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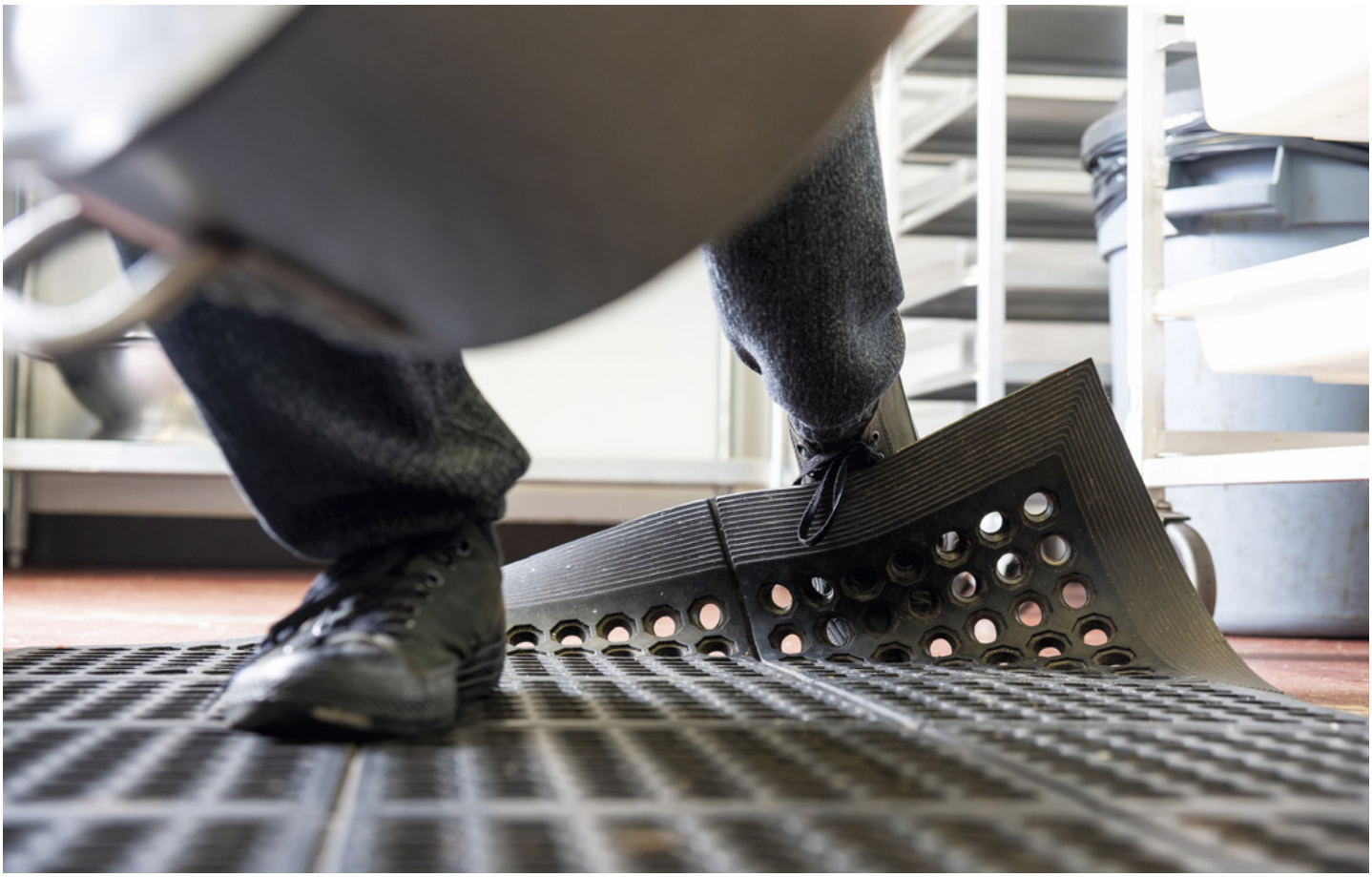

Workers' compensation liens and credit issues

WHEN THERE IS A THIRD-PARTY SETTLEMENT IN ADDITION TO WC BENEFITS, THE COMPLEXITY COMES IN LAYERS

It's simple – if your client is on the job as an employee and he or she gets injured, your client is entitled to workers' compensation benefits. (Lab. Code, § 3600.) In most instances, the law of the land makes workers' compensation an injured worker's *sole and exclusive remedy*. However, if another person or entity caused the worker's injury, you may have a viable third-party claim. If no one other than the employer is responsible for the injury and an exception to the exclusive remedy rule applies, you may be able to sue the employer in civil court.

