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CASES & COMMENTS ON WORKERS' COMPENSATION

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SOMEBODY ELSE DID IT!

A PRIMER ON THIRD PARTY CASES

THIRD PARTY REMEDY

The employee and employer each have an independent cause of action for damages against a negligent third party. Lab. Code § 3852; *Buell v. CBS, Inc.* (1982) 136 Cal. App. 3d 823, 825, 186 Cal. Rptr. 455. The employee may simultaneously proceed against the third party for civil damages and against the employer for workers' compensation benefits for the same injury. Lab. Code § 3852; *Finney v. Manpower, Inc.* (1981) 123 Cal. App. 3d 1066, 1069, 177 Cal. Rptr. 74. However, any amount that the employee recovers from the third party is subject to the employer's right of reimbursement for compensation already paid or credit against future compensation paid to the employee or to the employee's dependents (for a death claim) on account of that injury. Lab. Code § 3852; *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal. App. 4th 376, 383-384, 22 Cal. Rptr. 2d 360, 58 Cal. Comp. Cases 543.

Statutory subrogation under the labor code is the independent right of an employer, or an employer's insurance carrier, to recover compensation paid to the employee against a third party, by whose fault the employee has sustained an industrial injury. Lab. Code § 3852.

The right to seek reimbursement arises by operation of law concurrently with the liability to pay compensation to an injured employee. Lab. Code § 3852; *National Auto. & Cas. Ins. Co. v. Ainge* (1950) 34 Cal. 2d 806, 810, 215 P.2d 13, 16 Cal. Comp. Cases 53. Although the classic term "subrogation" is used to describe the activation of this right by the employer ("the subrogee") this right of action against a third party who has caused compensable injury to an employee is separate and distinct from the employee's cause of action, and is not dependant on the employee filing a lawsuit first. *Limited Mutual Etc. Ins. Co. v. Billings* (1946) 74 Cal. App. 2d 881, 883, 169 P.2d 673, 11 Cal. Comp. Cases 184.

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The idea behind the subrogation statutes is an avoidance of double recovery by the employee who elects to claim benefits under the compensation law and also seeks civil damages for his or her injuries from a negligent third party.

The parties ordinarily involved in subrogation cases are the allegedly negligent third-party, the employer or the employer's insurance carrier, and the employee. When the employer has an insurance carrier, the right of subrogation passes to that carrier on its assumption of liability in the compensation case or upon payment of any compensation for which the employer is liable. The insurer may proceed as a party in its own name.

To obtain a recovery or reimbursement, several courses of action are available to the employer or its Workers' Compensation carrier. Formal action, short of informal settlement with a negligent third party, can include independent suit by the employer in the employer's name against the third party, intervention by the employer as a plaintiff in a suit previously filed by the employee, and the filing of a lien claim in a suit previously filed by the employee. Aside from these alternatives in civil court, or even in addition to them, the employer (or its carrier) may file a petition for credit in the workers' compensation proceeding against future liability on the compensation case. These remedies are independent of each other, and the employer may choose any one of them

LIENS

When the employee has filed suit against the negligent third party, the employer, without filing suit or intervening as a party, may file a lien against the amount of any judgment recovered by the employee. This lien is payable after payment of reasonable litigation expenses and a

reasonable attorney's fee to the employee's attorney for services rendered in effecting recovery both for the benefit of the employee and the employer. Lab. Code § 3856(b)

If all of the parties agree, and no claim of the employer's comparative negligence is raised by the third party, the employer's lien claim may be established by stipulation, thus avoiding the trial time and expense that would be taken up in proving the amount of the benefits paid by the employer, which amount is usually not in dispute.

Lien rights may be sold to another party in the civil case. This gives the carrier some guaranteed and early recovery on a percentage of its lien, and it gives the lien purchaser full credit for the value of the lien. However, if the third-party defendant purchases the employer's compensation lien, it steps into the shoes of the employer and gains no greater rights than those originally owned by the employer. Until a judgment is entered, the third party merely holds an expectancy, and if the employee fails to obtain a judgment in his or her favor, the lien becomes worthless. *Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 788-789, 20 Cal. Rptr. 2d 265, 58 Cal. Comp. Cases 342.

