

Litigating, managing and settling workers' compensation/third-party crossover cases

Overview of the (sometimes devastating) effect of a WC claim on your recovery in a crossover personal-injury case

By Tal Rubin

Workers' compensation liens have a significant effect on every aspect of a personal-injury case. They therefore require full knowledge and understanding of the statutory rights and obligations imposed on the client and the attorney. Moreover, in serious-injury cases, the existence of an accompanying workers' compensation case may require unique considerations and strategy to ensure that the client is properly compensated. Just as importantly, the client must be informed of the effect that a civil settlement may have on the parallel workers' compensation case.



General background

When an employee is injured while in the course and scope of her employment, the employee has a right to workers' compensation benefits. The choice to apply for those benefits does not preclude the employee from pursuing a claim for damages or a lawsuit against a third party for the same injury. (Lab. Code, § 3852; *De Cruz v. Reid* (1968) 69 Cal.2d 217, 222.) The typical case will then involve a client who approaches you seeking representation in her civil case, while concurrently being represented by a workers' compensation attorney and receiving medical care and disability payments through the workers' compensation system.

Lien for past benefits paid [reimbursement rights]

An employer who has paid workers' compensation benefits to an injured employee has the right to be reimbursed for the sums paid and for certain expenditures. (Lab. Code, § 3852.).

The employer's reimbursement can be obtained by one of three methods:

- An independent lawsuit against the third party. (Lab. Code, § 3852.)
- An employer may file a complaint in intervention in a lawsuit filed by the employee. (Lab. Code, § 3853.)
- An employer may simply assert a lien against the employee's recovery (judgment or settlement). (Lab. Code, §§ 3852; 3856, subd. (b).)

It is important to understand that the employer has an *independent right of action against the tortfeasor defendant*. It is for this reason that workers' compensation crossover cases are different from ordinary civil cases where a health insurer has a contractual right of reimbursement (such as a lien) from a client's third-party recovery, without a right to a direct action against the defendant.

An illustration of the dangers to you

To illustrate the significance of these factors, and the dangers that lie if plaintiff's counsel is uninformed of this issue, we will use a very common set of facts. Assume a significant injury to your client, who was in the course and scope of her employment at the time of a car accident. The client opens a workers' compensation claim for injuries sustained in the accident, and at the same time, approaches your office for civil representation against the defendant-tortfeasor who caused the car crash. The defendant has a $250,000 third-party policy limit.

You are eight months post the subject incident. Your client is still actively treating through the workers' compensation system and has not yet reached the status of "permanent and stationary." As a result, there has been no disability rating and no permanent disability award in the workers' compensation case. Yet, you are eight months post-incident, and you feel you have obtained

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enough medical records evidencing injuries which would justify a policy-limits demand to the third party.

You send out the demand on behalf of your client *only*, and the third-party carrier tenders the $250,000. You have your client sign a release, obtain the $250,000 settlement check, deposit it into your attorney-client trust account, and you then contact the workers' compensation subrogation firm, or the employer, to "resolve" the workers' compensation lien. You are then informed that the employer's total benefits paid to date in the workers' compensation case are $220,000. The subrogation attorneys tell you they will not negotiate their lien, and that they demand the full amount paid to date of $220,000 out of your total recovery of $250,000. What has happened?

In the typical case, where benefits were paid by a workers' compensation carrier/employer, and since the workers' compensation system is often much slower, it is possible that neither you, nor the third-party carrier would be approached by the employer early in the process. If the client is still treating through the workers' compensation system or has not yet finalized her workers' compensation case with a final disability rating and a permanent disability award, the employer is well within its right to deem their case against the defendant as too premature for settlement. The employer knows that its lien is growing every month and the Labor Code allows the employer to ascertain its damages before filing a lawsuit against the defendant.

Except now, in our hypothetical but common fact pattern, your client has signed a release *indemnifying* the third-party defendant from any liens, including a workers' compensation lien. You have placed your client in an impossible position and in great peril by settling the third-party case unilaterally in that manner. That may lead to significant problems once the employer's subrogation attorneys file a claim or a civil lawsuit on behalf of the employer against the third party pursuant to Labor Code section 3852, a right which an ordinary health insurer with a contractual reimbursement right does not have.

The best practice

The best course of action under these circumstances is to always contact the employer *before* sending a policy-limits demand. Ascertain the amount of the lien to date and negotiate with the employer *in advance* how to split the policy if it is tendered. Why would the employer/subrogation attorney negotiate with you in advance, as opposed to after you already settled unilaterally and indemnified the third-party? Because before settlement, your client has leverage against the employer. In most cases, no third-party carrier will settle with the employer unilaterally, and leave their insured exposed to your client's independent claim which may exceed the policy limits.

