A PRIMER ON BASIC CONCEPTS OF WORKER’S COMPENSATION SUBROGATION

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I. INTRODUCTION

The author of this primer is a California attorney, and the referenced herein to laws, rules and regulations, except where specifically noted, are to California law. Nevertheless, it is hoped and believed that the information contained in these materials will provide a strong foundational grasp on these issues regardless of the jurisdiction in which the reader is located.

One out of every five automobile injuries involves an employee who is injured while in the course of his or her employment. One out of two products liability cases or construction site accidents includes a worker injured in the course of his or her employment.

Obviously, many worker injuries may give rise to a potential right of reimbursement for workers’ compensation benefits paid to or on behalf of an injured worker. The purpose of this paper is to briefly explain these rights to reimbursement, commonly referred to as “third-party cases,” or “subrogation.”

A simple example of a potential subrogation case is useful for understanding what subrogation means. Bob is a driver employed by Zip Messenger. One night Bob is making deliveries in his car when he is rear-ended by Joe. Bob is injured and files a claim for workers’ compensation benefits. The accident is neither the fault of Zip Messenger or Bob, but since Bob was on the job, Zip Messenger’s workers’ compensation carrier provides compensation benefits in accordance with California’s no-fault workers’ compensation system.

In addition to rights to workers’ compensation, Bob may also file a civil lawsuit against Joe. Likewise, Zip Messenger and/or its workers’ compensation carrier may file a lawsuit against Joe in an attempt to recover the money paid to or on behalf of Bob, either by joining Bill’s lawsuit, or if Bob does not file an action, by filing a lawsuit alone.

Generally speaking, the following factual patterns involving injury to a worker should suggest a potential subrogation case:

(a) Any accident occurring away from the employer’s premises;
(b) Any machine, equipment, or appliance malfunction;
(c) Exposure to toxic chemicals, fumes, dust, solvents, etc.
(d) Any auto accident (even single vehicle accidents);
(e) Slip and falls; and
(f) Non-industrial accidents exacerbating injuries incurred in a prior industrial accident

Any accident that involves somebody besides the employer or a co-employee, i.e. a “third-party,” should alert the attorney or claims examiner to the possibility of a third party lawsuit.

II. ISSUE SPOTTING

One of the more difficult aspects of managing the subrogation aspects of a worker’s compensation claim is the act of identifying the potential for subrogation early in the life of the claim. Every case is unique and, as such, presents a myriad of twists and turns that will impact on this determination.

Since subrogation is essentially little more than the act of establishing responsibility for the incident which created the need to pay the applicant benefits the inquiry should begin with a simple question: “who caused this injury?” If a third party can be identified (someone other than the applicant or employer) then subrogation is a potential. As is discussed below, however, simply because the applicant or the employer may have contributed to the incident does not preclude subrogation recovery. In California the analysis associated with allocating responsibility for causing an injury examines the fault of all the players, including the employer and the applicant. For example, there can be recovery where the employee is responsible is 10% of the loss, the employer 20% and the third party (the target defendant) the balance. The percentage of fault of the employer simply reduces (not eliminates) the amount of potential recovery.

When evaluating a new file for potential subrogation, then, ask yourself the following questions:

1. How did the accident happen (i.e., what were the mechanics of the accident)?
2. What area(s) of the applicant’s body that was impacted by the accident?
3. Who contributed to the accident’s occurrence?
4. How could the accident have been prevented?
III. INVESTIGATION

When conducting the initial investigation, focus the inquiry on the following areas:

1. Focus on fact gathering rather than drawing opinions;
2. Coordinate the investigation with the subrogation coordinator/supervisor;
3. Interview all witnesses, focusing on the mechanics of the accident and the observations of those on scene. You may wish to discuss obtaining a statement from a witness with the claim supervisor;
4. Determine if there is a waiver of subrogation in the insurance policy, as well as a “hold-harmless” agreement between the employer and any target defendant;
5. Advise the employer to preserve all physical evidence (to the extent feasible);
6. Obtain photographs of the accident scene and components involved in the loss (a machine, a car, etc.) as well as the area of the loss as well;
7. Coordinate placing the target defendants on notice of the worker’s compensation claim;
8. Contact the employer to discuss the following:
   a. employee training and safety programs;
   b. the chain of command and employee supervision on the site at the time of the accident;
   c. any complaints regarding safety made either to the employer or to anyone else at the site (usually applies to construction accidents);
   d. prior similar accidents;

IV. TYPES OF LOSSES

Most actions for recovery of damages resulting from the negligence of a third party fall into four basic areas, each with their own unique patterns and rules. As such, the examiner should approach the initial investigation aware of these scenarios. A suggested approach to each is set forth below. When evaluating losses in these areas the examiner should focus on the following steps:
A. Motor Vehicle Accidents

1. Obtain a copy of the police report;
2. Contact the employer’s auto carrier (if the applicant was driving a company car) to obtain estimates of property damage and to obtain a copy of their investigation report if one was done;
3. Obtain repair estimates for all automobiles involved in the accident;
4. Determine the extent of physical damage to the applicant and the other participants in the accident;
5. Determine if the applicant was wearing a seat belt;
6. Was an air-bag installed and, if so, did it deploy;
7. Run an index check on the applicant;
8. If possible, interview the target defendant and determine if they were in the course and scope of their employment at the time of the accident;
9. Investigate if there were any mechanical failures of the cars involved (brake failure, steering problems, etc.);
10. Identify the owner of the defendant’s vehicle;

