

**CALIFORNIA**  
**WORKERS' COMPENSATION**  
**SUBROGATION**

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# **CALIFORNIA WORKERS' COMPENSATION SUBROGATION**

Workers' Compensation benefits represent the injured employee's exclusive remedy against the employer for injuries sustained AOE/COE [Note: there are limited exceptions under the California Labor Code]. However, the injured employee retains civil recovery rights against third parties by whose fault the employee has sustained an industrial injury.

The employer and/or the employer's workers' compensation carrier also have the right to seek recovery of workers' compensation benefits and employer provided benefits paid to or, on behalf of the injured worker.

Employer subrogation rights have developed so that an injured employee does not benefit by obtaining a "double recovery" for benefits obtained pursuant to workers' compensation law along with civil damages from responsible third parties for the same injuries. Reimbursement to the employer negates the "double recovery".

A statutory scheme for the interplay among injured employees, employers and/or workers' compensation carriers and, third party defendants is set forth in the California Labor Code §3850 – 3865 [See Addendum "A"]. Additionally, a significant number of cases have

been decided in the California Courts of Appeal and the California Supreme Court covering the numerous issues related to the interpretation of the code sections.

Pursuant to Labor Code §3850(b) “employer” includes “insurer”. I will be referring to the employer intending the term to encompass the worker’s compensation carrier.

### ORIGINAL COMPLAINT

The employer may become involved in a third party case by filing an original third party complaint against a third party alleged to be responsible for causing the AOE/COE injury. For various reasons, the injured employee may not be pursuing a third party claim. At times, the injured worker receives workers’ compensation benefits in an amount that he believes will exceed any claim for damages. There would be no benefit to the employee to file and prosecute a third party claim where the entire amount of the third party recovery would go to the employer. If the employer desires to be reimbursed for compensation benefits it will be necessary for the employer to file a complaint within the applicable statute of limitations (currently 2 years in California). The employer has the burden of proving up liability, causation and damages against the third parties. Any recovery over and above the amount of workers’ compensation benefits would belong to the injured employee, less a reasonable attorney fee to be awarded for obtaining the employee’s money.

If both the employee and the employer file an original complaint then, the two matters are consolidated for further litigation proceedings.

The typical situation arises when the employee files the original complaint against a third party. Thereafter, the employee has the obligation of serving the employer with a copy of the complaint by personal service or, by certified mail followed by proof of service being filed at the Court.

### LIEN CLAIM

After the employer becomes aware of a third party complaint having been filed by the employee, choices must be made regarding how to proceed. The employer may file a lien against any judgment to be recovered by the employee. The lien will be reduced by the reasonable employee attorney fee for creating the fund from which employer reimbursement is obtained.

The employer lien claimant does not actively participate in the litigation process. However, to the extent that the litigating employee and defendant do not object there may be a benefit to appearing at some proceedings such as significant depositions of witnesses or, settlement proceedings such as mediations.

The lien claim approach may be initiated when the claim for reimbursement is relatively low and the cost of litigating the reimbursement claim mitigates against active involvement.

## EXAMPLE 1

Joe is on an errand for his employer in the company truck. While driving to the store another driver runs a red light and strikes Joe's vehicle. Joe breaks his small finger on his left/minor hand when he jams it against the steering wheel. He is off work for one week (\$500.00 TD), receives medical treatment (\$500.00), a medical-legal report (\$125.00) and makes a great recovery but for residual pain in his finger (1% - \$870.00). Joe settles his workers' compensation claim for \$2000.00. The claim for reimbursement is \$3,125.00. Joe has the illusion of recovering a huge sum of money from the other driver's insurance company. He demands \$100,000.00 or he will go to trial. His demand is not met so he files his complaint. The driver's carrier does not want to settle with the employer. Adding up the \$435.00 filing fee, employer attorney fee expense and other litigation costs it is more beneficial to file a lien rather than litigate the claim. It is anticipated Joe will recover enough to reimburse the employer but, not too much more than that amount. After reducing the lien claim by a reasonable attorney fee to Joes' attorney, the net recovery is better for a lien than recovery after litigation.

There may be concern about the successful prosecution of a third party claim no matter the extent of the employer's claim. Third party liability may be questionable. If there is no judgment against the third party defendant there may be concern that the employer could be held responsible for the third party's recoverable costs of litigation.

## EXAMPLE 2

Joe's intersection accident results in significant injury to Joe. His workers' compensation benefits total \$50,000.00. Investigation establishes there are several witnesses who say it was Joe

who ran the red light. Joe, nonetheless, wants \$1,000,000.00 to settle. The employer will likely derive no economic benefit by intervening in the third party case filed by Joe. Better to lien the case with the hope that a credible witness appears who can say Joe did not run the red light resulting in Joe's third party recovery and reimbursement of the lien.

It is also possible that third party case evaluation points to employer comparative fault sufficient to result in little or no employer recovery should the employer litigate its claim for reimbursement. The lien is filed with the intent of developing a cost-effective small third party recovery by reaching a settlement with a third party defendant or, a reimbursement agreement with the plaintiff employee.

