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Hon. Steven Siemers (Ret.)
STEVEN SIEMERS DISPUTE RESOLUTION

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Mediating a third-party workers' compensation claim

THREE EXPERTS EXPLAIN THE CLAIMS BY A WORKER WHO IS INJURED BY A THIRD PARTY

PART I: The interplay of workers' compensation rules and third-party cases

By Hon. Steven Siemers (Ret.)

You have filed a lawsuit against a third party, where your client was injured at work due to the fault of that third party. In addition to the third-party civil lawsuit, the client also has a workers' compensation claim. Some attorneys handle both, some work with a separate applicant's attorney, and some may find the workers' compensation case an annoyance and ignore it. The first two options are far more advisable, in terms of a client's long-term interests than the latter. But the most efficient and expeditious way to resolve a third-party case with a workers' compensation lien claim is through mediation.

The injured worker

Most personal-injury attorneys are aware that an employee injured in the course of employment has a right to file a claim for workers' compensation benefits and a civil lawsuit against a third party whose negligent conduct caused the injury. (Lab. Code, § 3852.) While the exclusive-remedy rule precludes the employee from filing a civil suit against the employer (Lab. Code, §§ 3601 & 3602), the employee may seek these dual remedies against both the employer and a negligent third party.

Where the employer has paid workers' compensation benefits and the employee is injured due to a third party's tort, the employer can seek reimbursement for the workers' compensation benefits paid to the injured worker (the employer's lien rights regarding past paid benefits) (Lab. Code, §§ 3852, 3853, & 3856), and seek protection from having to pay future benefits, in order to prevent an employee's double recovery (the employer's credit rights regarding future benefits). (Lab. Code, §§ 3858 & 3871.)

When attempting to settle a third-party case, while focusing on the fault of the third party as the cause of the injury, it would be a mistake to ignore the potential for any existing employer negligence. An employer's negligence may limit the employer's recovery rights against the third-party tortfeasor.

Negotiation strategies

First: An employer's lien and credit for reimbursement can be reduced in proportion to the employer's fault. (*Witt v. Jackson* (1961) 57 Cal.2d 57.) [See below for a discussion of credits.] While there are strategic reasons to assert or not assert employer negligence, based upon the facts of the case and the exposure in the third-party case as compared to the amount of the workers' compensation lien claim, ignoring that potential would be a mistake.

Second: Most importantly, the impact of a large third-party settlement has the potential for ending a client's workers' compensation case with the imposition of the employer's third-party credit.

Third: If the workers' compensation case is not settled and remains technically open, although the right to future medical care is essentially barred by a third-party credit, it will be unavailable without a Medicare Set-Aside [discussed in Part III] approved by the Center of Medicare Services (CMS). In this situation, a client could be without access to medical care benefits through either workers' compensation or Medicare. If the plaintiff is unaware of the potential for this eventuality, the impact could be devastating.

Fourth: Negotiation problems can be avoided by working with an experienced workers' compensation applicant's attorney unless the PI attorney's office has the expertise to handle both cases.

Fifth: When settlement negotiations with the civil defendant's attorney and the workers' compensation carrier are not developing, one option to achieve resolution is to consider mediating both claims with a mediator who is well versed in such complex negotiations.

Mediating third-party claims

There are workers' compensation mediators (not many, as workers' compensation in California is way behind the rest of the legal universe when it comes to utilizing alternative dispute resolution) who can assist in mediating these cross-over claims. Some can co-mediate along with a civil mediator. There is an increased cost, of course, but it may be worthwhile if co-mediators get the case settled without creating future risk.

These mediations need to include all interested parties: the plaintiff/applicant, the civil defendant(s), and the workers' compensation defendant(s). The idea is to assure the mediator or mediators have a grasp on negotiating the settlement of a significantly high-exposure workers' compensation claim, how to deal with the workers' compensation lien in the civil case, and the impact of a third-party credit on the workers' compensation claim going forward.

The mediator(s) need to take the workers' compensation future claim seriously to avoid drastic consequences to a seriously injured worker with future medical needs. Otherwise, mediating third-party claims is conducted in the same way as any mediation is undertaken but with the flexibility to allow for a productive multi-party negotiation.