B. Product Liability/Machine Cases

1. Obtain diagrams, manuals, sales literature, models and options available on the product;
2. Interview the employer regarding all of the following (discuss with subrogation coordinator/supervisor first):
   a. prior accidents;
   b. prior knowledge of problems with the product or machine;
   c. the date of acquisition of the product or machine;
   d. any repairs made to the machine, either before or after the accident;
   e. identify the seller or manufacturer of the product or machine;

C. Slip/Trip and Fall Cases

1. If possible, obtain a skid test of the surface in question or retain the object that caused the slip/trip and fall. If possible, also retain a sample of the surface where the incident occurred and a sample of the substance that caused the fall;
2. Ask the applicant to preserve the shoes and clothing
being worn at the time of the fall. With supervisor approval, offer to purchase those items from the applicant;
3. Obtain a copy of the janitorial/maintenance contract for the premises where the fall occurred;
4. Identify the owner of the premises;
5. Identify the maintenance company;
6. Determine how long the object or substance causing the fall was allowed to remain at the scene (for example, for how long was the water allowed to remain on the floor without being cleaned up?);
7. Determine how the substance or object that caused the fall came to be in place;
8. Determine who took responsibility to clean up the scene after the fall;

D. Construction Accidents

1. Obtain a copy of the contract between the general contractor and the sub-contractor (typically your employer);
2. Interview all general and subcontractors to determine as much of the following as possible:
   a. The status of the job – was it on time? Was it rushed?
   b. Were there any safety meeting procedures in place (sometimes called “tailgate meetings”)?
   c. Was any training offered to the applicant?
   d. Who was in charge of supervising the job?
   e. What was the employer’s role in the project?
   f. Were any complaints made regarding either the specific mechanisms of the accident or the general condition of the safety of the worksite before the accident?

Claims investigation is an art in and of itself that is an essential part of the claims examiner’s responsibilities. The extent to which an incident will lend itself to the various methods discussed above will be determined on a case by case basis, and no detailed investigation should be undertaken without first coordinating those efforts with the subrogation coordinator or supervisor or legal counsel. Always remember that the opposing side in a civil lawsuit can discover much of what is developed in the context of an in-house investigation. Care must be taken to insure that the examiner’s investigation is protected from discovery to the fullest extent possible, a result which can be furthered through coordination of the investigation effort with subrogation counsel or, if available, in-house counsel.
V. EMPLOYEE REMEDIES FOR ON THE JOB INJURY

A. Workers’ Compensation.

An injured employee is entitled to workers’ compensation benefits where the “conditions of compensation” exist. The “conditions of compensation” are set forth in Labor Code Section 3600. Essentially the conditions of compensation occur when an employee is injured “in the course of his or her employment.”

B. Civil Action Against Employer or Co-Employee

An injured employee is generally not entitled to bring an action against his employer or co-employees for injuries arising in the scope of employment because of the “exclusive remedy rule” of Labor Code Sections 3601 and 3602. These statutes provide that an injured employee’s “exclusive remedy” against his employer or co-employees for injuries occurring in the scope of his or her employment is workers’ compensation.

There are a limited number of exceptions, including:

1. Where the employee’s injury is proximately caused by a willful assault by the employer; Labor Code Section 3602(b)(1).

2. Where the employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer’s liability shall be limited to those damages proximately caused by the aggravation. Labor Code Section 3602(b)(2).

3. Where the employee’s injury is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee’s use by a third person. Labor Code Section 3602(b)(3).

4. Where the injury does not arise in the scope of employment, and/or the employer is uninsured for workers’ compensation. Labor Code Section 3602(c).
5. Where an employer willfully and intentionally removes or fails to install a point of operation guard on a power press under specified conditions. Labor Code Section 4558.

6. Where the injury is caused by the intoxication or willful physical assault of a co-employee. Labor Code Section 3601(a)(1) and (2).

C. Third Party Lawsuit

An employee injured on the job is also entitled to bring an action against any person, “other than his employer,” whose actions or omissions have proximately caused the employee’s injury. Labor Code Section 3852

If the employee brings a third-party action he or she must serve a copy of the complaint on the employer, and file proof of such service. This rule also applies to employers who file suit. Labor Code Section 3853.

VI. EMPLOYER REMEDIES

Pursuant to Labor Code Section 3852, an employer who pays benefits to or on behalf of an employee under the Worker’s Compensation Act is entitled to bring suit against the responsible third-party to recover those benefits. Labor Code Section 3850(b) provides that the term employer includes the actual employer or the employer’s workers’ compensation insurer.

The payments provided to or on behalf of an injured worker, or his or her dependents in the event of death, comprise what is known as the workers’ compensation “lien.” The lien is recoverable by the employer if the injury to the employee is the result of tortious conduct by a third party.

The workers’ compensation lien may consist of the following:

1. Medical payments made to the employee, or on his or her behalf.

2. Temporary disability payments for time lost from work.

3. Permanent disability payments designed
to compensate the injured employee for loss of ability to compete in the open labor market. [Where the Workers’ Compensation Appeals Board (WCAB) has made a permanent disability award, but the award has not yet been paid, such as a Stipulation & Award with future payments to be made, then the present value of the future payments may also comprise the lien. Smith v. County of Los Angeles, 275 Cal.App.2d 156 81 Cal.Rptr. 120 (1969).]

The following items are not properly included in the “lien.”

1. Medical defense-legal costs, (at least when an employer or compensation carrier “intervenes” in the third-party lawsuit of an employee). Labor Code Section 3852.

2. Permanent disability where there has not yet been an award or certainty as to the amount of the future payment.

3. Legal costs, attorney fees, other expenses.

Note: An employer can request increases in the lien after judgment in a civil case, but before judgment is satisfied. Labor Code Section 3857.

