



Discovery can be key to PI/workers' comp "crossover" cases

Cooperation between the PI and workers' comp attorneys is key to maximizing the client's recovery, and the PI attorney often needs to play the lead role in discovery

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Workers' compensation often fails to provide injured workers adequate compensation, particularly when serious injuries are involved. However, there are many instances in which a worker injured during the course and scope of employment may be able to receive compensation in a personal-injury case in addition to the benefits received from a workers' compensation claim. These are known as "crossover" cases.

Workers' compensation is not always the exclusive remedy against the worker's employer as there are several recognized exceptions, including the power press exception, failure to obtain workers' compensation coverage, dual capacity, fraudulent concealment, and assault by the employer. (See Lab. Code, §§ 3602(b)(1), 3602(b)(2), 3602(b)(3), 3706, 4558.) Additionally, third-party claims may also exist against non-employers for dangerous conditions of property, defective products, motor vehicle negligence, and negligence on a multi-employer worksite.

In crossover cases, it is important for the client's benefit that the personal injury attorney understands the intersection of the two cases. This article will address strategies for a personal injury attorney working with the client's workers' compensation attorney to obtain helpful

evidence for the personal injury case and to maximize the client's overall recovery.

Developing a case plan

A workers' compensation practice is quite different from a personal injury practice in terms of the relevant issues, objectives, and discovery practices. To be entitled to workers' compensation benefits, there is no required showing of employer fault. Employee fault and the fault of others are also immaterial as long as the injury occurred during the course and scope of employment. Consequently, workers' compensation attorneys may not be familiar with the liability theories involved in third-party cases and exceptions to the exclusive remedy.

It is therefore advisable to meet with the workers' compensation attorney as soon as possible to discuss your liability theories for the personal injury matter and develop a case plan together. At this time, you should agree to keep each other informed of all significant events in each case, including the client's deposition, significant medical evaluations/reports, mediation and settlement discussions, potential resolution of the case, and the trial date. Throughout the pendency of both cases, regularly touch base to see if there are any new developments that could impact the case plan.

Discovery and evidence gathering

Workers' compensation cases are commonly initiated much sooner than

personal injury cases due to an earlier statute of limitation. This can be beneficial in providing investigative opportunities prior to filing the personal injury case as long as you have a cooperative relationship with the client's workers' compensation attorney. For example, the workers' compensation attorney can assist with obtaining an early inspection of the site or product, written discovery from the employer, and depositions of the employer and witnesses. The information obtained during this investigation can be helpful not only in evaluating whether a client has a potential personal injury claim, but also in developing evidence early for the personal injury case. Such discovery may be particularly helpful for claims involving exceptions to the exclusive remedy and multi-employer worksite.

You should know that not every workers' compensation attorney is experienced with all of these discovery tools. Workers' compensation benefits entitlement in California is based on a no-fault system, which means that the discovery needed and conducted in most cases tends to be minimal. It usually includes the deposition of the injured worker and possibly a deposition of the employer. Written discovery and other discovery methods are thus rarely used. However, additional discovery becomes more common when the worker asserts a claim of serious and willful misconduct by the employer under Labor Code section 4553,



which thereby makes employer fault a relevant issue.

Preparing discovery can be quite time consuming for workers' compensation attorneys who typically have hundreds of matters on their caseload. You can make things easier for the workers' compensation attorney by preparing the written discovery, deposition notices, and subpoenas for the workers' compensation attorney to serve. You can also take the noticed depositions on the workers' compensation attorney's behalf. This is a win-win situation because the burden on the workers' compensation attorney is greatly reduced and you have the advantage of crafting the discovery in a way that makes most sense to obtain the evidence you need for the personal injury case.

The deposition of your client in the workers' compensation case often takes place well before a defendant notices your client's deposition in the personal injury matter. Your client's testimony at a workers' compensation deposition can be used as evidence in the personal injury case to support or discredit your client. It is therefore critical that your client is as prepared for his or her deposition in the workers' compensation case as well as you would prepare him or her for deposition in the personal injury case. The best practice is to assist in the deposition preparation.

Monitoring medical treatment

It is important to be active in monitoring the medical care in your client's workers' compensation case. The workers' compensation attorney is a good resource for information regarding your client's medical treatment and can also assist in obtaining medical payment and benefits printouts from the workers' compensation carrier. Periodically check in with the workers' compensation attorney to find out if there are any new health care providers, new procedures being considered or scheduled, upcoming evaluations by an Agreed Medical Examiner, and any obstacles to your client receiving the

diagnostic testing or treatment recommended by treating doctors.

