



Chapter 7

Employers’ Immunity Under Workers’ Compensation Statutes: Deal or No Deal?

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§ 7.01. Introduction.

The sharp rise of industrial injuries in the United States at the turn of the 19th century resulted in the adoption of workers’ compensation statutes by every state. These now-familiar statutes allow employees to recover for on-the-job injuries regardless of fault—at the expense of employers. In exchange, employers are immune from suit and compensation benefits are the exclusive remedy for employees.

In the past 110 years of workers’ compensation law, the vast majority rule has been that employers enjoy immunity from suit unless the employer intentionally injures the employee. This majority rule considers “intentional” as actual subjective intent to cause harm, *i.e.*, an “intentional tort” such as assault or battery.

However, in the past 30 years, there has been increasing receptiveness to broadening the definition of “intentional” to accommodate a wide variety of scenarios where the facts suggest an employer’s acts are “just south” of intentional and, despite protestations to the contrary, more akin to gross negligence. Increased public scrutiny on modern industrial accidents, combined with a business culture already inundated with regulatory agencies and safety rules, creates a modern climate ripe for the continued erosion of employer immunity. This fact is evidenced by states like South Carolina, which this past year introduced legislation whittling away at employer immunity.¹

Evaluating the actual strength of one’s employer immunity in a given jurisdiction is an important consideration before commencing or continuing in any operations. Like high stakes poker games, there are many rule variations to the employer immunity “game” from state to state. As with any game, employers must know these rules, including the subtle nuances, to succeed. This chapter is intended to provide guidance in evaluating just how “immune” an employer is, examine modern trends in employee suits for workplace injuries, and also discuss methods to increase an employer’s chances of success in jurisdictions that tend to encourage employee suits.

§ 7.02. The Advent of Workers’ Compensation Statutes.

[1] — History.

The origins of workers’ compensation statutes in the United States stem from increasing industrial injuries in the late 19th century.² At that time, the common law duties of employers and the common law defenses to employers

¹ S.B. 390 and 386 proposed to create an exception to the exclusivity provision “for a willful, intentional, or reckless injury resulting from the violation of a statute or regulation . . . the intentional removal of a safety device or warning label . . .” Neither bill passed. Note also that Maine, a state that has for a long time not recognized any exceptions to immunity, introduced bills that, if passed, would have created significant “intentional” exceptions to employer immunity.

² Lex K. Larson & Arthur K. Larson, *Workers Compensation Law: Cases, Materials and Text* § 2:03 (3d ed. 2000).

gave the employers a stacked deck.³ For example, employer defenses like the “fellow-servant” rule, assumption of the risk and contributory negligence made employee recovery very difficult.⁴ The combination of increasing injuries with limited recovery created conditions ripe for compensation systems such as those gaining favor in Europe.⁵

Early workers’ compensation statutes failed on constitutional grounds but eventually, by about 1910, most significant constitutional impediments were resolved.⁶ By 1920, all but eight states had adopted compensation acts, and, in 1949, Mississippi became the last state to enact a workers’ compensation statutory scheme.⁷

[2] — General Features—The Rules of Every Game.

The hallmark of workers’ compensation acts is the creation of a system whereby injured employees recover cash-wage benefits and medical care for work-related injuries regardless of fault. The cost of this system is unilaterally born by employers. In exchange for the assured benefits to employees, employees surrender their common-law rights to sue their employers for work-related injuries. In other words, employers are immune from suit as a result of participation in the compensation system, and employees’ exclusive remedy is workers’ compensation.⁸

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of

³ *Id.* at § 2.01[4].

⁴ *Id.*

⁵ *Id.* The reader may note that Larson is frequently cited in the historical and background portions of this chapter. As the Larson texts are the well-recognized authority on workers’ compensation law, it is difficult to avoid.

⁶ *Id.* at § 2.04.

⁷ *Id.*

⁸ *Id.* at §§ 1.01-.04.

these payments to the most appropriate source of payment, the consumer of the product.⁹

§ 7.03. **Intentional Injury Exceptions to Employer Immunity—The Game Is On!**

[1] — Theory Supporting Intentional Injury Suits.

As mentioned, workers' compensation acts provide employees with an exclusive remedy for work-related injuries. However, the majority of states limit application of the act, either legislatively or judicially, to those injuries that occur "by accident."¹⁰ Accordingly, intentional injuries do not occur "by accident," employer immunity is lost, and common law remedies become available.

[2] — Statutory and Common Law Exceptions.

Every state has addressed the issue of "intentional injury" and whether an exception to employer immunity is appropriate. Of those that recognize an exception, some codify the exception in their statutes, and others are the result of judicial interpretation of the statute. Eleven states do not recognize any "intentional injury" exception *for employers*:¹¹ Alabama, Colorado,¹² Georgia, Hawaii, Maine, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Virginia, and Wyoming.¹³

⁹ *Id.* at § 1.04[3].

¹⁰ 2 Arthur K. Larson & Lex K. Larson, *Larson's Workers' Compensation Desk Edition* § 42.01 (2006).

¹¹ Some may, however, recognize intentional injury actions against individual employees.

¹² However, Colorado courts have alluded to an exclusion where an employer may be held liable to an employee for intentional torts that are committed by the employer or the employer's alter ego if it is shown that the employer deliberately intended to cause injury and acted directly, rather than constructively through its agent. *See* John W. Grund, J. Kent Miller, and Graden P. Jackson, *Personal Injury Practice—Torts and Insurance*, Ch. 54, § 54.9 (2006); *Kandt v. Evans*, 645 p.2d 1300 (Colo. 1982); *Schwindt v. Hershey Foods Corp.*, 81 p.3d 1144 (Colo. App. 2003); and *Ventura v. Albertson's Inc.*, 856 p.2d 35 (Colo. App. 1992).

¹³ The Oklahoma Legislature has introduced a bill eliminating intentional injury exceptions to immunity. If passed, it would become effective November 1, 2007.

Of the states that do recognize an exception, the battleground issue arises: what is “intentional”? This question is often easily answered in the context of the traditional notion of “intentional torts,” *i.e.*, subjective intent to cause harm. Some states, however, are inclined to allow moral sensibilities erode the definition of “intentional” into something less.

