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How to maximize your client's recovery in a workers' compensation credit hearing

PROVING EMPLOYER FAULT FOR THE INJURY CAN OFFSET THE WC CREDIT AGAINST YOUR RECOVERY – AND YOU CAN BE PAID FOR YOUR WORK AS AN EXPERT WITNESS ON DAMAGES

In personal injury cases, it is common for your client's employer (actually, the workers' compensation carrier) to claim a lien against your client's recovery. When the case concludes, the employer usually seeks compensation for moneys the employer's carrier has paid on behalf of the injured worker, such as medical payments and disability benefit payments. This typically results in post-recovery lien negotiations with the workers' compensation carrier.

Meanwhile, the employer is maneuvering to reduce its future exposure in your client's workers' compensation case. The employer has an obligation to keep paying medical or disability benefits to your client into the future. In cases of significant injury, these future benefits may be expensive. When the personal injury case is resolved, the employer wants to stop paying future benefits.

Credit against your client's recovery

In order to end its future obligations, the employer can seek a *credit against your client's recovery*. (Lab. Code, § 3861) The employer can go before the workers' compensation board and move to "classify the employee's damage recovery as a workmen's compensation benefit." (*Roe v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 884, 891) That is, the PI recovery will become the new source of the employee's future benefits, relieving the employer's obligation. If successful, the employer will be credited with your client's net personal injury recovery, as if the employer had paid this amount as a benefit.

The workers' compensation credit proceeding can be a serious issue for the plaintiff. Your client's future medical care and disability benefits are at stake. Potentially, the employer could receive a credit up to the full amount of your client's net recovery. This would completely end the employer's obligation to provide future medical or disability benefits, which your client now must pay out of the recovery.

Employer fault

Fortunately, employer fault can significantly reduce the employer's credit claim. "'It is contrary to the policy of the law for the employer, or his subrogee, the insurance carrier, to profit by the wrong of the employer.' [citation]" (*Witt v. Jackson* (1961) 57 Cal.2d 57, 72.) The employer cannot claim any credit against the injured worker's personal injury recovery, until the employer has provided benefits to the worker in the amount of the employer's percentage of fault times the total damages. (*Associated Const. & Engineering Co. v. WCAB* (*Cole*) (1978) 22 Cal.3d 829, 843 ("*Cole*").)

In cases of workplace injury, this rule is frequently a complete bar to employer credit. If the employer has significant fault (over 10 percent or 15 percent), there is a good chance that the employer's fault will eliminate the employer's credit claim. This will ensure the employer keeps paying benefits to your client (or, pays your client a lump sum to end its obligation).

PI attorney can offer expert testimony on the case value

On an employer's credit claim, evidence from the personal injury (PI) case provides critical information for the Workers' Compensation Appeals Board ("WCAB") on the two main issues: employer fault and total PI damages. Here, the plaintiff's PI attorney can play a crucial role as an expert on the total case value. WCAB cases recognize that the amount of settlement is almost always less than the plaintiff's total damages. Commonly, the WCAB accepts expert opinion from experienced PI attorneys on the value of the applicant's total damages. (*Bonner v. WCAB* (1990) 225 Cal.App.3d 1023, 1033-1034.)

Thus, the PI attorney can become a witness at the credit hearing, and help the client hold on to more of the recovery. The PI attorney can also be paid on an hourly basis for this expert testimony.

This article describes defendant employer's credit claims before the WCAB, and describes the necessary WCAB determinations to assess employer fault, total damages, defendant's credit threshold, and whether defendant is entitled to any credit on the applicant's recovery. We discuss the requirements for proof of the elements of the credit claim, and the typical practice of the WCAB in receiving evidence on these claims in similar cases, including the PI attorney's testimony as to the total case value.

Issues to be decided by the WCAB at the credit hearing

In the workers' compensation hearing, your client (plaintiff in the PI case) is the "applicant," and the employer (that is, the employer's insurance carrier) is the "defendant." The Workers' Compensation Appeals Board ("WCAB" or "the Board") has a set of issues to decide at the credit hearing:

• Determining the applicant's *past medical and disability benefits paid* by defendant, and the *net* recovery to the applicant (after fees and costs.) These facts will establish the prima facie case for the WCAB to conduct a credit proceeding. (It is also useful to determine *future benefits owed to applicant*.)

