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Lien management when there is both a workers' comp and civil case

WHEN A THIRD-PARTY TORTFEASOR ACTION IS COUPLED WITH A WORKERS' COMP CASE, THE COMPLEXITY AND DYNAMICS OF HANDLING THE LIEN CAN CHANGE DRAMATICALLY

This article deals with the fact pattern when an employee is injured during the course and scope of employment by a third-party tortfeasor. The legal concepts can become extremely complex when the injured employee and employer seek recovery in a civil case from the third-party tortfeasor. California law allows the injured employee to seek workers' compensation benefits under the Labor Code and additional damages from the responsible third-party tortfeasor in a civil lawsuit. Also, the employer and/or the workers' compensation carrier (hereinafter "employer") may pursue the third-party tortfeasor in a civil suit to seek reimbursement of the workers' compensation benefits paid to, or on behalf of, the injured employee.

The workers' comp case and the civil case

The California Workers' Compensation Act is set forth in Labor Code section 3200 et seq. Unless otherwise specified, all code citations referenced throughout this article are to the California Labor Code. The recent case of *Duncan v. Wal-Mart Stores, Inc.*, (2017) 18 Cal.App.5th 460 at 467-468 provides a comprehensive legal background concerning workers' compensation particulars as follows: "Under the workers' compensation statutes (§ 3200, et seq.), an employee who suffers an injury during the course and scope of employment may recover compensation benefits from the employer without regard to the negligence of either the employee or the employer. (See *Abdala v. Aziz* (1992) 3 Cal.App.4th 369, 374.)

With few exceptions, the employee's claim for compensation benefits is the employee's exclusive remedy against the employer; the employee generally may not sue the employer to recover in tort. (§§ 3600 - 3602; see *Abdala*, at p. 374.) "The policy [underlying this system] is that workers do not have to prove fault, adjudication is swift, but the benefits are

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smaller than might be obtained as tort damages. [Citations.] The law: (1) spreads the cost of industrial injuries to goods and services; (2) provides prompt, limited compensation to injured workers, regardless of fault; (3) increases industrial safety; and (4) insulates employers from tort liability." (*Fremont Comp. Ins. Co. v. Sierra Pine* (2004) 121 Cal.App.4th 389, 395.)

The workers' compensation statutes, however, do *not* limit the injured employee's right of action for damages against any person other than his or her employer. (*Abdala*, *supra*, 3 Cal.App.4th at p. 374; *Tate v. Superior Court* (1963) 213 Cal.App.2d 238, 243-244.) "Where the tort of a third party causes injury to an employee, ... section 3852 permits the employee to sue the tortfeasor for all damages proximately resulting from the injury even though he or she has received from an employer workers' compensation benefits covering some of the same injuries and resulting disability." (*Abdala*, at p. 374.)

Damages that injured workers recover in workers' compensation cases are limited. Assuming full insurance coverage, the injured worker will typically get all medical bills paid and receives temporary disability (a stipend for lost wages typically at two-thirds of the average weekly wage, up to a relatively small weekly maximum, while the worker is temporarily disabled). At the conclusion of most workers' compensation cases, if the injured worker has been found to be partially or totally permanently impaired, there is an award for permanent disability benefits and future medical costs.

Permanent disability payments are based on the percentage of the impairment the worker suffered as a result of the work-related injury. Overall, the damages recovered in workers' compensation do not typically pay for all of the injured worker's past wage losses, future wage losses, future medical care and provides no recovery of general damages for pain and suffering. These categories of damages can be sought by the injured worker in a civil lawsuit against a responsible third-party tortfeasor.

Section 3855 is an evidentiary section, when the employee joins in or alone prosecutes the action against the third-party tortfeasor. The code provides for admissibility of *either*, but not both, of (a) the amount of disability indemnity or death benefits paid or to be paid by the employer or (b) loss of the employee's earning capacity. The code further provides that proof of all other damages proximately caused to the employer or employee are admissible damages evidence.

The employer's subrogation and lien rights

The employer and its insurance carrier are considered as one, and references to the "employer" for benefit recovery, notices and other matters include the rights and detriments of the workers' compensation (sometimes hereinafter "WC") carrier.

