Adam Savin
SAVIN BURSK LAW

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

Trial strategies with a workers' comp lien

IF YOU ARE JUST PRESENTING A LUMP SUM WC LIEN TO THE JURY AND ASKING FOR THAT AWARD, YOU ARE WASTING A GOOD OPPORTUNITY TO INCREASE THE VALUE OF YOUR CASE

So, you find yourself gearing up for trial and you stop and think, "What am I going to do about this workers' compensation lien?" In this article we are not going to focus on why there is a lien or how to negotiate the lien following a settlement. There are plenty of well-written articles on those topics already (including one in this issue). Rather, we are going to focus on trial strategies to streamline the presentation of this evidence and the steps you can take to simplify your trial and boost the value of your case.

When it comes down to it, there are three typical scenarios that involve the workers' compensation liens in our civil trials: (1) the lien claimant pursuant to Labor Code section 3856, subdivision (b); (2) the complaint in intervention pursuant to Labor Code section 3853; and (3) the assignment of the lien to Defendant or Plaintiff. There are hundreds, if not thousands, of case-specific variables that will ultimately dictate how you should handle the workers' compensation lien in your specific trial. However, the goal of this article is to provide a few simple approaches to broaden your understanding of your options. We will assume for now that there is no employer negligence and I will briefly discuss employer negligence at the end. For this article, the term employer also includes the workers' compensation insurance carrier.

Scenario 1: Workers' compensation as a lien claimant

If you are reading this, you should already know that an employer has a lien for workers' compensation benefits pursuant to Labor Code section 3852. Therefore, absent any employer negligence, you are legally obligated to take care of the lien. With the exception of a few limited scenarios, a straightforward lien claimant is going to be your most favored situation in trial. This is the scenario where the employer does not file a complaint in intervention. The employer merely files a lien for benefits paid. This scenario is desirable because any reduction on the employer's reimbursement rights will hinge on their

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

role and involvement in the litigation process.

Additionally, this keeps you in the captain's seat. You are in control of the evidence and how to introduce it. In this scenario, it is best to have the employer's cooperation. That way, you are able to maintain some leverage over their cooperation, which can help facilitate your goal in creating the common fund (which they will benefit from). Once you understand the lien and its components, it is rather simple to strategize the best approach during trial.

In any case involving a workers' compensation lien, you were likely advised by the employer's carrier that they have a lien. Hypothetically, let's say that the amount is $250,000. You asked for a breakdown of the lien and the employer sent you a spreadsheet that is difficult to read and understand with amounts associated for all sorts of things including total temporary disability (TD or TTD), permanent disability (PD), medical expenses, and many other costs like subpoena service, attorneys' fees, bill review, utilization review, etc. There are a ton of line items that do not belong anywhere on a verdict form and yet you are responsible to consider the employer's entire lien when the time for payment comes.

Practice Pointer: *There may be improper items on the lien that you can challenge at a later date.*

The lien strategy is simple really: We break up the lien into categories we are familiar with and we use what we can. Let me start with an example using the $250,000 lien hypothetical. Let's say the $250,000 is comprised of $80,000 in temporary disability, and $140,000 in medical payments, and $20,000 in permanent disability, and $10,000 for miscellaneous items. Unless it is unavoidable, the goal in trial is to forget the term "workers' compensation." You should avoid using this phrase as it only complicates things and can cause juror confusion.

If you attempt to explain the workers' compensation system and their statutory rights pursuant to the Labor Code, the jury will most likely believe that your client has already been compensated or is "double-dipping." In the event that workers' compensation, or the employer's lien, or any evidence of workers 'compensation benefits get before the jury, you must make sure to include jury instruction CACI 3965 (formerly BAJI 157) instructing the jury that a verdict for the plaintiff should be for the amount of his damages without deducting the amount of compensation benefits. (See *Berryman v. Bayshore Const. Co*. (1962) 207 Cal.App.2d 331, 336.)

The plan of attack is to fit the broken-up lien amounts into your typical damages scheme, and where possible, maximize the recovery. Here's how we do it.

