CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Lee v West Kern Water District 11/15/16

Workers' Comp Exclusivity Rule; Intentional Infliction of Emotional Distress; Collateral Source Rule

According to the operative complaint, Plaintiff Kathy Lee was employed as a cashier at the office of defendant West Kern Water District (district), working behind a partition where customers came to pay their water bills, often in cash. Also employed by the district were accounting supervisor Ginny Miller, safety manager Sam Traffenstedt, quality control manager Gary Hamilton, and general manager Harry Starkey. The district provided its employees with some training on how to respond to a robbery. The complaint alleged that these four supervisors formed a plan to test how the district's female employees would respond if they believed they were really being robbed. While Plaintiff Lee was at the front counter, Hamilton entered the office wearing a ski mask, sunglasses, and a hat. He approached Lee, put a paper bag on the counter, and pointed at it. On the bag was written the message "I HAVE A GUN. PUT YOUR MONEY IN THE BAG." Fearing for her life, Lee complied as Hamilton made threatening gestures. Meanwhile, Miller was outside telling customers not to come in and Traffenstedt and Starkey were watching the mock robbery via surveillance video. Hamilton ran out the door with the bag of money. Then Miller, Traffenstedt, and Starkey came into the lobby and announced that the robbery was simulated.

The complaint alleged that after the robbery, Lee was crying, shaking, and nauseous and finally had to go home. She later suffered from fears, depression, nightmares, headaches, loss of appetite, and ongoing nausea. She sought

psychological treatment and had to use all her accrued sick leave and vacation time during an extended absence from work.

The complaint alleged causes of action against all defendants **for intentional infliction of emotional distress and assault.** The case was presented to the jury in two phases. In the first phase, the jurors were required to determine whether Lee's claims were barred because her sole remedy was a workers' compensation award. In the second, if the claims were not barred, the jury was required to determine defendants' liability and assess damages. The issues on appeal involve only the first phase.

Lee testified she was at work at her desk on the morning of the robbery. After 8:45 a.m, while at the front counter, Lee saw the masked man who turned out to be Hamilton coming into the lobby. She believed it was a real robbery and was terrified. He shoved a bag though the opening of the glass partition and pointed to the message written on it: "I have a gun. Give me your money." When she reached under the counter for the alarm button, Hamilton saw, pounded on the counter, and pointed again to the message. Shaking, Lee fumbled while taking the money out of the drawer and putting it in the bag. Hamilton pounded the counter again. She gave him the bag and he ran out the front door.

Applying training she had received, Lee looked to see which way Hamilton ran, and then wrote out a description of the robber. Soon an employee named Deann Gregory entered the lobby and announced that the robbery had been an exercise. Starkey or Traffenstedt next appeared and said the same. Lee was stunned and felt betrayed.

Lee testified that Traffenstedt then told her to go into an office and wait. After a while, Starkey appeared and asked if she wanted her husband to come and help her calm down. Lee's husband was also an employee of the district.

She waited with her husband, crying, for about 15 minutes. Starkey asked her to move to another room. She remembered talking to a police officer there. Then she went to Miller's office where she saw Hamilton. Hamilton cried, hugged Lee, and said he was sorry. Eventually, Lee resumed working, but she continued to be upset and went home an hour early at the suggestion of her husband.

Miller, Hamilton, Traffenstedt, and Starkey all testified that they participated in planning the mock robbery. Miller said she and Traffenstedt agreed it was important for the robbery to appear realistic and that the people working in the office should not know it was not real. Miller, Traffenstedt, and Hamilton worked out the plan to have Hamilton wear a mask and use a message written on a bag so the other employees would not identify him by his voice. Miller's job during the robbery was to stand outside to make sure no customers were coming in. She wanted to avoid upsetting or traumatizing customers by exposing them to the mock robbery.

Miller testified that the robbery went exactly as planned, although Lee looked distraught and shaken. Miller had intended Lee to believe it was a real robbery. She said she never intended to traumatize Lee, but conceded she did nothing in planning the robbery to take Lee's well-being into account. On cross-examination by her attorney, Miller testified again that she never had any plan or intention of hurting Lee.