Section 3852 also provides that any employer who pays an employee compensation benefits may bring an action against the third-party tortfeasor who injured the employee. (§ 3852, *Tate*, at pp. 243-244.) The employer or its WC carrier also has rights against the third-party tortfeasor. (*De Cruz v. Reid* (1968) 69 Cal.2d 217, 222, citing *Witt v. Jackson* 57 Cal.2d 57.) The term "lien" is frequently used to refer to an employer's reimbursement rights via subrogation or a lien in a civil lawsuit. The employer's claim can cause a significant reduction in an employee's right to compensation from the third-party tortfeasor.

The employer has rights to reimbursement from a recovery from a third-party tortfeasor, and it can use one of three methods to obtain the recovery by (§§ 3601 and 3850 et seq.):

(a) A *direct action* against the tortfeasor (§§ 3852 and 3854);

(b) A right to *intervene* into the employee's action against the tortfeasor (§ 3853); or

(c) The right to assert a *lien* claim on an employee's third-party action against the tortfeasor. (§§ 3856, subd. (b) and 3857).

The employer may also seek a credit against future workers' compensation benefits owed in the workers' compensation claim based upon the employee's net recovery of monetary damages in the civil lawsuit. Note that the employer's rights in both the civil case and workers' compensation case are dependent on whether or not its conduct negligently contributed to the employee's injury.

Employer recovery issues

The employee and employer deal with several issues concerning recovery from a third-party tortfeasor.

Employer's reimbursement rights

Note one of the most important aspects of this legal doctrine: Absent employer negligence, if the employee and/or the employer is successful in obtaining a recovery (by judgment, § 3856; or by settlement, § 3860) in the claim or action against the third-party tortfeasor, the employer's claim has reimbursement priority to the claimed recovery. The employee is entitled to recovery only after the employer's claim has been satisfied. (*Draper v. Aceto* (2001) 26 Cal.4th 1086, 1088. [T]he workers' compensation statutes are designed to prevent double recovery by an employee or an employer, and to preclude double liability being imposed on a third-party tortfeasor. *McKinnon v. Otis Elevator Co.* (App. 3 Dist. 2007) 149 Cal.App.4th 1125, review denied.)

The court in *Duncan v. Wal-Mart Stores, Inc.*, 18 Cal.App.5th 460, at 468 and 469, summarizes the employer's rights in the civil case:

> Section 3853 requires the employee to give the employer notice if the employee sues a third party for injuries the employee suffered during the course and scope of employment. (§ 3853; *Tate*, supra, 213 Cal.App.2d at p. 246.) The employer has an absolute right to intervene in any action brought by the employee against a third-party tortfeasor, and if the employee and employer independently sue the tortfeasor, the actions must be consolidated. (§ 3853; *Tate*, at p. 244.) The employer, however, is not required to intervene in the employee's lawsuit,

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and instead may allow the employee to prosecute the lawsuit against the tortfeasor for the benefit of both the employee and employer. (*Tate*, at pp. 246-247.) "If the employee alone prosecutes the action against the third party, the employer may nevertheless recover what he has paid out by applying for a lien on the employee's judgment." (*Tate*, *supra*, 213 Cal.App.2d at p. 244.) Specifically, section 3856, subdivision (b) (section 3856(b)), provides: "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 together with any amounts to which he may be entitled as special damages under Section 3852.

"The policy underlying [these statutory provisions] is avoidance of double recovery by the employee who elects to claim benefits under the Labor Code and also seeks compensation for his or her injuries from a negligent third party. [Citations.] Where an employer is required to provide benefits to an employee for injuries caused by a third party's negligence, the statutory scheme assures that the employer, not the employee, shall, at least ultimately, be entitled to recover the value of those benefits from the tortfeasor." (*Abdala*, supra, 3 Cal.App.4th at p. 376; see *County of San Diego v. Sanfax Corp*. (1977) 19 Cal.3d 862, 872 ["[these statutory provisions] seek to insure, first, that, regardless of whether it is the employee or the employer who sues the third party, both the employee and the employer recover their due, and, second, that, as far as possible, the third party need defend only one lawsuit"].) The chapter of the Labor Code establishing these employer remedies defines the term "employer" to include its insurer. (§ 3850, subd. (b).) The remedies available to the employer therefore are equally available to the insurer, and the insurer may sue in its own name without joining the employer as a party. (*Tate*, supra, 213 Cal.App.2d at p. 244.)

