

Rescuing third-party claims from silent death in a comp file

By MARK McGRATH

After some 18 years of first defending and now prosecuting third-party workplace claims, I firmly believe for every meritorious third-party workplace injury case that gets filed, at least five equally viable cases die an anonymous death on some dusty file-room shelf.

When lawyers fail to assess their comp cases to determine whether there is a basis for bringing a third-party liability claim, they are passing up a valuable opportunity to recover additional money for their clients (and themselves) without even knowing it.

Third-party cases do not always leap off the page and slap you in the face. I like to tell a war story to illustrate this point.

Several years ago, a lawyer approached me at a CLE where I was speaking to discuss one of his workers' compensation files involving the death of a young single mother.

The woman had been murdered while working at the local branch of a national payday lending company, and the lawyer had a gut feeling that there was a third-party case hiding in the facts somewhere. In particular, he wondered whether there was a way to make out an inadequate-security case against some culpable third party.

The file had already been sent out for review to a number of prominent plaintiff's firms in the state, and the file was well-papered with their decline letters.

I agreed to take a look. At first blush, there did not appear to be any basis for a third-party claim.

Upon closer inspection, however, details began to emerge suggesting that there might indeed be a responsible third-party defendant lurking between the pages who contributed to the employee's death.

The woman was employed by a North Carolina corporation that had been incorporated by the national chain to carry out the company's business in North Carolina. There were indications in the discovery materials, however, that suggested the involvement of different corporate entities in the management and operation of the branch at which the woman had been murdered.

For example, several of the documents produced in the Industrial Commission proceedings bore a fax number that did not belong to the employing entity, but to another company located at the same out-of-state address as the employer.

E-mails revealed the name of yet another corporate entity in their addresses. Title research uncovered a lease that identified the lessee of the property where the murder occurred as yet another corporation.

We requested records from the police department and State Bureau of Investigation, and these identified an employee of yet another corporate entity as the corporate "security officer."

Smelling thick smoke and armed with plenty of ammunition to pass Rule 11 muster we filed suit. Documents produced in the first round of discovery quickly confirmed that we had struck gold.

Corporate records indicated that the employer was merely a shell entity, formed only for purposes of processing payroll and minimizing liability exposure.

A separate corporation (the employer of the "security officer") conducted criminal background checks for prospective employees, researched and selected branch locations, made decisions regarding security measures to be implemented at those locations, paid for the installation and implementation of those security measures, performed security assessments of the branch locations and monitored and controlled security functions at all of the payday lending company's branches across the United States.

Documents produced in discovery also indicated that the third party had recently performed a nationwide audit of the company's branches to assess the adequacy of the security measures that were in place at those locations.

A written report determined that, considering the large amounts of cash that were kept on hand at the branches, their tendency to be located in high-crime areas, their hours of operation and their thin staffing levels, the security at most branches was very poor and in need of significant enhancements. Unless the company implemented these enhanced security measures immediately, the report concluded, employees and customers would continue to be placed at risk of death or serious injury.

None of the recommended improvements were ever implemented. Our client was killed shortly after the publishing of the report. Not surprisingly, the case settled very early in the litigation for full value. Plus some.

This story illustrates several important points.

First, third-party cases don't always jump out of a comp file and bite you on the nose. It often takes a lot of research, sleuthing, time and sweat to smoke them out.

Second, attorneys who refer out third-party cases should not be discouraged if one, two, three or even more firms have declined the case. If you believe in the case, trust your instincts and keep having the case reviewed.

Third, workplace cases involving death or serious injury should always be reviewed by someone who has expertise in this area. Most workers' compensation lawyers don't have the time or inclination to spend two or three days researching a possible third-party case.

Finally, and take this one to the bank, finding someone with the experience, persistence, capacity for hard work and downright stubbornness to consistently sniff out the third-party claims in your comp files will add significantly to your bottom line.

Much better yet, find a whole slew of someones. If one firm declines the case, send it out to a second firm, and then a third if you still believe in the case. As our payday-lending case suggests, these cases can be easy to miss.

To assist attorneys who are interested in screening third-party workplace cases, this will be the first in a four-part series that will identify and address the most-common issues and factual scenarios from which third-party claims typically arise.

The first is the "corporate-relative" case. These cases, like our payday-lending case, involve culpable corporations that are related in some way to the employer.

The second is what we like to call the "negligent-host" case. These cases involve employees who are injured while working on property or in facilities owned or operated by a party other than the employer.

The third is the "dangerous-instrumentality" case. These cases arise out of injuries caused by dangerous products (such as a drill press) or other equipment (power lines, for example).

Finally, the series will address the "multi-employer worksite" case. These claims typically arise from injuries that occur on construction sites or other projects involving multiple contractors, design professionals and other employers.

If you or members of your firm handle workers' compensation, Social Security disability or other injury cases, you will want to stay tuned.