Where the employer has no fault in causing the harms and losses suffered by an injured employee, the employer and their workers' compensation carrier enjoy the right to recoup workers' compensation benefits paid in the event the injured worker recovers from a third-party defendant. The right to recovery may come in the form of a lien claimant, a plaintiff in intervention, or as a petition for credit before the WCAB for an offset against further benefits. However, where the employer is arguably at fault for some, or a substantial share of fault, they may (in full or in part) lose their right to subrogation.

Third-party claims

Labor Code section 3852 provides: "The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer."

If the employee brings a third-party action, the employee must serve a copy of the complaint on the employer and file proof of service of same. This rule also applies to employers who file a third-party claim. (Lab. Code, § 3853.)

"If either the employee or the employer brings an action against such third person, he shall forthwith give to the other a copy of the complaint by *personal service or certified mail*. Proof of such service shall be filed in such action. If the action is brought by the employer or

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employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently."(Lab. Code, § 3853.)

Note: Failure to properly place the employer on notice of your third-party action may later reduce your ability to negotiate the workers' compensation lien they will eventually assert, as it may prevent an *assertion* under common fund principles, as later discussed herein.

Tip: When placing the employer/WC carrier on notice of the claim, seek their participation and active involvement by giving them a list of everything you need in writing, such as copies of all medical and billing records, employment file, wage records of the employee, investigation reports concerning the incident, etc. The employer/WC carrier will rarely oblige and this will strengthen your future argument in support of a common fund reduction to their recovery rights.

The lien

Labor Code section 3852 provides:

> Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents.

Labor Code section 3850, subdivision (b) provides that the term "employer" includes the actual employer or the employer's workers' compensation insurer.

What can their lien include?

The workers' compensation carrier is entitled to recover in the same third-party lawsuit with the employee, the total amount of its expenditures for "compensation," and any other special damages under Section 3852. (Lab. Code, § 3856, subd. (c).)

California law then defines "compensation" to mean compensation under this division and includes *every benefit or payment conferred* by this division *upon an injured employee*, or in the event of his or her death, upon his or her dependents, without regard to negligence. (Lab. Code, § 3207.)

"Compensation" therefore includes the following:

Medical and hospital expenses including nurse case manager expenses. (Lab. Code, §§ 4600-4608.)

Death benefits and funeral costs. (Lab. Code, §§ 4700-4709.)

Temporary disability (i.e., wage loss/replacement) payments for time lost from work. This is a wage replacement that generally pays up to two-thirds of an injured person's salary for up to 104 weeks subject to a statutory maximum. Some employers have additional wage-replacement policies and those are included as well. (Lab. Code, §§ 4650-4663.)

Permanent disability payments (i.e., loss of earning capacity) designed to compensate the injured employee for loss of ability to compete in the open labor market. [Where the Workers' Compensation Appeals Board (WCAB) has made a permanent disability award, but the award has not yet been paid, such as a Stipulation & Award with future payments to be made, then the present value of the future payments may also comprise the lien.] (*Smith v. County of Los Angeles* (1969) 276 Cal.App.2d 156, disapproved of on other grounds by *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1.) (Lab. Code, §§ 4650-4663.)

Workers' compensation also expends cost for rehabilitation benefits, which are recoverable benefits. (Lab. Code, §§ 4635-4647.)

Note: An employer can request increases in the lien after judgment in a civil case, but before judgment is satisfied. (Lab. Code, § 3857.)

Tip: Audit the WC lien! You must request/demand the "Itemized Printout of Benefits" from the Workers' Compensation carrier and assess every penny they claim to have spent on the claim to reach the alleged "total lien amount." All workers' compensation carriers and attorneys are familiar with this since, pursuant to California Code of Regulation, Title 8, section 10607, workers' comp attorneys demand an itemized printout routinely.