The employer has three choices in pursuing reimbursement for workers’ compensation benefits from a third party:

1. The employer may file suit in his or her own name under Section 3852.

   This lawsuit, if it is to stand as a separate action, must be brought within one year of the date of injury to the employee. The triggering date for the running of the statute of limitations is the date of injury, not the date that benefits have begun to be paid. County of San Diego vs. Sanfax Corporation, 19 Cal.3d. 862, 14 Cal.Rptr. 638 (1977). Even if the employer has not paid any benefits, he or she may still file a lawsuit in anticipation of future benefits to be paid.

2. The employer may file a “Notice of Lien”, or “Lien Claim” asserting first lien rights on the proceeds of any judgment obtained by an injured employee in the employee’s third party action. Labor Code Section 3856(b).

   It should be noted that the employer’s Lien Claim is subject to an allowance for litigation expenses and attorneys’
fees on behalf of the employee (or the employee’s attorney). Further, if the employee settles his or her case prior to judgment, as most cases do, no judgment is rendered and the employer’s lien is worthless. Also, as a lien claimant, the employer is not a party, and has no standing to appeal. Bates vs. John Deere Company, 148 Cal.App.3d 40, 195 Cal.Rptr. 657 (1983).

3. The employer may intervene into an existing action brought by the plaintiff/employee pursuant to Labor Code Section 3853, which provides for intervention any time before trial. See, also, Mar v. Sakti International Corp., 9 Cal.App.4th 1780, 12 Cal.Rptr.2d 388 (1992).

If the employer intervenes in the action, it is a party, and all of the defenses that the third party defendant has against the employee/plaintiff are also available against the Intervenor. Hubbard vs. Bolt, 140 Cal.App.3d 882, 190 Cal.Rptr. 15 (1983).

The right to intervene into an existing action is also available to the injured worker.


VII. STATUTE OF LIMITATIONS

A. One Year Statute of Limitations

The one-year statute of limitations for personal injury actions, C.C.P. Section 340, applies to employer actions against third parties for reimbursement. County of San Diego vs. Sanfax Corp. 19 Cal.3d 862, 140 Cal.Rptr. 638 (1977). If an employee fails to file his own action, the employer/workers’ compensation carrier must file an action within one year of injury to the employee or its claims will be barred.

However, if an employee files his own claim, the employer/worker’s compensation carrier may intervene in the employee’s action any time before trial. The filing of an action within one year tolls the limitations period for an Intervenor. Note: It is not wise to wait to intervene after an employee has filed suit. Nothing prevents the employee from settling with the defendants and dismissing his action. If the statute of limitations has run, the employer will be foreclosed from pursuing a
recovery.

**B. Government Claims.**

An employer or workers’ compensation carrier, like any other litigant, must satisfy the claim filing requirements of the Government Code when filing suit against a governmental unit, i.e. state, city, or government agency.

Generally, no suit for money or damages may be brought against a public entity until a written claim has been presented to the public entity, and has been acted upon, or rejected. Government Code Section 945.4.

A claim relating to a cause of action for death or for injury must be presented no later than six months after the accrual of the cause of action, i.e. the accident or injury. Government Code Section 911.2. Government Code Section 915 governs the manner of presentation of the claim to a public entity.

If the public entity has given written notice of rejection of the claim, a civil lawsuit must be brought within six months from the date such notice is delivered. Government Code Section 945.6.

When a claim that is required to be presented within six months is not presented in that time, a written application may be made to the public entity for leave to present a late claim. Government Code Section 911.4. An application for leave to file a late claim must be made within a reasonable time, not to exceed one year after accrual of the cause of action.

Government Code Section 911.6 indicates that the public entity must grant or deny the late claim application within 45 days after it has been presented. If the public entity fails to act on the application within the 45-day period, the application is deemed to have been denied on the 45th day.

The Labor Code does not specifically address whether the employer must satisfy the claims filing requirements if it exercises a right to intervene in the employee’s action under Labor Code Section 3852 et. seq. However, the weight of case law opinion indicates that an employer is protected by an employee who timely files a governmental claim. See San Diego Unified Port District vs. Superior Court, 197 Cal.App.3d 843, 243 Cal.Rptr. 163 (1988), Home Insurance vs. Southern California Rapid Transit District, 196 Cal.App.3d 522, 241 Cal.Rptr. 858 (1987). (But compare Pacific Tel. and Tel. Co. vs.
VIII. EMPLOYEE COMPARATIVE FAULT

In a civil action, the trier of fact makes a determination of the percentage of comparative fault among the parties; plaintiff, defendant(s), and the employer. An injured employee/plaintiff’s recovery is reduced by his own percentage of fault, (Aceves vs. Regal Pale Brewing Company, 24 Cal.3d 502, 156 Cal.Rptr. 41 (1979)), and with regard to non-economic damages, by the percentage of fault defendants are able to attribute to non-defendant parties. (DaFonte v. Up-Right, Inc., 2 Cal.4th 593, 7 Cal.Rptr.2d 238 (1992)). Where both the employee and employer bring a third party lawsuit the fault of the injured employee applies to the employee only and not to the employer. (Kemerer vs. Challenge Milk Company, 105 Cal. App. 3d 334, 164 Cal.Rptr. 397 (1980)). The Kemerer court recognized that if the negligence of the injured worker/plaintiff were imputed to the employer, there would be a double reduction of the damages.

IX. EMPLOYER COMPARATIVE FAULT

A third-party defendant will almost always raise the issue of employer fault as soon as possible in any case where a worker has been injured on the job. Employer fault can be used to decrease or defeat the workers’ compensation lien, and also may reduce the percentage of fault applicable to the defendant.

