

The intersection of civil torts and workers' comp

Counsel must work together to protect WC benefits while maximizing the civil award

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Plaintiffs' attorneys often come across situations in which their clients were injured while in the course and scope of employment, and therefore, have concurrent workers' compensation claims. To best serve their clients, it is important that plaintiffs' attorneys understand what benefits are available to their injured clients and how they can work in cooperation with workers' compensation attorneys to obtain additional monetary benefits. Where the client is due money in the workers' compensation case, collaboration between the plaintiff's attorney and the workers' compensation attorney can bring great benefit to the injured client.

This article covers the intersection of civil tort cases and workers' compensation cases, and the rights that the clients are entitled to in the workers' compensation case. This article also discusses ways in which cooperation between the attorneys in and throughout both cases can lead to the best outcome for the client. Finally, this article can assist union board members, as well as business agents, in assisting their members in understanding the competing interests of the two legal systems for industrial injuries when there is a third-party crossover case.

Workers' compensation benefits

There are five benefits that the injured worker is entitled to under the workers' compensation system. The first benefit due is to receive all medical treatment reasonably necessary to cure or relieve the injured worker from the effects of the injury from the date of the injury to the date of his death. (Lab. Code, § 4600 et seq.)

The second benefit due the injured worker is temporary disability. (Lab. Code, § 4650 et seq.) Temporary disability is due when a treating or evaluating physician finds that the worker is unable to work at his job because of the injury. Temporary disability is due for up to two years. After that period has elapsed, the worker may be due State Disability Insurance ("SDI"), for an additional year. The rate of temporary disability is calculated at 2/3 of the injured worker's wages in the 52 weeks preceding the injury up to a statutory maximum, which is currently set at approximately $2200 a week.

The third benefit due is permanent disability. (Lab. Code, § 4650 et seq.) The amount of permanent disability may be calculated either by a treating physician, or by a Qualified Medical Evaluator ("QME"). Obtaining the report(s) of the doctor(s) and selection of the primary treating physician ("PTP") are areas in which the interests of the workers' compensation and the plaintiff's attorney are aligned.

The reports of the QME and/or of the PTP determine what are the subjective and objective manifestations of the disability; they determine what is the permanent disability and what work restrictions are appropriate given the disability. The reporting of the QME or PTP also determines what the need for future medical care is. Selection of the specialty and sophistication of the PTP or QME is crucial, and the plaintiff's attorney may be of assistance in selecting the PTP or QME. The numerical value assigned by the evaluating doctor is run through a schedule for rating permanent disability, which will yield the final percentage of disability. The value of permanent disability can be worth from $870 for 1%, up to $260,202.50 for a 99% disability. If the worker is 100% permanently disabled, the value of the worker's case can range from one million to several million dollars.

The fourth benefit is a Supplemental Job Displacement Voucher ("SJDB"). (Lab. Code, § 4658.5 et seq.) The doctor may decide that the work the worker did before the accident can be resumed or that the worker is precluded from returning to the position. In the event the worker is deemed precluded from their prior job duties, the insurer is required to provide the worker with a voucher good for $6,000 in retraining. In addition to that sum, the worker can apply to the Return-to-Work Fund administered by the state of California which provides them with $5,000 in additional retraining funds applicable to work retraining programs.

The final benefit due is if the worker dies as a result of the injury. (Lab. Code, § 4700 et seq.) The injured worker's dependents are due death benefits, which can range from $250,000 to $350,000 total.

The applicant's attorney can help plaintiff's counsel

There are several benefits the workers' compensation attorney can provide to the plaintiff's attorney. These include the obtaining of medical records via subpoena or authorization without cost. The workers' compensation attorney can also help in arranging for treatment by a doctor. Additionally, they can provide

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for a competent QME's report without cost. The workers' compensation attorney can also obtain a qualified medical evaluation in specialties which are amenable to a life-care plan.

The plaintiff's attorney can also provide benefits to the workers' compensation attorney. Among the benefits are getting tests which the workers' compensation carrier has denied, including expensive tests like an EMG, an MRI or FMRI, etc. The workers' compensation attorney can use such results in the prosecution of the workers' compensation case.

Employer fault

It is important for both the plaintiff's attorney and the workers' compensation attorney to be well versed in California Labor Code sections 4600-4604, which describe the duties of an employer to provide a safe place to work. "In general, an employer's statutory duty under the Labor Code is greater than a duty of care imposed pursuant to common law principles." (*Bonner v. WCAB* (1990) 225 Cal.App.3d 1023, 1034.) Those duties encompass many responsibilities, including the duty to inspect the workplace, to discover and correct any dangerous condition, and to give warning of the dangerous condition. Employers must also comply with all applicable codes and regulations regarding safe working conditions, including OSHA regulations. (*Eisner v. Uvages* (2014) 34 Cal.4th 915, 924.) The plaintiff's attorney and the workers' compensation attorney should work with their client to investigate any and all avenues of discovering employer fault based on the desire to obtain remuneration in both forums for the client.