### EXAMPLE 3

Joe's employer maintains the company truck. A co-employee mechanic does a defective brake repair job on the truck. When Joe approaches the accident intersection, he observes the other driver about to run the red light. Joe hits the brakes but the truck does not slow down because of the company's defective brake repair. Joe enters the intersection where he is struck. Joe receives \$50,000.00 in workers' compensation benefits. After case analysis it appears probable that a jury will find 75% comparative fault on the other driver and 25% comparative fault on the employer (imputed to the workers' compensation carrier). It is believed Joe will obtain a jury verdict in the amount of \$500,000.00. Joe goes to trial and the verdict is as anticipated.

In this example, the employer can only obtain reimbursement for benefits paid in excess of \$125,000.00 (25% x \$500,000.00). Before trial the defendant attorney thought it prudent to

buy the lien from the employer. The defendant settled the \$50,000.00 lien for \$5,000.00. After the trial, the defendant was able to offset Joe's \$500,000.00 recovery by the full \$50,000.00 work comp benefits. The defendant came out ahead by \$45,000.00 and the employer lien claimant recovered some of the work comp benefits paid.

#### COMPLAINT IN INTERVENTION

After an employee files a third party claim and gives notice to the employer, a complaint in intervention may be filed. The employer becomes another plaintiff with all the rights and remedies of the employee. The employer actively participates in the litigation. The employer may initiate discovery (depositions, interrogatories, requests for admission, inspection of premises, hire expert witnesses).

The employer will usually file a complaint in intervention where the facts and circumstance of the injury incident or, injurious exposure or, the amount of the employer's reimbursement claim warrants active litigation.

#### EXAMPLE 4

Joe works for a food processor having been placed at the work location by a staffing company who has contracted with a PEO. The PEO has Joe on its payroll. Joe's job duties require him to use a sorting machine that he has to clean periodically. Joe follows safety procedures pursuant to the safety training provided by the food processor. Joe locks out the machine with a safety switch so that he can clean the machine. While cleaning the machine, without warning, the machine turns itself on resulting in Joe mangling his arm. Investigation

establishes that the machine was made with a defective safety switch. The safety switch design is defective. The safety switch is also defective because it is worn and not functioning very well. The food processor contracts with a maintenance company who has not properly maintained the machine including the inspection and replacement of the safety switch.

After the accident Cal OSHA inspects the machine and cites the food processor for violation of Cal OSHA regulations for failure to provide a safe place to work. Cal OSHA does not assess whether third parties are comparatively at fault for employee injuries. Cal OSHA is only concerned with the employer providing a safe place to work within the regulations. Joe files a third party complaint against the machine manufacturer, the safety switch sub-contractor manufacturer and, the maintenance company. Joe undergoes extensive medical treatment and physical therapy for his injuries. His workers' compensation benefits are \$200,000.00 and his workers' compensation case remains open and in litigation. The employer decides to intervene in Joe's case.

Although the food processor is cited by Cal OSHA it is believed that the employer is not comparatively at fault there being no notice previously of any safety switch problems. It is deemed prudent to intervene because there are "deep pocket" defendants, claim of employer fault can be factually disproved and the cost of litigation will be less than a reasonable attorney fee to be awarded to Joe's attorney if he creates the fund to reimburse a workers' compensation lien. Joe and the employer go to trial. The jury verdict is in the amount of \$1,000,000.00 with a finding of all defendants being 100% at fault and the employer not being at fault. The total verdict is divided \$800,000.00 to the employee and \$200,000.00 to the employer. Because the employer actively litigated its claim there is no attorney fee to be awarded to Joe's attorney.



Had there been a lien instead of an intervention it is likely that Joe's attorney would have requested and received a 40% attorney fee or, \$80,000.00 thereby reducing the employer recovery to \$120,000.00. The employer's subrogation attorney fee was based on an hourly fee totaling \$40,000.00 and a \$10,000.00 share of costs of litigation for discovery and experts. The employer benefited by intervening in Joe's case in the amount of \$30,000.00. Joe's attorney charged Joe a 40% attorney fee plus litigation costs, \$326,000.00. Joe nets \$474,000.00

#### EXAMPLE 5

During the course of litigation as set forth in EXAMPLE 3 discovery establishes that Joe's supervisor, Fred, knew that the safety switch was malfunctioning but, he took no action to take the food processor machine out of service. The jury assesses 20% comparative fault to the employer.

The employer is entitled to recover to the extent that its claim exceeds its proportional share of Joe's recovery. In this example the recovery threshold is \$200,000.00 so the employer recovery is \$0.

#### EXAMPLE 6

Joe is found 20% at fault and the employer is found 10% at fault. Joe recovers \$600,000.00 and the employer recovers \$100,000.00.

Note that the above examples represent simplified versions of the actual allocation of payment of general and special damages to be included in a jury verdict. The third party

defendants will be obligated to pay Joe's special damages and their proportional share of general damages.