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Attorney fee calculations in settlement of third-party cases

An injured worker's employer is entitled to recover expended workers' compensation benefits for injuries caused by a third-party tortfeasor. The employer's right of recovery is limited only by the employer's fault. The employer can have legal representation or rely on the worker's attorney to recover the compensation benefits paid to the worker.

This section deals with the distribution of attorney fees and costs agreed to during mediation of a worker's case against a third-party tortfeasor. How the worker's attorney and employer's attorney are compensated for recovery without trial depends on whether (1) the employer merely filed a lien claim in the third-party case and relied on the worker's attorney for recovery, (2) the employer's attorney represents both the employer and worker, or (3) both the worker and employer retained separate attorneys to represent their separate interests. (See *Summers v. Newman* (1999) 20 Cal.4th 1021.)

Determination of attorney fee compensation for settlement of such matters is codified in Labor Code section 3860, subdivisions (c) (d) and (e), as follows:

- Single representation by the worker's attorney: When the worker's attorney solely handles the matter against the third party, the worker's attorney is entitled to be reimbursed for costs and reasonable attorney fees for recovery of the workers' compensation benefits received by the worker/plaintiff. (Subd. (c).)
- Single representation by the employer's attorney: The employer's attorney is entitled to the entire attorney fee for the third-party recovery. (Subd. (d).)
- Separate attorneys represent both worker and employer: Attorney fees to the respective attorneys are based on the *active* services rendered in obtaining results for the represented party. (Subd. (e).) (See *Kavanaugh v. City of Sunnyvale* (1991) 233 Cal.App.3d 903. Also, see *Kaplan v. Industrial Indemnity Company* (1978) 79 Cal.App.3d 700.)

Subdivision (f) of section 3860 requires court approval of the expended costs and attorney fees incurred to settle the matter. "Where the employer and the employee are represented by separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount of such expenses and fees." (See *Summers v. Newman* (1999) 20 Cal.4th 1021, 1027.)

Note, when a third-party case goes to *judgment*, attorney fees are determined under Labor Code section 3856. (See *Quinn v. State of California* (1975) 15 Cal.3d 162 for the doctrine of reasonable apportionment.)

Third-party settlements and structure settlement assistance

There are also workers' compensation settlement experts with annuity expertise. They can help develop strategies to satisfy Medicare's interests without jeopardizing a client's future Medicare entitlements. If you ignore a past and future Medicare claim, you can be setting your client up for considerable trouble, including monetary fines assessed.

PART II: Negotiation of credits and lien purchases

By Bruce Gelber

What is a credit threshold, and how is it calculated?

When an employee receives a third-party recovery by settlement or judgment, the employer is entitled to a *credit* against the employer's future obligation to pay further workers' compensation benefits to the injured employee. The credit is in the amount of the employee's net recovery from the third-party settlement or judgment. (Lab. Code, § 3861.)

Where the employer is partially at fault for an employee's injury, the credit is reduced by the fault attributable to the employer. These are damages the employee will not be able to recover in a civil case against the employer, because the employer is immune from civil liability (for which there are several exceptions).

The law has been well established in California since 1961 in *Witt v. Jackson* (1961), 57 Cal.2d 57, 72, where the Court held it is contrary to the policy of the law for the employer, or his subrogee, the employer's insurance carrier, to profit by the wrong of the employer. The concurrent negligence of the employer can be invoked to defeat the employer's right of reimbursement. "[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*. at p. 71.)

Employer fault can be used to decrease or defeat both the workers' compensation lien and credit rights. There is dual jurisdiction both before the Workers' Compensation Appeals Board (WCAB) and the Superior Court to determine:
(1) the percentage of employer fault, and
(2) the civil tort value of the case.

However, where the civil case has settled, the employer's lien claim is often held in trust pending resolution of the issue of employer negligence. The only remaining viable jurisdiction to determine employer negligence would be the WCAB.

It is often a challenge to get a WCAB judge to hear and determine the issue of employer negligence. "Negligence" is often an unfamiliar concept to WCAB judges who are accustomed to a "no-fault" system, where negligence has no involvement. These judges have to be reminded that civil jurors – who have far less experience with legal issues than WCAB judges – are called upon every day to make these determinations.

What is the *Witt v. Jackson* credit formula, and how is it proven?

