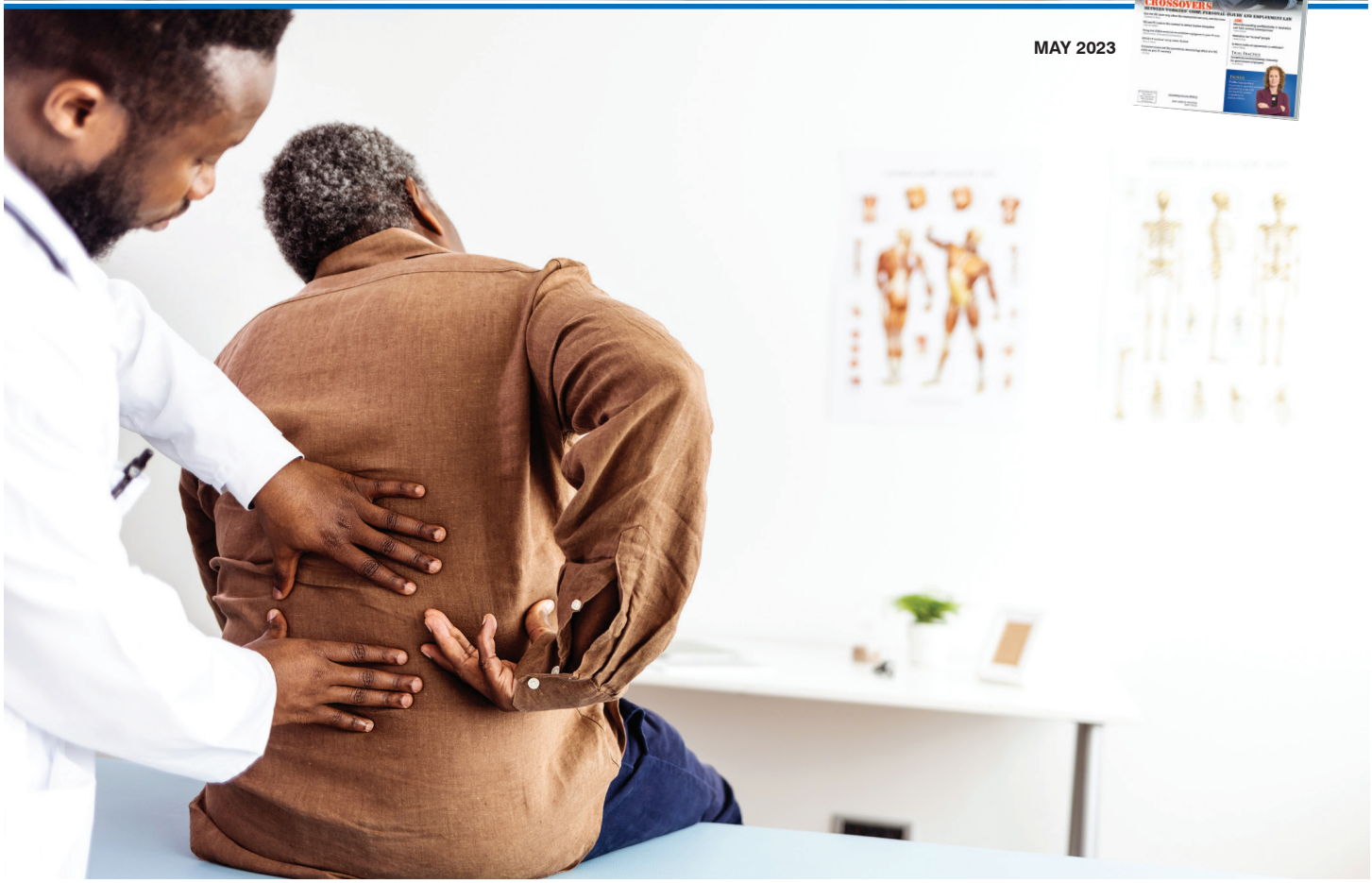


Crossovers between employment law and workers' compensation cases

How the WC claim may affect the employment-law case, and vice-versa

By Jonathan D. Roven

In many employment cases, especially ones involving disability claims, there are ongoing workers' compensation claims. And vice versa — in many workers' compensation claims, there are potential employment claims. However, because these two cases may be going on simultaneously, there are many benefits as well as pitfalls that can occur. Being cognizant of how a workers' compensation case can affect the employment case can be very beneficial for the prudent attorney. There are potential pitfalls such as providing conflicting evidence, and possible destruction of civil claims. There are potential advantages, such as obtaining favorable psychological treatment or evaluations, and witness statements.

