Mediation in the face of a workers' compensation lien

By Elinor Leary

An injured employee is entitled to receive workers' compensation benefits for an industrial injury. This does not restrict the worker's right to sue a third party for damages for the same injury. (Labor Code § 3852; *De Cruz v. Reid* (1968) 69 Cal.2d 217.)

The amount a plaintiff is entitled to recover as damages often exceeds what may be recovered as workers' compensation benefits. Only by pursuing a civil action will the injured person recover all to which they are entitled. There are strategic reasons why an attorney would choose to *not* bring a third party case, such as a defendant's lack of assets or liability insurance. For purposes of this article, let's assume that the plaintiff has brought a civil case and a comp case, and that both cases are ongoing at the point where you are ordered to or agree to mediation.

By the time your civil case is ripe for mediation, the workers' compensation insurance company will have paid benefits for medical care and temporary disability. The latter is intended to replace a portion of your client's lost wages. These benefits may be significant. And the workers' compensation insurance company will assert that it is entitled to reimbursement from any proceeds collected in the civil suit. (Labor Code §§ 3602(a), 3852; *Kavanaugh v. City of Sunnyvale* (1991) 233 Cal.App.3d 903, 908; *Quinn v. State of California* (1975) 15 Cal.3d 162, 167.) In such cases, the workers' compensation carrier or administrator will usually intervene – file a complaint-in-intervention – to recover benefits paid. (Labor Code §§ 3850, subd. (b), 3852; *Draper v. Aceto* (2001) 26 Cal.4th 1086, 1088.) The carrier will also typically file a Notice of Lien, which will enumerate the amounts paid to date and whether such sums have been paid towards medical expenses or for temporary disability.

In preparation for mediation, you must be sure that the workers' compensation carrier is on notice of the mediation and is planning to attend. It is rare that a subrogation adjuster appears in person. Usually the subrogation attorney attends solo. And because the negotiation involving the third party defendant will drive your position with the workers' compensation case, you may wait until the eve of mediation (i.e., the afternoon before) before you and the mediator speak with the subrogation attorney. Be patient. Subrogation attorneys usually are.

Once you have contacted the subrogation attorney to put that attorney on notice of the mediation, ask the attorney for an updated lien amount. A subrogation attorney should be able to provide you with an up-to-date printout of each and every item being claimed as an element of the comp lien. Be sure to review it – from time to time there are erroneous entries, such as claims of mileage or for translation services that you can easily negotiate away.

When you get to mediation, you may be able to reach a global settlement with the third party defendant and the compensation lienholder. This requires that the compensation carrier have current lien figures in hand; and that the workers' compensation case is at a stage where the carrier is ready to consider negotiation of its lien (or its right to credit). It is important to also involve the applicant attorney in the leadup to this point, making sure not to jeopardize the plaintiff's concomitant applicant benefits in the workers' compensation case.

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If the case is not ripe for a global settlement, then the best strategy is to focus on the third party defendant first. Be prepared to hold harmless, indemnify, and defend the third party defendant against the comp lien. Save the workers' compensation lien for further discussion or mediation down the road.

Once you focus on lien negotiations with the comp subrogation attorney, one of the big issues to discuss will be whether the evidence has demonstrated any employer

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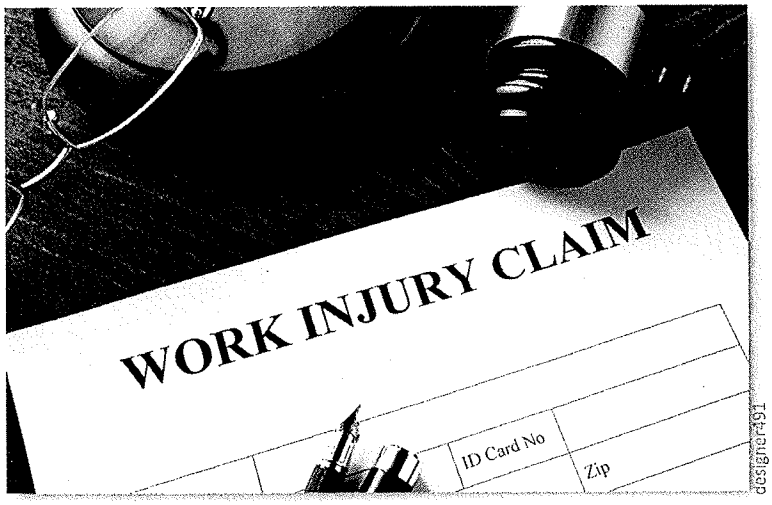

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fault. This is because a workers' compensation insurer can only recoup the amount of benefits paid to the employee if the employer is determined to *not* be negligent. (See *Aetna Casualty & Surety Co. v. Superior Court* (1993) 20 Cal.App.4th 1502.) The historical underpinnings of this rule are found in *Witt v. Jackson* (1961) 57 Cal.2d 57. In *Witt*, the California Supreme Court held that an employer could not recover comp benefits paid per the Labor Code if the employer's negligence contributed to the employee's injury. Since *Witt*, an employer must litigate the issue of its own negligence to recover benefits paid. (See *Ellis v. Wells Manufacturing, Inc.* (1989) 216 Cal.App.3d 312.)