Hamilton testified that Miller and Traffenstedt recruited him to participate in the mock robbery the day before he did it. The three of them discussed how he would use the disguise and the bag with the note about the gun so that the employees would not recognize him. The plan was for the employees to believe the robbery was real and that he really had a gun. The mock robbery was accomplished just as Hamilton, Miller, and Traffenstedt had planned. While it was happening, Lee looked startled, frightened and confused, but Hamilton did not consider revealing the truth to her, because Miller had told him not to do so.

Hamilton testified he gave no thought to how Lee would be affected. He had no intention of harming or traumatizing anyone.

Starkey testified that he was the general manager of the district with overall responsibility for its operations. The idea for the mock robbery originated with him, but what happened did not resemble what he intended. The purpose of the exercise, as Starkey intended it, was merely to test the alarm buttons at each window and make sure the employees knew where the buttons were. Starkey delegated the planning of this exercise to Dawn Cole, the district's director of business administration. He consented to Hamilton playing the robber without knowing how it was going to be done. If he had known, he would have stopped it. After the mock robbery, Starkey apologized to Lee. He never intended her to believe it was a real robbery.

Starkey watched a video recording of the mock robbery. Having seen it, he agreed that Lee was justified in being scared. He said he took responsibility for the harm Lee suffered. The recording was later erased.

When Traffenstedt testified, Lee's counsel asked, "You were the point person in charge of this staged robbery; right? It was your gig. It was your thing." Traffenstedt answered, "Yes." He denied, however, that he knew in advance that Hamilton would be wearing a mask or using a bag with a note written on it. He intended to have a supervisor approach the counter without a disguise and explain to the employees working at the counter that they were doing an exercise on how to respond during a robbery. He did not learn that Hamilton had been disguised or had used a note saying he had a gun until later in the day, after the mock robbery took place. When asked whether customers were kept out of the lobby during the exercise to ensure they would not be "terrorized" by it, Traffenstedt said no. Lee's counsel then impeached him with a video recording of his deposition, in which he said yes to the same question.

He conceded that Lee was harmed but said he never intended to harm her and had considered her a friend.

Taft Police Chief Edward Whiting testified for Lee. At the time of the mock robbery, Whiting was a police lieutenant. Whiting testified to his opinion that the exercise had been dangerous. He said a high-stress event like a robbery could lead to someone having a heart attack, and people could get injured by falling over furniture and the like when trying to get away. Further, someone could have been killed if an armed bystander or a passing police officer had witnessed the robbery. At the time, Whiting expressed these views to Traffenstedt, who was "not happy" to hear them. If Whiting had known in advance of a plan to conduct a realistic mock robbery with a disguised person playing the robber and threatening to use a gun on an unwitting employee, he would have intervened to prevent it from happening.

The court's charge to the jury included a pattern instruction, CACI No. 2800, on the conditions described in Labor Code section 3600. These are the conditions under which the workers' compensation system provides the sole remedy for an industrial injury. As read to the jury, the instruction stated:

> "Defendants claim that they are not responsible for any harm that Kathy Lee may have suffered because she was the defendants' employee and, therefore, can only recover under California Workers' Compensation Act. To succeed, the defendants must prove the following:
>
> "One, that Kathy Lee was defendants' employee;
>
> "Two, that the defendant had workers' compensation—compensation insurance covering Kathy Lee at the time of the injury; and

"Three, that Kathy Lee's injury occurred while she was performing a task for or related to the work the defendants hired her to do.

"Any person performing services for another, other than as an independent contractor, is presumed to be an employee."

Lee claimed that, even if the facts satisfied the Labor Code section 3600 conditions for an exclusive workers' compensation remedy, she could still recover damages in this lawsuit **because an exception applied**, **the assault exception** of Labor Code section 3602, subdivision (b)(1). To allow the jury to make findings under this theory, the court instructed it with a version of CACI No. 2801. The version read to the jury, which reflected certain factual admissions by defendants, was as follows:

"Kathy Lee claims that she was harmed because the West Kern Water District's employees—Gary Hamilton, Sam Traffenstedt, Ginny Miller, and Harry Starkey—assaulted her. To establish this claim, Kathy Lee must prove all of the following:

"One, that Gary Hamilton, Sam Traffenstedt, Ginny Miller, and Harry Starkey engaged in conduct that a reasonable person would perceive to be [a] real, present, and apparent threat [of] bodily harm;

"Two, that Gary Hamilton, Sam Traffenstedt, Ginny Miller, and Harry Starkey intended to harm Kathy Lee;

"Three, all defendants have admitted that Kathy Lee was harmed; and

"Four, all defendants have admitted that their conduct was a substantial factor in causing Kathy Lee's harm."