Where a lien is asserted in the civil case, the civil attorney can adduce evidence of employer fault that will be valuable to both the applicant's attorney and the civil attorney. By obtaining evidence of employer fault, said fault of the employer can be used to reduce or eliminate the claims to lien and credit rights. As our Supreme Court has explained, "It is contrary to the policy of the law for the employer, or his subrogee, the insurance carrier, to profit by the wrong of the employer." (*Witt v. Jackson* (1961) 57 Cal.2d 57, 72.)

Settlement

Settling a personal-injury case without considering the value of a workers' compensation case is a mistake. It is a much better strategy to cooperate between the plaintiff's attorney, and the workers' compensation attorney. The civil attorney needs to proceed very cautiously before settling the personal-injury case. Generally speaking, the workers' compensation insurance carrier will seek subrogation in the personal injury case, either by filing a lien or via a complaint in intervention. The plaintiff's attorney is required to give the employer and the compensation carrier notice of the pendency of the personal injury case. (Lab. Code, § 3861.) The best way to do this is to do a notice of third-party action and attach a copy of the complaint and answer if there are any allegations of employer fault. The carrier will seek reimbursement for the money it has paid. Where the client is entitled to additional compensation benefits and where the client has received recovery in the civil case, the workers' compensation carrier may assert credit against any future workers' compensation benefits due. This operates as a bar to future benefits.

At this point it is important for the two attorneys to work out an agreement to protect the fees of the workers' compensation attorney in the workers' compensation case. Settlement of the civil case will create a bar to the workers' compensation attorneys' fee due to a credit. (Lab. Code, § 3861.) Where there is no employer fault, an employer credit of the amount of money the injured worker receives from the civil case will be granted by a workers' compensation judge. Absence of employer fault means that credit will be granted against any and all future workers' compensation benefits. This agreement benefits both attorneys. It engenders the good will of the compensation attorney and may create a future referral source for the plaintiff's attorney. This embraces the interests of the client in both cases. The absence of such an agreement means the workers' compensation attorney gets nothing for his or her work after the Petition for Credit is granted.

Timing of any settlement is important

The timing of the settlement of both cases is another area in which cooperation between the two attorneys can make it happen for the client. As discussed above, the lien claimant or complainant in intervention will be seeking reimbursement for the monies paid to the injured worker in the compensation case. Settlement of the civil case before the workers' compensation case will wipe out the workers' compensation case. If the attorneys in both cases cooperate in establishing employer fault, both cases will benefit. For example, in a car accident case where the client was in the course and scope of employment, if the civil attorney does an inspection of the client's work vehicle involved in the collision and pays special attention to the cab area, they may find that the seatbelt or seat may not operate properly, or the design of the seatbelt or the head rest may be defective, or the method of storing materials may not have been secured properly, etc.

Assuming that the compensation case settles first, the plaintiff's attorney will be facing a lien in the civil case. If there is evidence of employer fault, the evidence will determine the credit threshold. For example, if the civil case has a value of $1,000,000 and there is 25% employer fault, the employer must have paid at least $250,000 before it will be able to recover on its lien. Following the determination of legal responsibility, the matter is cut and dried. The compensation carrier receives nothing for its lien.

If the matter is settled rather than tried, there will have been no judicial

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determination of employer fault, so it will fall to the compensation arena to determine the rights of the worker and the compensation carrier. Usually, the carrier will petition for credit following settlement. (Lab. Code, § 3861; *Row v. WCAB* (1974)23 Cal 3d 891.) If successful, the employer will receive a credit against the client's net personal-injury recovery. This would end the workers' compensation benefits in this claim.

In such a credit claim, evidence from the personal injury attorney can provide valuable information for the workers' compensation judge on two main issues: the employer fault and personal injury damages. Here, the plaintiff's attorney can play a crucial role as an expert on the total case value and the fault of the employer. The plaintiff's attorney is entitled to be paid for his or her time (see *Bonner infra*). The WCAB has to determine legal responsibility, past medical treatment, future medical treatment, past and future wage loss and also general damages. Most workers' compensation judges are grateful for the service of an expert because it simplifies their job of acting as a 13th juror.

Conclusion

The intersection of workers' compensation and personal injury cases can be a complicated area of law to navigate. Plaintiffs' attorneys are behooved to learn, at a minimum, what their clients are entitled to through their workers' compensation claims. Through experience, the savvy practitioner will discover that there are multiple important benefits an injured client is entitled to in the workers' compensation claim and there are situations where the attorneys in the civil and workers' compensation case can cooperate to obtain the best results for the injured client. The plaintiff's attorney is therefore encouraged to proactively reach out to the workers' compensation attorney from the very beginning and throughout the case to maximize the injured client's compensation.



Butler

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