ROBERT HENDRIX:Potential Claims Arising Out of His Injury

1. Workers' Compensation Benefits:

    a. Temporary Disability:
        (1) Statutory Max: $490.00
        (2) Two year adjustment to rate
            (a) L.C. §4661.5
            (b) Hoffmeister 49 CCC 438 (1984)

        (3) No two or even five year limit (injuries before 4/19/04)

    b. Medical Treatment: No dollar limit/lifetime exposure
        (1) Emergency/ambulance
        (2) Doctor visits
        (3) Prescriptions
        (4) Therapists
            (a) No 24 visit limit
            (b) Physical Therapy
            (c) Occupational Therapy
            (d) Chiropractic
            (e) Acupuncture
            (f) Special hand therapy
        (5) Attendant care
        (6) Lifetime prosthetic
        (7) Travel reimbursement (current rate $.055)

    c. Permanent Disability:
        (1) Amputation
        (2) Limitation of motion
        (3) Lifting/work limitations and preclusions: (both actual and prophylactic)
        (4) Compensable consequences
        (5) Psychiatric
        (6) Total/100%: LeBouef 48 CCC 587 (1983)

    d. Vocational Rehabilitation:
        (1) $16,000.00
        (2) Retro at T.D. rate
        (3) No Offset or credit
            (a) Gamble: 71 CCC 1015 (2006)
            (b) Medrano 73 CCC 928 (2008)

e. Life Pension:
(1) P.D. % (less 60%) x 1.5 x statutory A.W.E.
(2) L.C. §4659(c) "S.A.W.W." adjustment for injuries on/after 1/1/03

2. Serious and Willful Misconduct:

a. Definition:
(1) An intentional act, or failure to act, with knowledge that serious injury will be the probable result.
(2) Negligence, even gross negligence, does not constitute serious and willful misconduct.
(3) The employer must have "actual knowledge" of the dangerous condition, know that the probable consequences of not correcting the condition will involve serious injury, and deliberately fail to take corrective action.
(4) Serious and willful conduct may be based on the employer's general duty to provide a safe place to work or a violation of a specific safety order.

b. Amount of Penalty:
(1) 50% of all compensation paid and to be paid in the future.
(2) No monetary cap
(3) Not an insurable risk (Insurance Code §11661) but cost of defense may be insured.
(4) Example: <u>Robert Hendrix</u>
(a) T.D.: 2 yrs. @ $490.00 = $50,960
(b) Medical: $150,000.00
(c) P.D.: (80%) = $118,795.00 - ($230 x 515.5 weeks)
(d) Life Pension (80% p.d. - 60%) = 20% x 1.5 x $257.69 (AWE) = $77.30 per week. Life expectancy: (33 at time of accident) approx. 45 when P.D. paid out, so life pension for 32.8 years (1705.6 weeks) or $132,842.88 (without reducing to present value).
(e) Vocational Rehabilitation: $16,000
(f) Total Compensation:

T.D.	$ 50,960.00
Medical	$150,000.00
P.D.	$118,790.00
L.P.	$131,842.00
V.R.	$ 16,000.00
	$467,597.00

(g) Penalty for S&W: 50% x $467,597 = $233,798.50, plus every medical bill and other future compensation payment is increased by 50%.

3. Labor Code §132(a) Discrimination:

a. An employer violates L.C. §132(a) if it discharges, threatens to discharge, or in any manner discriminates against an employee:
   (1) Because the employee filed or made known the intention to file an application; or
   (2) Received a rating, award, or settlement, or
   (3) Testified or made known the intention to testify in another employee's case.

b. Judson Steel (1978) 43CCC 1205:
   (1) Liability is not limited to the specific statutory prohibitions.
   (2) Any loss of a "work benefit" which results from the injury or lost time caused by the injury may be a L.C. §132(a) violation.

c. Burden of Proof:
   (1) Employee has the initial burden of proving that he suffered an injury on the job and the effects of that injury resulted in the loss of "work benefit."
   (2) Burden then shifts to the employer to establish a non-discriminatory, legitimate "business necessity" for taking the action it did when it did.
   (3) "Equal Treatment" defense: Lauher 68 CCC 831 (2003)

d. Remedies:
   (1) Monetary sanctions up to $10,000 for each violation
   (2) Costs/expenses up to $250.00

   (3) Reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer without any monetary limit.

e. The claimant must be an "employee" at the time of the discriminatory act: Brazz (1980) 46 CCC 1264.