A final instruction pertaining to the applicability of the exclusive workers' compensation remedy was **special instruction No. 5**, requested by Lee and

objected to by defendants. This instruction was based on *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701 and stated as follows:

> "Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role or engages in conduct unrelated to the employment."

In his closing argument for the first phase of the trial, Lee's counsel urged the jury to find the defense did not carry its burden under CACI No. 2800—and therefore the exclusive remedy provisions of the Workers' Compensation Act did not apply—because the evidence showed her injury did not occur while she was performing a task for or related to the work defendants hired her to do, as required by the third element of the instruction. This, counsel said, was because being an unwitting participant in a mock robbery, as the victim, was not part of the work the water district hired her to do. In support of this argument, counsel cited special instruction No. five. He said the employer stepped outside its proper role because it made Lee believe her life was in danger from an armed robber and also because it created dangerous conditions as described by Chief Whiting. Next, Lee's counsel argued that, even if the jury found under CACI No. 2800 that defendants did prove the Workers' Compensation Act applied, it should go on to apply CACI No. 2801 and find that the assault exception applied.

Defense counsel argued to the jury that it could find Lee's claims were not barred by the Workers' Compensation Act only if it applied the assault exception; and it could apply that exception only if it found defendants intended to harm Lee. He said this would be an unreasonable conclusion because the individual defendants had no reason to want to harm Lee and all testified they did not intend to harm her.

Addressing CACI No. 2800, defense counsel contended the jury could not reasonably find the Workers' Compensation Act did not apply. He said Lee "obviously" was doing a task related to her job when she was injured. She was

at the front counter working. Defense counsel also said it would be "therapeutic" for Lee if the jury returned a defense verdict.

During his rebuttal argument, Lee's counsel again connected special instruction No. five (the workers' compensation exclusive remedy did not apply if the employer stepped outside its proper role) with the third element of the CACI No. 2800 instruction (the exclusive remedy applies if the injury happened while Lee was doing a task related to her job). "If you found that what they did … that day falls outside of what a normal employer is supposed to do, you check no on the space on the verdict form for the third element of CACI No. 2800. **The jury found the case fell outside the Workers' Compensation Act, and returned a verdict for Lee on phase one**.

Further evidence was presented in phase two, and the jury returned a further verdict. It made affirmative findings on the elements of assault for each individual defendant except Starkey, but it found that all individual defendants, including Starkey, conspired to commit the assault. It made affirmative findings on the elements of intentional infliction of emotional distress for each individual defendant except Starkey, and found that each individual defendant except Starkey conspired to commit intentional infliction of emotional distress. Each individual defendant was found to be acting within the course and scope of his or her employment during the mock robbery. The jury assessed past noneconomic damages of $175,000 and future noneconomic damages of $185,000, for a total of $360,000.

Defendants filed a motion for judgment notwithstanding the verdict and a motion for a new trial. The motions were accompanied by a request for judicial notice of documents from the file in Lee's workers' compensation case. These documents indicated that on September 17, 2013, a workers' compensation judge awarded Lee $57,721.38 based on a 53 percent permanent disability determination. The award was based on several stipulations by the parties. One

of these was that Lee sustained a psychiatric injury "arising out of and in the course of employment" on July 29, 2011, the date of the mock robbery.

The central argument of defendants' two motions was that, because of her workers' compensation award, and based on judicial estoppel, Lee should be barred from claiming her injury did not occur while she was performing a task related to her job. In the motion for a new trial, defendants argued that, because Lee should have been barred from arguing that she was not performing a task related to her job when she was injured, the jury instruction based on CACI No. 2800 and special jury instruction No. 5 were given in error: Both of those instructions allowed the jury to find Lee was not doing a task related to her job when she was injured.