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• Determining the *percentage of employer fault*, that is, the employer's percentage of responsibility for the applicant's injuries compared to other parties, based on principles of negligence and comparative fault.
• Determining the *value of the applicant's total damages* in the PI case.
• Determining the *defendant's credit threshold*, i.e., the employer's percentage of fault times the applicant's total damages.
• Determining *whether the defendant will receive any credit* for applicant's PI recovery. No credit will be paid until the defendant's obligation to provide workers' compensation benefits meets or exceeds the employer's credit threshold.

Preliminary facts establishing the employer's right to claim a credit

Where an injured worker obtains a third-party recovery by settlement or judgment, the employer or workers' compensation carrier may claim a credit against a plaintiff's recovery "to be applied against his liability for compensation." (Lab. Code, § 3861.) (Employers have an independent right to both a lien on the PI recovery, and a credit against the recovery in the workers' compensation case.) Where a defendant employer or carrier claims a credit against an applicant's third-party recovery, the defendant must litigate its right to credit before the Appeals Board. (*Roe v. WCAB* (1974) 12 Cal.3d 884.)

Before considering the issue of the employer's credit, the parties must establish preliminary facts related to the past and future workers' compensation benefits. Defendant employer must show that "there was a third-party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future." (*Martinez v. Associated Engineering & Construction Co*. (1979) 44 Cal.Comp.Cases 1012, 1021.) Relevant foundational considerations for the WCAB include:
• Past medical benefits paid by the carrier to the applicant
• Past disability benefits paid by the carrier to the applicant
• Amount of the applicant's net recovery by settlement or verdict (less fess and costs)

These considerations will establish the defendant's prima facie ability to make any credit claim against the PI recovery.

The employer has a potential right to a credit on the applicant's *net recovery* after attorney's fees and costs. (Lab. Code, §§ 3851 and 3861; see *Heaton v. Kerlan* (1946) 24 Cal.App.2d 716.) This issue can limit the employer's credit in some cases. However, as we discuss below, in the majority of cases the employer's right to credit will be eliminated, or will fall well below the applicant's net recovery, due to employer fault.

Determining the employer's workers' compensation credit threshold

Where an applicant disputes the defendant's entitlement to credit by alleging employer negligence, principles of comparative negligence will apply. (See, *Witt v. Jackson* (1961) 57 Cal.2d 57, 70.) Where the case has gone to a jury verdict with an assignment of fault, then the WCAB already has a determination of employer fault that can be used in the credit hearing. (*Mailett v. WCAB* (1972) 23 Cal.App.3d 107.)

In the case of a PI settlement, or other circumstances where no court has adjudicated the issue of an employer's concurrent negligence, the WCAB has the task of determining employer fault. "The rule announced herein contemplates two factual determinations: (1) the degree of fault attributable to the employer, and (2) the total damages suffered by the employee. When a settlement between the employee and a third party tortfeasor fails to resolve these issues, the task devolves upon the board." (*Cole, supra*, 22 Cal.3d 829, 845.)

Where the employer is found to be negligent, the defendant's entitlement to credit is reduced in proportion to the employer's share of fault. The WCAB muehrlichst then deny the employer credit until the ratio of its contribution to the employee's damages corresponds to the proportional share of fault. As held by the California Supreme Court:

> When the issue of an employer's concurrent negligence arises in the context of his credit claim based on a third-party settlement, *the board must determine the appropriate contribution of the employer* since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the *degree of fault of the employer*, and (2) the *total damages* to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. *Once the employer's workers' compensation contribution reaches this level, he should be granted a credit* for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of a statutory credit adequately accommodate the principle that a negligent employer should not profit from his wrong.

(*Associated Const. & Eng. Co. v. WCAB* (*Cole*) (1978) 22 Cal.3d 829, 843, emphasis added ("*Cole*"); see, *Hodges v. WCAB* (1981) 123 Cal.App.3d 501, 515 [citing *Cole*]; see, *Bonner v. WCAB* (1990) 225 Cal.App.3d 1023, 1033 [citing *Cole*].)

In practice, the WCAB uses a concept called the "credit threshold." This is the applicant's total damages, multiplied by the percentage of employer fault. The resulting credit threshold is then compared to the amount of benefits paid by the employer. If the defendant has not yet provided benefits proportionate to its share of the damages, credit is not allowed.

In order to determine the workers' compensation threshold and the employer's right to credit (if any), the WCAB considers a set of issues:

> First, Defendant must establish its right to claim a credit. It must show that there was a third-party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future.

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> Second, Applicant has the burden of proof to establish the employer was negligent in any degree. . . .
>
> Third, the employer or carrier to show comparative negligence of the third party Defendant or Defendants and any negligence by Applicant. . . .
>
> Fourth, the burden then shifts to Applicant to establish his total damages . . .