TD/TTD – Temporary disability indemnity

First, let's start with the temporary disability line item of $80,000 in our hypothetical. What is this? This is a reduced past loss of earnings. You do not have to present the case of having temporary disability ("TD") to a jury. The law allows you to elect whether to bring forth the TD indemnity damages or actual loss of earnings. You cannot do both. (See Lab. Code, § 3855; see also *Kuhlmann v. Pascal & Ludwig* (1970) 5 Cal.App.3d 144, 152.) So, the first step is to convert your TD payments into past loss of earnings so it fits nicely on your verdict form.

Having a TD lien is gold for your civil case because it required a physician attestation that your client cannot return to work due to their injuries. You also have an employer who agrees that they were unable to provide work accommodations for your client's restrictions during the relevant time period. This is a solid foundation for any loss-of-earnings claim and it really makes that claim beyond reasonable dispute.

Next, you need to understand that this TD is paid for a maximum of 104 weeks using your client's average weekly earnings while only paying them 66.6% of that income until they hit a maximum weekly limit. The maximum weekly allowance for 2023 is $1,651 per week, which is based on a weekly earning history of $2,309.56 per week (you can find the rates at dir.ca.gov). When you see a TD payment of $80,000, you should immediately know that your client's past lost earnings are at least $120,000. That is because they were not paid for the one-third of lost wages for the same time period under the Labor Code. You also need to consider if their TD payment was terminated due to the 104-week limitation, in which case your loss-of-earning claim is larger than just adding one-third back.

There are also instances where your client was cleared to return to work by a physician with some work restrictions that the employer did not accommodate. For example, there are situations when a physician finds that your client reached maximum medical improvement ("MMI") or permanent and stationary ("P&S"). When that occurs, the temporary disability benefits automatically stop. However, just because the benefits stopped does not mean your client returned to work. As you can see, this may result in additional lost earnings that are not accounted for on the lien. It is therefore important to make this evaluation separate and independent from the TD benefits per the printout provided by the employer.

In many instances, additional income, including benefits and overtime, are not included or missed in the TD calculation, thus providing another opportunity to expand on these damages. For larger TD liens, make sure to check your client's actual loss of earnings since these benefits really max out for employees earning $120,000 or less per year. For clients who earn over $120,000 a year, the TD rate pays less than 66.6% and may only be a fraction for high-wage earners.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

In trial, ignore the workers' compensation lien amount for TD and just put forward your client's actual loss of earnings. This really starts before trial and you should already know how to bring forward a loss-of-earnings claim and loss-of-earnings-capacity claim. When you remove the workers' compensation lien title, it is no different than any typical trial special damages.

During your clients' workers' compensation case, they had a primary treating physician, otherwise referred to as their "PTP." This doctor is required to see your client every 30-45 days and document whether or not they are able to return to work. During litigation, you should notice this doctor's video deposition. Your examination should cover each of these off-work notes to establish the basis and a timeline as to each time period your client was unable to return to work per physician orders. At trial, play the designations or bring in that doctor and establish your client's earnings history by any means, and you will have a clean physician-verified loss-of-earnings claim.

If you stipulate to the TD lien amount, you are at minimum, leaving one-third of their lost earnings on the table.

Medical payments

Back to the hypothetical, we have $140,000 in paid medical expenses. Forget the workers' compensation lien, call it what it is – *paid medicals*. The third-party defendant cannot argue or offer evidence that the employer's carrier paid unnecessary benefits or challenge the reasonableness of the charges. (See Lab. Code, § 3854; see also *Mendenhall v. Curtis* (1980) 102 Cal.App.3d 786.) You should be able to stipulate as to past medical specials and/or a motion in limine to preclude defendant from challenging the same.

The third-party defendant can, however, still challenge causation at trial. Use the workers' comp doctors, who can explain the process of approval, which establishes that they cannot simply do treatment that has not been reviewed and approved through a utilization-review process. Most often, your client's treatment has been confirmed by other physicians in the same specialty. This is compelling evidence at trial.