Applying the proper credit rule is best explained by a hypothetical settlement posed in *Associated Construction & Engineering Company v. WCAB* (1978), 22 Cal.3d 829, 843, fn. 10:

> Assuming employee receives $20,000 and Workers' Compensation benefits. He later sues third-party to recover for the same injury, [wherein he gets a net settlement of $25,000]. The employee

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> then seeks further benefits from the Board, and his employer claims a credit . . . of . . . $25,000. . . Under the [above] principles . . . the Board . . . then determine[s] the employer's degree of fault in the employee's total damages . . . . Were the board. . . to determine that the employer was 50% negligent and that the employee is entitled to $100,000 in damages, … then the employer cannot 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...

How can the credit threshold be exhausted or reduced?

When the employer is entitled to a third-party credit, the employer is relieved of an obligation to pay for the workers' compensation benefits until the employee exhausts or reduces the third-party credit. One way is for the employee to set aside their third-party recovery to pay out of their net recovery for future medical and other comp-related benefits. Once the worker has shown that it has paid out of pocket a sum equal to the credit threshold, the employer would be back on the hook for future workers' compensation benefits. However, this rarely, if ever, happens.

When the credit threshold is reduced by employer negligence, that reduction takes place at the front end

The employer must continue paying workers' compensation benefits up to the threshold *before* asserting its third-party credit. Thus, even if the employer has a larger credit, the employee has an immediate advantage in proving partial employer negligence.

Must an employer's credit threshold include past workers' compensation payments?

This was an issue in dispute in *Southern California Edison v. WCAB* (*Tate*) (1997) 58 Cal.App.4th 766, 62 Cal.Comp.Cases 1403. In *Tate*, the WCAB established the credit threshold as follows: The employer was 25% negligent; the civil value of the case as determined by the WCAB was $340,000; therefore, by multiplying 25% times $340,000, the credit threshold was established at $85,000. Again, the number reflects the civil value of the damage caused by the employer which the employee cannot recover because of the employer's immunity from civil liability.

The employer in *Tate* argued that it had already paid $80,383 in workers' compensation benefits to Tate, and, therefore, it only owed an additional sum of $4,617. The WCAB in *Tate* found that the employer was not allowed to apply the past payments against the $85,000 credit threshold. In a published decision, the *Tate* court disagreed.

An employer's credit threshold must be reduced by settlement with a third party

The employer in *Tate* argued that it had already paid $80,383 toward the $85,000 threshold and, therefore, only owed an additional $4,617. Tate pointed out that the employer recovered $40,000 in settlement of its subrogation claim with the third party and that sum should be factored into reducing the employer's payment toward the $85,000 threshold. The *Tate court* agreed with Tate that only $40,000 should be reduced from the previous payments of $80,383. Thus, the employer had to pay an additional $45,000 in future compensation benefits before asserting its credit.

The maxims of jurisprudence (Civ. Code, § 3515 et seq.)

The *Tate* court was faced with conflicting maxims: On one hand, Tate may have received a double recovery; however, a defendant employer wrongdoer should not profit from its wrong. The court sided with the employee and found that not allowing an employer wrongdoer to benefit from its wrong trumped the concerns with the dreaded double recovery.

Purchasing the workers' compensation lien by the civil defendant

Where a third party purchases the workers' compensation lien, it is in a position to control the WCAB case. The lien purchase may not be known to the worker or his civil or WCAB counsel. It may be a civil defense attorney appearing as a workers' compensation defense counsel taking the employee's deposition in the workers' compensation case. Stories of civil cases being destroyed or damaged at a comp deposition of the employee are legion. Yet, how many civil attorneys attend the employee's workers' compensation deposition and avoid the traps set during the deposition testimony? Not many. Beware.

How can the employee purchase the workers' compensation lien?

It is all a matter of negotiations. A good time to start is on day one by developing a close working relationship between the employee's civil and workers' compensation attorneys and the employer's counsel. Often an agreement can be achieved where the employer assigns its comp lien to the employee in exchange for a guaranteed recovery on a percentage (or sliding scale) basis. Where employer negligence is a factor, the employer might be more amenable to working with the employee than with the third party. (See *Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1163-1164.)

The lien purchase issue often comes during mediation in the civil or the comp case. However, the purchase may have been completed by that point, and often by the wrong party.

