Another potential escape valve from workers' compensation exclusivity is the "dual capacity" doctrine. This doctrine was first articulated in *Duprey v. Shane*, 39 Cal.2d 781, 249 P.2d 8 (1952), in which medical malpractice was alleged against the plaintiff's employer. In permitting the tort suit, the California Supreme Court reasoned that the workers' compensation statute barred employee suits against the employer only in its capacity as employer; the statute would not preclude suits against the employer in a different capacity—as provider of medical services. This doctrine has subsequently been extended to several other contexts (for example, the employer as product manufacturer, see *Bell v. Industrial Vangas, Inc.*, 30 Cal.3d 268, 179 Cal.Rptr. 30, 637 P.2d 266 (1981)), and has been adopted in other states. However, in its parent jurisdiction, California, the dual capacity doctrine was repealed by legislation in 1982. For that reason, in *Hendy v. Losse*, 54 Cal.3d 723, 1 Cal.Rptr.2d 543, 819 P.2d 1 (1991), the California Supreme Court held that Hendy—who was injured in 1976 while playing for the San Diego Chargers and later reinjured and permanently disabled when the Chargers' team physician, Dr. Losse, sent him back to play too early—could not maintain a tort action against the Chargers or Dr. Losse.

Because the employer bears workers' compensation liability and pays for this insurance coverage, the employer (and its employees, such as Dr. Losse) gets the benefit of statutory protection from tort suits. In many athletic situations, however, the team doctor is an "independent contractor" and thus is potentially exposed to suit, such as in the following case brought by two Chicago Bears players.

BRYANT V. FOX & CHICAGO BEARS

Court of Appeals of Illinois, First District, 1987.
162 Ill.App.3d 46, 113 Ill.Dec. 790, 515 N.E.2d 775.

JIGNATI, JUSTICE.

* * *

The documents before the trial court established the following facts concerning the relationship between the Bears and Dr. Fox. Dr. Fox was retained by the Bears in 1947 to render medical care to injured Bears' players. He was required to treat all injured players upon request, both during the regular season and the off season, and to report the treatment to the Bears' management. All anticipated treatment and surgery were discussed with the player and the Bears, either of whom could veto the proposed action. Dr. Fox did not bill the individual players for treatment. The record further shows that the agreement between the Bears and Dr. Fox required him to perform preseason physicals, which took place at Illinois Masonic Hospital. He was to attend all regular season games but could send a substitute subject to the Bears' approval. Dr. Fox was not obligated to attend preseason games or practices, but could do so at his convenience.

With respect to compensation and benefits, the record shows that Dr. Fox was paid an annual retainer of $12,000 which covered the preseason physicals and all treatment other than surgery. If surgery was required, Dr. Fox received fees for each surgery based upon the nature of the injury, the time involved and the complexity of the procedure. According to his discovery deposition, Dr. Fox had a very busy practice aside from the Bears and the compensation paid to him by the Bears represented "very much less" than 10% of his income. Unlike employees of the Bears, Dr. Fox was not offered group medical insurance, life insurance or paid vacations, and was not invited to participate in the pension and profit-sharing plan. He was not provided with W-2 forms and the Bears never made Social Security deductions from his compensation. Dr. Fox stated that he considered himself to be an employee of Lakeview Orthopedic Associates, Ltd., and received W-2 forms from that corporation.

As previously stated, the exclusive-remedy provision bars an employee from bringing a common-law negligence action against a co-employee. It has been recognized that there is no clear line of demarcation between the status of employee and independent contractor. Illinois Appellate Court in *Lister v. Industrial Commission*, 500 N.E.2d 134 (Ill.1986), stated a number of relevant factors in determining such status including the following: "[The] right to control the manner in which work is done; method of payment; right to discharge; skill required in the work to be done; who provides tools, materials, or equipment; whether the workmen's occupation is related to that of the alleged employer; and whether the alleged employer deducted for withholding tax." The single most important factor in determining the parties' relationship is the right to control the manner in which the work is done. An independent contractor has been defined as one who undertakes to produce a given result, without being controlled as to the method by which he attains that result.

* * *

In our view, the facts before the trial court on the Bears' motion to dismiss were insufficient to establish as a matter of law that Dr. Fox was an employee rather than an independent contractor. Although Dr. Fox was to treat injured players upon request, the evidence presented by the plaintiffs shows that the Bears were given little control over Dr. Fox's actions in accomplishing this result. He could send a substitute to regular season games if his attendance was not possible and was not obligated to attend practices or preseason games. Preseason physicals took place at Illinois Masonic Hospital using equipment belonging to the hospital. Although Dr. Fox was paid a relatively small retainer covering routine medical services, he would bill the Bears separately for each surgery he performed. Significantly, the plaintiffs presented evidence showing that the Bears did not withhold Social Security from Dr. Fox's compensation and did not provide him with W-2 forms. Dr. Fox stated that he received W-2 forms from Lakeview Orthopedic Associates, Ltd., and considered himself to be an employee of that corporation. A very small percentage of his practice was devoted to treating Bears' players. Finally, unlike employees of the Bears, Dr. Fox was not provided with benefits such as medical or life insurance, or a pension and profit-sharing plan.

Motion for dismissal denied.

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