INTERVENTIONS

As an intervenor in the employee's action, the employer becomes an additional plaintiff in the action. Lab. Code §§ 3852, 3856(c); *DeMeo v. St. Francis Hosp.* (1974) 39 Cal. App. 3d 174, 114 Cal. Rptr. 280, 39 Cal. Comp. Cases 462. As an intervenor, the employer has the same procedural rights and remedies as the employee and the third party. *Catello v. ITT Gen. Controls* (1984) 152 Cal. App. 3d 1009, 1013, 200 Cal. Rptr. 4. If the employer remains a plaintiff in intervention its right to reimbursement must be expressly set forth in both the verdict and in the judgment obtained by the employee against the third party.

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The statutes authorize intervention in an existing civil case "at any time before trial on the facts." Code Civ. Proc. § 387; Lab. Code § 3853; *Mar v. Sakti Internat. Corp.* (1992) 9 Cal. App. 4th 1780, 1782-1785, 12 Cal. Rptr. 2d 388, 57 Cal. Comp. Cases 703.

An employee, as plaintiff, can settle around the employer as plaintiff in intervention but the employer's action in intervention nevertheless continues against the third party. *LaBorde v. McKesson & Robbins, Inc.* (1968) 264 Cal. App. 2d 363, 369, 70 Cal. Rptr. 726, 33 Cal. Comp. Cases 478. Sometimes this strategy is employed, or at least threatened, by third party defendants who may presume that the intervenor is not prepared to proceed with what might be an expensive trial.

Labor Code § 3854 provides that workers' compensation payments will be deemed to be reasonable and proximately resulting from the employee's injury. The third-party tortfeasor may not litigate the reasonableness of the amount paid as workers' compensation. *Mendenhall v. Curtis* (1980) 102 Cal. App. 3d 786, 791, 162 Cal. Rptr. 569.

Just as when the employer files a lien and then waits, when the employer files a complaint in intervention, the employer's recovery may be reduced by an amount sufficient to compensate the employee's attorney for the expense and effort that produced the employer's recovery when the employer's attorney does little more than file the complaint in intervention. *Kaplan v. Industrial Indem. Co.* (1978) 79 Cal. App. 3d 700, 709, 145 Cal. Rptr. 219, 43 Cal. Comp. Cases 563. However, if the employer actively participates in the employee's suit through its own attorney, no fee from the employer's share of the recovery is payable to the employee's attorney. Attending depositions, consulting with the employee's

experts before trial, presenting evidence regarding compensation benefits, participating in cross-examination, and delivering a closing argument constitute active participation as a matter of law. *Walsh v. Woods* (1982) 133 Cal. App. 3d 764, 768 n.1, 184 Cal. Rptr. 267

CREDIT

The Workers' Compensation Appeals Board is empowered and required to allow, as credit to the employer or carrier to be applied against liability for compensation, the amount of any net recovery by the employee for his or her injury, either by settlement or after judgment. "Net" recovery means after the payment of expenses or attorney's fees, pursuant to the provisions of Labor Code §§ 3856, 3858, or 3860, and after consideration of any recovery the employer may have already made on the civil case. Lab. Code § 3861; *Associated Construction & Engineering Co. v. W.C.A.B. (Cole)* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333.

The failure to file a lawsuit or to intervene, or to assert a lien, or even the settlement of a claim in the civil case is not a settlement or a waiver of a credit right in the Workers' Compensation case. *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843.

An employer is also entitled to a credit against the employee's compensation recovery when its lien for benefits in the civil case has been paid, but the employee is seeking further workers' compensation benefits.

The employer's right to a credit is determined by the Workers' Compensation Appeals Board in the injured employee's compensation proceeding and not in civil court, although the facts found in a civil court proceeding, such as the amount of

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the employee's total damages and the respective percentages of fault of the parties, may be considered by the WCAB in making its determination. *Dighton v. Martin* (1935) 4 Cal. App. 2d 401, 405-406, 41 P.2d 197.