Direct action by employer for reimbursement: In California, an employer alone can seek a direct civil action for reimbursement of the WC benefits provided to an employee who was injured by a third-party tortfeasor. (§ 3852) The employer may recover … the total amount of compensation, damages for which it was liable, including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents. "Emolument" may include administrative fees and applicant attorneys' fees, among other expenses incurred in the workers' compensation case. Section 3854 is an evidentiary section. It provides that evidence of any amount which the employer has paid or become obligated to pay for an employee's injury is admissible and considered proximately resulting from the employee's injury and related damages.

Employer's intervention into employee's action: An employer can intervene into an action by the employee against the third-party tortfeasor. (§ 3853)

Employer's right to lien employee's action against third-party tortfeasor: See *Aetna Casualty & Surety Co. v. Superior Court* (*Marselle*) (1993) 20 Cal.App.4th 1502 for explanation of employer liens. The employer must file a Notice of Lien claim in the employee's civil case and can do so with or without the retention of a subrogation attorney. When no subrogation attorney is retained by the carrier, it is the obligation of the injured party's attorney to present the carrier's lien claim, so long as there is no alleged employer negligence. (*Aetna Casualty, supra.*)

Under the "common fund doctrine" the employee's attorney can then assert contingent fee rights and a pro rata percentage of litigation costs against the lien-claim recovery. For fee-accounting purposes, it is best for the jury to complete a special verdict form setting forth the amount of judgment for the lien claim. The lien recovery amount is then specific, and attorneys' fees are easily calculated. (§§ 3856 and 3860.)

Employer/employee attorney-fee distribution

Attorneys' fees distribution in these cases generally are based upon the degree of effort put forward by the injured worker's attorney and/or the employer's attorney.

Common fund doctrine: The common fund for distribution of attorneys' fees and costs has been codified and recognized by the court and sections 3856 and 3860. The seminal case holding application of the common fund doctrine in cases where an injured employee and the employer seek recovery from a third-party tortfeasor is *Quinn v. State of California* (1975) 15 Cal.3d 162, 167-169. "One who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of litigation costs."

Quinn explained the underlying application of the common fund doctrine as follows:

> Fairness to the successful litigant;
> Prevention of an unfair advantage to others who are entitled to share in the fund and who should bear their share of the burden of its recovery;
> Encouragement of the successful litigant's attorney, who will be more willing to diligently undertake and prosecute litigation for the protection or recovery of the fund, if he is assured of proper compensation.

Attorneys' fees and costs are first deducted from award: When both the employer and employee jointly settle a case, "the fees awarded to the employer's attorney and the employer's pro rata share of other litigation costs are to be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its workers'

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compensation benefits." See in contrast: *Summers v. Newman* (1999) 20 Cal.4th 1021, 1024, where the carrier demanded the employee pay the employer's attorney's fees and costs in addition to paying the full compensation for their lien claim; the court held otherwise.

Paying attorneys' fees: The procedure to be followed by the court in determining apportionment of attorneys' fees is set forth in *Quinn, supra,* at p. 175, as follows:

> *First*, the court is to calculate a reasonable attorney's fee that reflects the total services rendered to both the employee and employer;
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> *Second*, the court is to make reasonable apportionment of the fee between the employee and employer; and
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> *Third*, the court is to consider the difficulty in obtaining a result against the third party tortfeasor by attorneys representing the parties, allowing for equitable principles of apportionment.

Trial courts have considerable discretion in assessing the value of attorney services. That discretion includes using lode star calculations of hours spent and value for those hours, non-contingency billing rates, and contingent fee agreements of the parties, even when there is no true common fund recovery. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 41.)