4. Civil Cause of Action: "Power Press" Exception to the Exclusive Remedy Rule:

a. L.C. 4558(b) specifically authorizes a civil damages lawsuit against an employer by an employee (or a deceased employee's dependents) whose injury or death was proximately caused by the employer's:

(1) Knowing removal of, or knowing failure to install, a point of operation guard on a "power press" or
(2) Specific authorization to remove, or failure to install, a guard under conditions known by the employer to create a probability of serious injury or death.

b. What is a "Power Press"?
(1) A material-forming machine that uses a die and is designed for use in making other products.
(2) See L.C. 4558(a) for more definitions.

c. An employer is liable only if the maker of the power press "designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer."

d. The third party defendants (manufacturer, designer, distributor, etc.) may not recover indemnity against the employer who failed to install or remove the required guard.

e. The employee may recover both workers' compensation benefits and civil damages against the employer with no specific statutory provision for offset or credit.

5. The Civil Action(s) for Damages:

a. Lawsuit against the employer (Corporation-I)
(1) Lawsuit not barred due to the power press exception to the exclusive remedy rules of the Labor Code (Labor Code § 4558)
(a) Knowing removal of or failure to install a point of operation guard or a guard known by the employer to create a probability of serious injury or death under the circumstances
(b) See paragraph 4 above re "power press" exception.
(c) Result of "making" the power press exception.
(d) Lawsuit for damages against an employer as though the exclusive remedy rule did not exist.
(e) All potential causes of action (ways to recover damages) apply.

(f) There were two potential removals of guards: physical removal of prefabricated guards at/near point of operation; and failure to properly install a "kill-switch" at or near the point of operation.

(2) Was it really a "power press" after all?

(a) Legal theory under Labor Code.

(b) Our own expert says no.

(c) And then changes his mind after inspecting the AutoVibe 460.

(d) Description of machine, its place in the manhole ring creation system.

(e) A risk for the lawyers and Robert that existed throughout the pendency of the lawsuit was that the Court would determine that the power press exception did not apply, which would result in complete total loss against the employer..

(f) Defendant Corporation I fails to attack the Complaint by demurrer.

(g) Defendant files a Motion for Summary Judgment on the eve of mediation.

b. Lawsuit against the landowner (Corporation-II) of the property where AutoVibe 460 was located.

(1) Landowner (Corporation-II) is a separate corporation from employer. (Corporation-I)

(2) Separate corporations are separate individuals with separate legal responsibilities in the eyes of the law.

(a) Separate legal obligations to Robert.

(b) Separate basis of liability.

(c) Helped Robert and attorneys with risk Court will determine that power press exception does not apply.

(d) Landowner liability is predicated upon the presence on real property that the landowner owns or controls that has defects or operations on it that present an unreasonable risk of harm.

c. Against the manufacturer/designer of the AutoVibe 460.

(1) Product Liability-strict liability in tort.

(a) Same entity was both the manufacturer and designer.

(b) Strict liability in tort is based upon mass production of a product placed into the stream of commerce which is "defective" and causes injury.

(c) A real problem existed here since AutoVibe 460 was a “prototype”.

(2.) Breach of Warranty.

(3) Negligence.

(4) Negligence per se.

(a) Labor Code § 4558/public policy

6. Pretrial Discovery

a. Nearly 1600 hours of attorney time spent.

b. Approximately ten depositions were taken.

c. Depositions of nineteen categories of persons most knowledgeable from the defendant employer, landowner and manufacturer designer were still in the offing at time of mediation.

d. Expert discovery including in the neighborhood of eight expert depositions was still forthcoming at the time of mediation.

7. Mediation

a. Mediation occurred approximately 2 ½ years after injury; 1 ½ years after lawsuit initiated.

b. The case was mediated over approximately two weeks, including one whole day of face to face mediation in Sacramento, California.

c. Present for the defendants were five attorneys and three corporate officers/decision makers.

d. Robert and his wife Lori and their three attorneys, Charleton S. Pearse, Gerald M. Lenahan, and Robert’s workers’ compensation attorney, Mark Marcus.

e. The case did not settle after or during the first day of face to face mediation, but with the help of the mediator being persistent over a period of approximately two weeks the case was resolved in its entirety.

f. Global Settlement was reached covering all workers’ compensation claims, the S&W claim and all aspects of the civil claims against all defendants.

g. Separate civil releases referencing workers' compensation matters resolved were utilized.
   (1) Required Third Party Compromise and Release form executed for settlement of the workers' compensation claims.

8. Confidentiality

   a. Reading all releases in this case together makes it clear that we may not reveal amounts of the settlement(s) involved in this case.

   b. Employer and manufacturer settlement (indemnity) not divulged.