[3] — Pure Subjective Intent.

The majority rule across the country is that employers will not lose immunity for injuries caused by anything less than a “conscious and deliberate intent directed to the purpose of inflicting an injury.”¹⁴ In North Dakota, one can find an example of a well-written statutory exception:

The sole exception to an employer’s immunity from civil liability under this title . . . is an action for an injury to an employee caused by an employer’s intentional act done with the conscious purpose of inflicting injury.¹⁵

This statutory exception leaves little room for interpretation. It does not “open the door” for an injured employee to argue, based on circumstantial evidence, that his employer really intended the injury. Instead, it confines the exception to the rare circumstance where an employer subjectively and intentionally acts to hurt his employee. The criminal law concept of “premeditation” is echoed in the “conscious purpose” language.

Arkansas’ exception to employer immunity is a common law exception and the concept of “premeditated” even appears in its case law: “[the facts must show that the employer] had a ‘desire’ to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure the employee.”¹⁶ Interestingly, Arkansas’ case law has alluded to the

¹⁴ 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 103.03.

¹⁵ N.D. Cent. Code 65-01-01.1.

¹⁶ *Miller v. Ensco, Inc.*, 692 S.W.2d 615, 617 (Ark. 1985).

“substantially certain” language discussed below.¹⁷ However, the Arkansas courts have resisted the expansion of this concept.¹⁸

[4] — The Best of Intentions: Constructive Definitions of Intent.

Most jurisdictions which recognize an “intentional” exception to exclusivity follow the rule that actual intent to injure is necessary to come outside of the exclusivity provisions. Nevertheless, in recent years, there has been a trend toward permitting common law suits when the injury is the result of actions the employer knew were “substantially certain” to cause injury.¹⁹

The beginnings of an expanded concept of “intentional” can be traced to a couple of well-known legal authorities. First, the Restatement (Second) of Torts states: “[t]he word ‘intent’ is used throughout the Restatement of this subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are *substantially certain to result from it*.”²⁰

Next, Professor Prosser expounds on the subject of “intent” in his *Handbook of the Law of Torts* as follows:

Intent . . . is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired,

¹⁷ *Id.*

¹⁸ See *Guerrero v. OK Foods, Inc.*, 2006 WL 476985 (Ark. App. 2006): Here, appellant makes a public policy argument that we should expand our intentional-tort exception “to embrace patterns of fact such as the one at bar, thereby overturning a series of cases to the contrary.” He cites cases from other jurisdictions that have allowed an exception in situations where the employer had knowledge that there was a substantial certainty of harm to the employee, and he urges us to adopt this standard or a similar standard Guerrero’s arguments are policy arguments that are for the legislature, not the courts, to consider. Our supreme court has repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors.

¹⁹ 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 103.03, fn 1.

²⁰ Restatement (Second) of Torts § 8A (emphasis added).

but also to those which the actor believes are substantially certain to follow from what he does The practical application of this principle has meant that where a reasonable man . . . would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even the court, as though he had intended it.²¹

[a] — *Mandolidis v. Elkins Industries: The First Departure from True Intent.*

In 1978, West Virginia became the first jurisdiction to depart from the true intent standard in *Mandolidis v. Elkins Industries*.²² *Mandolidis* was a combination of three workplace injury cases. The namesake plaintiff, James Mandolidis, sued his employer for injuries sustained when he operated a table saw with a missing safety guard. Some exacerbating facts were alleged, including (1) that OSHA had previously forbidden the machine’s use until a guard was installed, but that the guard was again removed shortly thereafter; (2) the fact that an employee who had refused to operate the guardless saw had been fired; and (3) that the employer ordered employees to operate machines without guards to improve production speed. The West Virginia Supreme Court held: *an employer is subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in willful, wanton, and reckless misconduct*.²³ Note that concomitant with this holding the court adopted the definition of “intent” from Restatement (Second) of Torts § 8A.²⁴

[b] — “Substantially Certain” Jurisdictions.

Following West Virginia’s lead in *Mandolidis*, several other states broadened the concept of “intentional,” including Ohio, Louisiana, North

²¹ § 8 (W. Prosser, *Handbook of the Law of Torts* 4th Ed. 1971)(emphasis added).

²² *Mandolidis v. Elkins Indus.*, 247 S.E.2d 907 (W. Va. 1978).

²³ *Id.* at Syl. Pt. 1.

²⁴ *Id.* at fn. 9.

Carolina and Michigan, and what is termed the “substantially certain” test arose.²⁵

Today, nine jurisdictions follow the “substantially certain” test: Ohio,²⁶ Louisiana,²⁷ North Carolina,²⁸ Connecticut,²⁹ Florida,³⁰ New Jersey,³¹ Oklahoma,³² South Dakota³³ and Texas.³⁴ Note that Oklahoma introduced legislation to eliminate the exception this year, but that as of the date this chapter was submitted for publication it had not passed.

The problem with the “substantially certain” test is the room for interpretation, and, hence, creative legal arguments. The analysis can focus more on whether the result was certain to follow and less on what the employer actually believed would happen.³⁵

An example of this faulty analysis is found in *Mayer v. Valentine Sugars, Inc.*,³⁶ where an explosion occurred and injured the plaintiff. In his suit, the plaintiff alleged that the employer’s officers knew to a substantial certainty that their acts in violation of safety regulations would cause an explosion.³⁷ The Louisiana Supreme Court held that a cause of action was stated—to the dismay of the dissenting Judge Watson, who succinctly stated: “[t]he present case is one of those, because the allegations in the petition and the various amended petitions simply do not allege intentional acts; the substance

²⁵ 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 103.04[1].

²⁶ Ohio Rev. Code Ann. § 2745.01.

²⁷ *Bazely v. Tortorich*, 397 So.2d 618 (La. 1984).

²⁸ *Woodson v. Rowland*, 407 S.E.2d 222, 226 (N.C. 1991).

²⁹ *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994).

³⁰ Fla. Stat. § 440.11.

³¹ *Millison v. E.I. du Pont Nemours & Co.*, 501 A.2d 505 (N.J. 1985).

