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DEFENDING A NON-SUBSCRIBER CASE

In our last issue, we discussed what a non-subscriber is and gave general overview of non-subscriber cases. We will now discuss how to effectively defend a non-subscriber case.

As stated previously, the legal defenses for non-subscribers are:

1. Direct disproof of the elements of the Plaintiff's prima facie negligence case,
2. Reliance on principles given in special jury instructions, called inferential rebuttals,
3. The use of affirmative defenses explicitly permitted under the Texas Labor Code, and
4. The use of affirmative defenses not addressed by the Code, but allowed to non-subscribers.

In this second issue of The Bassett Bulletin, we will discuss number 1, "Disproving the Elements of the Plaintiff's Prima Facie Negligence Case."

I. DISPROVING THE ELEMENTS OF THE PLAINTIFF'S CASE

A. Evidence of Reasonable Conduct:

The simplest and most effective defense in a non-subscriber case is to show proof of reasonable conduct on the part of the Defendant. Keep in mind, the Plaintiff must prove by a preponderance of the evidence that the Defendant employer was negligent. Plaintiffs routinely take for granted that an injury on the job is sufficient proof for a negligence case. However, although an employer owes a duty to maintain a reasonably safe workplace, the employer is not the insurer of the employees' safety. The Plaintiff must show that the employer fell below the standard of care for that type of employer, given the circumstances.

Listed below are important ways to show that the Defendant provided a safe workplace and acted reasonably:

Training

Many Plaintiff's attorneys argue that the Plaintiff was inadequately trained in the proper procedure in doing his job. However, if you can show that the Plaintiff had adequate training it will greatly enhance your defensive position.

Specifically, producing sign in sheets for training, computer printouts of attendance, lists of education topics, and safety videos are all great trial exhibits. Furthermore, testimony from the injured employee's supervisor or trainer will also help your case. Interestingly, when taking the Plaintiff's deposition, the Plaintiff normally admits that he had proper training. If this happens, use it against the Plaintiff at trial.

Proof of the Plaintiff's Experience and Education

In lack of training cases, evidence that the Plaintiff received certificates for on the job training or proof of prior experience in doing the same job is very effective. You want to show that the Plaintiff was experienced and educated in performing his duties, and was not inadequately trained by the employer.

Unforeseeable Accident

If the injury that the Plaintiff sustained has never been seen before, you should argue that the accident was unforeseeable. Furthermore, you should have testimony that despite hundreds of man hours in doing the same job, an accident like this has never occurred.

Defendant Followed Guidelines

Another effective defense is showing that the Defendant met government guidelines given this particular type of work. You should also show, if possible, that the standard guidelines were followed, even though the Plaintiff's accident occurred.

You can prove this by showing the OSHA guidelines related to this particular line of work. In addition, you may be able to show that you had inspectors from insurance companies, fire departments or other government regulators inspect your premises, and they failed to criticize an alleged problem.

Common Sense

When certain dangerous conditions are common, it can be a powerful tool for the Defendant. For example, if the Plaintiff injured himself while working with a sharp knife, you should point out that it is common knowledge that knives are sharp and that people could be injured when handling them. Point out that common sense would have prevented this accident.

B. Defeating Proximate Cause:

Another defense in a non-subscriber case is to show that the act did not proximately cause the Plaintiff's injury or cause the Plaintiff's damages. Specifically, the negligence complained of by the

Plaintiff must be the proximate cause of the event or injury. In addition, the injury that occurred must proximately cause the need for the subsequent medical care and other damages claimed. For example, the Plaintiff must have fallen *because* the floor was wet and the need for surgery *must have been* necessitated by the injury that occurred as a result of the fall.

Injury Causation

Keep in mind that proximate cause embraces foreseeability. It is a complete defense to a negligence case that the event, or one like it, was not foreseeable.

For example, given the wet floor scenario, it may be true that there was a wet floor and it caused the Plaintiff to fall, but if the condition was unforeseeable, the Plaintiff fails to prove proximate cause and loses.

You can try to elicit this testimony during the Plaintiff's deposition, or at trial, that the Plaintiff's injury was not foreseeable. Evidence that this particular type of incident rarely happens, or that well-trained employees would not fail to follow safety rules, is great in showing that the employer could not foresee the accident. In fact, some Courts will hold that certain activities are so ordinary that injury from them is unforeseeable as a matter of law.

See *Great Atlantic and Pacific Tea Co. vs. Evans*, 175 S.W.2d 249, 250 (Tex. 1943), where an employee, who on a day-to-day basis lifted and carried 100 pound potato sacks, sustained a hernia.

Damages Causation

Also note that unforeseeable damages are not generally recoverable. This is usually difficult for the defense to prove, because almost any damage might be foreseeable once the injury has happened.

Preexisting injuries can also be a great defense in a non-subscriber case. However, this is not a complete defense. You will often find that Plaintiff's attorneys have worked with the expert doctor to say that the underlying medical attention was necessitated by an aggravation and not by the underlying condition.

Regardless, preexisting injuries can be very powerful in front of a jury. Plaintiffs sometimes lie or hide information about preexisting conditions. In fact, even their own medical experts do not have proper, honest histories, which undercuts the validity of their medical opinions. When the Plaintiff has not been fully open with his doctors, it makes it difficult for the Plaintiff's attorney to say that a proposed treatment was needed. Many times, an injury goes unwitnessed, and if the Plaintiff's credibility is in question, jurors might not likely believe the Plaintiff's story.

CONCLUSION

All of these items can be very powerful tools in disproving the elements of the Plaintiff's case. Obviously, depending on the circumstances, the Defendant may have more avenues to discredit or disprove the Plaintiff's case. In our next installment of The Bassett Bulletin, we will discuss defending non-subscriber cases by using (1) inferential rebuttals; (2) specifically permitted affirmative defenses explicitly permitted under the Texas Labor Code; and (3) affirmative defenses not addressed by the Texas Labor Code, but allowed to non-subscribers.

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