The trial court issued a written ruling on October 20, 2014. It rejected defendants' argument that judicial estoppel prevented Lee from claiming she was not performing a task related to her job when she was injured. Judicial estoppel is an affirmative defense that must be pleaded by a defendant. Defendants did not plead judicial estoppel in their answer and never sought leave to amend their answer, even though Lee's opposition to defendants' motion for summary judgment included an argument that she was not acting in the course and scope of her employment when injured. This failure meant the judicial estoppel defense was forfeited.

Despite this conclusion, **the court granted the motion for a new trial**. Relying on an argument not mentioned in the parties' briefs, the court found that Lee's complaint "pleads facts which place her in course and scope (Paragraph 21) and alleges that workers' compensation applies by pleading that her causes of action fall into the exceptions contained in Labor Code sections 3601 and 3602 (Paragraph 41)." Paragraph 21 of the operative complaint states that, at the time of the mock robbery, Lee "was working the front counter at the District's Office." Paragraph 41 alleges, "Plaintiff is further informed and believes and, based

thereon, alleges that the intentional conduct of the Defendants and all of them falls within the assault exemptions to the California Workers' Compensation Laws found in California Labor Code sections 3601 and 3602." In the trial court's view, these statements amounted to an admission that the exclusive remedy provisions of the Workers' Compensation Act applied to the case and barred recovery in a civil action unless the statutory exception for assault also applied.

The trial court reasoned that, because the complaint conceded the workers' compensation exclusivity rule applied unless the assault exception was proven, the jury should not have been instructed with CACI No. 2800, which said the defense had to prove the elements of the exclusivity rule. Instead, the jury should have been told the exclusivity rule applied unless Lee established the assault exception

Plaintiff Lee appeals the ruling on the motion for new trial. Lee maintains the trial court was mistaken when it granted the new trial motion on the grounds that the CACI No. 2800 instruction should not have been given because Lee had admitted in the complaint that she was doing her job at the time of the mock robbery, and that the complaint made an admission by mentioning the assault exception.

The Fifth District Court of Appeal set forth the grounds upon which a motion for a new trial can be granted are set forth in Code of Civil Procedure section 657:

> "1. Irregularity in the proceedings … by which either party was prevented from having a fair trial.
>
> "2. Misconduct of the jury ….
>
> "3. Accident or surprise ….
>
> "4. Newly discovered evidence ….

"5. Excessive or inadequate damages.

"6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

"7. Error in law, occurring at the trial and excepted to by the party making the application."

The workers' compensation exclusivity rule is the rule, embodied in Labor Code sections 3600, 3601 and 3602, that with certain exceptions, an injury sustained by an employee arising out of and in the course of his or her employment is compensable by way of a workers' compensation insurance award only, not by a tort judgment.

Labor Code section 3600 provides that, with exceptions, workers' compensation liability exists "in lieu of any other liability whatsoever" "against an employer for any injury sustained by his or her employees arising out of and in the course of the employment" if specified "conditions of compensation concur …." (Lab. Code, § 3600, subd. (a).) There are eight conditions of compensation. Of significance here are conditions 2 and 3: "Where, at the time of injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment" (*id.*, subd. (a)(2)); and "Where the injury is proximately caused by the employment, either with or without negligence" (*id.*, subd. (a)(3)).

The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. (*Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1809.) It is a looser concept of causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied "if the connection between work and the injury is a contributing cause of the injury …."

The requirement that the employee be acting in the course of employment is different: It generally means the injury happened at a time when the employee was working and in the place of employment. (*Atascadero Unified School Dist. v. Workers' Comp. Appeals Bd.* (2002) 98 Cal.App.4th 880, 883.) It further requires that the employee, when injured, was doing "'"those reasonable things which his contract with his employment expressly or impliedly permits him to do."'" (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733.)

For this case, it is important that "arising out of" and "in the course of" are two separate requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury.

Labor Code section 3602, subdivision (a), repeats the rule that workers' compensation benefits are the exclusive remedy for industrial injury. Subdivision (b) of that section lists **three exceptions to the exclusivity rule**. The one pertinent here is: "Where the employee's injury or death is proximately caused by a willful physical assault by the employer." (Lab. Code, § 3602, subd. (b)(1).) Subdivision (c) makes explicit the converse of the exclusivity rule, i.e., that ordinary civil remedies apply to injuries falling outside the workers' compensation system: "**In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted**." (Lab. Code, § 3602, subd. (c).)