³² *Davis v. CMS Continental Natural Gas, Inc.*, 23 P.3d 288 (Okla. 2001).

³³ *Harn v. Continental Lumber Co.*, 506 N.W.2d 91 (S.D. 1993).

³⁴ *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex. 1985).

³⁵ 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 103.04[4].

³⁶ *Mayer v. Valentine Sugars, Inc.*, 444 So. 2d 618 (La. 1984).

³⁷ 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 103.04[2][c], fn 27.

of plaintiffs' petition and amended petitions, even as skillfully and artfully drawn as they are, is that *the courts are urged to believe that the defendants intended to blow up the plant*. Since such a conclusion is patently absurd, the petition does not state a cause of action."³⁸

Another example is found in Texas. In *Rodriguez v. Naylor Industries, Inc.*,³⁹ the plaintiff was told by his supervisor to drive one of employer's trucks on a two-destination trip. The truck had four tires on the back axle and two tires on the front axle. Before leaving the plaintiff discovered that the tires had no tread and were cracked and that the inner tube was visible on one of the tires. When the plaintiff informed his supervisor of this fact he was told to "Either take it or walk."⁴⁰ Indeed, on the first leg of the journey a front tire blew out, and plaintiff was told by a second supervisor to replace it with one of the back tires and keep going. Before plaintiff reached his final destination, the lone back tire blew out causing the truck to flip over.

The Supreme Court of Texas reversed the lower court's grant of summary judgment to the employer on the grounds that an issue of fact existed as to whether the employer knew with substantial certainty that injury would occur, despite the employee-plaintiff's testimony that he was unaware of any reason his employer would want to hurt him. Certainly, the facts of this case demonstrate an employer who was willing to subject an employee to unreasonable risk. But does it demonstrate an *intent* to injure? When the court's analysis focuses on likelihood of injury, as the Texas court does in this case, this issue tends to fall by the wayside.

For a "substantial certainty" determination that cuts in an opposite direction, the Supreme Court of North Carolina's decision in *Rose v. Isenhour Brick & Tile Co.*⁴¹ is illustrative. In *Rose*, the employee was killed operating a brick setting machine. The employer had trained employees to bypass the machine's safety mechanisms in order to speed up production, and plaintiff's

³⁸ *Mayer*, 444 So. 2d at 621 (*emphasis added*).

³⁹ *Rodriguez v. Naylor Indus., Inc.*, 763 S.W.2d 411 (Tex. 1989).

⁴⁰ *Id.* at 411.

⁴¹ *Rose v. Isenhour Brick & Tile Co.*, 472 S.E.2d 774 (N.C. 1996).

expert testified that this method resulted in a 77.3 to 93.1 percent chance of serious injury or death. The employer argued contrarily that there was no evidence of prior injuries in six years, and that the machine head moved slowly and made noise that warned of its approach. The North Carolina court upheld summary judgment in favor of the employer on the grounds that there was no evidence that, prior to the accident, the employer was aware of a high probability of injury. Thus, in this decision, the *likelihood* of injury is “trumped” by lack of employer *knowledge*, as it should be.

[5] — The Best of the Rest.

Several jurisdictions have intentional injury exceptions that vary from the “substantially certain” or “pure intent” models. They are briefly discussed in this section.

[a] — West Virginia.

Since the *Mandolidis* decision nearly 30 years ago, West Virginia’s Legislature has created a statutory scheme to control the exception. An employee may sue his employer by either alleging that the employer acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury,⁴² or by alleging the elements of a five-part statutory test. West Virginia’s unique statutory test essentially defines the circumstantial evidence that will suffice to demonstrate that the employer intentionally caused injury; the employer is liable if the employee proves:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

⁴² W. Va. Code § 23-4-2(d)(2)(i).

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.⁴³

[b] — Michigan.

Michigan's Legislature removed "substantially" from the "substantially certain" exception:

an intentional tort shall exist only when an employee is injured as a result of the deliberate act of the employer and the employer specifically intended the injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional act shall be a question of law for the Court.⁴⁴

⁴³ W. Va. Code § 23-4-2(d)(2)(ii).

⁴⁴ Mich. Comp. Laws § 418.131.

[c] — California.

California has a unique system that generally does not allow employee suits. However, an employee gets compensation increased by one-half if he or she is injured by reason of “serious and willful misconduct” of the employer.⁴⁵ Employee suits for intentional injury are also permitted when 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.⁴⁶ Finally, an employee or his/her dependants may bring an action where the employee’s injury or death is proximately caused by a willful physical assault by the employer,⁴⁷ 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, or 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.⁴⁸

[d] — Washington.

Washington’s intentional injury exception is similar to Michigan’s. Washington’s Revised Code provides that “[i]f injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted . . .”⁴⁹ “Deliberate intention” “means the employer

⁴⁵ Cal. Lab. Code § 4553.

⁴⁶ Cal. Lab. Code § 4558(b).

⁴⁷ Cal. Lab. Code § 3602(b).

⁴⁸ *Id.*

⁴⁹ Wash. Rev. Code § 51.24.020.

had actual knowledge that an injury was *certain* to occur and willfully disregarded that knowledge.”⁵⁰

[e] — Oregon.

Oregon possesses a statutory “deliberate intent” exception.⁵¹ Worth noting, however, is an Oregon appellate court’s holding that under this exception, “deliberate intent to injure” means that the employer had an opportunity to weigh consequences and made a “conscious choice” among possible courses of action.⁵²

[f] — Missouri.

Missouri trades the “substantially certain” exception for the “specific purpose” test: an employer is subject to common law action where it *intentionally acts with the specific purpose* of injuring the employee.⁵³ The “specific purpose” test varies a little from “substantial certainty; “when an employer acts intentionally and is substantially certain that injury to an employee will result, the employer has a specific purpose to inflict injury.”⁵⁴

[g] — New Mexico.

New Mexico’s Supreme Court created an intentional injury exception somewhat similar to the West Virginia’s statutory test. In New Mexico, an employer loses immunity if (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker, (2) the worker or employer expects the intentional act or omission to result in the injury or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.⁵⁵ This exception is one of, if not

⁵⁰ Birkliid v. Boeing Co., 904 P.2d 278 (Wash. 1995)(emphasis added).