9. Uh Oh, Somebody Forgot to Do Something on the Defense Side of the Ledger.

   a. Neither the workers' compensation attorney nor the attorney for the employer sought the surrender of Robert's job as a term of the global settlement.

   b. At the time of mediation, Robert was precluded from returning to his employment by reason of his ongoing psychiatric disability.
      (1) Just before mediation Robert was found to be Permanent and Stationary orthopedically.

   c. Risk Rears its Ugly and Dangerous Head Again.
      (1) Assumptions were wrongly made about Robert's ability to physically and psychologically recover from this injury.
      (2) Robert wanted his job back.

   d. Post Mediation; Healing and Attempting to Return to Work
      (1) Robert's job during his ongoing period of disability and for as long as he needed was to heal from and learn to cope with the effects of his injury, which were all encompassing.
      (2) Robert was released to return to employment orthopedically and psychiatrically.
         (a) Robert, despite what happened to him, really wanted to work, and was able to be released to return not just to employment, not just to employment with the same employment where he had sustained such a grievous injury, but to actually doing the same job he did at the time of

his injury, and in order to work he was willing to operate the machine that had taken his hand.

(3) Robert Gets the Runaround
   (a) Paperwork mishandled.
   (b) Different forms asked to be filled out and certified by physicians on multiple occasions.
   (c) Robert is informed that it was too late to be hired back after his injury and that his job no longer existed.

10. The Employment Discrimination Case.

a. Having succeeded in physically and mentally rehabilitating himself to the point where he could work and in fact perform his actual job Robert sought his job back and was denied employment.

b. An Administrative Complaint for Discrimination and Related Claims was filed with the Department of Fair Employment and Housing alleging disability discrimination, retaliation, etc. against Robert's employer and the three individuals involved in reaching the conclusion not to rehire him.

c. Right to Sue received as DFEH closes their case.
   (1) Statute for filing is one year from the date of case closure and the issuance of the Right to Sue, unless there are other causes of action the claimant intends to bring.

11. The Lawsuit is initiated

a. The employer and the three individuals who denied Robert employment were sued in the Sacramento County Superior Court.
   (1) Causes of action in the Complaint were:
      (a) Constructive wrongful termination against public policy.
      (b) Disability discrimination.
      (c) Retaliation
      (d) Failure to prevent discrimination.
      (e) Failure to provide reasonable accommodations.
      (f) Intentional infliction of emotional distress.
      (g) Negligent infliction of emotional distress.
      (h) Full damages were sought: compensatory damages, punitive damages and attorneys fees.

(i) Attorneys fees are awardable to a plaintiff and/or the plaintiff's attorneys should the plaintiff prevail; Four defendants; not so much.

12. A Labor Code § 132(a) violation case was separately filed with the Workers' Compensation Appeals Board.

a. The California Supreme Court had previously determined that disability discrimination and discrimination under the Labor Code for filing a workers' compensation claim were not the same thing and thus the workers' compensation benefits and Labor Code § 132(a) benefits were **not** the exclusive remedy of the employee so treated.

b. The defendants fight back by hiring three different law firms.
(1) One to represent the employer and two of the officers.
(2) One to represent the remaining employee.
(3) One to represent the employer in the 132(a) claim.

c. The defendant employer tries to get rid of the case by legal motion, and fails.

d. The defendant employer and two of its supervisors/officers who discriminated against Robert serve a C.C.P. § 998 offer.
(1) A C.C.P. § 998 offer is a way to attempt to settle a case and to potentially cut-off the right to attorneys fees where offer is refused and the plaintiff does not exceed that offer amount at trial.
(2) Makes plaintiff potentially liable for heightened costs.

13. Uh Oh, Another Mistake Was Made.

a. Assumptions were made again, and that would appear to be (and we are guessing here) that the attorneys for the employer sent the § 998 offer either assuming that the entirety of the case would be resolved along with the § 132(a) case by some type of global settlement.
(1) The attorneys for the employer and two of the officers did not represent the third officer and did not represent on the § 132(a) case.
(2) The attorneys on the § 132(a) case and the separate officer did not intervene and involve themselves in attempting a global resolution.

(3) A C.C.P. § 998 offer is very interesting in that the legal manner in which that is accepted is signing a document that says it is accepted.
(a) Acceptance gives a very seldom used right to have judgment entered against the offering defendant on their terms offered.

b. Robert accepts the § 998 offer and prepares a judgment to be entered against the employer and the two individual officers.
(1) This left the civil case outstanding against one officer of the employer, who the employer was legally required to defend and indemnify under the Labor Code.
(2) The § 132(a) still existed as well.

c. The employer finally resolves all matters by a global settlement with Robert in an amount greater than the § 998 demand accepted by Robert.

14. Robert Hendrix: What is his Life Like Now?