Portions of a settlement allocated to a claim independent of the employee's claim, such as a claim for loss of consortium by an employee's spouse, are not subject to an employer's claim for credit. *Gapusan v. Jay* (1998) 66 Cal. App. 4th 734, 742-743, 78 Cal. Rptr. 2d 250. However, the court of appeal, in an unpublished opinion held that the Board's equitable power includes the power to reallocate civil court settlement proceeds in order to enforce an employer's third-party credit rights before the WCAB. This extends to situations when an injured employee and his or her spouse have colluded in a civil case to make a bad faith and/or fraudulent allocation of the settlement proceeds in order to defeat the employer's third-party credit rights. The Board has even taken the position that it has the power to reallocate whenever the employee's spouse has received a "disproportionate" settlement. *CNA v. W.C.A.B.* (Kirkeby) (2006) 71 Cal. Comp. Cases 149, 152-154 (court of appeal opinion not published in official reports.)

USING THE CREDIT

The credit under Labor Code § 3861 for the net amount of the employee's third-party recovery may be applied against any compensation liability conferred by Division 4 of the Labor Code, including penalties awarded under Labor Code § 4553, medical-legal costs, *State Compensation Ins. Fund v. W.C.A.B.* (McDowell) (1977) 76 Cal. App. 3d 136, 138, 142 Cal. Rptr. 654, 42 Cal. Comp. Cases 1023, rehabilitation costs, *Oldaker v. McGrath Steel Co.* (1981) 46 Cal. Comp. Cases 186 (Appeals Board En Banc Decision), future medical treatment, *Simmons v. L. & S. Lighting Fixture Co.* (1978) 43 Cal.

Comp. Cases 341 (Appeals Board En Banc Decision), and attorney's fees awarded in the employee's compensation case. *State Comp. Ins. Fund v. W.C.A.B.* (Borges) (1997) 53 Cal. App. 4th 579, 583, 61 Cal. Rptr. 2d 794, 62 Cal. Comp. Cases 300, 302. It also applies against lien claims. *Trustees Collection Service v. W.C.A.B.* (Lyon) (1997) 62 Cal. Comp. Cases 997, 997-999 (writ denied).

The Appeals Board has held that the language of Labor Code § 3858, to the effect that "the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee ... up to the entire amount" of the employee's net recovery from a third-party settlement, was not limited to expenses incurred by the employer subsequent to the third-party settlement, but included expenses incurred prior to that settlement. Thus, the employer was allowed to assert the credit that it had been awarded against lien claimants who had filed liens for medical treatment provided to the employee prior to the third-party settlement. The lien claimants' sole recourse was to proceed against the employee. *Trustees Collection Service v. W.C.A.B.* (Lyon) (1997) 62 Cal. Comp. Cases 997, 997-999 (writ denied).

Absent a stipulation, the right to use a credit and the amount of the credit is dependant on a WCAB determination and order, and should not be unilaterally taken by the defendant in the compensation case due to potential penalty exposure.

Settlement of a civil claim while the compensation case is ongoing is not a waiver of the right to credit with respect to additional compensation later awarded, absent settlement language to the contrary. A cautionary note, however: The employer or the insurer may be deemed to have waived the right to a further

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credit by agreeing to overbroad language in the settlement agreement, such as by agreeing to a "full and final release of all claims, demands, actions, and causes of action arising out of the accident." *County of San Mateo v. W.C.A.B.* (Gladysz) (1983) 48 Cal. Comp. Cases 244 (writ denied).

An employer may agree to resolve its reimbursement claim with the third party by assigning its lien to the third party in exchange for an immediate payment of a portion of its claim without a finding of employer fault. A third party who purchases an employer's reimbursement claim and takes an assignment of the lien from the employer is entitled to deduct the full amount of the lien from the injured employee's damages verdict, unless there is a finding of employer fault. *Quinn v. Warnes* (1983) 144 Cal. App. 3d 309, 312, 192 Cal. Rptr. 660.

