

Third Party Comp Claim Leads To \$7M Settlement

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A recent \$7 million wrongful death settlement paid to the family of a man killed on the job demonstrates the importance of carefully screening workers' compensation cases for third party liability.

In the case, the plaintiffs brought a third party claim against an engineering company which had made repairs to a fuel-loading system and allegedly failed to close a key valve in the system, causing it to malfunction.

Douglas K. Sheff of Boston, counsel for the plaintiffs, acknowledged that finding third parties who may be responsible for the worker's injury can be a difficult task since they are often hidden.

"It's like finding a needle in a haystack," Sheff said. "You need to be willing to put in the time early to investigate and pay for the right experts."

Sheff estimates that approximately 10-to-15 percent of all workers' compensation cases have some third party action worth pursuing.

According to Worcester attorney Nora Tolins, possible areas of third party liability include a negligent contractor, defective product or defective premises.

Tolins, who specializes in third party workers' compensation cases, explained that under the workers' compensation act an employer cannot be held liable at common law when one of its employees is injured at work.

Such protection, however, does not extend to other companies or their employees who may have caused the worker's injuries, she noted.

Donald R. Grady Jr. of Boston, who also represented the plaintiffs, said a third party case can be important financially for workers injured on the job.

"It opens up a whole new horizon of damages because it allows them to get beyond the limited remedies that the workers' compensation law provides them," said Grady.

A plaintiff suing a third party can collect for future economic losses, pecuniary services as well as punitive damages, he said.

The settlement report for the case, *Arevalo v. Fraser, et al.*, can be found at page B16.

The Accident

In December 1993, Rodolfo Arevalo, a 36-year-old immigrant from El Salvador, was working as a technician at the Exxon fuel-loading facility in Everett.

As Arevalo stood on top of one of the tankers loading it with heating oil, a bubble of compressed air exploded from the nozzle of the truck's loading arm, causing it to fly up into his chest. The force knocked Arevalo off of the tanker onto the concrete floor 12-feet below.

As a result of the fall, Arevalo fractured his skull and died a few days later.

It was subsequently discovered that the defendant, Fraser Engineering, had made repairs to the fuel-loading system earlier that day, but had failed to close a key valve in the system, allowing air to get inside.

Through their investigation, Sheff and Grady also learned that similar accidents had happened elsewhere and that safety equipment was available to avoid serious injury.

Getting There Early

Both Sheff and Grady said that the third party case against the engineering company would not have been discovered if they hadn't been able to get to the scene of the accident early and "freeze" the physical evidence.

Fortunately, the plaintiffs were referred to them by Arevalo's union shortly after the accident occurred.

"It's difficult for a family who is grieving over a death or taking care of a disabled loved one to consider getting a lawyer," observed Sheff. "But while they are grieving, the other side is preparing."

After getting the case, the first thing he did was hire an expert in fluid dynamics to examine the fuel-loading system.

Bringing that expert to the scene immediately to preserve the relevant evidence was critical, observed Sheff.

Talking to witnesses soon after the accident before their memories began to fade was also paramount.

"It's so important to get in early and know what happened before you do discovery," Sheff said.

Tolins agreed that a thorough inquiry into the facts surrounding a worker's injury is the only way to determine if the negligence of a third party was the cause.

"Nothing can substitute for a prompt investigation after the accident [which] includes photographs of the site or machine involved, statements from witnesses to the accident itself, as

well as witnesses who may have prior knowledge of the machine or instrumentality which caused the accident,” she said.

Sheff also emphasized that he does not file suit until the “lion’s share” of the investigation is complete. In many instances he ultimately finds that there is no third party case worth pursuing.

“You have to go on blind faith at the outset,” noted Sheff. “For every one case I get, there are 50 others that have no case and I pay someone thousands of dollars to tell me that.”

Because of the importance of starting these cases quickly, Sheff cautioned other attorneys who have workers’ compensation cases with potential third party liability not to hold onto them in hopes of referring them to someone else later.

“I can’t tell you how many times I have seen cases where it was too late or not enough evidence was saved [to bring a third party case],” he said.

Tolins added that “practitioners who specialize in workers’ compensation alone may tend to gloss over facts which tend to establish the responsibility of other individuals.”

Keep Digging

Once the case against Fraser Engineering was filed, Sheff and Grady continued talking with experts and witnesses and making repeated visits to scene.

“It was that continued and persistent digging that led to the gold,” said Grady.

While discovery in a this type of case can be expensive and time consuming, it is also extremely important, noted Sheff.

Sheff also credited the focus groups he employed with helping him put the final pieces of his case together.

“You need to understand who is making the decision and learn how they think and the [thought] process that they go through,” he said.

Sheff said the focus groups were especially important in this case where the plaintiff’s personal responsibility for the accident was an issue.

“There were strong allegations of comparative negligence here, but the focus group led us to believe that a jury would discount that,” he said.

Both Grady and Sheff agreed that the reason the case settled on the eve of trial after several days of mediation was because the defendant saw how thoroughly they had prepared their case, which included an animation of the evidence.

“It’s undisputable that is why we settled,” Sheff said. “You have to be ready for trial and show you are ready. You can’t fake it.”

Sheff noted that the defendant made several earlier settlement offers but that he wanted to wait until discovery was completed before he considered settling the case.

Sheff attributed the large settlement to the inaccurate statements he elicited from Fraser executives concerning their knowledge of prior accidents.

“This case got its value from the smoking guns determined during the investigation and discovery,” he noted. “Because of the extensive investigation and early work on the case with experts we were able to put together an extensive discovery plan with a lot of traps in it and they stepped right in them.”

As rewarding as Sheff finds these complex tort cases, he acknowledged that they require a great deal of work and are not for every lawyer.

“If you are going to take a case and settle it without doing all these things, you aren’t zealously representing your client,” he remarked.