⁵¹ Or. Rev. Stat. § 656.156(2).

⁵² See Lusk v. Monaco Motor Homes, Inc., 775 P.2d 891, 894 (Or. App. 1989).

⁵³ McCoy v. Liberty Foundry Co., 635 S.W.2d 60 (Mo. 1982)(emphasis added).

⁵⁴ *Id.*

⁵⁵ Delgado v. Phelps Dodge Chino, Inc., 34 P.3d 1148 (N.M. 2001).

the most, liberally-worded exceptions to employer immunity. First, the employer need only “reasonably expect” an injury, which is not far from saying that the injury is “foreseeable”—as in negligence cases. Second, to “utterly disregard” consequences is quite easy to do if an employer is found to “reasonably expect” the injury.

§ 7.04. When to Hold 'Em and When to Fold 'Em: Evaluating Your Deal as an Employer.

Recognizing a jurisdiction's attitude toward what is or is not “intentional” is only the beginning. There are a variety of other factors affecting just how “immune” an employer is from employee suits. This section discusses some of these factors. Learning about different aspects of other jurisdictions' systems may also provoke some thought for legislative change in your particular state.

[1] — Just Who Is the “Employer”?

Many jurisdictions limit the breadth of intentional injury exceptions by not allowing the employer to be liable for its employees' actions. In other words, traditional notions of *respondeat superior* are discarded and it must actually be the employer, and not a merely a supervisor or foreman, who intentionally injures.⁵⁶ Larson favors this approach:

When the person who intentionally injures the employee is not the employer in person or a person who is the alter ego of the corporation, but merely a foreman, supervisor or manager, both the legal and moral reasons for permitting a common-law suit against the employer collapse and a majority of modern cases bar a damage suit against the employer.⁵⁷

However, many early decisions assumed that a supervisor's actions are those of the employer, and some jurisdictions more recently addressing the

⁵⁶ See, e.g., *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271 (Ind. 1994)(it must be the employer who harbors the intent and not merely a supervisor, manager or foreman).

⁵⁷ 2 Arthur K. Larson & Lex K. Larson, *Larson's Workers' Compensation Desk Edition* at § 103.06.

issue have found that supervisors' actions may be imputed to the employer.⁵⁸ It is in these states that potential exposure is greatest.

[2] — Election Options.

A few states require that the employee forego compensation benefits in order to pursue an intentional injury suit. For example, Kentucky's statute provides that "[i]f injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, *or in lieu thereof*, have a cause of action at law against the employer as if this chapter had not been passed . . ."⁵⁹

Another interesting employee-option feature of some states' systems is the option to waive workers' compensation coverage at the very outset of employment, thus retaining the ability to maintain a common-law right of action for damages. For example, in Texas "[a]n employee who desires to retain the common-law right of action to recover damages for personal injuries or death shall notify the employer in writing that the employee waives coverage . . . The employee must notify the employer [within five days of beginning employment or receiving notice that compensation coverage has been obtained]."⁶⁰

Both of these kinds of statutory election provisions treat the employer more fairly because they require the employee to surrender his traditional end of the bargain in workers' compensation systems—no fault recovery for injury. In other words, the employer loses its immunity, but the employee also loses his compensation benefits.

⁵⁸ *Id.*

⁵⁹ Ky. Rev. Stat. § 342.610(4)(emphasis added). *See also* Ariz. Rev. Stat. § 23-1022 (injured employee may either claim compensation or maintain an action at law for damages against the person or entity alleged to have engaged in willful misconduct); Md. Lab. & Empl. § 9-509(d)(covered employee or surviving spouse, child or dependent may either bring claim for compensation or bring an action for damages against employer for deliberate intent.).

⁶⁰ V.T.C.A. Labor Code § 406.034(b).

[3] — Borrowed Servants.

The borrowed servant doctrine recognizes that if a “special” or “borrowing” employer exercises a sufficient degree of control over the borrowed employee for a sufficient length of time to suggest that the employee has assessed the risks of his new employment and has acquiesced in the special employer’s control, the special employer is deemed to be a statutory employer for purposes of workers’ compensation.⁶¹ The borrowed employee who sustains an injury while working for the special employer is then barred from asserting a personal injury suit against the special employer and instead is remitted to the exclusive remedy provided by the relevant workers’ compensation statute.⁶²

The borrowed servant rule is a useful extension of employer immunity and yet another layer of protection that limits suits.

[4] — Employee Recovery Issues.

[a] — Offsets for Benefits Paid.

In jurisdictions that favor employee intentional injury suits, some solace can be found in the form of an offset against the injured employee’s recover for workers’ compensation benefits received. For example, in West Virginia an employee only recovers in common law action damages above those benefits “received or receivable.”⁶³ Note that this provides an offset that includes *future* benefits the employee is expected to receive.⁶⁴ New Mexico,

⁶¹ *Vanterpool v. Hess Oil V.I. Corp.*, 766 F.2d 117 (3d Cir. 1985)(citing 1C A. Larson, *Workmen’s Compensation Law* § 48.10 (1982)).

⁶² *Id.* See also *Maynard v. Kenova Chem. Co.*, 626 F.2d 359 (4th Cir. 1980)(negligence action precluded where injured employee was borrowed servant under control of special employer; special employer enjoyed immunity under workers’ compensation statute); *Lavallie v. Simplex Wire and Cable Co.*, 609 A.2d 1216 (N.H. 1992)(borrowing employer receives immunity under statute).

⁶³ W. Va. Code § 23-4-2(c).

⁶⁴ See also Wash. Rev. Code § 51.24.020: [i]f injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits *paid or payable* under this title. (emphasis added).

another liberal jurisdiction, employs a similar rule: if an employee receives workers' compensation and recovers damages against the employer for intentional injury, the tort damages must be offset by the benefits received under workers' compensation.⁶⁵

[b] — Benefits Adjustments in Lieu of Common Law Damages.