A. When Allegation of Employer Fault is Raised.

The case of Brandon v. Santa Rita Technology Incorporated, 25 Cal. App. 3d 838, 102 Cal.Rptr. 225 (1972), establishes that the issue of employer fault must be raised in a pleading filed and served on the employer or lien claimant in a timely manner. “Timely” as discussed in that case was at the time of the pre-trial or trial setting conference.

The Brandon case has been used successfully by plaintiffs in intervention to obtain motions precluding the introduction of evidence of employer negligence or fault at trial were the allegation has not been timely raised.
B. How Allegation of Employer Fault is Raised.

The third party defendant may raise employer fault as an affirmative defense in its Answer to the complaint. The allegation of fault of the injured employee is not sufficient to raise the issue of employer negligence. A third party defendant may also file a cross-complaint for indemnity or contribution against the employer. However, Labor Code Section 3864 provides immunity for the employer or co-employee of an injured worker from a lawsuit for indemnity or contribution, unless there is a written indemnity agreement executed by the employer in favor of the third-party defendant prior to the date of injury. Further, a third party defendant may file a cross-complaint against the employer alleging employer negligence, but solely seeking an offset for the Workers’ Compensation benefits paid, also known as a Witt v. Jackson offset. This type of lawsuit does not provide affirmative relief for the third-party defendant against the employer. City of Sacramento vs. Superior Court, 205 Cal.App.2d 398, 23 Cal.Rptr. 43 (1962), and Tate vs. Superior Court, 213 Cal.App.2d 238, 28 Cal.Rptr. 548 (1963).

Many times a third party defendant will bring a cross-complaint against the employer because it is helpful in discovery. Defendants argue that a cross-complaint forces the employer to become a party to the lawsuit, thereby giving defendants greater access to investigation reports, the accident site, medical bills, etc. However, the court in C.J.L. Construction, Inc. v. Universal Plumbing, 18 Cal.App.4th 376, 22 Cal.Rptr 2d 360 (1993), held that an employer may not be compelled to participate in litigation based solely on a Witt v. Jackson cross-complaint.


In those proceedings where all parties are present, plaintiff, third party defendants, and the employer or insurance carrier, and the civil court makes a finding concerning the comparative fault of the parties, that finding is binding or “res judicata” in the event that subsequent proceedings are instituted before the Workers’ Compensation Appeals Board. “Res Judicata” is the rule that when an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether
on the same or different claim.

The related doctrines of “collateral estoppel” as well as res judicata operate between civil courts and the WCAB. See, Roe vs. WCAB 12 Cal.3d 884, 117 Cal.Rptr. 683 (1974): “both [the] trial court and Workers’ Compensation agency are bound to accept the others’ prior adjudication of employer negligence but [are] free to adjudicate the issue if it is yet unsettled.” Note, at least one court has found that the doctrine of collateral estoppel may apply in WCAB “credit rights proceedings” on the issue of employer negligence even though the employer was not a party to the civil action. Curtis vs. State of California, 128 Cal.App.3d 668, 180 Cal.Rptr. 843 (1982). This case appears contradictory to standard res judicata principles.

D. The Effect of Employer Fault on the Award of Damages in a Case.

1. No Employer Fault:

The recovery made by an injured worker in his civil suit is reduced by the percentage of the worker’s own comparative fault. Aceves vs. Regal Pale Brewing Company, 24 Cal.3d 502, 156 Cal.Rptr. 41 (1979). If there is no employer fault, the employer recovers its lien from the remaining award

Example:

An injured worker received $10,000.00 in workers’ compensation benefits and sues a third party for civil damages. The jury determines the full value of the plaintiff’s case to be $100,000.00 and that the plaintiff is 20 percent at fault, the defendant 80 percent at fault, and the employer free from fault.

In the example, the worker would recover $70,000.00 based upon a 20 percent reduction of the total damages, and then a further dollar for dollar reduction of the workers’ compensation benefits. The employer who was without fault in this example would recover his full lien of $10,000.00. The purpose of this reduction of the plaintiff’s recovery by the amount of the lien is to prevent a double recovery by the plaintiff. Witt v. Jackson 57 Cal.2d 57, 17 Cal.Rptr. 369 (1961), Arbauqh vs. Proctor and Gamble, 80 Cal. Cal.App.3d 500, 145 Cal.Rptr. 608 (1978).

2. Employer Fault: Prior to Proposition 51.
Prior to the enactment of Proposition 51, the “Tort Reform Act of 1985,” a third-party defendant was jointly and severally liable for all of the damages of the employee, even the damages caused by the fault of the employer. However, if the third-party defendant could establish employer negligence, the worker’s recovery was reduced up to the amount of workers’ compensation benefits paid. Witt v. Jackson 57 Cal.2d 57, 17 Cal.Rptr. 369 (1961). If the employer was not found negligent, the third party gets no offset because the compensation benefits are treated as a “collateral source.” De Cruz vs. Reid, 69 Cal.2d 217, 70 Cal.Rptr. 550 (1968).

Example:

An injured worker received $10,000.00 in compensation benefits and sues a third party. The jury determines the total amount of damages to be $100,000.00 and finds 20 percent fault on the plaintiff, 70 percent fault on the employer, and 10 percent fault on the third party. Under the former law, in this example, the third party defendant would be required to pay $70,000.00 to the plaintiff, the total damages minus 20 percent (plaintiff’s fault), followed by a further reduction of the $10,000.00 in compensation benefits. The employer would receive no reimbursement since the amount of damages caused by the employer exceeds the amount paid in compensation benefits. See, American Motorcycle Association vs. Superior Court, 20 Cal. 3d 578, 146 Cal.Rptr. 182 (1978), (superseded by statute).