Labor Code section 3601 extends the exclusivity rule to bar tort actions against co-employees who cause injury while acting in the scope of employment.

In California, the exclusivity rule is complicated, as the above discussion indicates: The rule bars recovery in a tort action for *any* injury happening under

the stated conditions of compensation unless an exception applies. This means that some injuries caused by intentional torts remain subject to the exclusive workers' compensation remedy.

Our Supreme Court explained the law in *Fermino*. On one hand, Labor Code section 3600 frames the exclusivity rule in general terms (any injury) without ruling out intentional torts. Likewise, Labor Code section 4553 establishes a special rule for injuries caused by an employer's "serious and willful misconduct"; in such cases, the employee's workers' compensation award is to be "increased by one-half." Thus, at least **some intentional torts are included within the exclusive workers' compensation remedy**, with a premium added to the recovery (although case law holds that serious and willful misconduct in this context is not quite the same as intentional wrongdoing and instead involves an intermediate form of fault somewhere between negligence and intent). On the other hand, Labor Code section 3600 makes a point of stating that the exclusive remedy applies "without regard to *negligence*" (Lab. Code, § 3600, subd. (a), italics added), indicating that the Legislature was focused mainly on setting up a system to compensate workers whose injuries arose without fault or through negligence and did not intend to deal comprehensively with injuries caused by intentional torts. (*Fermino,* at pp. 709-710.)

When are intentional torts within the Workers' Compensation Act, then, and when are they not? Case law developed to try to answer this question, as the *Fermino* court explained. *Conway v. Globin* (1951) 105 Cal.App.2d 495, 498, held that an intentional assault was not within the exclusivity rule. *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 630, held that a workers' compensation insurer, standing in the shoes of the employer, was not shielded by the exclusivity rule from an action for fraud. *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 474-476, held that the exclusivity rule did not bar an action for fraudulent concealment where the employer willfully withheld information from the employee's physician about the employee's asbestos-

related illness. (*Fermino,* at pp. 710-712.) In 1982, the Legislature ratified some of the case law by adding to Labor Code section 3602 the exception for willful assault and an exception for fraudulent concealment of an injury. (*Fermino,* at p. 712)

In *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, the Supreme Court considered **whether a claim of intentional infliction of emotional distress fell within the exclusivity rule**. The employee alleged that he had been unfairly demoted to a position in which he had to perform humiliatingly menial duties. In the Supreme Court's view, reviewing and disciplining employees was a normal part of the employment relationship and could not be brought outside the exclusivity rule by a showing that the employer intentionally caused harm through it. (*Fermino,* at pp. 712-713.) To hold otherwise would create too large an exception to the exclusivity rule, because "an employer or supervisor is generally in a position that gives him power to damage the employee's interests through ordinary acts of discipline, and must often act with the recognition that such acts will cause the employee mental distress."

In *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1430, the Court of Appeal distinguished *Cole* and held that **a claim of intentional infliction of emotional distress was not barred by the exclusivity rule**. The plaintiff was subjected to a persistent campaign of harassment that included physical molestation and deliberate humiliation. This behavior could not be considered a normal risk of employment.

In *Fermino* itself, the plaintiff sued her employer for false imprisonment. She was a sales clerk accused by her personnel manager of stealing $4.95. According to the complaint, the sales manager, the loss-prevention manager, and two security agents called her into a room and interrogated her. They claimed two witnesses saw her commit the theft. She was told they would count one point each time she denied guilt. When there were 14 points, they would call the

police. They shouted profanities at her over her insistent denials and blocked her way when she tried to leave. After an hour, she broke down in tears and her interrogators admitted no one witnessed her committing theft. They said they believed her and let her go.