(*Martinez v. Associated Engineering & Construction Co*. (1979) 44 Cal.Comp.Cases 1012 at 1021-1022, paragraphs added.)

Determining the percentage of employer fault

Evaluation of employer negligence

Typically, in the PI case, the plaintiff's attorney is focusing on the liability of third-party defendants, and is trying to minimize employer fault. This strategy should be reversed in the workers' compensation credit proceeding, where we need to emphasize employer fault. (It is wise to keep this issue in mind when pursuing the civil case, by keeping track of evidence of employer fault.)

Employer negligence in a PI case is established by showing that the employer breached a legal duty of care that was the proximate or legal cause of injury to the applicant. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 338.) Generally, the employer who is paying benefits to the injured plaintiff (and later claiming a credit) is the "exposing employer" under the Labor Code – "The employer whose employees were exposed to the hazard." (Lab. Code, § 6400(b)(1).)

In the context of a work-related injury, the legal duty imposed upon employers is "to maintain a safe and healthful place of employment pursuant to the mandate of [Labor Code] section 6400 through 6404." (*Bonner v. WCAB, supra,* 225 Cal.App.3d 1023, 1034.) "In general, an employer's statutory duty under the Labor Code is greater than a duty of care imposed pursuant to common law principles . . . . The duty to maintain a safe workplace encompasses many responsibilities, including the duty to inspect the workplace, to discover and correct a dangerous condition, and to give an adequate warning of its existence." (*Ibid.*)

In addition, employers have a duty to follow all applicable codes and regulations regarding safe working conditions. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 924.) Some relevant Cal-OSHA regulations include California Code of Regulations, title 8, section 3203 [adequate Injury and Illness Prevention Program, including safety training for workers]; section 3328 [providing safe equipment]; and section 1511 [employer duty to inspect work site]) Employer duties are also established by standard practice in the industry. (CACI 413.)

Determining the percentage of employer fault under comparative negligence

The WCAB will also consider negligence by parties other than the employer, e.g., the applicant and the third-party defendants. The employer bears the burden of proof to show comparative negligence by the applicant or by third parties. (*Martinez, supra*, 44 Cal.Comp.Cases 1012 at 1021-1022.)

After assessing the negligence of the employer, the third-party defendants, and the applicant, the WCAB can assess the employer's percentage of fault under general principles of fault apportionment. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 583 [liability among multiple tortfeasors may be apportioned on a comparative negligence basis]; see, CACI 406, Apportionment of Fault.) The WCAB's analysis of comparative negligence should result in a calculation of the defendant employer's percentage of responsibility. (*Rodgers, supra,* 36 Cal.3d 330, 338.)

Determining the applicant's total damages

The next task for the WCAB is the determination of the applicant's total damages. In the case of a jury verdict, the total damages has been determined by the verdict. (*Mailett v. WCAB, supra,* 23 Cal.App.3d 107.) In cases where a settlement has occurred, the amount of settlement is almost always less than the plaintiff's total damages. Therefore, it is not reasonable to rely on the settlement value as the value of total damages. (*Bonner, supra*, 225 Cal.App.3d 1023, 1033.) Commonly, the WCAB accepts expert opinion from experienced PI attorneys on the value of the applicant's total damages. (*Ibid*.)

In *Bonner v. WCAB,* the settlement amount was $500,000. The petitioner provided unrebutted expert testimony of a PI attorney that the damages likely would have been $883,840. The Court of Appeal held that the workers' compensation judge erroneously accepted the settlement amount as a limit on potential tort recovery, and arbitrarily rejected the expert testimony that the case value was greater. (*Bonner, supra*, 225 Cal.App.3d 1023, 1039.) "[T]he Board must determine the appropriate contribution of the employer because the employee's settlement does not represent a judicial determination of tort damages." (*Id*. at 1033)

WCAB cases following *Bonner* have rejected the settlement amount to set the value of the applicant's total damages, and instead used expert opinion testimony from PI attorneys. (See, e.g., cases cited in Pollack, *California Workers Comp. Law & Prac.* (rev. 14, 2017) Third Party Suits, § 24:102, including: *Unicare Ins. Co v. WCAB* (*Simmons*) 95 Cal.Comp.Cases 1122 (W/D-1994) [testimony by PI attorney established value of third-party action]; *Torrance USD v. WCAB* (*Ebey*) 64 Cal.Comp.Cases 1329 (W/D-1999) [PI attorney as expert established value of third-party action as $315,000]; *US Color Graphics v. WCAB* (*Campos*) 63 Cal.Comp.Cases 879 (W/D-1998) [Applicant's third-party attorney offered expert opinion that case value was $994,748.62.])