This article discusses some of the most common crossovers in helping an employment attorney litigate their employment case while there is an ongoing workers' compensation case.

Obtaining discovery through workers' compensation

There are many types of discovery that can be obtained in the workers' compensation arena. This can be in the form of subpoenaed documents to medical providers, employer documentation, and insurance documentation. This discovery can be very beneficial because they include documentation that many employment defense attorneys refuse to produce.

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Typically, the applicant's attorney as part of their initial investigation will send a request for documents to the workers' compensation insurance company and the employer, asking for a variety of documents. These document requests typically include the personnel file, wage statements, witness statements, Insurance Services Office (ISO) reports, and other documentation. As part of their investigation, the workers' compensation insurance company may take witness statements. After the statement is taken, they can produce the witness statements to the applicant's attorney. This is a very common practice, and for the employment attorney, this can appear odd because it is as though they are receiving very long transcripts of the employer. This can avoid the meet and confer requirement, and ultimately law and motion practice, usually necessary in the civil court.

Applicants can serve subpoenas without expense to them. This is a great tool for applicants because they can obtain virtually all the same types of records they can in civil court, without the expense. This can include documents from prior employers, medical providers (including films), and documentation from government entities. Often, the defense in workers' compensation will send the applicant's attorney the subpoenaed records and request the same practice from the applicant's attorney.

The employee will also likely undergo a deposition in the workers' compensation case. Applicant's attorneys are eager to have their client deposed in many situations because the applicant's attorney is entitled to a fee under Labor Code section 5710. When preparing the applicant for their deposition, the attorney will likely focus on workers' compensation aspects. However, the applicant's attorney is likely unaware of the intricacies of civil employment law. A clever civil defense attorney will confer with the workers' compensation defense attorney and try to elicit responses helpful to the defense in the civil case in the workers' compensation deposition. Additionally, the applicant may answer various questions that will likely affect the civil case in one way or another. Therefore, it is a good practice to discuss with the applicant's attorney and perhaps be involved in the preparation of the workers' compensation deposition so that the applicant and their attorney can be better prepared for the workers' compensation deposition.

Communicating with the applicant's attorney regarding the discovery they received can be helpful in litigating the employment case. Perhaps they already have witness statements of the persons the employment attorney would like to depose. Perhaps they have ISO reports containing prior accidents the employee was in, that would be beneficial in answering discovery or advising a psychologist as to prior potential stressors.

Obtaining treatment and evaluations through workers' compensation

One of the major benefits of workers' compensation is an applicant's ability to obtain treatment as well as medical-legal evaluations. This can be incredibly beneficial in proving emotional distress damages in a civil case. An injured worker can obtain treatment from a psychologist or psychiatrist, reports regarding their treatment, and extensive evaluations including opinions on causation. This is very powerful for the injured worker as the psychologist or psychiatrist may take into account prior psychological stressors and apportion how much a prior stressor caused the injured worker's current psychological injury compared to what occurred at employment.

If a case is "accepted" in the workers' compensation case, the injured worker can obtain treatment through the workers' compensation carrier's medical provider network (MPN). If the case is "denied," then the injured worker can obtain treatment on a lien basis through a provider of their choice. Obtaining favorable psychological treatment and evaluations for use in the civil case can be incredibly powerful for a plaintiff to prove his or her emotional distress damages. If an employer is deemed to have harmed an injured worker psychologically, they may have to pay for the treatment.

An applicant is also entitled to a Qualified Medical Evaluator (QME) in the workers' compensation arena, which comes at the expense of the workers' compensation carrier. A QME is a physician or medical provider who evaluates an injured worker to see whether they are entitled to benefits. A QME must have requisite educational and licensing requirements to participate as a QME. Typically, the QME will run tests, take an extensive history, and review records when issuing their report. The QME wants to draft a report that will be considered "substantial medical evidence" so that the workers' compensation parties can proceed to either resolving the case or trial.