Labor Code Section 3856 – attorneys' fees order after *judgment*: For a full evaluation of section 3856, see *Quinn v. State of California* (1975) 15 Cal.3d 162, 167-169. In essence, section 3856, regarding judgments, provides the following application to attorneys' fees:

> **a. By employer:** Action prosecuted by *employer* alone, employer's attorneys' fees and costs shall first be ordered paid from the judgment; the employer is then ordered to receive "an amount sufficient to reimburse the employer for WC benefits and any special damages assessed under section 3852 against the defendant. The judgment should be used to reimburse the employer the amount of WC benefits paid the employee, with the remaining portion of the judgment payable to the injured plaintiff employee. (§ 3856, subd. (a).);
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> **b. By employee:** Action prosecuted by *employee* alone, the employee's attorneys' fees and costs shall first be ordered paid from the judgment; upon application by the employer, the court shall allow a first lien against the employee's judgment for the WC benefits paid to the employee and any special damages assessed under section 3852 against the third party defendant. (§ 3856, subd. (b).) (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 30.)
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> **c. Action by both employee and employer:** Action prosecuted by *both* employer and employee in a single or consolidated action represented by same *agreed* attorney or by *separate* attorneys, attorneys' fees and costs shall be first ordered payable "based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon services rendered in each instance by the attorney in effecting recovery for the benefit of the party represented"; the employer is then ordered to receive "an amount sufficient to reimburse the employer" for WC benefits and any special damages assessed under section 3852 against the defendant third party tortfeasor.

(§ 3856, subd. (c).)

"After fixing the amount of the attorney fee award, the trial court must apportion the fee award between the parties benefitted by the recovery; in doing so, the trial court must decide to what extent the passive beneficiary should contribute to the litigation expenses and fees which created the recovery fund." (*Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1277.)

Labor Code Section 3860 – attorneys' fee order after settlement: Section 3860, subd. (f) provides: "The amount of expenses and attorneys' fees referred to in this section shall, on settlement of suit, or on any settlement requiring court approval, be set by the court. In all other cases these amounts shall be set by the appeals board. For an examination of section 3860, see *Summers v. Newman* (1999) 20 Cal.4th 1021. Where the employer and employee are represented by separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount and division of such expenses and fees." (See *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517.) In essence, section 3860, regarding settlements, provides the following application to attorney fees:

> (a) For settlement effected solely by employee's attorney, reasonable attorney fees and costs shall be ordered by the court to first be deducted from the settlement and paid to the employee's attorney "for his services in securing and effecting settlement for the benefit of both employer and the employee," prior to reimbursement of the employer of WC benefits paid or owed to the employee. (§ 3860, subd. (c).);
>
> (b) For settlement effected solely by employer's attorney, reasonable attorney fees and costs shall be ordered by the court to first be deducted from the settlement and paid to the employer's attorney "for his services in securing and effecting settlement for the benefit of both employer and the employee," prior to reimbursement of the employer of WC benefits paid or owed to the employee. (§ 3860, subd. (d).);
>
> (c) For settlement effected by the same agreed upon attorney or by separate attorneys, reasonable attorney fees and costs incurred by "both the employer and the employee or on behalf of either," shall be ordered by the court to first be deducted from the settlement and paid to the respective attorneys based upon respective services rendered in obtaining the settlement "for the benefit of the party represented," prior to reimbursement of the employer of WC benefits paid or owed to the employee.

(§ 3860, subd. (e).) (See *Summers v. Newman* (1999) 20 Cal.4th 1021 for application of this subdivision.)

Note that section 3860, subdivision (e) sets forth a pecking order for the

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court to follow: (1) Proceeds of the settlement are first used to pay the reasonable attorney fees and costs of both employer and employee; (2) Proceeds of settlement after payment of attorney fees and costs are used to reimburse the employer for WC benefits paid to employee; and (3) remaining proceeds, if any, are disbursed to employee. (See concurring opinion in *Summers v. Newman*, supra at pp. 1036-1042 for discussion of this issue.) The concurring opinion also discusses the unfairness of *Gapsun v. Jay* (1998) 66 Cal.App.4th 734, 745-747, where employee's attorney is denied attorneys' fees (in opposition to the language of § 3860, subd. (e)), if employee recovers nothing after employer receives reimbursement that depletes the settlement fund and/or judgment.