Workers' compensation insurance carriers are notorious for repeatedly delaying or denying authorizations for diagnostic testing, procedures, and other appropriate and necessary medical care. These delays and denials are often detrimental to your client's recovery or treatment options and may lead to lifelong limitations that your client may have avoided had timely testing and care been provided. If there are issues or delays in obtaining authorization for recommended diagnostic imaging or testing to see if your client is a surgical candidate, consider paying for the testing as a case cost or finding a provider who will do the testing on a lien basis. Then, the testing results can be provided to the treating doctor for review.

You will also want obtain all reports prepared by the Agreed Medical Examiner. Their role in the workers' compensation case is to evaluate your client and resolve questions or disputes about the injuries or treatment needs. These reports can suggest potential items to include in your client's life care plan. The correspondence from the workers' compensation attorneys to the examiner could also be helpful in providing early insight as to issues that the defense may raise in the personal injury case related to causation of the injury or necessity of a particular form of treatment.

Be sure to advise your client when speaking to the workers' compensation attorney and treating doctors, to be forthcoming in identifying all injuries, complaints, and symptoms believed to be a result of the incident to ensure receipt of appropriate care. It is also a good idea to instruct your client to be as accurate and truthful as possible when describing to doctors the injuries, particularly as to the frequency, severity, and duration of symptoms. Defense counsel will eventually review the medical records and examine any notes about your client's self-reported symptoms.

Much like deposition testimony or written discovery responses, you do not want to see in the doctor's notes obvious exaggeration or overstatements of pain or other symptoms reported by the client because it affects the client's credibility. It is also harmful when your client minimizes or underreports his or her injuries because it can prevent your client from obtaining the correct diagnoses or most appropriate treatment.

Maximizing client's recovery

If the potential for a third-party case does not look promising or the likelihood of a favorable recovery is uncertain, you should notify the workers' compensation attorney as soon as possible. The attorney can then explore whether a "serious and willful misconduct" petition should be filed before the one-year statute of limitation. If your client is successful in showing that the employer contributed to an employee's injury by its "serious and willful misconduct," your client will be entitled to receive an additional 50 percent in compensation from the employer. (Lab. Code, § 4553.)

When an injured worker receives compensation from the personal injury case, the worker may be required to reimburse the employer for some or all of the past workers' compensation benefits received. This includes the benefits of temporary disability, permanent disability, and medical care. Additionally, the worker may lose some or all future benefits that the worker would have otherwise been entitled to absent the third party recovery. It is thus essential that the personal injury attorney and the workers' compensation attorney discuss all aspects of proposed settlements to ensure that they are in the client's best interest and most favorable under the client's particular circumstances.

The employer is generally entitled to recover the amount of benefits it has provided to an injured worker from a responsible third party. The employer typically asserts a lien, but it may also file its own



action or intervene in a pending third party personal injury case. If the employer asserts a lien, the amount of recovery on the lien is reduced by its pro rata share of costs and attorney fees. The value of the lien and the carrier's ability to recover from the client's third party proceeds is based on comparative fault principles. (*Associated Construction & Engineering Co. v. WCAB* (1978) 22 Cal.3d 829, 843.) Employer negligence will reduce the amount of reimbursement on the lien or potentially eliminate the lien depending on the percentage of employer fault, the client's damages, and the amount of benefits provided by the employer. (See *Witt v. Jackson* (1961) 57 Cal.2d 57.)

A recovery in the personal injury case may also impact the duty the employer has to provide future workers' compensation benefits to your client. This issue is known as a "credit." An employer must pay its proportional share

of your client's damages before it will receive a credit against its future responsibility for disability and medical payments. (*Associated Construction & Engineering Co. v. WCAB* (1978) 22 Cal.3d 829.)

For example, assume that the client's total damages are \$1 million, that the employer's negligence is 25 percent, the third party's negligence is 75 percent, and that the workers' compensation carrier has provided \$200,000 in benefits to date. In this scenario, the employer is obligated to provide future benefits up until it has paid 25 percent of \$1 million (\$250,000) and after that could seek a credit from the client's third-party recovery against future benefits. If, however, the employer is determined to have had no responsibility, then the employer would be entitled to a credit of \$250,000 and would not be obligated to provide additional workers' compensation benefits until \$250,000 has been paid by or on behalf of your client. In other words, your

client would need to spend \$50,000 out of his or her recovery on incident-related medical expenses before being able to seek additional benefits from the employer.

Lien and credit issues are complex, so maintaining communication with the workers' compensation attorney is essential throughout the duration of both cases and particularly during settlement discussions.



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