

# California Employer's Liability for Serious and Willful Misconduct: Labor Code sections 4553 and 4553.1

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## Summary:

- The penalty for S&W liability is fixed by statute, is an “all or nothing” proposition, and is uninsurable.
- Employees can prove liability in three different ways.
- Where a careful analysis of the claim shows that the employee has a reasonable chance of prevailing, employers should seriously consider settlement over trial.

## 1. The Penalty for Serious and Willful Misconduct

We begin our discussion with the penalty provisions for serious and willful misconduct (known by the abbreviation “S&W”) because they are strict and harsh, and are the primary driver of decisions on both side of these disputes. These provisions have the power to raise the stakes to “bet the company” levels.

Under [California Labor Code § 4553](#), an employer that is found to have caused an employee's injury by its “serious and willful misconduct” will be ordered to pay an amount equal to half the value of all benefits paid as a result of the injury. This includes all temporary and permanent disability, medical and vocational rehabilitation benefits.

Although the California Supreme Court has characterized awards for serious and willful misconduct as an additional “benefit”, the statute provides that this liability, like criminal fines and Cal/OSHA penalties, is uninsurable. An S&W award must be paid from the employer's own funds. The employer cannot shift this liability to an insurance company or a third party, by contract or otherwise.

Moreover, unlike the power vested in judges and juries to decide the value of damages in personal injury negligence actions, Labor Code section 4553 denies the workers' compensation judge any discretion to adjust the amount of the award: Either there is no S&W liability, in which case the

employer pays nothing, or there is, in which case the employer pays the full amount.

See “Settlement of S&W Claims” below for further discussion of the dynamics which these rules create when developing a litigation plan.

- 2. The Employee’s Burden of Proof under Section 4553** No citable decisions have parsed the meanings of “serious” and “willful” individually. Indeed, the phrase might as well be spelled “seriousandwillful.” And neither the California Workers’ Compensation Appeals Board (WCAB) nor the appellate courts have discussed what constitutes “serious” misconduct in any detail. Instead, the focus of the Board’s and the courts’ attention has been on what constitutes “willful” misconduct by the employer.

To recover under section 4553 the employee must demonstrate that the employer’s conduct was “willful”; that is, that the employer actually knew of the dangerous condition, yet deliberately failed to take corrective action. This requirement has been interpreted by the courts to mean conduct which is something more than even gross negligence. It has been said to be conduct of a quasi-criminal nature . The California Supreme Court has said that an employer commits willful misconduct “...when he ‘turns his mind’ to the fact that injury to his employees will probably result from his acts or omissions, but he nevertheless fails to take appropriate precautions for their safety.”

An easier way to prove an S&W claim is to prove either:

1. that the employer failed to act even though it had information or knowledge that a serious injury would probably result, or
2. that the employer violated one of California’s safety regulations, even if no citation was issued by Cal/OSHA (see discussion of LC § 4553.1 immediately following).

### **3. Labor Code § 4553.1: Using Cal/OSHA Regulations to Prove S&W Liability**

- A. Relaxing The Burden of Proof [Labor Code § 4553.1](#) eases the employee’s difficulty in proving an S&W claim by establishing the Division of Occupational Safety and Health’s (Cal/OSHA’s) regulations (found in [Title 8 California Code of Regulations](#), and also known as safety orders) as the standard of care for employers. Whether or not Cal/OSHA has issued a citation, the employee can

use the Division's safety orders to establish S&W liability if he or she can show:

1. the "specific manner" in which a safety order was violated;
  2. the violation caused the employee's injury; and
  3. both the safety order and the conditions making the safety order applicable to the work were known by a particular named person, who can be either the employer, a partner or a "managing representative" (e.g., a foreman, supervisor or higher).
- B. If this is too tough a burden for the employee to meet, section 4553.1 also allows him or her to prove S&W liability by showing that:
1. the condition making the safety order applicable was obvious;
  2. it created a probability of serious injury; and
  3. the failure to correct the condition constituted reckless disregard for the probable consequences.
- C. The Effect of Cal/OSHA Citations on S&W Liability Because the conduct and conditions found to satisfy the requirements of "serious and willful misconduct" under Labor Code sections 4553 and 4553.1, and the definitions of "serious" and "willful" as used by the Division and the Cal/OSHA Appeals Board are similar, the employee may attempt to offer a related Cal/OSHA citation in evidence at the WCAB as proof of either or both of the elements of S&W liability.

In other words, a citation which has become final and which has been classified as "serious" or "willful serious" may be offered in evidence at trial in an attempt to prove an S&W claim

#### **4. Settlement of S&W Claims**

The high levels of proof needed to establish "serious and willful misconduct" should favor the employer. However, the reality is that California's workers' compensation judges are, by and large, sympathetic to injured employees and unsympathetic to employers. In addition, the Board has long held that Labor Code section 3202 compels its judges to interpret evidence in the light most favorable to the employee. Moreover, the Board's judges dislike hearing S&W trials because they are unfamiliar with issues of negligence law and evidence which these claims raise. This lack of familiarity increases the employee's and the employer's uncertainty that the decision after trial will be appropriate.

In past years employees' attorneys rather routinely tacked S&W claims onto workers' compensation claims even where the injuries clearly did not result from misconduct. Given the Board's unfamiliarity with Cal/OSHA and negligence law, whether real or simply perceived, few of these claims went to trial and it seemed to defense attorneys that this practice was intended merely to squeeze out a few more settlement dollars. Those claims that did go to trial went, on the whole, badly for employers.

This trend against employers seems to be abating, resulting in fewer filings of dubious claims and leading us to believe as this is written (Fall, 2008) that the pendulum of favor has come back to center. Nevertheless, the "all or nothing" nature of the judge's decision following an S&W trial can create intense pressures on both sides to settle the claim rather than risk everything.

## **5. Conclusion**

Our general recommendations for employers remain twofold.

- First, conduct a careful analysis of your liability.
- Second, be open to settlement when the employee has a reasonable chance of prevailing at trial.