What the WC lien cannot include... arguably

This is a gray area of the law as there is no definitive answer; therefore, a good argument can often carry the day. The argument you need to make is that there is no category of damages on the verdict form to identify business expenses of the employer. As stated by the Supreme Court in *Breese v. Price* (1981) 29 Cal.3d 923, "[I]t would be anomalous for an employer or insurer to recover damages greater, in nature or amount, than those afforded the injured employee." Arguably, the following items may not be recoverable by the employer's lien:

Permanent disability where there has not yet been an award or certainty as to the amount of the future payment. If permanent disability has already been paid, which is often the case in the form of an advance or permanent disability advance (PDA), then permanent disability payments may be part of the lien.

Legal costs, defense attorney fees, other expenses such as copy service and investigation (e.g., sub-rosa).

Case management that is a collaborative process of a medical assessment, bill audit, medical treatment reasonableness determination, utilization review.

Utilization Review (UR) and Independent Medical Review (IMR)

Although this process is now mandated by California law under Labor Code section 4610, you should argue that this process is *not a benefit or payment conferred* on an injured employee. While California law may support reimbursement of such expenses, in many cases the WC carrier abuses the process to wrongfully deny the employee benefits.

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Medical examiners cost: PQME/QME & AME

Remember that these are not treating physicians, they are experts, similar to an IME. Under current WC law these doctors cannot dictate medical treatment. In most situations they are used when the employee or applicant disagree on the PTP's report and findings. Plaintiffs, in many instances, finds themselves in a worse situation following these exams as their primary physicians are often more liberal to the plaintiffs' cause. Again, you should argue that this process is *not a benefit or payment conferred* on an injured employee and it is certainly not medical treatment.

Tip: In a case with a favorable QME/AME, particularly where the WC attorney helped the third-party case with these experts, don't try to argue against the QME/AME's costs. In many instances you may even be able to work with the subrogation attorney in getting your client to a favorable QME/AME to help build your third-party claim. We often take QME/AME's depositions at the WC carrier's expense. Sometimes, we see extensive AME/QME costs that can really drive up the lien, which pressures the third-party defendant into settlement.

Subrogation argument

While most subrogation attorneys make assertions without any legal support, we do see the occasional good argument. We have seen an argument based on a "cost of mitigation" effort. One Court of Appeal decision does allow plaintiffs to recover the cost of mitigation efforts as a recoverable item of damages. (*Kleinclause v. Marin Realty Co*., (1994) 94 Cal.App.2d 733.)My takeaway is: Argue *against* this theory in your work comp subrogation negotiations, and argue *for it* in your third-party negotiations.

Note: When the subrogation attorney for the employer/WC carrier argues to recover costs or expenses beyond the basic indemnity and medical benefit payments, ask them for legal authority in support of their position. Put the burden on them. The odds are they won't be able to provide you with any authority and you'll be able to effectively argue down the lien.

The credit

Lien versus credit

In basic form, the lien constitutes the reimbursement rights of the employer based on benefits paid to the employee up to the time you satisfy the lien. Credit, on the contrary, represents the employer's right to halt any further benefits by the employer to the employee until the employee has exhausted his net proceeds of any third-party settlement or award.

Credit is based on Labor Code section 3858, which states: "After payment of litigation expenses and attorneys' fees fixed by the court pursuant to section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment . . ."

An employer is entitled to claim a credit against future compensation benefits which may be payable to the employee to the extent of the employee's net recovery from the third party. (Lab. Code, § 3861.) However, if the employer's concurrent negligence contributes to the employee's injury, its credit rights may be reduced or defeated depending on the extent of its negligence. (*Associated Construction and Engineering Company v. WCAB* (1979) 22 Cal.3d 829.) Credit applies to any benefit of compensation including indemnity, medical treatment, lien claims, attorney's fees, voucher, med-legal cost, and even penalties.

Credit only applies where the work comp claim is still ongoing with the right to future benefits. You do not need to consider credit issues where the work comp case is closed via C&R. Work comp claims will arise in one of the following situations:

Open and ongoing

This is likely the case in at least 50 percent of your third-party cases since most WC cases take even longer to resolve than civil cases. Likewise, WC seems to delay settlement when they know a third-party settlement is down the road that will potentially relieve them from further payments.