Next, your client's medical expenses may actually be higher, so hear me out. The majority of medical treatment in workers' compensation are pre-approved and paid pursuant to a fee schedule. When you receive a lien for $140,000 in itemized paid medical expenses, this is for all the treatment that was approved and actually already paid for by the employer's carrier. Unless you have dabbled in workers' compensation, you would not know that a lot of medical treatment provided may not be pre-approved and is therefore unauthorized, which may result in the treatment remaining unpaid and not on the lien.

I am talking about treatment that your client has actually received and treatment that will eventually be paid in most instances. It may even be a portion of a visit or a physician may have been pre-authorized to perform a variety of treatments, but added a few items during the visit or procedure. These physicians then file "medical liens" with the Workers' Compensation Appeals Board which are dealt with generally long after the close of your civil case.

Here is the approach: You need to subpoena each medical provider on that lien list for all of their billing records including paid and unpaid invoices. Using our hypothetical, when you tally up the total, whatever is above and beyond the $140,000 that is identified on the lien should be treated as outstanding medical bills. The total past medical specials could be significantly higher than what was reported on the itemized lien. You can then use any approach you like to get these figures in front of the jury, whether you use your medical experts, billing experts, PMK's or by stipulation. At the end of the day, these are just paid medicals. They are really no different than dealing with the typical medicals paid for by any other private health insurance carrier for purposes of trial.

PD – Permanent disability indemnity

Permanent disability ("PD") is the lasting disability from your client's work-related injury that affects their ability to earn a living. When you see line items for permanent disability indemnity payments, this is really a diminished future earnings capacity claim, and my opinion is that you should ignore the indemnity amount and pursue the actual loss of earnings capacity. Plaintiff can claim in trial either their permanent disability indemnity or put on evidence of their loss of earning capacity. (See Lab. Code, § 3855; *Kuhlmann v. Pascal & Ludwig* (1970) 5 Cal.App.3d 144, 150.) Your client may have significant injuries and have a 90% to 99% diminished future earning capacity per workers' compensation, and be unable to compete in the labor market. According to workers' compensation disability tables and percentages, your client may only be receiving a few hundred thousand dollars for that. Welcome to California Workers' Compensation!

Do not attempt to argue permanent disability ratings and whole-person impairment per the AMA Guidelines in your civil trial. The workers' compensation rating system has no place in our civil trials and I do not believe they accurately describe your client's injuries in the vast majority of instances.

So instead, focus on the fact that your client actually has a diminished future earnings capacity. Forget about the lien and just build your future-loss-of-earnings and earning-capacity claim in the same manner you would on any other case going to trial. The figure you present to a jury for this category will be significantly larger than the amount assigned to your client for those same damages by workers' compensation.

Miscellaneous items

The workers' compensation lien will undoubtably have a slew of other miscellaneous items included. These generally only constitute a small portion

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

of the total workers' compensation lien. As trial attorneys, we already know to "trim the fat" from our cases where we can. My recommendation is to ignore them all together for purposes of trial if you cannot fit them into your typical verdict form landscape.

C&R – Compromise and release

In some instances, you will see a Compromise & Release ("C&R") on the lien, which adds a payout to your client for future medical care. These future medical payouts are negotiated amounts and really do not account for the full spectrum of reasonable future medical provisions. Workers' compensation doctors, particularly the AMEs and QMEs, are pretty good at creating future medical provisions for patients/clients. This is actually a requirement for their final reports. Use these doctors to support your life care plan with your own experts. In this approach, your life care plan cost will most likely be significantly larger than any C&R award for future medical care.

Scenario 1 recap

If you followed along, your goal is to take the data out of the lien and fit it into your typical special damage's framework. Focus on the past and future loss-of-earnings and medical-treatment damages. At their core, the principal elements of an injured worker's damages are the same as in any personal injury case. If you are just presenting a lump sum WC lien to the jury and asking for that award, you are wasting a good opportunity to increase the value of your case and risk creating jury confusion.