### THIRD PARTY CREDIT

In addition to a right to claim reimbursement of workers' compensation benefits in a third party case, the employer is entitled to claim a third party credit against all future and unpaid workers' compensation benefits under Division 4 of the Labor Code. Credit rights are separate and distinct from third party subrogation rights. The credit applies to future and unpaid TD, PD, medical treatment, medical-legal expenses, future medical treatment, retraining, attorney's fees to be awarded in the workers' compensation case and claims of penalty for failure to provide benefits.

### EXAMPLE 7

Joe's workers' compensation case is open and unresolved. The employer's credit is in the amount of \$350,000.00. At this stage it is likely Joe's future and unpaid benefits consist of PD and future medical treatment expenses. Hypothetically, Joe's PD is below life pension and is rated at 60%, \$101,862.50 (including his attorney's fee to be paid out of the PD). If it is believed that Joe's future medical expenses are less than \$248,137.50 then, there is no incentive but to assert a third party credit and never provide additional benefits. However, if the values are greater for PD and future medical expenses then, the credit may not be sufficient to prevent being on the hook for future benefits over and above the amount of the third party credit. If PD and future medical is estimated at \$400,000.00 or, more then, the employer may be obligated to

pay additional benefits in the amount of \$50,000.00 (\$400,000.00 - \$350,000.00) or, more. So, if the employer would like to forego the risk of paying additional benefits and close a file then, Joe's case may resolve by a third party compromise and release [see Addendum "B"]. The employer reduces its reimbursement by \$50,000.00 and gives it to Joe in exchange for a closed workers' compensation file.

#### EXAMPLE 8

The employer is found 30% at fault. The employer must pay \$300,000.00 compensation benefits before its third party credit applies to future and unpaid benefits. The employer has previously paid \$200,000.00 workers' compensation benefits. The employer must pay an additional \$100,000.00 in benefits before the third party credit kicks in.

If the third party case is settled without a trial to verdict and there is a third party credit dispute then, the third party case must be litigated before the WCAB. The Workers' Compensation Judge must act as the trier of fact to ascertain liability and comparative fault. The WCJ may consider the entire discovery including depositions to make the determination. However, if a party objects then a full trial will take place. Because the trials usually take place one day at a time, it can take several years to fully litigate a third party credit claim with liability and comparative fault issues.

## OTHER SUBROGATION CONSIDERATIONS

The employee is permitted to settle a third party claim around the employer. The employee must give notice to the employer with an opportunity to proceed in the third party case. If the employer has filed a lien then, the employer may file a complaint in intervention and proceed with the litigation.

Usually, the third party defendant takes the position that the employer is not prepared to litigate the third party case and will, in the alternative, accept a smaller settlement rather than proceed to trial. The intervenor attorney should be an active participant in the litigation proceedings and be prepared to proceed as the sole counsel in the third party case.

If the employee settles around the employer then, the third party defendant can settle on the condition that the employee steps into the shoes of the third party defendant. The employee agrees to indemnify defend and hold harmless the third party defendant from the employer's claim. If the employer proceeds to trial then, it is the employee who acts as the defendant.

Both the employee and the employer must be aware that a potential third party defendant may be a governmental entity such as the State of California, a California County, a California City, department of a governmental entity (such as a school district) or utility or even a state sanctioned fair association (such as the Antelope Valley Fair or the Los Angeles County Fair). A defendant driver who is driving a personal vehicle may be in the course and scope of employment for a governmental entity at the time of a vehicle accident. The California government Code requires the filing of a of a governmental entity claim within six months following the accrual of a cause of action against the governmental entity. It is unusual for a California governmental entity to accept liability for a personal injury claim. The plaintiff must

file the complaint against the governmental entity within six months following the claim denial. Absent the filing of the claim, a plaintiff may be precluded from proceeding with a valid third party action against the governmental entity.

#### EXAMPLE 9

An employee delivering a package to the Antelope Valley Fair trips and falls at the entrance to the fairgrounds because the ground gives way at a turnstile entrance to the fairgrounds. A governmental entity claim must be filed within six months by the employee and the employer following the incident and the complaint and the complaint in intervention must be filed within six months following the claim denial.

A claim against the federal government usually requires a claim filing within two years following the accrual of the cause of action.

#### EXAMPLE 10

A truck driver delivers a flatbed of anchor chain to a US Coast Guard facility. A Coast Guard employee lifts the chain off the flatbed using a crane. The employee negligently drops the chain causing it to hit the truck driver who is watching the off-loading activity resulting in injury AOE/COE to the truck driver. The employee or the employer must file the claim form with the Coast Guard, likely to be denied, and then file the complaint within two years of the event. The employer must intervene in the employee's third party action because there is no lien procedure available under the Federal Rules of Civil Procedure.

If the employee is injured in a vehicle accident by an uninsured driver and proceeds with an uninsured motorist claim under his own or his employer's insurance policy then, the employer may not lien the claim or intervene in the claim. The UM carrier may offset the UM claim to the extent of workers' compensation benefits. The employer may not claim a third party credit for the employee's UM recovery.

The employer may not intervene in an employee's medical malpractice claim. The medical malpractice defendant may offset the workers' compensation benefits. If the malpractice carrier fails to take the workers' compensation benefits offset then, the employer may claim a third party credit for the malpractice recovery.