



THE BASSETT FIRM
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DEFENDING A NON-SUBSCRIBER CASE (PART 2)

In our last newsletter, we discussed defending a non-subscriber case by disproving the elements of the Plaintiff's prima facie negligence case. In this edition, we will talk about the other defenses that are available to the Defendant.

They are as follows:

1. Reliance on principles given in special jury instructions, called inferential rebuttals;
2. The use of affirmative defenses explicitly permitted under the Texas Labor Code; and
3. The use of affirmative defenses not addressed by the Texas Labor Code, but allowed to non-subscribers.

I. INFERENTIAL REBUTTALS

As stated in our previous newsletter, inferential rebuttals can also be used in defense of non-subscriber claims. Some of the most common inferential rebuttals are as follows:

1. Sole proximate cause (showing that a Plaintiff's own actions, or those of a third party, not employed by the employer, are the sole proximate cause of the incident);
2. New and independent cause (such as subsequent injuries and lawsuits, extreme exacerbations during physical therapy or at home, negligence of medical providers, or anything else that worsened the Plaintiff's condition after the fact);
3. Unavoidable accidents (an event was not proximately caused by the negligence of any party in the lawsuit);
4. Act of God (an occurrence was caused solely by an act of God, not caused by the negligence of any person. This is usually raised in severe weather cases); and

5. Premises instruction (requesting a specific instruction to the fact finder that the employer was negligent if (1) the condition posed an unreasonable risk of harm, (2) the employer knew or should have known of the danger, and (3) the employer failed to exercise ordinary care to protect the employee from danger by both failing to warn of the condition and failing to make that condition reasonably safe.)

II. SPECIFICALLY PERMITTED AFFIRMATIVE DEFENSES

The Labor Code also allows for the defenses of intentionally self-inflicted injury and intoxication. As such, following an accident, conduct an investigation with other co-workers to see if they have knowledge as to whether the Plaintiff committed an intentional act or spoke about doing so. Additionally, this is also another good reason to do a drug and alcohol test on any injured worker, since it provides the evidence the employer would need to put forth this defense.

III. OTHER AFFIRMATIVE DEFENSES

Other affirmative defenses that can be submitted to the jury in non-subscriber case are as follows:

1. Accord and satisfaction (the claim that you previously negotiated and resolved);
2. Arbitration and award (the case was previously determined);
3. Bankruptcy (the Defendant has filed for bankruptcy);
4. Estoppel (this acts to bar the Plaintiff's case where he has taken contradictory positions and prosecuting this case would be unfair);
5. Release (the Plaintiff has released his/her claim. Keep in mind that pre-injury releases are not valid in Texas for non-subscriber claims);
6. Res Judicata (the matter has been determined in Court before); and
7. Statute of Limitations (generally, non-subscriber cases must be brought within two years of the injury).

CONCLUSION

There are many defenses available to employers in non-subscriber cases. Although this edition of The Bassett Bulletin does not list every possible defense, it provides some valuable tools that should help in evaluating non-subscriber claims. It is important to see if any of the affirmative defenses or inferential rebuttals would apply to your specific case. If it does, it gives you more arsenal in defending these types of cases.

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