PART III: Considering Medicare's interests when settling WC claims

By Steve Chapman

Considering Medicare's interests is an essential part of the settlement process. It should include an assessment of potential Medicare-related medical costs and a determination if there were any Medicare conditional payments. Since

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the Medicare program began in 1966, it was the primary payer for all claims except those covered by workers' compensation (WC). Thus, it is incumbent upon all parties to a settlement to ensure that Medicare does not pay for items and services that WC is primarily responsible for. Additionally, Congress passed the Medicare Secondary Payer (MSP) Act in 1980 to further protect the Medicare Trust Fund. The MSP ensures the cost of medical expenses is paid by primary payers (WC, liability insurance, etc.) and not by Medicare.

Medicare Set-Aside

The Medicare Set-Aside (MSA) is the recommended vehicle created by the Centers for Medicare and Medicaid Services (CMS) for use to comply with the MSP requirements. It was introduced in 2001 in a memo released by CMS. The MSA is an integral portion of a WC settlement when the injured worker expects to have *future* medical care. It is a necessary part of the calculation for future medical expenses. It is calculated to cover future medical costs related to the industrial injury that would otherwise be paid for by Medicare. An MSA is only appropriate when settling future medical expenses. When and if the MSA account becomes exhausted, Medicare steps in as the primary payer.

It is appropriate to consider Medicare's interests whenever the burden of future medical expenses could potentially be shifted from WC to Medicare. Medicare wants to eliminate the possibility of double-dipping by an injured worker (IW) who is also a Medicare beneficiary or soon will be.

Double-dipping occurs when the IW settles the WC claim, including funds for future medical expenses. Instead of using those funds for future services and medications related to the work injury, the injured worker can pocket this money and then seek to have Medicare pay for future work-related medical costs. Thus, it is essential to include an MSA whenever the IW is a Medicare beneficiary. It is also appropriate to include an MSA when the IW is not yet a Medicare beneficiary, but there is a reasonable expectation the IW will become entitled to Medicare benefits while the WC's medical expenses are still being paid out.

Structured settlement

An experienced structured settlement broker (broker) will prove to be a valuable asset in preparation for an upcoming mediation. The broker can work to assist in determining Medicare eligibility of the injured worker. Brokers are able to interface with MSA vendors in the preparation of the MSA prior to a mediation. The broker can obtain the necessary medical records release and obtain rated ages essential in containing the MSA's cost.

It is not advisable to wait until the day of the mediation to begin to address the Medicare issue. The plaintiff/applicant attorney will want to ensure that any settlement will have sufficient funds to cover the set-aside required by CMS. Given the various pricing methodologies required by CMS, it is not advisable to guess what the MSA might be. The complexity of determining the industrial body parts and correct pricing mechanisms is not something easily eyeballed. They are best left to the MSA vendor to determine Medicare's interests.

Medicare's requirements in dealing with MSAs and the MSP statutes are not static, but change over time. Submission of the MSA for CMS approval is one issue that recently received much attention. While the submission of the MSA has always been voluntary, earlier this year CMS updated its guidelines to reflect a possible stricter stance on the MSA that is not submitted for approval. This issue is just one of several issues where the plaintiff/applicant attorney will want to have worked out a strategy before a mediation. Once again, an experienced structured settlement broker will be able to discuss all options with the attorneys and develop settlement strategies that makes sense for the case at hand.

Judge Steven Siemers (Ret.) for many years was a workers' compensation applicant's attorney who regularly collaborated with third-party attorneys. He was a workers' compensation hearing judge and Chief Judge of the Division of Workers' Compensation. He currently serves as a mediator in the workers' compensation field. He can be reached at steven@siemersadr.com.

Bruce Gelber has been a long-time member of both CAALA and CAAA. He attended his first CAALA (then LATLA) convention 40 years ago in Ashland, Oregon, where only a handful of LATLA members attended. He is a certified specialist in workers' compensation. He has argued before the United States Supreme Court in Perry v. Thomas *in 1987, a case involving mandatory arbitration of employment disputes. Mr. Gelber can be contacted at fenstenandgelber@gmail.com.*

Steve Chapman has been a structured settlement broker/specialist since 1986. While he has expertise in all areas where structured settlements are utilized, he has specialized in the settlement of workers' compensation cases for the past 25 years. Mr. Chapman works to stay current on all areas that are essential to assisting attorneys in the resolution and settlement of their cases; these include: MSAs, new products, updated guidelines affecting Social Security concerns, experts, special needs trusts, professional administration, etc. He can be reached at settleman@aol.com.