Some states merely adjust benefits received by the injured worker instead of allowing common law suits. In these jurisdictions, the standard for recovering these extra benefits seems to be typically less stringent than intentional injury suits. For example, in Connecticut the worker is compensated at higher percentage if injury or illness is caused by violation of safety regulation after the violation is cited and not timely abated.⁶⁶ In Massachusetts, if an employee is injured by reason of *serious and willful misconduct* of an employer or any person regularly entrusted with and exercising the powers of superintendent the amounts of compensation are doubled.⁶⁷ In these systems the employer is still punished for undesirable conduct but still maintain a strong layer of protection from the general damages a jury could award.

[c] — Interaction with the Third Party Case.

[i] — Subrogation by Law or Right.

Although not entirely related to intentional injury suits, it is useful to note that some jurisdictions provide the employer subrogation rights against third parties who injure or kill its employee while on the job. For example, Florida's code provides that if a third party injures or kills employee, the employee or dependents may accept compensation benefits and sue the third party, and that the employer is subrogated to rights of employee against third party tort-feasors.⁶⁸

⁶⁵ Salazar v. Torres, 122 P.3d 1279 (N.M. 2005).

⁶⁶ Conn. Gen. Stat. § 31-307.

⁶⁷ Mass. Gen. Laws, ch. 152, § 28.

⁶⁸ Fla. Stat. § 440.39. *See also, e.g.*, Idaho Code Ann. § 72-223: If compensation has been claimed and awarded, the employer having paid such compensation or having become

[ii] — Made Whole Rule.

Subrogation between tort-feasors that have different theories of liability and have different elements of damages presents some of the most complicated legal questions for counsel. When the offsets and collateral source issues become overly complicated, the litigants should refer back to the made whole rules. As long as the employee is not receiving a double benefit, or the defendant getting a double credit, such as an offset credit and a subrogation against a co-defendant, then the interaction between defendants can be reconciled.

[iii] — Differing Standards of Culpability.

This section could be an entire chapter of its own. As such, allow the following example to illustrate the issues that arise when the employee sues multiple parties for a workplace injury, and seek to understand how your jurisdiction addresses these issues (or whether they have even been addressed at all):

Employee (Bert), a roofbolter, is injured in the mine when installing roofbolts. Specifically, when he is pushing the roof bolt into the roof with the hydraulically-driven arm of the roofbolting machine, the bolt bends, snaps and strikes Bert. Bert had previously complained to his supervisor, Ernie, that the roofbolter arm had been malfunctioning, and the mine had previously been cited for not maintaining the roofbolting machine in good working condition. Bert sues the mine/employer for intentional injury, the roofbolting machine manufacturer for product liability, and the roof bolt manufacturer for product liability. It is not clear exactly what caused the bolt to break.

Suppose this case goes to trial. How will fault be apportioned among the co-defendants when there are two “negligence defendants” and

liable therefore, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employers' compensation liability.

one “intentional injury defendant”? Can an employer who is liable for intentionally injuring its employee be apportioned a percentage of fault (and, as such, be jointly and severally liable for only a percentage of an injury it intentionally caused)? Can the employer enjoy contribution from the product liability defendants if they are liable? Can the product liability defendants enjoy the benefit of an offset for benefits received by the employer? What if the employer is found not to have intentionally injured the employee, but to have negligently contributed to it—does it still owe contribution to the co-defendants?⁶⁹

In short, traditional concepts of allocation of fault, contribution and indemnity become contorted when an “intentional injury defendant” is thrown into the mix. Moreover, because the employer is most often the “closest” defendant to the injury it is perceived as a target despite the more difficult theory of recovery—and negligence defendants are often quick to deflect blame.

[d] — Who Gets a Piece of the Pie?

It is useful to know who is able to recover for an intentional injury suit, particularly in the event of death. Some statutes limit recovery to those individuals who are most directly affected by the loss of the worker. For example, in Maryland the covered employee or *surviving spouse, child or dependent* may either bring claim for compensation or bring an action for damages against employer for deliberate intent.⁷⁰ Likewise, in West Virginia “the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer . . .”⁷¹ Provisions such as these may prevent “Uncle Buck” from trying to cash in on

⁶⁹ “Perhaps the most evenly-balanced controversy in all of compensation law is the question of whether a third party in an action by the employee can get contribution or indemnity from the employer when the employer’s negligence has caused or contributed to the injury.” 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* at § 121.01[1].

⁷⁰ Md. Lab. & Empl. § 9-509(d).

⁷¹ W. Va. Code 23-4-2(c).

an employee's death when the immediate family does not want to sue the employer for which their loved one worked for over 30 years, or when the deceased employee had no spouse or dependents.

[5] — Who Is the Decision Maker?

[a] — Administrative Determinations.

In Missouri, the question of whether an injury is “accidental” or “intentional” is an issue that is to be determined by the Labor and Industrial Relations Commission, and not by the courts.⁷² This feature is an interesting alternative to a jury determination of this question (particularly if there is general animosity towards the employer in the venue where the injury occurred).

[b] — Question for the Court.

In Michigan, the question of “intentional” is one for the court.⁷³ Again, and certainly depending on the judge, this can in many circumstances be preferable to a jury determination of the issue.

[6] — Co-Employee Liability.

Although not necessarily directly affecting employers, it is useful to note that some jurisdictions do not extend the employer's immunity to co-employees. For example, in Alabama there is no intentional injury exception to employers, but an employee may sue a co-employee for “willful conduct” causing injury.⁷⁴

[7] — Exclusions for Employee Action.

Most workers' compensation statutes exclude coverage for an employee's intentional injury to himself, or for injury caused by employee intoxication. More interesting, however, are some states' provisions to exclude coverage

⁷² Killian v. J & J Installers, Inc., 802 S.W.2d 158, 161 (Mo. 1991).

⁷³ Mich. Comp. Laws § 418.131.

⁷⁴ Ala. Code 1975 § 25-5-11(b). *See also* W.S. § 27-14-104(a): co-employees are not granted immunity where employee acts intentionally to cause physical harm or injury . . . Otherwise, immunity extends to employee acting within scope of employment.

for particular unsafe actions by the employee. For example, in Kansas, if the injury to the employee results from the employee's willful failure to use a guard or protections against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury is disallowed.⁷⁵ In Virginia, there is no recovery for accidents caused by the employee's willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee.⁷⁶

§ 7.05. Issues in Litigating Intentional Injury Cases— Play Your Hand Wisely.