The employer may even assign its lien to the injured employee, and such an assignment does not violate the prohibition against a double recovery. *Engle v. Endlich* (1992) 9 Cal. App. 4th 1152, 1164-1165, 12 Cal. Rptr. 2d 145, 57 Cal. Comp. Cases 617. However, this is an area where carriers and employers are strongly cautioned to get expert legal help. This writer was once assigned by a carrier to mollify the parties and a civil judge in a case where an adjuster sold the lien to both the plaintiff and the defendant!

COMPARATIVE FAULT

When the employee's injury is caused, in part, by the employer's negligence, the employer is entitled to reimbursement or credit only to the extent that its compensation liability exceeds its proportional share of the employee's recovery in the third-party action. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 599, 7 Cal. Rptr. 2d 238,

828 P.2d 140, 57 Cal. Comp. Cases 345. The fault of the injured employee's co-employees is attributed to the employer under the doctrine of respondeat superior, but the fault of the employee is not. *Rodgers v. W.C.A.B.* (1984) 36 Cal. 3d 330, 337, 682 P.2d 1068, 49 Cal. Comp. Cases 513. Thus when the employer is not negligent, the employer's claim for reimbursement of compensation benefits paid may not be reduced merely because the employee was negligent. *Kemmerer v. Challenge* (1980) 105 Cal. App. 3d 334, 338, 164 Cal. Rptr. 397.

An employer who is partially at fault for the employee's injuries is entitled to reimbursement for the amount of compensation benefits paid once the employer has paid benefits that exceed the employer's proportional share of the employee's total civil damages. *Associated Construction & Engineering Co. v. W.C.A.B. (Cole)* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333. The California Supreme Court has expressly rejected the contention that an employer is not entitled to reimbursement until it has paid benefits equal to the proportion of the civil damages attributable to the negligence of both the employer and the employee. *Rodgers v. W.C.A.B.* (1984) 36 Cal. 3d 330, 337, 682 P.2d 1068, 204 Cal. Rptr. 403, 49 Cal. Comp. Cases 513. When the employer's percentage share of responsibility for the employee's total recovery is greater than the compensation benefits paid, then its claim for reimbursement will be denied. *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 512, 156 Cal. Rptr. 41, 595 P.2d 619, 44 Cal. Comp. Cases 714

THE FORMULA

The employer is required to pay compensation benefits to the injured employee up to the employer's proportional share of the employee's total damages before the employer is entitled to a

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credit against future liability for these benefits. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 599, 7 Cal. Rptr. 2d 238, 828 P.2d 140, 57 Cal. Comp. Cases 345. This threshold amount is determined by multiplying the total damages by the employer's percentage of fault. For example, when the employer is 10 percent negligent and the employee's total damages are \$100,000, the employer is not entitled to a credit until it pays to and or on behalf of the injured employee \$10,000 in compensation benefits. *Associated Construction & Engineering Co. v. W.C.A.B. (Cole)* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333.

When the third party's negligence aggravates the effects of a previous industrial injury, the employer is not entitled to reimbursement of the total amount of compensation benefits paid on account of the original injury, but is entitled to reimbursement for the amount of benefits paid as a result of the aggravation, which they would not have had to pay absent the subsequent event. The employer will bear the burden of proof on this, which is difficult and will require convincing expert medical evidence. *Rhode v. National Medical Hospital.* (1979) 93 Cal. App. 3d 528, 155 Cal. Rptr. 797, 44 Cal. Comp. Cases 706.

IN SUMMARY

The above information is by no means comprehensive. Subrogation, even insofar as it applies to the Labor Code and Compensation cases, is a complex area requiring legal expertise. Many subjects including liability basics, special procedural issues, and complexities involving certain industries (such as safety officers, contractors, indemnification agreements and the like) are not discussed due to space limitations but are not uncommon. Expert legal assistance in these areas is definitely recommended.

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Editor's Note: Reports concerning writ denied cases are published in the California Compensation Cases and may be cited at WCAB trial level but are not binding authority on a WCAB trial judge. WCAB *en banc* decisions as well as published opinions of the Court of Appeal and the Supreme Court are controlling case law on the issues addressed in the opinion

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