Stipulation with request for an award (Stip)

This settles all issues and gives lifetime medical benefits. Client may receive indemnity and/or pension payments every other week, possibly for life.

Findings and Award (F&A)

Same concept as a Stipulation but after a finding of fact by the trial court.

Compromise and Release (C&R)

The claim is 100 percent closed and money paid out in lump sum.

You need to know at what stage the WC claim is in and understand its ramifications when you settle the third party. If the WC claim is open and ongoing when you settle the third party, the WC attorney will likely not be paid for any work he has done on the case including litigation cost he has expended.

The employer's pursuit for subrogation

The employer has three options in pursuing reimbursement for workers' compensation benefits from a third-party claim:

1) The employer may file suit in his or her own name under Labor Code section 3852. Even if the employer has not paid any benefits, he or she may still file a lawsuit in anticipation of future benefits.

2) The employer may file a Notice of Lien asserting first lien rights on the proceeds of any judgment obtained by an injured employee in the employee's third-party action. (Lab. Code, § 3856, subd. (b).) [Note: As a lien claimant, the employer is not a party, and has no standing to appeal. (*Bates v. John Deere Company* (1983) 148 Cal.App.3d 40).]

3) The employer may intervene into an existing action brought by the plaintiff/employee pursuant to Labor Code section 3853, which provides for intervention any time before trial. (See also *Mar v. Sakti International Corp*. (1992) 9 Cal.App.4th 1780.) If the employer intervenes in the action, it is a party and all of the defenses that the

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third-party defendant has against the employee/plaintiff are also available against the intervener. (*Hubbard v. Bolt* (1983) 140 Cal.App.3d 882).The right to intervene into an existing action is also available to the injured worker.

Tip: If the employer timely files their lawsuit against the third-party defendant and the plaintiff misses the SOL, the plaintiff can still intervene into the employer's action and will not be barred by an SOL defense.

Resolving the lien with a fault-free employer

There are two scenarios to consider here. The first – where the employer is fault free; the second – where the employer is not. We will first address the former. [Note: It is good practice to inform the employer when you begin settlement discussion with the third party. And, you are *required* to notify the employer of any settlement pursuant to Labor Code section 3860.Failure to provide the proper notice and, in some instances, obtain employer consent may entitle the employer to their full claim for reimbursement. (See Lab. Code, § 3860, subds. (a) & (b).)]

Settlement effectuated with or without suit under Labor Code 3860

Labor Code section 3860, subdivision (c) –"Where settlement is effected, with or without suit, solely through the efforts of the employee's attorney, then *prior to the reimbursement of the employer*, as provided in subdivision (b) hereof, *there shall be deducted from the amount of the settlement the reasonable expenses incurred in effecting such settlement, including cost of suit, if any, together with a reasonable attorney's fee to be paid to the employee's attorney*, for his services in securing and effecting settlement for the benefit of both the employer and the employee." (Emphasis added.)

Labor Code section 3860, subdivision (e) – "Where both the employer and the employee are represented by the same agreed attorney or by separate attorneys in effecting a settlement, with or without suit, *prior to reimbursement of the employer*, as provided in subdivision (b) hereof, *there shall be deducted from the amount of the settlement the reasonable expenses incurred by both the employer and the employee or on behalf of either, including cost of suit, if any, together with reasonable attorney's fees* to be paid to the respective attorneys for the employer and the employee, based upon the respective services rendered in securing and effecting settlement for the benefit of the party represented." (Emphasis added.)

Where there is a judgment

Labor Code section 3856, subdivision (b) states: "If the action is prosecuted by the *employee alone*, *the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee* which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. *After the payment of such expenses and attorney's fee* the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation with any amounts to which he may be entitled as special damages under section 3852." (Emphasis added.)

Labor Code section 3856, subdivision (c) states: "If the action is prosecuted both by the *employee and the employer*, in a single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, *the court shall first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in preparation and prosecution of such action or actions, together with reasonable attorneys' fees* based solely on the services rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. After the payment of such expenses and attorney's fees the court shall apply out of the amount of such judgment for damages an amount sufficient to reimburse the employer for the amount of his expenditures for compensation together with any other amounts to which he may be entitled as special damages under section 3852." (Emphasis added.)