Caution as to how the injured worker settles their WC case

There are horror stories in which an applicant releases their civil case within the workers' compensation settlement agreement for far below the actual value. Sometimes insurance companies will offer an extra hundred dollars to release any and all claims. Sometimes insurance companies require applicants to sign "voluntary resignation" papers to show that the applicant was not actually terminated. There are many pitfalls to an injured worker securing WC benefits which can materially affect their civil case.

If a workers' compensation insurance company wants to settle a case, they will present either a Compromise and Release (C&R) or a Stipulation With Request for Award (referred to as a "Stip"). The main difference between the two is that if an applicant settles by C&R, their medical expenses are "bought out," meaning the claim is not intended to be reopened. The more common approach is for an applicant to settle by C&R.

The issue with C&Rs is that insurance companies will attempt to settle claims outside the workers' compensation arena,

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including employment claims. The clear language of every standard C&R form states the following at the end of Paragraph 2: "Execution of this form has no effect on claims that are not within the scope of the workers' compensation law or claims that are not subject to the exclusivity provisions of the workers' compensation law, unless otherwise expressly stated." The courts have interpreted the same meaning as what is stated in the standard form: "[E]xecution of the mandatory standard preprinted compromise and release form would only establish settlement of the workers' compensation claims; the intended settlement of claims outside the workers' compensation system would have to be reflected in a separate document." (*Claxton v. Waters* (2004) 34 Cal.App.4th 367, 378.)

Insurance companies will send the applicant's attorney a C&R with several addenda, or even releases within the C&R document itself, which may seem harmless to the workers' compensation attorney but can be fatal to the applicant's civil case. If there is a release of civil claims in the addenda and the applicant signs it, they may be deemed to have released those claims.

If an applicant wants to put even more language in the C&R to further exclude civil claims, they may. For example, language such as "All parties agreed that this Compromise and Release shall have no effect whatsoever on any civil claim Applicant had, currently has, or may have. All parties agreed that this Compromise and Release settles claims within the workers' compensation jurisdiction only. Applicant does not release any defendant from any civil claim liability. Applicant currently has a pending civil claim on the case entitled [CASE NAME], et al., [COUNTY] Court Case No., [CASE NUMBER] ("Civil Lawsuit"), and the parties agree that this Compromise and Release does not have any effect on the Civil Lawsuit." However, proceed with caution that there should be no conflicting terms within the C&R as well.

Putting these kinds of conditions may upset everyone in the workers' compensation case. The applicant's attorney may be close to a settlement, but the defense now wants to settle out all civil claims. The job of the employment attorney is to protect his client's civil-case interest, so the best practice is to avoid those pitfalls.

In terms of a "voluntary resignation" requirement that could present a major difficulty in the civil case: First, it could destroy a wrongful termination and Fair Employment Housing Act (FEHA) claim. Second, it could force the employee to present a constructive discharge claim, which is much more difficult to prove than wrongful discharge. The workers' compensation carrier wants assurance that the injured worker no longer works for the employer. Therefore, a good practice here is to offer language indicating separation of employment. For example, such language as "[Injured Worker] acknowledges he/she no longer works at [Employer]," could suffice.

The best practice is to have no addenda in the C&R and no language within the C&R releasing any of the claims that are outside the workers' compensation jurisdiction.

Caution when the employee settles their employment case

A couple of crossovers which do put the applicant at risk are settling retaliation claims for filing a workers' compensation action (Lab. Code, § 132a) and injuries arising from "serious and willful misconduct…" (Lab. Code, § 4553). In many employment cases, employers will attempt to insert as part of the release that it includes claims involving Labor Code sections 132a and 4553. It is prudent for the employee's attorney to discuss with the workers' compensation attorney whether there are any ongoing claims in the workers' compensation court involving these claims.

Along these lines, employers will try to insert tricky language buried deep within a settlement agreement. Usually it will look like "plaintiff acknowledges he or she has not sustained any injuries in the workplace," or something along those lines. Although this does not "release" the workers' compensation claim, it can significantly affect their ability to obtain workers' compensation benefits if they are admitting in writing to not sustaining any injuries at work.

