Managing workers' compensation liens in third-party actions

Here are strategies when your case has both workers' compensation and third-party PI claims

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An individual who is injured on the job typically receives workers' compensation benefits, which includes disability payments and medical care related to the work injury. Although the injured employee is generally barred from suing the employer due to the workers' compensation exclusive remedy rule (Lab. Code, § 3602, subd. (a).), the employee may bring a personal injury claim against a third party who shares responsibility for the injury. (Lab. Code, § 3852.) To prevent a double recovery, the employer has the right to be reimbursed for the workers' compensation benefits it has previously provided to the employee from their third-party recovery. (Lab. Code, §§ 3852, 3853, 3856, subd. (b).) This is known as a workers' compensation lien.

There are special considerations and procedural requirements related to workers' compensation liens, which are very different than with private health insurance, medical providers, MediCal, and Medicare. Therefore, when representing a client in a third-party personal injury lawsuit, it is important to know your client's legal obligations to protect the employer's lien and the ways in which you can reduce or extinguish the lien to maximize your client's recovery.

Notice of third-party action

The employee is required to notify the employer "forthwith" of their third-party lawsuit by serving the employer and workers' compensation carrier with a copy of the complaint by personal service or certified mail. (Lab. Code, § 3853.) Although not specifically required by the code, it is advisable to also attach the answers filed by the defendant(s) to the notice and explicitly state that the employer's negligence is at issue in the action. Defendants commonly plead employer negligence or fault of others generally. By providing this additional information, the employer can make an informed decision regarding how to proceed. This also prevents the employer from later claiming that it did not have notice that its fault was at issue.

The employer (actually, the WC insurance carrier) then has a choice of filing a notice of lien, bringing an action directly against the third party, or intervening in the plaintiff's case any time before trial to protect its right to be reimbursed for workers' compensation benefits it paid. (Lab. Code, §§ 3852, 3853, 3856, subd. (b).) When the employer merely files a lien and the settlement was achieved solely by plaintiff's counsel's efforts, the most the employer will be able to recover is the lien amount minus its pro rata share of costs and attorney fees. (Lab. Code, § 3860, subd. (c).)

More than a lien is required

Filing a lien is insufficient to protect the employer's right to reimbursement when there are allegations of employer negligence. Instead, the employer must file a complaint in intervention before trial or dismissal of the action. (*Ibid.*; *American Home Assurance Co. v. Hagadorn* (1996) 48 Cal.App.4th 1898, 1906.)

If the employer has intervened, it is a party to the case and is entitled to participate in all activities in the litigation. The employer may propound written discovery and notice depositions, but it is also required to respond to discovery propounded on it by the plaintiff or defendant.

During litigation, the interests of the plaintiff and the employer-intervenor are essentially aligned. They share the common goal of establishing and maximizing the defendant's fault, which is the only way that the plaintiff can recover their damages and the only way the employer can get reimbursed for the benefits it has paid. The employer can thus become an ally against the defendant in discovery and in opposing a motion for summary judgment.

Settling the third-party action

When the employer has not intervened, the plaintiff may settle their case without the consent of the employer as long as it is exclusive of the amount of workers' compensation benefits paid. (*American Home Assurance Co. v. Hagadorn* (1996) 48 Cal.App.4th 1898, 1904.) Such settlements do not eliminate the employer's right to reimbursement. (Lab. Code, § 3859.) The plaintiff must give the employer notice of an impending settlement to allow it a reasonable opportunity to file a complaint in intervention to try to recover the benefits it has paid. (Lab. Code, § 3860, subd. (a); *American Home Assurance Co.*, *supra*, 48 Cal.App.4th 1898 at 1908; *O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 657.) If the employee fails to provide sufficient notice to enable the employer to timely assert its claim, the employer can sue the employee for breach of the

duty to notify. (*American Home Assurance Co.*, *supra*, 48 Cal.App.4th 1898 at 1907.)

There are no bright line rules as to how much notice is appropriate. What is reasonable notice will depend on the circumstances. Thirty days' notice before dismissal is probably reasonable if you had already given proper notice of employer fault being at issue early in the litigation. If earlier notice had not been given, you will want to allow more time before dismissing the action. For example, in *O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, the court found that seven weeks' notice was insufficient when the plaintiff failed to provide the employer notice at the outset of litigation, failed to notify it of the settlement, and then dismissed the action one week before trial.