So when the subrogation attorney/WC carrier argues that "they have the first lien"….yes, they do…after your cost and attorney's fees have been paid. "Where the settlement is insufficient to satisfy the employer's claim and compensate counsel, the attorney's fees and cost take priority." (*Quinn v. State of California* (1975) 15 Cal.3d 162.)

The distribution of funds

Labor Code section 3860 is clear – first the proceeds are to be used to pay the litigation cost and attorney's fees; second they are to be used to pay the employer's reimbursable compensation claims; and third the plaintiff will receive any balance remaining. (*Summers v. Newman* (1999) 20 Cal.4th 1021.)

In *Summers v. Newman*, the California Supreme Court held where an "employer and employee are separately represented and the joint efforts of both counsel contribute to a settlement with the third party, the employer's fair share of attorney's fees is determined by reference to the benefit conferred on the employer which is the primary criterion used to determine the fee paid to the employer's attorney. We conclude the amount of this fee, together with the employer's fair share of other litigation expenses, is to be deducted from the reimbursable compensation cost paid to the employer." (*Id.* at 1035.)

For instance, if the employer lien is $150,000 and the employer intervenes and aggressively fights for reimbursement and is eventually awarded $150,000, any claim for cost and attorney's fees by the firm representing the employer comes out of that same $150,000 and not from any other source.

Common Fund Doctrine

The issue is based on whether the employer had "active participation" or "passive participation." If the employer is merely a lien claimant, you can argue

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they are a passive participant and common fund principles apply. If the employer intervenes and has "actively participated," then the common fund doctrine or equitable apportionment is not allowed. (See *Kavahaugh v. Sunnyvale* (1991) 233 Cal.App.3d 903). However, just because the employer intervenes does not automatically make their participation active. The intervener has the burden of proof and, in more instances than not, they are passive beneficiaries. The trier of fact for "active versus passive" participation is the trial court and the courts are in disagreement to some degree as to whether you can apportion the level of active participation in calculation of attorney's fees under a common fund theory.

Expect the employer to remind you that "you do not represent the employer" and they do not have to reduce their lien. As stated in *Quinn v. State of California* (1975) 15 Cal.3d 162, 176, "Yet if the employer receives his fair share of the recovery, he must bear his fair share of the cost of the recovery."

For the employer to avoid paying its share of fees and costs, they have the burden to produce evidence of a "conscientious effort in the circumstances to address the substantive issues encompassed by the lien holder's case." (*Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 745-746.) Employer has the burden to show their active participation, and merely filing a complaint and showing up to a few depositions will not suffice. "[A] token appearance insufficient." (*Id.* at 745-746.) Another court in *Hartwig v. Zacky Farms* (1992) 2 Cal.App.4th 1550 stated, "merely retaining separate counsel or filing a complaint in intervention or a lien, with nothing more, does not satisfy the standard of 'active participation.'"

Settlement proceeds allocated to independent claim

Some claims, such as a wife or husband's claim for loss of consortium, are not subject to the employer's claim for credit. (*Gapusan v. Jay* (1998) 66 Cal.App.4th 734.) *Use with caution,* as in every third-party case where you have a spouse, you have the ability to make a loss of consortium claim and specifically assign a portion of the settlement to the spouse. When WC comes asking for the net recovery to the plaintiff/employee, you need only give the net recovery to him/her and *not* include the amount assigned to the loss of consortium claim for the spouse. Be fair and reasonable. The courts have the power and authority to re-allocate funds if it appears this was done to unfairly circumvent the employer's right to credit.

UM/UIM recoveries

There is no right to a lien or credit when the policy belongs to the employee. (See Ins. Code, § 11580.2, subd. (c)(4) and *Rudd v. California Casualty General Inc. Co.* (1990) 219 Cal.App.3d 948, 954.) The UM/UIM carrier may, however, have an offset for benefits paid by workers' compensation carrier. (*Ibid.*)

Malpractice actions, both medical and legal

While not 100 percent impossible, it is extremely difficult and rare for the Employer/WC Carrier to assert a valid right of lien or credit in a medical malpractice action. (See *Graham v. Workers' Comp. Appeals Board* (1989) 210 Cal.App.3d 499.)