The Supreme Court held that the suit was not barred. It rejected the notion that the 1982 amendments to Labor Code section 3600, listing specific exceptions to the exclusivity rule, were "intended to provide an exhaustive list" of such exceptions. (*Fermino,* at p. 720.) Although it is not included in that list, "false imprisonment committed by an employer against an employee is always outside the scope of the compensation bargain." A reasonable detention of an employee to investigate a suspected theft would be a normal part of the employment relationship, but a reasonable detention would not be false imprisonment. The court stated:

> "We have held … that normal employer actions causing injury would not fall outside the scope of the exclusivity rule merely by attributing to the employer a sinister intention. Conversely, … **actions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship merely by means of artful terminology.** Indeed, virtually any action by an employer can be characterized as a 'normal part of employment' if raised to the proper level of abstraction.… [For instance], the harassment in *Hart* … may be viewed as a 'personal conflict' between an employee and a supervisor, … a not uncommon feature of an employment relationship.
>
> "What matters, then, is not the label that might be affixed to the employer conduct, but whether the conduct itself, concretely, is of the kind that is within the compensation bargain. In this case, Fermino does not contend … that seemingly ordinary employer disciplinary

> actions become tortious when seen in light of the employer's malicious state of mind. Rather, Fermino here claims that the acts themselves were prima facie outside the employer's 'proper role,' irrespective of [the employer's] intent to harm, because they criminally deprived her of her liberty and therefore were beyond the scope of the compensation bargain." (*Fermino, supra*, 7 Cal.4th at pp. 717-718.)

With this legal background in mind, the Fifth DCA concluded the trial court erred in granting the new trial motion. The court was mistaken in its view that the complaint conceded the case was within the scope of the Workers' Compensation Act and the only issue was whether one of the exceptions in Labor Code sections 3601 and 3602 applied as well. The court's conclusion on this point was based on the fact that the complaint stated Lee was at the workplace doing her job when she was injured and also stated the assault exception applied. As stated, **an injury does not necessarily fall within the conditions of compensation delineated in Labor Code section 3600 just because it happened when the employee was in the workplace during working hours doing his or her job.** There must also be industrial causation, i.e., it must be shown that the work was a contributing cause of the injury. The complaint did not concede that it was. Further, the fact that the complaint pleaded the assault exception did not imply that the injury was within the scope of the Workers' Compensation Act and the recovery sought was based solely on that exception. The pleading of one theory of recovery does not exclude another theory, even if the two are inconsistent. (*Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1403.) The allegations in the complaint were sufficient to present both a theory that the facts fell *outside* the conditions of compensation *and* a theory that they fell *within* the assault exception.

The trial court's opinion that the complaint made a concession regarding the conditions of compensation was the basis of its ruling that the CACI No. 2800

instruction should not have been given. The court thought that, in light of the complaint, the jury could only find that Lee was performing a task for her work when she was injured. The instruction was correctly given, however, because **the evidence was able to support a finding that the work was not a contributing cause of the injury**.

The jury could properly make this finding by applying **special instruction No. five, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment.** This instruction stated the doctrine of *Fermino* correctly. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that **unwittingly participating in the mock robbery as a victim was not part of the employee's work**. Lee's counsel urged the jury to make this finding. Evidently, judging by the jury's question, this is in fact what it found.

For the above reasons, the grounds given by the trial court for granting the new trial motion were erroneous.

On appeal, Defendants argue that the trial court improperly excluded evidence of Lee's application for and receipt of workers' compensation benefits. The court also gave the jury the following instruction, which was based on the first sentence of CACI No. 3963: "You are not to consider whether or not the plaintiff, Kathy Lee, received workers' compensation benefits as a result of the incident which is the subject matter of this lawsuit in determining the issues in this case." Defendants argue that the documents showing Lee's application for and award of compensation should have been admitted into evidence to show that her injury arose out of her employment.

Lee's counsel first raised the issue in a motion in limine, saying evidence of workers' compensation payments should be excluded. Lee relied on **the**

collateral source rule, i.e., the rule that a payment from a third party for a loss to a plaintiff is not admissible to show that a tort action for the same loss is precluded or that the amount of damages should be reduced. In response, defendants argued, "We have got to prove that the plaintiff received workers' compensation benefits in order to establish that workers' comp is an exclusive remedy, and we should receive a defense verdict because of that." The trial court ruled that "the fact that she is covered by a workers compensation policy" was admissible but not "the amounts that she has received …." "In the event of a plaintiff's verdict," the court continued, "I will do the deduction." Defense counsel had asserted earlier that if there was a plaintiff's verdict, the district would be entitled to offset the amount of the workers' compensation benefits "since it's the same entity," presumably meaning the district was self-insured.

