYEES' FAMILIES

By Scott A. O'Mara

The California Workers' Compensation system was established over a period of time to allow workers to access medical care without having to show negligent behavior on behalf of their employer. This system is referred to as "the bargain entered into" by the parties to create mutual benefit for both workers and employers.

There have been different views regarding the legislation enacted in 1911 and 1914, as well as current legislation. One of the *principal protective devices* for employers is the "exclusive remedy rule", while one of the *principal protective devices* for employees is not having to show negligence on the part of the employer in order to access medical care to cure or relieve the effects of a work-related injury. In addition, while the Workers' Compensation system places no limitation on the employer's cost for an employee's needed medical care, the procedural steps involved in processing a claim can place a window of limitation relative to a worker's residual impairment.

The concept of exclusive remedy is intended to protect employers from unlimited liability for a worker's level of impairment. This protection can place some parameters on the scope of the medical care for which employers are liable. The design of the exclusive remedy rule in the vast majority of situations bars employees from pursuing civil actions against their employer for their work-related injuries.

Some of the exceptions which have arisen regarding removal of the exclusive remedy rule include the following:

- When an employee's injury or death is caused by *woeful* physical assault by the employer.
- When an employee's injury is aggravated by the employer's *fraudulent* concealment of the existence of said injury.
- When an employee's injury or death has been proximally caused by a defective product manufactured by the employer — a product which is sold to others for value.

- When an employee's injury has resulted from the employer's removal of, or failure to install, a point-of-operation guard on a power press.

The COVID-19 virus — which has impacted virtually everyone — is now being evaluated as a potential exception for derivative injuries which may occur if employers fail to implement safe-guards to prevent the spread of the virus among their workers, who then take the virus home and pass it on to other family members. Such family members may then have a cause of action against the employer because of the employer's failure to take protective action to prevent the spread of COVID-19 to a family member.

Exposure to and harm caused by COVID-19 is now being viewed as a potential exception to the Workers' Compensation exclusive remedy rule. This point of view may also carry over to potential LEAD exposure and the transference of same to family members.

Of significance, the California Supreme Court recently has accepted the Federal Appeals Court's request to decide whether the derivative injury doctrine prohibits civil claims against employers when a worker develops a COVID-19 virus at work and then takes it home, causing injury or death to a family member. The 9th Circuit Court of Appeal has asked the California Supreme Court whether employers have a statutory duty to employees and their households in the exercise of care to prevent the spread of COVID-19. Is there an exception for injury or death to a family member for the job-related illness? It is unusual for the Court of Appeal to ask the Supreme Court for such a finding. Is there now going to be an additional exception for the exclusive remedy rule?

Examination as to the change in limits imposed under the exclusive remedy rule could well have flow-over beyond COVID-19 to other issues, such as LEAD exposure to the families of employees who have such exposure on their bodies and in their clothing during the course of their work and then take that exposure home.

In 2020, the Department of Industrial Relations *(see Law1199.com Newsletter 2020 #18 at www.law1199.com)* set forth a model COVID-19 Prevention Program (CCPP). This program established for all California employers the methodologies to manage, contain and control COVID-19 hazards. The CCPP program strongly reflects the responsibility of employers to minimize work exposure to COVID-19.

This type of program should be applied to LEAD exposure as well to minimize (if not eliminate) its transmission to people outside the work environment, particularly the families of exposed workers. Likewise, the exclusive remedy rule should have application to LEAD exposure — something which would have more power when the Department of Industrial Relations issues a current model for a current LEAD protection program.

Therefore, a change in the standing of the derivative injury rule and its relationship to limiting causes of action by families for COVID-19 and/or potentially LEAD exposure may cause additional remedies for harmed families from COVID-19 or LEAD.

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