Since the enactment of Proposition 51, a third party remains jointly liable only for economic damages. With regard to non-economic damages, the third party’s liability is limited to his or her own comparative fault only. DaFonte v. Up-Right, Inc., 2 Cal.4th 593 (1992). Since the DaFonte decision, applying Proposition 51 to third party cases, it is unclear how damage awards are supposed to be calculated in third-party cases where there is substantial employer negligence.

However, it is still clear that the employer’s recovery is the total amount of benefits paid reduced by an amount that represents the employer’s percentage of fault for the Plaintiff’s total damages.

Example:

An injured worker receives $10,000.00 in compensation benefits and sues a third party. The employer intervenes
claiming a right to reimbursement of $10,000.00. The jury finds total damages of plaintiff to be $100,000.00 and allocates fault at 25 percent to the plaintiff, 5 percent to the employer, and 70 percent to the third party.

The employer would receive $5,000.00. This is based upon $10,000.00 he paid less 5 percent of $100,000.00, attributable to his fault. Had the jury found that the employer in the situation was 10 percent or more at fault, the employer would have been denied any recovery. If the employer’s share of the plaintiff’s total damages equals or exceeds the amount of the employer’s lien, the employer recovers nothing.

It is not clear how much the plaintiff would receive in this situation because of the uncertainty left since the DaFonte decision. At minimum, the plaintiff should receive $65,000.00 or his total damages reduced by 25 percent (plaintiff’s fault) and 5 percent (employer’s fault), and employer’s recovery of $5,000.

Note, an employer is charged with its own negligence, and under the doctrine of respondeat superior, he or she is also charged with the fault of all of his or her employees except for the personal fault of the plaintiff. Kemerer vs. Challenge Milk Company, 105 Cal.App.3d 334, 164 Cal.Rptr. 397 (1980).

4. Defendant’s Fault Less than the Lien.

What happens if the defendant’s total fault is less than the employer’s recoverable lien? In Finney vs. Manpower Inc., 123 Cal.App.3d 1066, 177 Cal.Rptr. 74 (1981), the plaintiff was injured in the course and scope of his employment. His employer paid out the amount of $13,252.00 in workers compensation benefits. At trial, the jury found the total amount of damages to be $20,452.00, and further found that the plaintiff was 50 percent at fault and that defendant, Manpower, was 50 percent at fault. The employer was free from fault. The court entered judgment for the plaintiff awarding him nothing based on the fact that his percentage of fault (50%) reduced his total recovery to $10,226.00 and that the dollar for dollar reduction of the total lien from that figure ($13,252.00 lien) left no recovery for the plaintiff. The court then ordered judgment awarding the employer $13,252.00, the full amount of its lien. Defendant Manpower appealed arguing that its total amount of fault was $10,226.00, or 50 percent of the total percent of damages and that no award could be made in excess of that amount. The Court of Appeal agreed, finding that the ultimate financial liability of the third party defendant will remain the same regardless of what compensation benefits have been paid. The court argued that one who subrogates to the rights of
another could recover no more than the injured worker could have.

E. Calculating Reimbursement Where Worker Settles Around the Intervenor.

Often, especially where there is a large degree of employer fault, there may be a separate settlement between the third party and injured worker/plaintiff, with the lawsuit continuing to trial between the workers’ compensation carrier or employer and the third party defendant. In that case, the employer’s recovery will still be reduced by multiplying the percentage of employer fault times plaintiff’s total damages consistent with the Aceves/Arbaugh method. Johnson vs. Cayman Development Company, 108 Cal.App.3d 977, 167 Cal.Rptr. 29 (1980). (For purposes of computing plaintiff’s damages, the employer is not bound by the amount of the settlement reached between the plaintiff and the third party.)

Example:

An injured employee receives $10,000.00 in workers’ compensation benefits. After filing suit against the third party, he settles for $20,000.00 and no provision is made for reimbursement of the employer. The employer proceeds to trial against the third party and the jury finds the worker’s total damages to be $100,000.00 and allocates fault 20 percent to the plaintiff, 5 percent to the employer and 75 percent to the third party. In this example, the employer would recover $5,000. It is not clear whose burden it is to prove plaintiff’s damages. Arguably, since proof of plaintiff’s damages is a means of defending the action against the employer, the defendant should have the burden of proving the amount of damages the plaintiff suffered. The employer, of course, would try to establish the plaintiff suffered less damages. The employer would still be required to show that the conduct of the defendant was the proximate cause of injury to the employee. Breese v. Price, 29 Cal.3d 923, 176 Cal.Rptr. Supp.791 (1981)

X. SETTLEMENT

A. Settlement With, or Assignment of Lien to Employee.

An employer may settle its lien directly with its employee. Generally, whether the employer settles with the worker or the defendant, the settling party demands an
assignment of the workers’ compensation lien. The lien is assignable, Hone vs. Climatrol Industries, Inc., 59 Cal.App.3d 513, 130 Cal.Rptr. 770 (1976), and the employer may assign it to the employee in exchange for a compromise and release of further benefits, for an amount less than the amount of the lien, or some other type of settlement. Engle v. Endlich, 9 Cal.App. 4th 1152, 12 Cal.Rptr.2d 145 (1992).

Assignment of the lien is beneficial to a worker to the extent that it permits him or her to assert rights of reimbursement for the lien, instead of the employer. However, the defenses of employer negligence are still available to the defendant, and the defendant can reduce or defeat the lien by establishing employer negligence.

**B. Settlement With, or Assignment of Lien to Defendant.**

The employer may settle its lien directly with the third party defendant. An employer’s failure to give notice of the settlement, as required by Labor Code Section 3680(a), will not invalidate the settlement. Quinn v. Warens, 144 Cal.App.3d 309, 192 Cal.Rptr. 660 (1983).

