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Are all Employers Created Equal?
Setoff Shenanigans for Special Employers in Deliberate Intent Cases

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Generally, employers are immune from negligence and other common law claims arising from an employee's on-the-job injury if the employer pays into the workers' compensation fund. *See* W. Va. Code §23-2-6 (2003). The exception to this rule is the deliberate intent cause of action created by West Virginia Code Section 23-4-2 (2015). Deliberate intent claims require higher standards of proof and are much more difficult for employees to win. Moreover, the statute allows for a setoff of workers' compensation benefits. *See* W. Va. Code §23-4-2(b).

Indeed, in a deliberate intent case, "evidence of the value of workers' compensation benefits ***must be*** submitted to the jury with instructions that any verdict for the plaintiff shall be for damages ***in excess of*** such benefits." Syl. Pt. 1, *Mooney v. Eastern Associated Coal Corp.*, 174 W. Va. 350, 326 S.E.2d 427 (1984) (emphasis added). Stated otherwise, any damages awarded in a deliberate intent case will be offset by any workers' compensation benefits received for the employee's work-related injury. *See, e.g., Powroznik v. C. & W. Coal Co.*, 191 W. Va. 293, 296, 445 S.E.2d 234, 237 (1994). The policy behind the workers' compensation setoff is to prevent double dipping because an employer already paid premiums, allowing the employee to recover workers' compensation benefits. This policy is consistent with the legislative intent for workers' compensation immunity (i.e., protecting employers from civil suits in exchange for no-fault recovery for on-the-job injuries).

It is now settled in West Virginia that a second employer can be considered a "special employer" for purposes of workers' compensation immunity. *See Bowens v. Allied Warehousing Services, Inc.*, 229 W. Va. 523, 729 S.E.2d 845 (2012). In *Bowens*, the plaintiff worked for a temporary employment agency (Manpower) and was assigned to operate a forklift for a warehouse operator (Allied Warehousing). While operating the forklift, the plaintiff suffered injuries and filed a workers' compensation claim, listing Manpower as his employer. He later

sued Allied on negligence theories. The Wayne County Circuit Court found that Allied was the plaintiff's special employer and entitled to workers' compensation immunity from common law claims. The plaintiff appealed. On a matter of first impression, the Supreme Court of Appeals of West Virginia ("WVSCA"), following the majority rule, affirmed the Wayne County Circuit Court's order granting summary judgment to Allied.

In reaching this decision, the *Bowens* Court adopted Larson's test for determining whether a second employer is eligible for workers' compensation immunity:

> (1) whether the employee has made a contract of hire, express or implied, with the second employer; (2) whether the work being done is essentially that of the second employer; and (3) whether the second employer has the right to control details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers will be liable for workers' compensation and both will have the benefit of the exclusivity defense of tort claims.

Id. at 535, 857 (citing 3 Larson's Workers' Compensation § 67.01 (2011 ed.). Reviewing these elements, the WVSCA found that Allied was the plaintiff's special employer, and that Allied was entitled to immunity from the plaintiff's negligence claims. However, the Court did not address the issue of whether a second employer would receive a setoff for workers' compensation benefits the plaintiff received. As such, it remains unclear whether all employers enjoy all of the benefits of workers' compensation immunity as primary employers.

Predicting how the WVSCA would rule on this issue is no easy task. Consideration of the legislative intent in creating the deliberate intent setoff and the public policy supporting workers' compensation immunity leads us to the all-too-often legal conclusion: "IT DEPENDS."

The answer may depend on whether or not the secondary or special employer paid workers' compensation premiums. *See, e.g., Spanish Peaks Mental Health Center v. Huffaker,*

928 P.2d 741 (Colo. Ct. App. 1996) (holding that a concurrent employer was not entitled to a statutory offset against workers' compensation benefits where the concurrent employer did not contribute.) Certainly an employee's attorney would argue there is no "double dipping" if the employee's workers' compensation benefits were received because the primary/general employer—not the secondary employer—paid workers' compensation premiums. However, regardless of whether or not the secondary/special employer wrote the check for the workers' compensation premiums, there are strong arguments in favor of extending the setoff to ***any*** employer entitled to workers' compensation immunity.