It is generally a good practice to serve a formal notice of settlement by personal service or certified mail to the employer and workers' compensation carrier stating that the plaintiff claims that their employer is not entitled to reimbursement of compensation benefits paid on behalf of plaintiff due to its own negligence in contributing to plaintiff's injury based on *Witt v. Jackson* (1961) 57 Cal.2d 57. Although not required, you may want to state in your notice the earliest date by which the plaintiff intends to dismiss the action with prejudice so that it is clear how time sensitive the matter is for the employer to respond. After receipt of the notice of settlement, the employer must then intervene before the entire third-party action is dismissed or the lien will be extinguished. (Lab. Code, § 3853.)

Where the employer has intervened, you can still settle around the employer, but you will need to protect the lien until it is resolved and agree to defend, indemnify, and hold harmless the third-party defendant against the employer's claim.

Litigating the lien

The plaintiff has an equitable right to litigate the issue of employer fault as an offset to the intervenor's right of reimbursement. (*Witt v. Jackson* (1961) 57 Cal.2d, 57; see also, *Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197, noting modification of *Witt* per Prop. 51.) Plaintiff's right to litigate against the intervenor continues despite any settlement with a defendant and even where the defendant is dismissed. (See, *Ellis v. Wells Manufacturing, Inc.* (1989) 216 Cal.App.3d, 312.)

The value of the lien is governed by comparative fault principles. (*Associated Construction & Engineering Co. v. WCAB* (1978) 22 Cal.3d 829, 842-843.) When evaluating an employer's claim of reimbursement and credit, the amount of settlement is irrelevant to the determination of the employee's actual total damages. (*Id.* at 843.) Total damages means all of the economic and non-economic damages that the plaintiff has suffered from the incident regardless of settlement amount. The employer's claim for reimbursement may be defeated if the employer's proportionate share of compensation owed due to its own fault exceeds the reimbursement value.

For example, suppose the plaintiff's total damages are $1 million, the employer has paid $300,000 in benefits, and the employer is found to be 20 percent at fault, i.e., responsible for $200,000 in damages. Under this scenario, the employer would be entitled to recover $100,000, which is the amount that exceeds the employer's percentage share of the plaintiff's total damages. If the employer was found to be 30 percent or more at fault, the employer would receive no reimbursement on its lien. However, the employer maintains the right to make a petition for credit in the Workers' Compensation Appeals Board, which would be relief against future liability for benefits once it has paid its percentage share of plaintiff's damages.

To maximize your client's recovery from the third-party settlement, you will want to demonstrate as much employer fault and as much damages as the evidence will allow to greatly reduce or even eliminate the lien. It is helpful to understand the general duties that all employers have to their employees under the Labor Code to develop a theory regarding employer fault in your case.

Employers have a duty to provide employees with a safe place to work. (*Levels v. Growers Ammonia Supply Co.* (1975) 48 Cal.App.3d 443, 451-452; Lab. Code, § 6400.) An employer's duty to maintain a safe workplace encompasses many responsibilities, including the duty to periodically inspect the workplace to discover and correct dangerous conditions and to adequately train and warn of their existence. (*Bonner v. WCAB* (1990) 225 Cal.App.3d 1023.) Every employer is required to provide all necessary safety devices and safeguards for their employees. (Lab. Code, §§ 6401, 6402, 6403.) Employers are required to develop and implement an Injury and Illness Prevention Program. (Lab. Code, § 3203.) The employer's statutory duty under the Labor Code is greater than the duty of care imposed under common law principles. (*Conner v. Utah Construction and Mining Co.* (1964) 231 Cal.App.2d 263, 271-272.)

Review the OSHA records for the incident to find citations showing the employer's safety violations and other evidence of employer fault. Borrow the evidence and arguments that the defendant used during the litigation to support employer fault. Because the employer has many safety-related duties under the Labor Code, you should be able to find violations to establish some level of employer fault in most cases. If you are headed towards trial, you will also want to retain a workplace safety expert to bolster your position.

Frequently, the employer (normally, its workers' comp carrier) is not interested in going to trial over its lien. You should have greater leverage because you know the evidence better, you are a more experienced trial lawyer, the employer has the burden of establishing its reimbursement claim, and the

employer does not want to spend money on trial. To expeditiously resolve the employer's claim, send its attorney a letter explaining how the lien has no monetary value due to the amount of plaintiff's total damages and the employer's percentage of fault that you expect to prove at trial. Propose that you settle the employer's claim with a waiver of costs and a dismissal as well as an agreement that the settlement would not prejudice the employer's ability to have the credit issue resolved before the Workers' Compensation Appeals Board.

Conclusion

Understanding the mechanics of workers' compensation liens is key to protecting your client from being sued for breach and maximizing your client's net recovery from a third-party settlement. Be sure to give the employer notice that its fault is at issue as early as possible in the litigation and when settlement is impending. Then, after settling with the third-party defendant, use your superior bargaining position to persuade the employer to walk away from its lien.


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