The issue arose again during opening statements. Defense counsel told the jury, "The evidence will show that Kathy Lee did, in fact, process a workers' compensation claim. We will not discuss the amount that she received. We will not discuss that. But the evidence will show that she did, in fact, receive workers' compensation benefits and that her medical expenses were paid for." Lee's counsel objected and the court and parties conferred outside the presence of the jury. Defense counsel said he believed the in limine ruling only barred mention of the amount of the benefits Lee received. He said, "And for these jurors to understand the case, they need to know that she got workers' compensation." The court explained that it had intended to rule that the fact that the district had a workers' compensation policy was admissible (since that is one of the conditions of compensation required to be shown by Lab. Code, § 3600) but not the facts that Lee had applied for and received benefits. The issue came up a third time during a discussion of jury instructions, leading to the instruction that the jury could not consider whether or not Lee received workers' compensation benefits.

Defendants **argued that the collateral source rule does not apply to the compensation benefits paid in this case**. They further argue that the error of excluding the evidence on this ground prejudiced them because the evidence would have "disproved" Lee's assertion that her injury was not caused by her work.

It is unclear whether the collateral source rule applies in this situation. **Ordinarily, the rule applies only to sources of compensation "wholly independent" of the defendant**. (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6.) In general, the plaintiff's insurer is a wholly independent source while a co-tortfeasor or a co-tortfeasor's insurer, or the tortfeasor's own insurer, is not. (*Pacific Gas & Electric Co. v. Superior Court* (1994) 28 Cal.App.4th 174, 178, 180.) Here the collateral source was workers' compensation benefits paid by the district's policy. Under the general principles just described, this would not be an independent source; the defendant is the policyholder, so the collateral source rule would not apply. Yet the California Supreme Court held that the rule did apply in a case in which an employee received benefits from the employer's workers' compensation policy and then sued a third-party tortfeasor, the compensation insurer having waived its right of subrogation against the third party. (*De Cruz v. Reid* (1968) 69 Cal.2d 217, 223-227.) A commentator explained this result by pointing out that **workers' compensation insurance is a benefit of employment; thus the employee can be deemed to have paid for the insurance with his labor, so the situation is similar to that in which the collateral source is the plaintiff's own insurance and therefore the rule applies**. (Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits* (1986) 37 Hastings L.J. 667, 674-675.) In *Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, the California Supreme Court appeared to assume the collateral source rule generally applies to workers' compensation benefits. (*Id.* at pp. 10-11 [stating that, as general rule, when employee sues employer under Federal Employers' Liability Act, jury should not be told of employee's *in*eligibility for workers' compensation benefits, just as juries ordinarily should

not be told of plaintiff's collateral sources of compensation for injury caused by defendant].)

The 5th DCA found it was "probably" correct in this case to apply the collateral source rule to exclude evidence of the benefits received by Lee. **As a rule of evidence, the collateral source rule serves to avoid the danger that the jury will decline to impose liability or will reduce damages in the belief that the plaintiff has already been compensated and should not receive a double recovery.** In this case, the possibility of a double recovery actually happening appears to be remote, so the rule is especially apposite. The trial court and the parties all appear to agree that if Lee obtains a damages judgment, some means will be employed to ensure the compensation benefits will be offset or refunded. Informing the jury of Lee's prior receipt of benefits therefore **could only have been misleading, giving rise to the risk the rule is meant to avoid.** The rule apparently served its purpose here.

In the end, however, the Justices did not decide whether the collateral source rule was applicable here to exclude the documents from Lee's workers' compensation file. Even if the ruling was erroneous, defendants have not shown it was prejudicial. Contrary to defendants' position, the fact that Lee received benefits could not prove the workers' compensation exclusivity rule applied, for the mere fact that an award was made cannot show that an award was the correct remedy. The elements stated in Labor Code sections 3600, 3601, and 3602 determine whether the exclusivity rule applies and the existence or nonexistence of an award is not one of those elements.

The order granting a new trial is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion. Plaintiff Lee is awarded costs on appeal.