There is no right to a lien or credit for the employer for monies recovered in a legal malpractice action arising out of the incident giving rise to industrial benefits. (See *Soliz v. Spielman* (1974) 44 Cal.App.3d 70.)

Example scenarios with no employer negligence

"Passive Participation"

Assume the following: The employer filed a notice of lien in the amount of $150,000, which constitutes all the benefits paid to that point. The employer does not participate in the fight. In the third-party case you recover $450,000 in settlement. Assume litigation costs are $50,000 and fees are $180,000 (40 percent); the remaining balance would be $220,000. ($450k-$50k-$180k=$220k.) In such a scenario, you should argue that the work comp lien is subject to a 40 percent reduction for fees and a pro-rata share in the cost, in this case one-third of $50,000, or $16,666.Hence, their lien would be reduced first by the fees of $60,000, followed by the cost of $16,666, and they would be paid $73,334 on their $150,000 lien. The plaintiff would pocket $146,660 from $450,000, which would be subject to employer credit rights in the event the WC case was still open.

The above illustration is the argument supported by law; however, in practice we see the employer is more likely to agree to a 33.3 percent to 40 percent reduction for fees and no reduction in cost. It is all open to negotiation, so make your case.

"Active Participation"

Assume the same $450,000 settlement, the same $50,000 in cost and same fees at $180,000, but this time the employer has actively participated in the litigation sufficient to meet their burden. They would be entitled to their full lien value of $150,000, which would leave a balance of $70,000 for the plaintiff, which would still be subject to credit. As discussed above, unless the employer has acted as a true party to the litigation, noticed deposition and examined witnesses, served and answered discovery, do not let them extort your client by claiming they are active participants and therefore the common fund does not apply.

Policy limits issues

Assume you had the same $150,000 in employer paid benefits and your third party only had a $100,000 policy limit which was tendered. In this scenario, it really doesn't make a difference what level of participation the employer had. You would recover your attorneys' fees and your cost first and the balance would then go to the lien. The plaintiff recovers nothing from the third party. This is almost always the situation in high WC lien cases and low third-party policy limits.

Note: In these situations, work closely with the WC attorney representing your client. In our experience, when the employer is being paid back a substantial sum of money, we are often able to obtain a more favorable WC settlement for the client. Thus, not all is lost.

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Employer fault and its impact on the lien and credit

> 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 . . . the concurrent negligence of the employer [can be invoked] to defeat its right of reimbursement. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 72.)

"[W]hen . . . the employer seeks to recover the amount paid . . ., from such third party, his [or her] hands ought not to have the blood of the dead or injured work[er] upon them." (*Id.* 57 Cal.2d at 71.)

Employer fault can be used to decrease or defeat the workers' compensation lien and credit rights. Timing is everything. During discovery the employer can prove to be a powerful ally and cooperate in providing witnesses, documents and more. Raising issues of employer's negligence too early can impair this alliance and give the third-party defendant ammunition to push for a lower settlement. A case-by-case analysis must be done.

In the calculation we consider what's called the "*threshold*" number. The threshold number is the amount of money the employer must spend in compensation benefits before it has the right to recover its lien and claim credit. "The Board must…deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his [or her] proportional share of fault." (*Associated Const. & Eng. Co. v. WCAB* (1978) 22 Cal.3d 829.)

Scenario one – pre-verdict settlement

Assume settlement of $1 million where employer fault was alleged. Assume work comp paid $150,000 in benefits. Assume employer was an estimated 30 percent at fault and third-party defendant at 70 percent. Plaintiff receives $1 million less fees ($400,000) and costs; assume $500,000 in plaintiff's pocket. Employer fault at 30 percent amounts to a "threshold" number of $300,000.

This means that their lien does not get paid and WC must provide additional benefits up to an additional $150,000 until they get a right to their credit. Once WC has paid $300,000 in benefits, they will have the right to petition the WCAB for a credit based on the $500,000 plaintiff recovered. You will need to work with the WC attorney and respond/object to any petition for credit where employer negligence is alleged.