Scenario 2: The complaint in intervention

The workers' compensation carrier and/or employer can intervene in your case at any time before trial. (See Code Civ. Proc., § 387; Lab. Code, § 3853.) In essence, they are their own plaintiff and they must put on their own damages case. As long as the employer's lawyer takes an "active role in the recovery, the employer's reimbursement claim will not be reduced. (See *Hartwig v. Zacky Farms* (1992) 2 Cal.App.4th 1550; *Kavanaugh v. City of Sunnyvale* (1991) 233 Cal.App.3d 903.)

If you find yourself in this situation, you must align yourself with the employer's attorneys. There will be no hiding the fact of workers' compensation at trial, so you must embrace it.

At trial you will treat the intervenor exactly like a second plaintiff. They will get their own voir dire, opening, witness examinations, experts, cross examinations, and closing arguments. It is desirable to have skilled intervenor trial counsel as it can strengthen your case overall versus the alternative. Coordination of the trial can create a strong double team against the third-party defendant.

In these situations, the approach I typically recommend is to present only a general-damages case. Let the intervenor attorney argue their case for their full damages amount. Build your case credibly by only demanding those damages which are not included in workers' compensation.

Following a verdict where the employer is represented and made their own claim, you do not have any obligation towards the lien. If you only demanded general damages and allowed the employer's attorney to argue for the benefits that they paid and reasonably expect to pay, they likewise have no basis for a credit against future benefits based on the net recovery to your client. So, in cases where your client has ongoing medical care and indemnity and maybe even lifetime pension payments, a large general damages net recovery should not stop the ongoing benefits.

***Practice Pointer**: If during discovery you realize that the intervenor attorney will not present well in trial, you need to find a way to obtain an assignment of the lien. An intervenor at trial without the requisite skill set will do far more harm than good to your case. Don't allow it!*

Scenario 3: Assignment of the lien rights

In our hypothetical, we have discussed a $250,000 total lien. In most instances the lien claimant already expects that they will be reducing their lien by at least 40% with the Plaintiff's attorney if they wait. However, they still have risk and there is no guarantee of payment. What happens if the Plaintiff does not prevail at trial, or the verdict is lower than expected?

Let's say that a third-party defendant, just before trial, offers the lien claimant $100,000 to take the lien off their hands. Let's assume the lien claimant accepts. At the end of your trial, whatever your verdict, the third-party Defendant gets an offset for the full value of the $250,000 even though they only paid $100,000. Sounds like a good deal, right? Not always.

First, what most third-party defendants who purchase liens fail to understand, is that the Plaintiff can still get the same post-verdict reduction on the lien. In other words, the Plaintiff is afforded the same rights as if the lien was still in the hands of the employer. (See *Raisola v. Flower Street Ltd.* (1988) 205 Cal.App.3d 1004, 1009.) This goes back to the "common fund" principles and "active participation" which are routinely discussed with work comp liens. (See *Quinn v. State of California* (1975) 15 Cal.3d 162.)

If the Plaintiff did all the work to achieve the common fund – which is the verdict – the Plaintiff is entitled to reasonable attorney's fees and pro rata share in cost. Thus, we know that the $250,000 lien less your attorneys' fees of 40% is now $150,000. In addition, you get the pro-rata share in cost, which could be tens of thousands of dollars.

For our illustrative purposes in this article, let's call it $25,000. Now the third-party defendant only has a $125,000 offset from the verdict which they paid $100,000 for. Defendant's benefit is

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2023

minimal and Plaintiff's position is likely the same as if the employer never sold the lien. Unless they are buying the lien for pennies on the dollar (which they sometimes can), third-party defendants' purchase of the lien is often overstated and misguided.

In the above situation, Plaintiff still puts on all of the evidence to support a verdict that includes the $250,000 in lien damages, no differently than if the lien was held by the employer still. Plaintiff's rights with respect to their evidence and case are unchanged. So, do not let defense counsel tell you otherwise. Remember, the third party stands in the shoes of the employer lien claimant and their rights are mirrored.