Serious consideration should be given to selling a lien to a third party defendant at a compromise figure when the facts reveal substantial employer negligence. Otherwise, the lien would probably be defeated at a trial, and the res judicata effect of a finding of employer negligence may reduce or defeat the employer’s credit rights before the WCAB. Labor Code Section 3861.

Assigning a lien, or waiver of a lien, does not mean that the employer waives its credit rights. Hodae vs. WCAB, 123 Cal.App.3d 501, 176 Cal.Rptr. 675 (1981), Herr vs. WCAB, 98 Cal.App.3d 321, 159 Cal.Rptr. 435.

**C. Settlement by Plaintiff.**

An employee may settle the action against the third party defendant exclusive of the workers’ compensation benefits paid (i.e., the “lien”) without the consent of the workers’ compensation carrier. This is often referred to as “settling around” the employer, and is authorized by Labor Code Section 3859(b). An employee’s attempt to use Labor Code Section 3859(b) will fail, and settlement proceeds will be subject to the employer’s lien, if the settlement includes workers’ compensation benefits that have been paid. Marruqo vs. Hunt, 71 Cal.App.3d 972, 138 Cal.Rptr. 220 (1977).
An employee has a statutory duty to notify the employer of any settlement with the third party defendant. Labor Code Section 3860(a). In order to avoid an employer’s claim that it did not get notice, a plaintiff should give written notice with proof of service in a similar fashion as the notice required in Labor Code Section 3853.

**XI. TRIAL**

An Intervenor joining on the side of the employee/plaintiff does so in subordination to the plaintiff’s right to control the litigation. Rhode vs. National Medical Hospital, 93 Cal.App.3d 528, 155 Cal.Rptr. 797 (1979). While the employee has the right to control the litigation, the Intervenor has an independent status, and is thus not bound by all procedural decisions made by the employee. Deutschmann vs. Sears, Roebuck & company, 132 Cal.App.3d 912, 183 Cal.Rptr. 573 (1982).

The full extent of involvement of the attorney for the Intervenor is subject to the power of the court to regulate the order of proof, (Evidence Code Section 320), to exclude evidence, (Evidence Code Section 352), and to control the mode of interrogation, (Evidence Code Section 765). A defendant is not entitled to question the reasonableness and necessity of payment made by the workers’ compensation carrier in order to defeat the lien of the employer. However, the employer must still prove proximate cause. Mendenhall vs. Curtis (1980) 102 Cal. App. 3d 786. Breese vs. Price, 29 Cal.3d 923, 176 Cal.Rptr. 791 (1981).

Generally, the lien is proved outside the presence of the jury to avoid confusion and to comply with Labor Code Sections 3854 and 3855. Presumably the plaintiff, rather than the employer, will prove the medical bills and will also elect to prove wage loss. Labor Code Sections 3854 and 3855 indicate that either wage loss or temporary disability may go to the jury, but not both.

Stipulating to the lien is common. The Defendant may wish to avoid re-enforcing plaintiff’s claims, since the insurance company has accepted the claim, and is paying benefits. However, defense counsel may refuse to stipulate to the lien to create the impression that the plaintiff already has been compensated, or to challenge the validity of the medical expenses or periods of disability.
XII. CREDIT

A. “Credit” Defined.

If employer negligence is not resolved in the third-party case, the WCAB acts as an alternate forum for resolution of the employer’s negligence. An employer is entitled to claim a credit against future compensation benefits which may be payable to the employee to the extent of the employee’s net recovery from the third party. (Labor Code Section 3861). However, if the employer’s concurrent negligence contributes to the employee’s injury, its credit rights may be reduced or defeated depending on the extent of its negligence. Associated Construction and Engineering Company vs. WCAB, 22 Cal.3d 829, 150 Cal.Rptr. 888 (1979)

An employer may assert a claim for credit for the net amount of the employee’s third party recovery, i.e., after deductions for attorneys’ fees and costs. Credit rights extend to all forms of workers’ compensation benefits. State Compensation Insurance Fund vs. WCAB, 76 Cal.App.3d 136, 142 Cal.Rptr. 654 (1977), holding that credit applies even to medical/legal costs. Also, in spite of the prohibition on settling vocational rehabilitation benefits contained in Labor Code Section 5100.6, credit rights also apply to vocational rehabilitation benefits, and an acknowledgment in the third party compromise and release of the employer’s right to credit will act as a settlement of such benefits to the extent of the third party recovery.

Waiver of the employer’s right to reimbursement is not also a waiver of credit rights, as the employer’s rights to reimbursement and credit are separate and distinct. Hodge vs. WCAB, 123 Cal.App.3d 501, 176 Cal.Rptr. 675 (1981). However, care must be taken. See, Advance Electric, Inc. vs. WCAB, 47 CCC 1179 (1982), (waiver of credit); Chief Auto Supply, Inc. vs. WCAB, 46 CCC 753 (1981), (failure to mention vocational rehabilitation in the third party compromise and release may be construed as a waiver); Salazar vs. General Electric Company 46 CCC 233 (1981), (deleting a reference to rehabilitation in a settlement may amount to waiver of credit).

B. Calculation of Credit.
If the injury is severe, and future medical expenses or disability are expected to be high, a worker may wish to continue to pursue workers’ compensation benefits, despite obtaining a third party recovery. Under Associated Construction v. WCAB, 22 Cal.3d 829, 150 Cal.Rptr. 888 (1978), where an issue of employer negligence arises in the context of a credit claim, if there has been no prior determination of comparative fault, the WCAB must determine the comparative negligence of the parties.