Scenario two

Same as scenario one, but $1 million by verdict with the same fault allocation. Because there was no settlement, defendants can raise a "*Witt v. Jackson*" post-trial motion to reduce the judgment by the amount the workers' compensation benefits paid. Hence, no double recovery. Thus, a $1 million recovery will be reduced to $850,000 after deduction of work comp benefits paid. WC will not be paid their lien and will have to pay an additional $150,000 in benefits before they can assert a credit. After deduction of attorney's fees and costs (same as above), the plaintiff in this case nets $150,000 less in his pocket.

Note: When you have significant employer fault and you compare the same gross outcome before trial and after verdict, your client may be better served with a settlement. The third-party defendant runs the risk they will not be able to shift liability to the employer which should result in a larger pre-trial settlement. Likewise, when you have facts pointing to employer negligence, you carry all the cards in negotiating the WC lien. These cases are prime for mediation.

The third-party defendant may raise employer fault as an affirmative defense in its answer to the complaint. However, the court in *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, held that an employer may not be compelled to participate in litigation based solely on a *Witt v. Jackson*.

The case of *Brandon v. Santa Rita Technology Incorporated* (1972) 25 Cal.App.3d 838, establishes that the issue of employer fault must be raised in a pleading filed and served on the employer or lien claimant in a timely manner. The *Brandon* case has been used successfully by plaintiffs in intervention to obtain motions precluding the introduction of evidence of employer negligence or fault at trial were the allegation has not been timely raised. We too can use this case to our advantage.

Res judicata

In those proceedings where all parties are present, plaintiff, third-party defendants, and the employer or insurance carrier, and the civil court makes a finding concerning the comparative fault of the parties, that finding is binding or res judicata in the event that subsequent proceedings are instituted before the Workers' Compensation Appeals Board.The related doctrines of collateral estoppel as well as res judicata operate between civil courts and the WCAB. (See *Roe v. WCAB* (1974) 12 Cal.3d 884. ["both the trial court and WCAB are bound to accept the others prior adjudication of employer negligence but are free to adjudicate the issue if it is yet unsettled"].)

Interestingly, at least one court has found that the doctrine of collateral estoppel may apply in WCAB credit rights proceedings on the issue of employer negligence even though the employer was not a party to the civil action. (*Curtis v. State of California* (1982) 128 Cal.App.3d 668.)

Settling around the employer

An employee may settle the action against the third-party defendant exclusive of the workers' compensation benefits paid (i.e., the "lien") without the consent of the workers' compensation carrier. This is often referred to as "settling around" the employer, and is authorized by Labor Code section 3859, subdivision (b), which reads: "Notwithstanding anything to the contrary contained in this chapter, *an employee may settle and release any claim he may have against a third party without the consent of the employer*. Such settlement or release shall be subject to the employer's right to proceed to recover compensation he has paid in accordance with Section 3852." (Lab. Code, § 3859, subd. (b).)

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An employee's attempt to use Labor Code section 3859(b) will fail, and settlement proceeds will be subject to the employer's lien, if the settlement includes workers' compensation benefits that have been paid. (See *Marruqo v. Hunt* (1977) 71 Cal.App.3d 972).

An employee has a statutory duty to notify the employer of any settlement with the third-party defendant. (Lab. Code, § 3860, subd. (a).) In order to avoid an employer's claim that it did not receive notice, a plaintiff should give written notice with a proof of service in a similar fashion as the notice requirements set forth in Labor Code section 3853.

Trial on the issue of employer negligence

Employer as a lien claimant

The trial court's ruling or a jury verdict on the issue of employer fault are binding on the employer. However, if employer's negligence is not resolved in the third-party case, the WCAB acts as an alternative forum for resolution of the employer's negligence.

Employer as plaintiff in intervention

The trial court's ruling or a jury verdict on the issue of employer fault are binding on the plaintiff in intervention.

Settlement with third party before trial

You may wish to settle with the third-party defendant and proceed forward in your civil case to trial essentially against the plaintiff in intervention on the sole issue of employer negligence. This is a rare instance where you can answer ready for trial without the defendant and put on your case to establish employer negligence. The trial court may prefer this to be conducted as a bench trial or evidentiary hearing during which the trial court judge will make the necessary ruling.

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