As a historical point, when *Witt* was decided an employer retained the right to veto any settlement with a third party defendant. This gave a contributorily negligent employer a huge tactical advantage in settlement negotiations – one which usually did not reflect its likelihood of success at trial. In 1971, Labor Code sections 3859 and 3860 were amended to fix this problem. Section 3859, subdivision (b) now provides: "Notwithstanding anything to the contrary contained in this chapter, an employee may settle and release any claim he may have against a third party without the consent of the employer. Such settlement or release shall be subject to the employer's right to proceed to recover compensation he has paid in accordance with Section 3852."

This is the change that enables a civil plaintiff to "settle around" the compensation insurer at mediation. As discussed above, this becomes important in the event that the insurer is not prepared to negotiate, whether because they do not possess current lien figures or because they are not prepared to discuss issues of employer fault that can result in a reduction of the lien.

If the employer is at fault, even partially, it is only entitled to reimbursement when the amount of benefits paid is greater than the employer's share of responsibility for the employee's total recovery. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502.) Said another way, employer fault may bar or reduce its right to reimbursement. This is true even in cases of strict liability (*Anderson-Cottonwood Disposal Serv. v. WCAB* (*Webb*) (1982) 135 Cal. App.3d 326, 311.)

For example, assume a total recovery of $1,000,000 in the civil action. The workers' compensation carrier seeks reimbursement of compensation benefits totaling $200,000. There is evidence in the case that the plaintiff's employer (or co-employee) is 10% at fault; your client is 20% at fault; and the third party defendant is 70% at fault. In this scenario, the comp carrier would only be entitled to recover a maximum of $100,000 on its lien claim – which is the amount by which the $200,000 lien exceeds the employer's proportional share of the employee's damages (10% of $1,000,000). You may have noticed that in the above example, the employee's percentage of negligence did not affect the workers' compensation carrier's right to reimbursement from the third party tortfeasor. This is because the employee's recovery in the civil case is, of course, already reduced by the amount of damages due to his or her own negligence. (*Aceves, supra* 24 Cal.3d 502.)

In addition to arguments about employer fault, your negotiation should also contemplate the common fund doctrine, under which the party who expends costs and attorney fees in obtaining a result which creates a fund from which others derive benefits may require those passive beneficiaries to bear fair share of litigation costs.

The policy reasons for the common fund doctrine are implicated here: Fairness to the successful litigant whose recovery might otherwise be consumed by expenses, prevention of unfair advantage by requiring passive beneficiaries to bear a fair share of the burden of recovery, and encouragement of attorneys, who will be more willing to take cases if assured of prompt compensation when successfully recovering a judgment. (*Crampton v. Takegoshi* (1993) 17 Cal.App.4th 308 (abrogated in part by *Phelps v. Sostad* (1997) 16 Cal.4th 23).)

In workers' compensation matters, the common fund concept is codified. Labor Code section 3856 governs the allocation between employee and employer of a judgment obtained against a negligent third party. In most cases, mediation of a civil case will involve an attorney for the lienholder (the comp subrogation attorney) and an attorney for the plaintiff (you!). When a judgment is reached against a third party defendant through the efforts of both the employer and the employee, a resulting judgment shall be used first to pay the "reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee." (Labor Code § 3856, subd. (b).)

Under this framework, how do you figure out whose efforts resulted in what? Look for signs of "active participation."

It's easy if the comp lienholder does not intervene. But in the more common scenario when it does, and the subrogation attorney has attended depositions, case management conferences, and other proceedings, it's incumbent on you to show the extent to which you took the laboring oar in getting the case settled. You may want to start with the basic common fund doctrine framework for figuring out the relative value of each attorney's services. What was the demonstrated skill and ability of each attorney? What was the complexity of issues at hand, and whose work was at the heart of resolving those issues? And what was the cause of the success of the mediation with the third party defendant? Identifying the ways in which your efforts resulted in success in the civil case is a good starting point.

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Contrast your efforts to those of counsel for the workers' compensation carrier. Merely retaining separate counsel or filing a complaint in intervention or lien, with nothing more, does not satisfy the standard of "active participation." Conclusory statements of participation in deposition, attended settlement conferences, and opposed motion may not be sufficient to establish "active participation." (*Hartwig v. Zacky Farms* (1992) 2 Cal.App.4th 1550.)

After the allocation issue is resolved, statutory rules dictate the order of the distribution of settlement proceeds, as well as the employer's and employee's respective rights to payment of attorney fees from the settlement proceeds. (See Labor Code § 3860.) First, the proceeds are to be used to pay the costs of litigation, including reasonable attorney fees. Second, after litigation costs are fully paid, the proceeds are to reimburse the employer's compensation costs. Finally, after payment litigation costs and reimbursable compensation costs, the employee receives any balance remaining from the settlement proceeds.

"Without labor nothing prospers." (Sophocles) Preparing to negotiate is hard work. But success at mediation can be a huge benefit to your client, and well worth the effort. ■