The following must be ascertained to calculate the extent of the employer’s credit rights:

1. Plaintiff’s total damages.
2. Employer’s comparative fault percentage.
3. Employer’s payments made to date.
4. Plaintiff’s third party recovery.

Example:

The WCAB finds that the applicant suffered $100,000 in damages, and that the employer is 20 percent at fault. The employer paid $15,000 in benefits. The applicant obtained a net recovery of $30,000.

In this example the employer is responsible for $20,000 dollars of damages, and has already reimbursed the employee $15,000. The employer does not have a right to credit until the employer pays an additional $5,000 in workers’ compensation benefits. Then, the employer will have a credit of $30,000. The employer will thereafter be liable for future medical treatment or disability that exceeds $30,000.

The employer has the burden of proving the third party settlement. The burden of proof then shifts to the employee to show his or her damages and the employer’s negligence. The WCAB judge may determine if it is necessary to a determination of the percentage of employer’s negligence, the negligence of all other parties. The WCAB judge may refer the case to arbitration, or appoint a special master to assist in making its factual determinations. Martinez vs. Associated Engineering and Construction Company, 44 CCC 1012 (1979).

XIII. THIRD PARTY COMPROMISE AND RELEASE

As you are aware, in the context of a worker’s compensation case, the parties may settle, subject to approval by
the Board, any liability that is claimed under the worker's compensation laws of California. Such an agreement is called a "Compromise and Release Agreement." Once the employer (or its insurer) is released from liability for the injury (as is the goal of the C&R), by virtue of the Board's approval of the agreement, the injured employee's claim is (usually) ended forever. Only in rare cases requiring a showing of good cause will the claim be allowed to be re-opened.

Agreements that provide for the payment of less than the full amount of compensation due or to become due and that purport to release the employer from all future liability will generally only be approved where it appears that a reasonable doubt exists as to the rights of the parties or that the agreement is in the best interests of the parties (i.e., the employee). An employer is typically never relieved from liability for Vocational Rehabilitation benefits, subject to certain very limiting exceptions (e.g., an appeals board finding that there is a good faith issue, which if resolved against the injured employee, would defeat the employee's right to all worker's compensation benefits).

The Compromise and Release agreement is prepared on a form approved by the WCAB and then submitted to the Board, after which time it can be approved directly or it can be made the subject of a hearing for adequacy or appropriateness. When the C&R proposes to resolve outstanding liens by disallowance or other compromise, the proposed C&R must also be served on lien claimants, who then have a short period of time to object. Medical reports and good faith lien declarations are also required to be filed along with the proposed C&R.

Similarly, a settlement by the employee with a third party can also become the subject of a Compromise and Release Agreement, the so-called "Third Party Compromise and Release" or "Third Party C&R." These documents typically include a full resolution of the employee's compensation case as well as the civil action, and generally recite that one of the conditions for approval of the third party C&R is that the employee is receiving an amount of money directly from the third party defendant which (arguably, at least) effectively compensates the injured worker fully for his injuries.

This third party agreement is a three-way agreement among the injured employee, the employer or its insurance carrier and the third party whose tortious conduct was a cause of the employee's injuries. If none of the employee's rights to compensation benefits are being compromised in the agreement, then Board approval is not required. Generally speaking, in all
other respects this third party C&R is fundamentally the same as a “regular” C&R. Note that unless specifically called for in the C&R, an agreement between the employee and the carrier alone will not terminate an action against the employer (i.e., a serious and willful petition or 132a liability).

\textbf{XIV. THE COMMON FUND DOCTRINE}

The bane of the employer’s subrogation attorney is the so-called “common fund doctrine.” This concept is found at Labor Code section 3860, and generally provides that “…where both the employer and employee are represented … by separate attorneys in effecting a settlement, with or without suit, prior to reimbursement of the employer, … there shall be deducted from the amount of the settlement the reasonable expenses incurred by both the employer and employee or on behalf of either, … together with reasonable attorney’s fees to be paid to the respective attorneys for the employer and employee, based upon the respective services rendered in securing and effecting settlement for the benefit of both the employer and employee.”

Simply put, the concept is expressed as follows: one who expends attorney’s fees in winning a suit that creates a common fund from which the other derives a benefit is entitled to contribution for litigation costs. It has been held by the California Appellate Court that the correct interpretation of this statute does not ask whether counsel “minimally participated” in the case but rather whether counsel “actively participated” in the creation of the settlement fund. Luque v. Herrera, (2000) 81 Cal. App. 4th 558.

That case (poorly decided in this author’s opinion) held that because Fremont’s counsel had not actually managed the negotiations call leading to the defendant’s agreement to settle the third party case, Fremont was required to “pay” the employee’s civil attorney “reasonable” attorney’s fees in conjunction with “his” creation of the settlement fund. Those “reasonable fees” took the form of a forty-two (42%) percent reduction of its lien.

The reasoning of the trial court (upheld on appeal) was that the participation must be meaningful; the employer’s (or, as is typically the case, the insurance company’s) attorney cannot simply ride on the coattails of the employee’s civil attorney. What this means is that in those situations where the decision is made to pursue subrogation recovery directly (rather than simply filing a lien in the employee’s case), care must be taken to insure that the litigation is aggressively managed and moved forward at every opportunity. To do otherwise exposes the insurance
company to a potentially significant reduction of its lien in favor of the employee's attorney.
**TERMINOLOGY**

**Applicant**
Injured worker in WCAB proceedings.

**Complaint in Intervention**
Pleading authorized by Labor Code Sections 3852 and 3853 by which a compensation carrier may become a party to plaintiff's lawsuit for purposes of recovery of workers' compensation and related benefits.