Another option is to flip the script on the third-party defendant to make them litigate their newly acquired lien as a Plaintiff. They have stepped in the shoes of the employer after all. Labor Code sections 3859-3860 permit an employee to segregate their own claims free from the employer's claim. (See also *American Home Assurance Co. v. Hagadorn* (1996) 48 Cal.App.4th 1898, 1904.)

You can advise the lien holder (now the third-party defendant) that Plaintiff will not be putting forth those lien damages at trial and will thus only be seeking general damages and any non-economic damages that are not covered by workers' compensation. Note that this does not eliminate the lien holder's rights to reimbursement if damages are awarded that the lien holder would be entitled to. You must still provide them notice of your plan to segregate your damages and provide them an opportunity to file a complaint in intervention. It is highly unlikely that the third-party defendant will take these steps and put forth their own damages case for benefits paid to the employee to seek an offset post-verdict. In that case, your verdict should not be reduced by the lien that was acquired by the third-party defendant.

Finally, Plaintiff likewise can obtain an assignment of the lien. In a strong case, this could make a lot of sense since Plaintiff may be able to purchase the lien of $250,000 for the cost of $100,000 or less. Plaintiff can still put on the full $250,000 (or more as discussed above) in damages, have a jury award it, and as the lien holder there is no post-verdict offset. The net difference to the Plaintiff is the additional $150,000. Assignment of the lien can often be negotiated into the resolution of the workers' compensation case. Do not merely allow the lien/credit to be waived as this may trigger a post-trial motion to deduct the amount from the verdict on the principals of double-dipping. You need to make sure your client obtains an assignment of the rights and not a waiver.

Witt v. Jackson – The employer-negligence issue

Earlier in this article we adopted the assumption of no employer negligence. Let's now turn the discussion to situations of employer negligence. *Witt v. Jackson* (1961) 57 Cal.2d 57, stands for the rule that an employer's claim for reimbursement and credit rights may be reduced or completely wiped out if the employer is at least partially at fault for causing the employee's injuries.

Both the third-party defendant and the plaintiff can raise employer negligence as an issue at trial; however, timing of this defense is generally not aligned.

In trial it is generally the third-party defendant who ordinarily benefits from a finding of fault against the employer. From a plaintiff's vantage point, it is desirable to attribute all or a majority of fault on the third-party defendant. As a post-trial motion, under *Witt*, when a jury finds comparative fault on the employer, the third-party defendant will be entitled to a reduction in its liability to the extent of fault attributable to the employer, thus reducing or completely eliminating the lien. Defendant must plead the employer's negligence issues prior to trial to allow the employer an opportunity to defend against the claims or they are waived. (See *Difko Admin. (US) Inc. v. Superior Court* (1994) 24 Cal.App.4th 126, 59*; C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 390.)

For Plaintiff, the timing of an employer-negligence claim can be tricky. To some extent, you want the employer's cooperation, but you also do not want to pay their lien. Plaintiff has an equitable right to litigate the issue of employer fault to either offset or defeat the employer's claim for reimbursement. (*Witt, supra*, 57 Cal.2d 57; see also *Rosales v. Thermex-Thermatron, Inc*. (1998) 67 Cal.App.4th 187, 197, modifying *Witt* per Prop. 51.)

If there is a strong case for significant employer negligence, a good strategy is to resolve the third-party case before trial. If Plaintiff and Defendant resolve the third-party claim and defendant is dismissed, the Plaintiff's right to litigate the issue of employer negligence continues. (See *Ellis v. Wells Manufacturing, Inc*. (1989) 216 Cal.App.3d 312.) If the employer has intervened in the case, the Plaintiff can proceed forward to trial on the limited issues of employer negligence. This can also be accomplished with a bench trial. If the employer was only a lien claimant and never intervened, the jurisdiction for establishing employer negligence can go back to the Workers' Compensation Appeals Board. In most of these instances the employer will drastically reduce their lien or waive it.

Adam J. Savin is a partner at Savin Bursk Law, *located in Encino. He has extensive experience in personal injury and workers' compensation. He has devoted a major part of his practice to third-party crossover cases and injury cases with elements of workers' compensation.*