In *Draper v. Aceto* (2001) 26 Cal.4th 1086, our Supreme Court evaluated the attorney fee scenarios stated in section 3860. Comments by the Court are worth reading. *Draper,* however, did not fit into any of the scenarios set forth in section 3860, in that the plaintiff's attorney achieved no value for his client. The entire settlement went to pay the employer, who had legal representation. The court held only the employer's attorney would be paid out of the settlement, even though the plaintiff's attorney's efforts assisted in obtaining the result for the employer.

Cases setting forth apportionment of attorney fees: The following decisions are a sampling of attorneys' fee holdings: Employer lien filed on first day of trial. No participation by employer attorney. Employee's attorney's efforts in disproving defense of employer's concurrent negligence accounted for a disproportionate amount of litigation that should allow employee's attorney a greater portion of attorneys' fees to be ordered by the court. (*Quinn v. State of California* (1975) 15 Cal.3rd 162, 167-169.)

Active participation by either or both attorneys for the employee and employer in creating the common fund is determined by the trial court prior to making a fee order. The court decides to what extent the passive beneficiary is responsible to the active party for attorneys' fees and costs in creating the recovery fund. (*Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1277-1278.)

When attorneys for both the employee and employer are active participants in creating the common fund, equitable apportionment does not apply. Each party then bears their own obligation for fees and costs out if their client's share of recovery. (*Crampton v. Takegoshi* (1993) 12 Cal.App.4th 308, 318, disapproved on other grounds in *Phelps v. Stostad* (1997) 16 Cal.4th 23, 34.) Note in *Crampton,* the employer sold its lien right to the defendant third-party tortfeasor. The employee proceeded to trial and proved third-party tortfeasor negligence and award of money. The defendant/assignee claimed reimbursement rights. The court awarded the plaintiff employee attorneys' fees and costs against the third-party tortfeasor who stepped into the shoes of the employer. The fees and costs were awarded because employee plaintiff created the fund from which reimbursement is deducted. "To the extent that defendant is asserting his assigned lien rights to offset the judgment against him, he is asserting them as the employer and not in his capacity as a party defendant." (*Crampton* at p. 319.)

In *Summers v. Newman* (1999) 20 Cal.4th 1021, 1024, attorneys for both employee and employer actively participated in the litigation against the third-party tortfeasor. The case settled before trial, and court was petitioned to assess attorneys' fees, in accordance with section 3860, subdivision (e). Employer demanded employee pay the employer's attorneys' fees and costs, in addition to employer recovering the full compensation for its lien claim. Court held employer is responsible to pay its attorneys' fees and costs out of the reimbursement proceeds it received. Note that this case was a settlement and employer sought a court order for attorneys' fees and costs from *employee.* (§ 3860, subd. (e).)

Where employee's attorney achieved settlement with third-party tortfeasor that was inadequate to pay employer's reimbursement request, only employee's attorney was entitled to fees. Employer's attorney was not active in the settlement negotiations and received no fee award for his representation of employer. (*Luque v. Herrera* (2000) 81 Cal.App.4th 558.)

Employer and employee notices

The Labor Code has specific notice requirements for both the employee and employer. Failure to adhere to the notice requirements can be detrimental to recoveries from the third-party tortfeasor.

Mutual notice required of action against third-party tortfeasor: Both the employee and employer have a duty to notify the other if an action is brought against a third-party tortfeasor. The noticing party is required to serve on the other a copy of the complaint by personal service or certified mail. Proof of service is to be filed with the court. At any time before trial, the other party may intervene into the action. If both parties file independent actions against the third-party tortfeasor, the other party may join as a party plaintiff or petition to consolidate the actions. (§ 3853.)

It is best for an employee to personally serve notice of the employee's civil complaint on both the employer and its workers' compensation carrier. If no notice is served, the injured worker and his/her attorney may be personally liable to the employer and/or its workers' compensation carrier for not protecting the employer's rights to reimbursement.