**Civil Recovery Potential**
The maximum amount of money Republic can presently recover in a civil action.

**Complaint**
The legal document filed with the court to initiate the civil lawsuit (similar to an Application for Adjudication of Claim filed at the WCAB).

**Complaint in Intervention**
A legal document filed with the court (actually, a complaint) after the injured worker has filed a complaint. That is, the Intervenor “joins into” the applicant’s third party lawsuit, and sues the same defendants.

**Credit Rights**
Labor Code Section 3861. Employer may claim credit against future compensation benefits to extent of net recovery of worker in third party action.

**Defendant**
The party who is being sued by the Plaintiff in the third party civil action. This is the person (or entity) that the Plaintiff (generally Republic or the injured worker) believes is at fault for the injuries.

**Economic Damages**
These are objectively verifiable monetary damages such as past and future earnings, medical expenses and costs for vocational rehabilitation.

**Employer/Compensation Carrier**
In the context of subrogation, these terms are used interchangeably, and for the purposes of third party litigation the carrier is to be considered the employer under Labor Code section 3850.

**Evidence**
A physical object or thing, or testimony (either in court or at a deposition) that is
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fault</strong></td>
<td>An indication that a party’s negligence contributed to the incident.</td>
</tr>
<tr>
<td><strong>Intervenor (or Plaintiff in Intervention)</strong></td>
<td>Designation of employer or compensation carrier who becomes a party in plaintiff’s civil action by means of filing a Complaint in Intervention.</td>
</tr>
<tr>
<td><strong>Lien</strong></td>
<td>Broad term referring to the claim of the compensation carrier or employer. The lien encompasses workers’ compensation benefits. The term “lien” is somewhat inaccurate in this context. It is a true “lien” only after a final judgment obtained by the injured worker.</td>
</tr>
<tr>
<td><strong>Lien Assignment</strong></td>
<td>The transfer of the workers’ compensation lien to another party in the action for consideration, typically at a discount. For example, defendant purchases a $10,000 lien for $5,000.</td>
</tr>
<tr>
<td><strong>Lien Claim</strong></td>
<td>Filing a “Lien Claim” pursuant to Labor Code Section 3858, asserting a first lien against plaintiff’s judgment. A lien claimant is not a party.</td>
</tr>
<tr>
<td><strong>Negligence</strong></td>
<td>Conduct that is below the standards of a “reasonably prudent person” under similar circumstances. This is the basis of finding someone at fault for an injury (i.e., “was the defendant negligent in driving his car so as to cause this accident?”).</td>
</tr>
<tr>
<td><strong>Non-Economic Losses</strong></td>
<td>Non-monetary losses such as pain, suffering, inconvenience, emotional distress, mental suffering and anguish, loss of companionship, etc.</td>
</tr>
<tr>
<td><strong>Percentage of Fault</strong></td>
<td>The proportional amount of blame for causing injury assigned to a defendant by the Judge or jury.</td>
</tr>
<tr>
<td><strong>Permanent Disability</strong></td>
<td>Refers to the inability of the worker to compete in the open labor market. This will vary depending on the age and occupation of the worker.</td>
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the worker according to the schedule published by the State of California.

**Permanent Disability Rating**

The percentage of permanent disability calculated by using a rating schedule.

**Plaintiff**

The party who initiates the civil lawsuit (usually this will be the injured employee or Republic).

**Self-insured**

An employer authorized by the State of California to operate without a policy of workers’ compensation insurance.

**Serious and Willful Misconduct**

See Labor Code Section 4553. An employer guilty of serious and willful misconduct faces augmentation penalties of 50 percent of benefits paid. NOTE: serious and willful misconduct is more than gross negligence and generally suggests an intentional act or failure to act with the knowledge that serious injury is a probable result or with a positive and active disregard for the consequences. See, e.g., Johns-Manville Sales Corp. v. WCAB (1979) 96 Cal.App.3d 923.

**“Settle Around”**

The act of plaintiff and defendant to settle the third party case without the consent of the employer. Labor Code Section 3859(b).

**Sliding Scale**

Typically a percentage settlement agreement between plaintiff and employer that provides that the recovery by the compensation carrier will vary according to the amount recovered by the plaintiff.

**Statute of Limitations**

A legal rule which establishes a deadline for the filing of a complaint. Unlike the worker’s compensation system, the statute of limitations in a civil action is absolute and can almost never be avoided. Government claims may toll the running of the statute of limitations, but those claims require a claim form be filed with the responsible governmental agency, an event that typically must be filed within three to six months after the date of loss. If that deadline is missed, a plaintiff will be denied the opportunity to pursue their claim in court.
In virtually all of the cases in which subrogation is an issue, the stature of limitations is **one year**.

**Subrogation**

The right of the employer to recover from a third party tortfeasor benefits paid to and on behalf of the injured worker.

**Temporary Disability**

Partial wages paid by a compensation carrier while an employee is totally disabled or participating in a vocational rehabilitation plan. This is paid until the employee returns to work or declared permanent and stationary.

**Threshold**

The amount of worker’s compensation benefits that must be paid before Republic can receive a financial recovery out of the civil action, or claim a credit in the worker’s compensation action.

**Third Party (Third Party Defendant)**

The defendant in the civil action. NOTE: In WCAB proceedings, the employer is referred to as the defendant.

**Third Party Compromise & Release**

Settlement document filed with the WCAB reflecting a settlement of the compensation case concurrently with the third party action.

**WCAB**

Workers’ Compensation Appeals Board.

**Witt vs. Jackson**

57 Cal. 2d 57 (1961), case partially overruled in the Associated Construction case; the term is still widely used to refer to issues of apportionment of employer negligence. For example, a Witt vs. Jackson cross-complaint for assessment of the employer’s comparative negligence.