Absent a global settlement, the employer's only option is to file an independent lawsuit, litigate for two years, take the case to trial at a significant cost, and obtain a judgment. In most cases, subrogation attorneys are not looking to do that, and they want the easy way out via global settlement. Yet, if you settled unilaterally, indemnified the third-party, and have the settlement funds sitting in a trust account, you have lost all leverage and will face, in most instances, a demand for the full lien amount — and a prolonged battle.

Employer credit rights vs. lien rights

In instances where the civil case resolves *prior* to the resolution of the workers' compensation case, the client will obtain a certain net civil recovery. The employer's "credit rights" refer to the right to be relieved from the obligation to pay future workers' compensation benefits, up to the client's net civil recovery. (Lab. Code, § 3861.) The employer's credit rights against *future* workers' compensation benefits are *distinct and separate* from the employer's lien right for *past* benefits paid.

By way of example, your civil case settles for $100,000 and the client nets $35,000 after attorneys' fees, costs, and payment of the workers' compensation lien to date. The workers' compensation carrier is relieved from the obligation of continuing to pay any more benefits in the client's workers' compensation case, up to the client's net recovery of $35,000.

Due to the significant effect that the civil recovery has on the potential for future benefits in the workers' compensation case (both medical and disability), it is critical to properly inform and educate the client on all issues prior to accepting the civil settlement. For example, a client may already be approved for surgery in the workers' compensation case, but the surgery has not taken place by the time the civil case settles. The employer/workers' compensation insurance carrier may not pay for that surgery if the client's net civil recovery was higher than the surgery cost. Similarly, with respect to permanent disability, the employee's right to a lump sum permanent disability award in the workers' compensation case may be affected by the employer's credit rights.

It is therefore easy to see the importance of negotiating the credit rights at the time of the global civil settlement, such as limiting credit to permanent disability only and not medical. In any event, the client must be informed of the civil settlement's final effect on future workers' compensation benefits.

Litigation of a case with a workers' compensation lien

Notice

Upon the filing of a civil lawsuit, the employee's attorney is under a statutory obligation to provide notice to the employer/workers' compensation carrier. (Lab. Code, § 3853.)

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Common-fund reduction and employer's active participation

As noted earlier, once notice is given, the employer may either intervene or file a lien. Most plaintiff's attorneys know that if the employer chooses to just file a lien, the Common Fund Doctrine applies, and upon recovery from the third party, the employee may seek a reduction of the employer's lien amount by the proportionate share of litigation expenses, including attorney fees. (Lab. Code, §§ 3856, subd. (b), 3860, subd. (c); *Quinn v. State* (1975) 15 Cal.4th 1021, 1029.)

It is important to note that even in instances where the employer/workers' compensation carrier intervenes, but fails to "actively participate," the same common fund reduction applies: "It is well settled, that even in situations where both the employer and the employee are represented by counsel, the employee's attorney is entitled to attorney fees from the employer's recovery, if the Court finds that the employer's counsel did not actively participate in the litigation and did not participate in the creation of the settlement." (*Kaplan v. Industrial Indem. Co.* (1978) 79 Cal.App.3d 700, 708-709; see also, *Manriquez v. Adams* (2003) 108 Cal.App.4th, 340.)

The question of active participation by a particular counsel is one of fact for the trial court. (*Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1278.)

Workers' compensation doctors

The workers' compensation system in California allows the parties to use Agreed Medical Examiners (AME). These are wholly independent doctors who examine the applicant and resolve disputed medical issues. It is important for the civil attorney to obtain the AME reports and take the AME deposition in the civil case for trial testimony use, if favorable. In the eyes of the jury, such independent favorable testimony may be more effective than a plaintiff-hired medical expert.

Other considerations – employer negligence

Employer negligence affects both the reimbursement and credit rights. "An employer who has paid workers' compensation benefits to an injured employee has the right to be reimbursed for the sums paid and for certain other expenditures, except to the extent that fault attributable to the employer caused the worker's civil damages"... also, "credit is reduced by the extent to which fault attributable to the employer caused the worker's civil damages." (*Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd.* (1997) 58 Cal.App.4th 766, 769.)

The employer's percentage of negligence is determined either during the civil trial, or by a workers' compensation judge, if the civil case resolved by settlement. *Southern Cal. Edison Co., supra*, explains in detail the mathematical formula that must be followed to calculate the employer's negligence effect on the lien and credit rights. In any case where there is a claim for employer negligence which may significantly affect the employer's reimbursement and credit rights, it is important for plaintiff's counsel to study the cases on topic and negotiate accordingly, during mediation and prior to trial. Note that employer negligence applies to co-employees and agents' negligent actions as well. (*Witt v. Jackson* (1961) 57 Cal.2d 57, 69.)

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