Notices by employee to employer: *Judgment*

Section 3858 deals with a notice of judgment in favor of the employee and against the third-party tortfeasor. "No satisfaction of such judgment in whole or in part, shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy its lien."

Release or settlement

The Labor Code has two sections dealing with notice of release or settlement required of the employee to the employer: Section 3859 is, on its face, confusing. Subdivision (a) requires the consent of a non-settling party to a release or settlement of a court action against the third-party tortfeasor. Subdivision (b) allows a plaintiff employee to execute a release and settlement of

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any claim against the third-party tortfeasor *without* the consent of the employer. (§ 3859.) The code permits the employer to proceed with a third-party tortfeasor action on its own to seek compensation for the WC benefits paid to the employee "in accordance with Section 3852." Section 3860 requires both the employee and employer to be noticed of any release or settlement, "with or without suit," by any party thereto. Such notice allows the employer to proceed with an action for reimbursement and the employee to proceed with an action for tort damages against the third party tortfeasor, including attorneys' fees and costs. (§ 3860.)

Employer's right to credit against employee's future workers' compensation benefits

Employer's right to a credit: If the employee's WC case remains open at the time the employee settles with a third party, the employer is entitled to assert a credit on all future benefits to be paid to the employee up to employee's net recovery from the third-party tortfeasor by way of settlement or judgment. (§ 3861.) Section 3861 empowers the WCAB "to and shall allow" a credit to the employer's future liability to the employee for work-related injury. Where an employer's negligence has not been adjudicated in a third-party tortfeasor action, the employee is entitled to have the employer's negligence adjudicated before the WCAB to diminish the credit rights. (*Gregory v. WCAB* (1974) 12 Cal.3d 899, 902.)

The employer's credit can affect all future WC benefits, including future permanent disability benefits and future medical care, even if it had previously awarded in a WC proceeding. Thus, the employee must take into account a potential credit against future WC benefits, *prior* to seeking recovery against the third-party tortfeasor.

Credit is a net sum after litigation: The amount of employer's credit is a net sum after deduction for employee's litigation costs, attorneys' fees and reimbursement paid to the employer awarded in the civil action against the third-party tortfeasor. "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, if satisfied, without any deduction." (§ 3858.)

The credit is reduced by the percentage of fault attributable to the employer for injuries sustained by the employee. (*Associated Construction & Engineering Co. v. WCAB* (*Cole*) (1978) 22 Cal.3d 829, 843.) Some courts hold the credit is only against future benefits and not to reimburse the employer for past benefits paid. (*Curtis v. State of California* (1982) 128 Cal.App.3d 688.)

For a method to calculate an employer's credit rights after being found contributorily at fault in a civil action against the third-party tortfeasor, see *Southern California Edison Company v. WCAB* (1997) 58 Cal.App.4th 766.

Avoiding credit issues

To prevent a credit issue, it is best to obtain a waiver by the workers' compensation carrier and/or employer for any future credit prior to settling with the third party. It is best to do so at the time of a global settlement or at the time of a WC settlement that includes the right of the employee to obtain future WC benefits.

The most practical time to resolve the civil case with the third-party tortfeasor is before the WC case has been resolved. The amount of the WC benefits paid at that time is less than the full value of the WC case. Both the WC and the civil case can be resolved by way of a third-party compromise and release, which is a form settlement document used by the WCAB for simultaneous settlement of both the WC case and the civil case.

The employee will be able to resolve both cases and understand the full monetary recovery for the injury-causing incident.

The employer can limit its liability on future benefits owed in the WC case and is in a better position at that time to potentially reduce its demand on the benefits paid to date.

The third-party tortfeasor will usually pay less at this time to resolve the case because of the uncertainty of the full value of the WC case. If the WC case is fully resolved (except for the credit rights of the employer for the net proceeds of the employee from the civil suit) and the civil case goes to mediation, each of the parties is more entrenched into their financial position and wants to maximize recovery against the third-party tortfeasor. This leads to cases that are much more difficult to resolve, and typically, these are the cases that proceed to trial.

