

# INTER-OFFICE MEMORANDUM

**TO:** ALL ATTORNEYS/CLIENTS  
**FROM:** JOE TRUCE  
**DATE:** August 3, 2004  
**RE:** SERIOUS & WILLFUL MISCONDUCT OF EMPLOYER

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The Court of Appeal has just issued another decision emphasizing how difficult it is for an applicant to prevail on a charge of Serious & Willful Misconduct of the employer.

Cases involving an allegation as to the serious and willful misconduct of the employer generally fall into two categories:

1. The applicant's allegation that the actions of the employer constituted serious and wilful misconduct pursuant to Labor Code §4553. However, the Appellate Courts of this state have consistently maintained that the applicant must do more than establish mere negligence or even wanton negligence, but must establish recklessness on the part of the employer as well as a reckless disregard for the safety of the employee with a knowledge that great harm will befall the applicant.
2. The second prong of the S&W statute is somewhat easier or so the applicant's bar has thought for some time. Labor Code §4553.1 provides that if the employer violates a safety order the employer can be found guilty of Serious & Wilful Misconduct.

In the case of Linam v. WCAB, Court of Appeal, 5th Appellate District, April 29, 2004 certified for non-publication (32 CWCR 91) the applicant was injured when a wooden platform, on which he was working, collapsed causing him to fall 20 feet.

The workers' compensation judge (WCJ) found that the applicant's injuries resulted from a violation of a Cal/OSHA safety order "requiring the personal restraint systems be used for workers exposed to falls in excess of 7 ½ feet . . ."

However, on defendant's Petition for Reconsideration, the Board granted Reconsideration "noting that the purpose of railings and harnesses was to keep workers from falling off scaffolds, not to prevent injury where the scaffold itself has collapsed . . ."

On applicant's Petition for Review, the Court of Appeal affirmed the Decision of the WCAB and set forth the prerequisites for showing that a violation of a safety order constitutes Serious & Wilful

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Misconduct by the employer. The court indicated that the applicant would have to show the following:

1. "The manner in which the order was violated,
2. That the violation proximately and specifically caused the injuries,
3. That the condition was known to and violated by the employer or was obvious and created the probability of serious injury,
4. With the employer's failure to correct it constituting a reckless disregard for the probable consequences. . . "

The court concluded as did the Board that the collapse of the platform and/or scaffolding bore no relationship to the employer's violation of the safety order.

WJT:wf