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Calculation of the defendant's credit threshold and entitlement to credit, if any

The WCAB's final task is to calculate defendant's "credit threshold" and potential entitlement to a credit against applicant's benefits. The credit threshold is the employer's proportionate share of total damages, calculated as the employer's percentage of fault times the total case value. The credit threshold is compared to the defendant's contribution to date; if the defendant has not yet provided benefits proportionate to its share of the damages, credit is not allowed. "The Board must . . . deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault." (*Cole, supra,* 22 Cal.3d 829 at 843.)

The *Cole* case offered a sample calculation of an employer's credit threshold in a hypothetical third-party settlement case. (*Cole, supra,* 22 Cal.3d 829 at 843, fn. 10.) In the *Cole* exemplar, the third-party settlement was $25,000, and the employer had paid $20,000 in benefits. The WCAB had determined there was $100,000 in total damages; and 50 percent employer fault. In this circumstance, the employer's credit threshold is therefore $50,000 (50 percent x $100,000). As the defendant had not yet provided benefits in this amount, it was not entitled to a credit. "[T]he employer could not claim a credit until he contributed an additional $30,000 in benefits. The employer would then have contributed a total of $50,000 to the employee's recovery, or 50 percent of the employee's total damages of $100,000, and the ratio of his contribution to the employee's damages would correspond to his degree of fault." (*Ibid*.)

In the *Cole* example above, with 50 percent employer fault, the employer was denied a credit. However, employer fault does not usually need to be this high to deny the employer a credit against the recovery. In the above example, the employer had paid $20,000 against a total case value of $100,000. With these facts, a finding of employer fault as low as 20 percent would still deny the employer a credit.

Example of a credit determination

Let us consider another example adapted from a recent case. In this case, the worker/applicant had been injured while working at a site managed by another company. The injury occurred when some equipment failed, causing the worker to fall and injure his back. He was unable to work after this incident. Subsequently, the employer's workers' compensation carrier paid out $40,000 in medical benefits and $60,000 in disability (indemnity) benefits on the worker's behalf.

In the PI case, the plaintiff asserted negligence claims against the company that ran the site, and a negligent bailment claim against the company that leased the faulty equipment. Plaintiff claimed $2 million in damages, including past and future medical damages, past and future wage loss, and general damages. The case settled for $1,000,000. The employer moved the WCAB for a credit on the employee's PI recovery.

Let us assume that the WCAB, after considering the comparative fault of the involved parties, assigned 25 percent fault to the employer, and assessed the applicant's total damages at $2 million. The employer's credit threshold would be $500,000 (25 percent x $2,000,000). This is the amount the employer must pay in benefits, before the employer receives any credit from the recovery. However, the employer had paid only $100,000 in past benefits. In this example, the employer would not receive any credit, and would have to pay an additional $400,000 in future benefits before any credit was given.

In this example, the applicant has "room to spare" with this credit threshold. Even with more defense-favorable determinations, any employer credit would be limited. For example, if the WCAB assigned just 10 percent employer fault and assessed total damages of only $1 million, the employer's past paid benefits of $100,000 only just meets the credit threshold, and does not entitle the employer to a credit against the recovery.

Where the WCAB determines a credit threshold significantly higher than the paid benefits, the applicant has more negotiating power over the settlement of the applicant's future benefits from the employer. The employer not only wants a credit on past payments, but also wants to limit or eliminate future payments to the applicant. In our example, with a $500,000 threshold, the employer must keep paying reasonable future benefit claims up to $400,000. This obligation gives the applicant leverage when negotiating a lump-sum payment of the present value of such future benefits. (In our example, the applicant claims $100,000 in future medical benefits, and $35,000 in future disability benefits.)

Conclusion

We would encourage any plaintiff's attorney to assist at the employer's credit hearing in the workers' compensation case by giving expert testimony on the case value. This will help maximize the client's recovery, and can also earn expert fees for the plaintiff's attorney. Ultimately, it is very satisfying to help your client hold on to the settlement money that you worked so hard to acquire, and at the same time continue to receive their benefits in the workers' compensation forum.

For further guidance and more detail on relevant case law, we recommend Judge Pollack's California Workers' Compensation Law and Practice (James Publishing 2017), ch. 24, §§ 24.50, et seq. Also useful is Eshkanazi, Cal. Civ. Prac. Workers' Compensation, Ch. 17, Employer Credit Rights (available on Westlaw).

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