Reimbursement reduction for employer negligence

When employer negligence is alleged in the third-party suit, the employee may settle around an employer's lien claim; so it is best practice to file a Complaint-In-Intervention to protect the recovery rights of the employer. (See *Aetna Casualty & Surety Co. v. Superior Court* (*Marselle*) (1993) 20 Cal.App.4th 1502.)

Unless the employer's recovery is barred by his contributory negligence, he will be entitled to a first lien on the entire amount a claimant recovers from a third-party tortfeasor, for injuries sustained in course of employment, after litigation expenses, regardless of what elements of damage the claimant proves. (*Duncan v. Wal-Mart Stores, Inc.*, 18 Cal.App.5th 460, at 471.)

***Witt v. Jackson* offset**: Since the passage of Proposition 51 (Civ. Code, §§ 1431-1431.5), calculation of employer negligence has been a difficult task for the courts. *Witt v. Jackson* (1961) 57 Cal.2d 57 is the seminal case that held an employer had no right to recovery if the employer's negligence contributed to the employee's injury. It further held the injured employee is not allowed double recovery, and the worker's damages against a third-party tortfeasor must be reduced by the amount of workers' compensation benefits received. (*Id.* at p. 73.)

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This latter rule, as applied to "economic" damages, is explained in *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 132, as follows:

> Under *Witt v. Jackson* and its progeny, an employee's *economic* damages [jury] award is properly reduced by the amount of any workers' compensation benefits received from a concurrently negligent employer that properly are attributable to economic damages. [citations] This reduction is commonly referred to as the *Witt v. Jackson* offset. It is calculated by multiplying the workers' compensation benefits by the percentage of the jury verdict attributable to economic damages. The product of that equation (the *Witt v. Jackson* offset) is the amount of the workers' compensation benefits presumably attributable to economic damages, and is subtracted from the jury's award of *economic* damages to prevent the injured employee's double recovery. [citations]

The passage of Proposition 51 created a process for proportionally reducing an injured plaintiff's right of recovery for noneconomic damages. The proposition, in essence, provides a defendant is jointly and severally liable with other tortfeasors for a plaintiff's economic damages, but the defendant's liability for noneconomic damages is limited to its proportionate share of fault with others; i.e., noneconomic damages are "several only, and not joint." (Civ. Code, § 1431.2, subd. (a).)

The California Supreme Court held Proposition 51 applied to employer negligence, whether named or not. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603-604.) (Note that *DaFonte* required the appellate court to calculate and apply the employer negligence to economic and noneconomic damages. (*Id.* at pp. 604-605).) "[A] finding of employer negligence eliminates a third party defendant's joint and several liability for noneconomic damages attributable to the fault of the employer." (*Sanchez v. Brooke* (204 Cal.App.4th 126, 126, 132, *citing DaFonte, supra*.)

A third-party defendant has a right of offset (credit) for employer negligence: To avoid double recovery by the employee plaintiff, a third-party defendant is entitled to an offset (also called "credit" or "deduction") for WC benefits that had been paid to the injured plaintiff by the employer. The offset is obtainable even if the employer is not a party to the action. (*Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1161-1162.)

Since the passage of Proposition 51, the courts have struggled to determine whether the credit should be assessed to economic and/or noneconomic damages. If assessed to economic damages, the third-party tortfeasor can deduct the cash value of the WC benefits from a jury award in favor of plaintiff employee. Many courts have held that all WC benefits are solely economic damages and the employee's judgment against a third-party tortfeasor is reduced by the amount of the benefits. The third-party tortfeasor defendant and the employer are deemed co-defendants for this purpose, and their obligations are deemed joint and several.

If all or a portion of the damages against the third-party tortfeasor are deemed noneconomic, the percentage of responsibility assessed to the employer will reduce the judgment against the third-party tortfeasor by a portion of the employer's negligence. The parties are severally, but not jointly, liable for noneconomic damages. Calculation of WC benefits to both economic and noneconomic damages appears to be the prevailing view.

Two decisions that seem to be the benchmark for allocating the credit are *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1 and *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221. (Also *see Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 132-133.)