Best practices are to include an explicit carve-out for any workers' compensation claims. They are usually included in employment-law settlement agreements, but it is important to make sure the term is there. A sample clause is as follows: "The released claims shall not include, nor shall anything in this Agreement be construed to waive, any right that is not subject to waiver by private agreement, including, without limitation, any rights or claims arising under workers' compensation laws." Sending a copy of the drafted settlement agreement to the workers' compensation attorney to review is also a prudent practice so they can review for other potential pitfalls the employment attorney may not be aware of.

Caution when the employee tries to return to work

There are times during a workers' compensation case where an applicant's attorney may instruct their client to attempt to return to work for the employer that you may have a claim against. Often, the "employer" in the workers' compensation case is unrepresented, and it is the "insurance company" who is the actual defendant in the case.

The communications that manifest between employer and employee in the workers' compensation case once the employee has civil counsel can be fatal to various claims. For example, if an employee gets injured on the job, requests an accommodation, and suddenly gets ignored by the employer, this may result in a Failure to Engage in the

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Interactive Process claim (along with others). However, once you have started litigating your claim, the applicant's attorney may tell the applicant/plaintiff to attempt to communicate with the employer and go back to work.

The employer, who likely now has civil counsel, may tell them what to say in order to destroy any potential claim for Failure to Engage in the Interactive Process. They may say things like, "Is there a time that we can discuss your ability to work to see what duties you can fulfill?" or "Can you describe what duties you are able to do to see what accommodations we can provide?"

If the employment attorney is in communication with the applicant's attorney, the two can discuss and coordinate how these kinds of communications can affect the other. Therefore, it is important to stay in communication with the applicant's attorney and put a hold on any communications with the employer. Communications with the employer could potentially be construed as communicating with a represented party, a potential ethics violation.

Workers' compensation preemption?

Many times, employers who are defendants in employment lawsuits will argue that if an applicant is seeking workers' compensation for emotional injuries, then they are barred from seeking compensation in the civil arena as well, as it may result in a double compensation. However, this is incorrect. The exclusivity rule does not bar a suit for emotional distress damages attributed to unlawful discrimination or other misconduct that "exceeds the normal risks of the employment relationship…" (*Saunders v. Sally Beauty Supply LLC* (C.D. Cal. 2020) 2020 WL 1847620.) For example, emotional distress caused by an employer's unlawful discrimination is not preempted. (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492.) Retaliation generally is also not preempted by workers' compensation exclusivity. (See *Gantt v. Sentry Ins.* (1992) 1 Cal.App.4th 1083, 1100-1101.)

Therefore, when an employee pleads unlawful discrimination, or other causes of action outside the "normal risks of the employment relationship," they are not preempted by workers' compensation.

Employers in civil cases may also try to argue that if an applicant receives evaluations or treatment in the workers' compensation arena, they should not be able to utilize that evidence in the civil arena. This argument tends to fail. At the end of the day, a psychologist is a psychologist; whether they are evaluating an injured worker or an ex-employee, they are still evaluating a patient.

These arguments will come up at various times in civil litigation. They will come up during demurrer, when the employer may argue that certain claims are subject to workers' compensation exclusivity. They may come up during motions for summary judgment or adjudication, when the employer may argue either workers' compensation exclusivity or that various civil claims have been already settled within the workers' compensation court. They may also come up at trial when arguing motions in limine. It is best to be prepared for these kinds of arguments. The best preparation is researching and practicing opposing these arguments because they do come up frequently.

Summary: Best practices

There are a few good practices when litigating a civil claim with an ongoing workers' compensation claim. They all involve staying in communication with the workers' compensation attorney and the employee. There are many advantages to be taken from the workers' compensation case, so utilize them if you can.

It is very important to introduce yourself to the applicant's attorney and let them know that you are handling the civil matter. This can prevent problems down the line when the employee settles the workers' compensation case, as well as other pitfalls. The civil attorney should review all documents before the applicant signs. If the applicant undergoes psychological treatment or evaluations, get those records. If there are potential witness statements or if the applicant gets deposed, get those transcripts. It is best to be in communication with the applicant's attorney to see what is available.

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