When accused of intentional injury in states that interpret “intentional” broadly, a host of issues and evidence typically come into play. Understanding these common issues and evidence can help employers limit their risk and successfully litigate suits.

[1] — Prior Injuries, Complaints and Citations: Are They the Employee's Only Aces?

The most common (and easiest) way for the employee to stack the deck and prove circumstantially that an employer intended injury is through prior injuries, complaints or regulatory citations arising from a particular unsafe condition.⁷⁷ These three items readily show that an employer realized and appreciated an unsafe condition likely (substantially certain, even) to cause injury.

The most damaging evidence for an employer in an intentional injury suit is a prior accident resulting from the same or similar conditions or practices that caused the instant injury. The “dots are easily connected” because it is a result tied to an unsafe condition. Unless the prior accident is not known, or

⁷⁵ Kan. Stat. Ann. § 44-501(d)(1).

⁷⁶ Va. Code § 65.3-306.

⁷⁷ See 2 Arthur K. Larson & Lex K. Larson, *Larson's Workers' Compensation Desk Edition* at § 103.04[2][f].

the cause is not ascertainable to the employer, there is a strong presumption of prior knowledge.

Prior citations from federal or state agencies relating to similar conditions as those that caused the injury are also persuasive in proving that the employer was aware of a workplace hazard likely to cause injury. However, if the condition is one that was cited and abated, it can be evidence of lack of knowledge (and, thus, lack of intent).

Employee complaints may also demonstrate knowledge of an unsafe condition likely to cause injury. On the other hand, these are often less effective proof, as complaints are often vague and intertwined with general reporting of workplace conditions.

In contrast, always remember that the *absence* of prior injuries, citations or complaints is strong evidence that the employer did not have prior knowledge of unsafe conditions, and thus did not intend to cause injury. This is especially true for employers with extensive history marked by strong safety records.

However, the circumstantial evidence available to plaintiffs is not limited to these three items. West Virginia and most constructive intent states recognize that the standard can be proven by any circumstantial evidence.⁷⁸ Accordingly, a supervisor's knowledge of unsafe conditions may be established in deposition testimony and can provide the foundation for a *prima facie* case of constructive intent in jurisdictions where the supervisor's knowledge is imputed to the employer. In mining or industrial cases, the past experiences of supervisors, combined with general knowledge of the numerous hazards that are presented by the work environment, can show knowledge of unsafe conditions. For example, the employee's attorney can often solicit admissions from the supervisor that certain conditions are known to present a high degree of risk in the workplace, and then establish that the supervisor knew of the existence of these conditions just prior to the subject accident. A circumstantial bridge to intent is then constructed.

⁷⁸ See, e.g. *Woodson v. Rowland*, 407 S.E.2d 222, 231 (N.C. 1991) (“substantially certain” test is one of “constructive intent” and “actual intent” need not be proved).

[2] — Supervisory Employees: Their Role in the Defense.

As evidenced by the above section, in states where an employer's intent can be established by a supervisor's actions, the role of supervisors in the defense is pivotal. From the outset of the case, defense counsel and the employer should be selecting the supervisor(s) who will be the "face" of the employer in the litigation and at trial. Remember that supervisors have different capacities and are distinguished in different ways. Employers can have salaried employees who do not supervise and control the workforce and hourly employees that oversee and direct employees. This is especially true when experienced employees are asked to train employees on new tasks.

During the early stages of the litigation, it can be difficult to predict what path a case will take. If supervisors are trained not to exaggerate their authority and not to give opinions on specific aspects of conditions and practices with which they are unfamiliar, the defense can be tailored as the case progresses. Therefore, supervisors should be trained to minimize their authority and responsibility in the work place when possible. The answer "I do not know—that's not my job" can be a perfect answer to many questions. This answer can prevent the preparation plant foreman from becoming the plaintiff's key witness about the unsafe conditions at the load-out.

In order to prevent evidence that establishes intent from being developed, it is important to work with key witnesses to avoid traps such as those discussed above. It is far more effective to prepare witnesses to recognize the types of admissions the plaintiff's counsel will attempt to solicit than to have them memorize multiple aspects of the litigation. In other words, if the witness understands the "big picture," he is less likely to provide plaintiff's counsel the ammunition to construct an intentional injury case.

In preparing supervisors for deposition testimony, a variety of tactics can increase the chance of success. First, find the appropriate supervisors early in the case, as good testimony can be molded at the outset of the litigation. In an initial meeting, a supervisor's early attempts to specifically recall events after significant passage of time can become an exercise in strengthening and solidifying good facts for the defense in that person's mind.

Find out if the witness is or has been contacted by plaintiff's counsel. Plaintiff's counsel will sometimes attempt to obtain statements from

supervisors and memorialize versions of the facts that are advantageous to the employee's case. This is a questionable legal tactic as these witnesses are entitled to counsel if their conduct may be at issue, but the rules for this type of contact can be vague for ex-employees. So, find out if the witness has ever been contacted, and if so, the mechanism and content of the statement. A witness can always request his or her own statement.

Explain the cause of action to the supervisor and make it personal. Many supervisors do not view themselves as a target, particularly if the supervisor is low-level and more inclined to be sympathetic to the plaintiff. It is helpful in gaining both the supervisor's attention and cooperation to make it clear that the employee is alleging that the employer, through its supervisors (you!), intentionally caused injury. In some states, the employees may name the supervisors personally in the suit. Often, this is an attempt to keep the matter out of federal court by destroying diversity. However, this can benefit the defense of the suit in two ways. First, especially for employers with high turnover, it keeps the supervisor-defendants involved and interested in the case, even if they no longer work for the employer. Second, it provides a "little guy" defendant for the jury to identify with at trial.

Use examples and practice common lines of questioning. Employee suits are often complicated and difficult even for a sophisticated supervisor to comprehend. Discuss examples of conduct that would or would not sustain an intentional suit to help the supervisor understand the cause of action and also recognize lines of questioning intended to create scenarios of intentional injury.