Typically, the defendant argues that all WC benefits are economic in nature and all should be credited entirely against economic damages. Therefore, there would be a 100% deduction of the WC benefits against the economic damages, as though the employer was jointly and severally liable. The decisions, however, hold that WC benefits contain more than economic damages, and it is fairer to formulate a credit against both economic and noneconomic damages.

In *Torres* and *Scalice*, questions arose whether WC benefits paid to the injured plaintiff should be considered economic and/or noneconomic damages, as defined in Proposition 51. These issues were analyzed in depth in both decisions, and they discuss other court holdings that all WC benefits should be offset only against economic damages.

In *Torres,* credit for WC benefits was calculated by following the holding in *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276-277. *Espinoza* held that "*pre*-verdict settlements [with one or more defendants] . . . are to be allocated between economic and noneconomic damages in the same proportions as the total amounts of those damages later awarded by the trier of fact [against remaining defendant(s)]." *Torres* states: "Under this *'Espinoza'* approach, *workers' compensation* benefits are to be allocated between economic and noneconomic damages in the same proportions as those damages are awarded by the trier of fact." (*Id.* at p. 7.)

For post-verdict settlements by a co-defendant, *Torres* created a new theory that it called a "ceiling approach." The ceiling approach allocates the settlement "first to non-economic damages, but only up to the amount of the settling defendant's liability for such damages, with the balance then allocated to economic damages." (*Id.* at p. 40.) *Torres* reasoned: "The *Espinoza* approach is not a suitable means of apportioning a post-verdict settlement because it may result in an allocation of more of the settlement to noneconomic damages than the settling defendant's liability for such damages under the verdict." (*Id.* at p. 40.)

Scalice followed *Torres* and held the rule used for apportioning settlement funds established in *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268 is to be used for allocating the employer's credit against economic and noneconomic damages, or assessed by a jury against a non-settling defendant. In *Scalice,* the court does provide the clearest *Witt v. Jackson* offset within the opinion.

There is no setoff right if employer waives lien, its rights and is not negligent: The third-party tortfeasor defendant has

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no right to a setoff of WC benefits paid to the employee plaintiff, when it fails to prove concurrent negligence by the employer and the employer waives its right to a lien, subrogation or intervention. See *De Cruz v. Reid* (1968) 69 Cal.2d 217, 226-227, where the employer, in a settlement agreement with the employee, waived any reimbursement rights against a third party tortfeasor. "In our view, the compensation benefits of which the non-negligent employer has waived reimbursement, inure to the benefit of the injured employee or his dependents, as the case may be, as payments received by them from a collateral source." (*Id.* at p. 223.)

De Cruz is an example of when an employee-plaintiff "buys" the employer's rights against the third party. In *De Cruz v. Reid* the employer, in a settlement agreement with the employee, waived any reimbursement rights against a third-party tortfeasor. "In our view, the compensation benefits of which the non-negligent employer has waived reimbursement, inure to the benefit of the injured employee or his dependents, as the case may be, as payments received by them from a collateral source." (*Id.* at p. 223.)

An employer's assignment of lien rights to third party tortfeasor: "An employer entitled to reimbursement for payment of workers' compensation benefits may assign its lien rights, even to the torfeasor, who then steps into the shoes of the employer/intervener. [Citations.]" (*Crampton v. Takegoshi* (1997) 17 Cal.App.4th 308, 314, fn. 3, disapproved on other grounds in *Phelps v. Stostad* (1997) 16 Cal.4th 23, 34.) "To the extent that defendant is asserting his assigned lien rights to offset the judgment against him, he is asserting them as the employer and *not* in his capacity as a party defendant." (*Id.* at p. 319.)

Jury instruction: CACI 3963 instructs the jury to *not* consider whether or not the injured employee plaintiff had received WC benefits, and the jury is provided a special verdict form. The special verdict form requires the jury to assess damages for economic and non-economic damages against the tortfeasor and assess the contribution of liability, if any, against the employer. The court thereafter does the math and calculates the amount of WC benefits to be assessed to economic and non-economic damages, in accordance with the formula set forth in *Espinoza, supra.* (§ 3856. *Engle, supra* at p. 1166.)

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