First, West Virginia Code Section 23–2–6 (2003) reads, in pertinent part: "Any employer subject to this chapter who subscribes and ***pays into the workers' compensation fund the premiums*** provided by this chapter ... is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing." (emphasis added). Second, an employer who qualifies as a special employer under the Larson factors is liable for workers' compensation. Syl. Pt. 8, *Bowens, supra*. It is inherently prejudicial to make secondary employers liable for workers' compensation benefits without affording them all of the workers' compensation immunities and protections, including the setoff protection. Additionally, there is no reason to distinguish between the two employers: both the general/primary and secondary/special employer meet the definition of an "employer" under the Act, both are liable for workers' compensation benefits, and both are entitled to workers' compensation immunities. Therefore, both should be afforded the workers' compensation offset.

But the secondary employer need not make specific payments directly into the workers' compensation fund for such employer to be afforded workers' compensation immunity protections. It is sufficient if the secondary employer makes payments to the general employer

that are intended to cover the cost of workers' compensation premiums. The WVSCA noted that "the court in *St. Claire v. Minnesota Harbor Service, Inc.*, on facts very similar to [*Bowens*], considered the 'most damning fact' against the petitioner-employee to be that part of the difference between what the defendant-employer paid Manpower and what Manpower paid the plaintiff went towards paying the plaintiff's workmen's compensation premium. 'In other words, the plaintiff [was] suing in tort the man who paid for his Workman's Compensation.' In the *St. Claire* court's opinion, such a case 'strikes at the heart of the Workman's Compensation law' and 'is in unequivocal opposition to the well-known principles on which Workman's Compensation is founded.' *Id.* The same argument may be made in this case." *Bowens*, *supra*, at 534, 856 (citation omitted).

Based on this language from *Bowens*, there is a strong argument that if a special employer contributes to the workers' compensation premiums, it should receive the benefit of the workers' compensation setoff. In fact, the United States District Court for the Southern District of West Virginia has found that "[i]t appears that the overwhelming legal authority supports the conclusion that a tortfeasor is entitled to a setoff when the benefits an injured party receives are from a fund wholly derived from the contributions of the employer." *Reed v. E.I. Du Pont de Nemours & Co.*, 109 F. Supp. 2d 459, 466-67 (S.D. W. Va. 2000) (citing *Phillips v. Western Co. of N. Am.*, 953 F.2d 923, 930, 932 (5th Cir. 1992) (finding that in cases where the tortfeasor contributes toward the benefit, the justifications for denying setoff becomes less compelling, and "it would be unfair to allow the plaintiff a double recovery when both the liability judgment and the collateral benefits are paid for by the defendant."); *Equal Employment Opportunity Comm'n v. Enterprise Ass'n Steamfitters Local No. 638 of U.A.*, 542 F.2d 579 (2nd Cir. 1976) (if the collateral source is wholly derived from the contributions of the employer, offset for payments

from the fund will be required); *Powroznik v. C. & W. Coal Co.*, 191 W. Va. 293, 445 S.E.2d 234 (1994) (finding that Workers' Compensation benefits must be offset in a deliberate intent suit)).

However, even if the special employer does not directly contribute to the workers' compensation premiums, it should still get the benefit of the workers' compensation setoff. The *Bowens* Court found that, "[e]ven though a general employer and special employer may agree between themselves that the general employer is responsible for payment of benefits, the special employer would be liable if the general employer defaulted in that obligation." *Bowens, supra*, at 535, 857. It is unfair to state on the one hand that the special employer is entitled to immunity from common law claims, but still make them respond to, and remain liable for, ***all*** of the plaintiff's damage claims if the general employer defaults in payments of workers' compensation premiums. Again, there is no reason to distinguish between the two employers and afford one employer more immunities and protections than the other employer. If the case law recognizes that they are both the plaintiff's employers and entitled to immunity from the plaintiff's negligence claims, as well as that they are both essentially jointly and severally liable for payment of the plaintiff's workers' compensation premiums, they should both be entitled to a setoff for the plaintiff's received workers' compensation benefits. To find otherwise would allow the plaintiff to double dip against his employers.

Further, determining which employer is entitled to the setoff based on which employer paid the premiums is misguided, because the *Bowens* analysis emphasized that the controlling factor was the "right to control" the details of the work. Payment of premiums was not one of the specific factors set forth in the three-factor Larson test. Because the *Bowens* Court contemplated a finding of a special employer relationship ***even if*** the special employer did not

directly contribute to the premiums, the fact that the general employer paid the premiums is not dispositive as to whether or not the special employer also gets the setoff.

Ultimately, there are arguments to be made, but no clear solution, for the setoff shenanigans. Employees will take the position that only one employer gets the setoff, hoping that the primary and special employers will battle it out. Hopefully primary and special employers can find common ground in the legislative intent and public policies outlined in this article so that both can take advantage of the setoff.