Finally, one of the most important things to do is establish rapport with the supervisors. Demonstrate an understanding of their industry, job and responsibilities. Let them feel important and vested in the action and motivate them to care about the result. A disinterested, low-level supervisor can sometimes be a very bad witness.

[3] — Employer's Accident Investigation and Reports.

Employer accident investigation reports can be the most damaging evidence in a case. It is a document usually authored by the employer contemporaneously with the injury—giving it substantial credibility.

Report forms should be reviewed and tailored to limit damaging evidence. Many employers use the forms as an accident prevention tool. They often identify what, in the opinion of the author, caused the event, or even worse, ask “how could this accident have been prevented?” The answers to these questions can provide a basis for showing knowledge and appreciation of a condition that can cause injury. For example, an entry on an investigation form that says “the shaft should have been guarded” guarantees the allegation in the employee’s complaint that the employer recognized the fact that the unguarded shaft was dangerous and substantially certain to cause injury. However, the employer could very well not have realized that the slowly-rotating, unguarded shaft not near any employees’ working area was unsafe (particularly if it were the first incident of injury and not the subject of any prior citations). Although reports can be used to constructively memorialize the incident, the information on them should be kept to the facts. Critical review and prevention meetings, and documents related thereto, should be separated from the investigation process to limit discoverability.

Despite potentially negative ramifications, investigation reports are often completed by low-level supervisory employees. At a minimum, reports should be reviewed by someone who understands potential liability and the nature of causes of action in the jurisdiction where the employer is operating.

Safety-consciousness and zealous safety attitudes often result in the worst reports. Employers work hard to foster strong safety attitudes and approach incidents with a critical eye on later prevention. Although an admirable practice, such mentalities often result in a desire to accept blame or assume that the accident was a failure on the supervisor’s part. Accordingly, the report becomes an admission of guilt.

Review accident investigation protocol and written forms to ensure that they do not increase potential exposure.

[4] — Administrative Agency Investigation and Reports.

The Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) investigate most, if not all, serious accidents; as a result, their investigations are often evidence in intentional injury suits. In some states, the violation of a statute or regulation

is an element that must be shown by the plaintiff in his/her lawsuit. At a minimum, the findings from the agencies relating to the severity of conduct can be relevant to the determination of whether the employer's acts were "intentional." A review of criteria and determinations made by these two major federal agencies will demonstrate their relevance to an intentional injury suit.

[a] — Occupational Safety and Health Administration.

The Occupational Safety and Health Administration (OSHA) compliance officers assess degrees of penalties based on an employer's knowledge of the subject conditions. For example, an officer will examine four elements to determine if a violation is "serious":

- Step 1. The types of accident or health hazard exposure which the violated standard or the general duty clause is designed to prevent.
- Step 2. The most serious injury or illness which could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1.
- Step 3. Whether the results of the injury or illness identified in Step 2 could include death or serious physical harm.
- Step 4. Whether the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.
 1. In this regard, the supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge.
 2. In cases where the employer may contend that the supervisor's own conduct constitutes an isolated event of employee misconduct, the CSHO shall attempt to determine the extent to which the supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.

3. If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO is satisfied that the employer could have known through the exercise of reasonable diligence. As a general rule, if the CSHO was able to discover a hazardous condition, and the condition was not transitory in nature, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence.⁷⁹

As is apparent, the OSHA inspector writing a violation will make many determinations bearing on an employer's knowledge, and, as a result, create circumstantial evidence highly relevant to a potential lawsuit.

[b] — Mine Safety and Health Administration.

Like OSHA inspectors, the Mine Safety and Health Administration inspector's job duties involve many discretionary determinations that may become evidence in an employee suit. A review of several sections of the MSHA 7000-3 form illustrates this fact:

8. **Condition or Practice:** In this section, the citing official outlines the working condition noted in the workplace in full narrative description. It is often cited to later by the plaintiff's expert when the condition can be connected to the cause of the injury. In some instances, previously existing conditions are used to show prior knowledge of the unsafe condition.
9. **Violation:** Part A allows the citing official to indicate an opinion that the condition cited in section 8 affects safety. Part C gives the specific violation of the federal regulation involved in the condition or practice.
10. **Gravity:** Parts B and C of this element can be the most damaging. Part B allows the citing official to assess the severity of the

⁷⁹ OSHA Field Inspection Reference Manual CPL 2.103, Section 7 - Chapter III. Inspection Documentation.

injury that can be “reasonably expected” to come from the condition or practice. Obviously, a permanently disabling or fatal determination here would be used to establish the standard included in many states that the potential injury be severe. Part C is the decision by the citing official as to whether the condition meets the “Significant and Substantial” (“S&S”) criteria of the agency. S&S is not defined in the Mine Act itself, but is defined in numerous Review Commission cases as simply a condition that is reasonably serious and likely to cause injury. In order to sustain this finding, if the Citation/Order is contested, the Secretary of Labor must have proof that the condition or practice was a violation of a mandatory safety standard which created a measure of danger that is likely to result in injury of a serious nature.

11. Negligence: There are five choices for the negligence evaluation by the citing officer. In instances of conditions or practices that result in serious injuries, the choice is usually between “D. High” and “E. Reckless Disregard.” In most states neither element definitively establishes intent, and in fact a high negligence finding can be evidence that there was no intent.
12. Type of Action: If the citing official determines that the condition or practice constitutes an unwarrantable failure, a 104(d) Order will usually be issued. Unwarrantable failure is also related to the operator’s degree of fault, and can be issued if Part 11 is found to be “high negligence” or “reckless disregard.” It is not a finding that is associated with a “could have or should have known” standard.

In litigation, the findings above can have the same practical effect as a policeman’s determination of fault in a car wreck case. While an opinion in large part, it is rendered by an individual with authority and close in time to the actual incident.

If possible, it is better to contest and win than settle and negotiate penalty severities. However, settlement of a Citation/Order may provide an opportunity to negotiate settlement language that reduces severity

determinations. Be aware, however, that a thorough litigant can file a Freedom of Information Act request for the entire Citation/Order record, ascertain the negotiated language, and explain to the jury that the penalty was initially more severe and only lessened through compromise.

[5] — Training and Training Records.

When the basis for allegations of intentional injury is “slim pickens,” training issues tend to surface. Some states allow the failure to train to stand as a specific condition or practice that can establish a deliberate intent case. Indeed, previous accidents or citations on training issues are decent circumstantial evidence that the employer knowingly subjected its employee to unsafe conditions.

Complete and accurate training records can be a great benefit for the defense regardless of whether insufficient training is alleged. Consecutive years of training can add to the weight of evidence demonstrating general “safeness.” But, absence of written proof of training can be damaging to a case, and incomplete, haphazardly written, or lost records can be more damaging yet.

Lack of training records in the employee’s file is usually a technical violation of regulatory requirements. However, that does not necessarily mean an employee was not trained or that lack of training caused an accident. The mere inadequacy of training documents is not insurmountable; just because an employer did not provide training does not mean an employee was not trained. On-the-job training, past experience with the job tasks from other employers, union and trade classes, and observations of co-employees or supervisors working on an assigned task can substitute for formal training. In multi-employer work places, employees often receive training from site owners or contractors as well. Finally, the regulatory requirements for training can also be used to establish the content of training. For example, both MSHA and OSHA trainers and training plans must be certified by the agencies. In the case of MSHA, the agency outlines base training requirements, and so the defense can at least establish that these base elements were covered.

In some states the existence of training can be a complete defense. If the accident was caused by employee conduct, and that conduct was contrary

to training, then an intentional injury cannot be established. In fact, in West Virginia,⁸⁰ if the conduct that caused the injury was contrary to employee training or expected employee conduct, no action will lie.⁸¹

[6] — Hazard Inspections.

Hazard inspections are an emerging issue in intentional employee injury cases. Both MSHA and OSHA require varying assessments of the workplace for hazard identification. Failure to perform such inspections could become the basis for a law suit.

Recently, the West Virginia Supreme Court of Appeals, a leader in the erosion employer immunity since the *Mandolidis* decision, issued an opinion in *Ryan v. Clonch Industries, Inc.*⁸² that essentially turned a failure to perform a hazard inspection into a “clear liability” intentional injury case. The plaintiff in *Ryan* was a banding man at a saw mill. He was required to use tin snips to cut measured lengths of metal banding from a coil. During his third day of employment, he was struck in the eye when a piece of banding that he cut snapped back into his face. He was not trained to or required to wear eye protection.⁸³

The *Ryan* court recognized the employer’s lack of appreciation that the plaintiff-employee needed to wear eye protection, but did not find this fact fatal to the case:

While we agree with [the employer] that [the plaintiff’s] evidence with respect to [the employer’s] actual subjective knowledge of an unsafe working condition was lacking, we nevertheless find that Mr. Ryan’s evidence that [the employer] violated its mandatory duty to perform a hazard evaluation pursuant to [OSHA regulations], along with [the employer’s] admission of the same, requires greater scrutiny of the issue.⁸⁴

⁸⁰ West Virginia does not allow evidence of employee fault in intentional injury suits.

⁸¹ See, e.g. *Blevins v. Beckley Magnetite, Inc.*, 408 S.E.2d 385 (W. Va. 1991).

⁸² *Ryan v. Clonch Indus., Inc.*, 639 S.E.2d 756 (W. Va. 2006).

⁸³ *Id.*

⁸⁴ *Id.* at 765.

Appalled at what can be termed the “ostrich defense,”⁸⁵ the West Virginia Supreme Court of Appeals found that an employer under such circumstances is deemed to have prior knowledge of an unsafe condition and is precluded from denying the same.⁸⁶

In jurisdictions that favor intentional injury suits as a means to modify employer behavior, this decision is likely to surface in the near future. However, at its core, the *Ryan* decision is flawed. Failure to perform an inspection is an unsafe work condition like any other. If it is a willful failure, it may constructively show intent. However, the inadvertent failure to perform a hazard examination, or the negligent performance of a hazard analysis, should not provide the basis for an intentional injury suit.

[7] — Multiple Causes of Injury: Two Wrongs Don’t Make a Right.

Safety experts for employees in deliberate intent cases are tempted to expand the list of unsafe conditions or practices that exist in the workplace. In their minds, they will do a better job and the case will have a greater chance of success if they identify a plethora of safety problems. In those instances, the defense must separate these conditions into two categories: those that caused and contributed to the injury and those that did not. Clearly, those that did not are not admissible and should be the subject of a pre-trial motion *in limine*. Those that can arguably be held to have caused the accident need to be analyzed closely relative to the employer’s or supervisor’s prior knowledge of a safety issue.

In some respects, complicated combinations of causation can be beneficial for the defense.⁸⁷ The more causes there are, the more difficult it is for plaintiff to establish the burden of proof with respect to his/her injury.

⁸⁵ An employer claiming lack of knowledge of an unsafe condition despite admittedly failing to perform a required hazard evaluation.

⁸⁶ *Id.* at 766.

⁸⁷ *See, e.g.* *Handley v. Union Carbide*, 620 F. Supp. 428, 436 (“[t]here is nothing to prevent a plaintiff from alleging and attempting to prove that there was more than one specific unsafe working condition present in the workplace; it also measurably compounds [the plaintiff’s] burden of production.”).

However, this defense before the jury is not without some drawbacks. Depending on the specific facts of the case, this argument may be interpreted as acknowledgment that many safety issues existed in the workplace. If any unsafe conditions, even those only tangentially related to the accident, are egregious or inflammatory, then it may not be the most effective defense to assert.

§ 7.06. Conclusion.

The strength of one's employer immunity under workers' compensation statutes varies significantly from state to state. In some cases immunity is strong and losses will be fairly minimal, while others resemble a high stakes, no-limit poker game. At a minimum, develop business strategies to minimize exposure and increase the success of available defense tactics—else you will find the deck stacked against you. Evaluate your “deal” where you do business, know how to play your hand successfully, and you can come out a winner even if you do not have an “ace in the hole.”

