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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER APRIL 2008

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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WORKERS' COMPENSATION SUBROGATION

NAVIGATING THE STORM:

Understanding Future Credits In California Workers' Compensation Subrogation

Claiming a future credit as a result of the claimant's recovery in a third-party action has become big business. It is frequently as important, or even more important, to recover a large credit and close out a large, pending workers' compensation claim, than to effect a recovery of past benefits which have been paid. While we see far too many carriers unnecessarily waiving large liens in order to receive a credit which was due to them anyway, it is important to understand the nuances of claiming a credit in today's larger workers' compensation cases. Nowhere does this issue become thornier than in the Golden State – California.

California Labor Code § 3858 provides for and defines a future credit for carriers upon resolution of a third-party action. Cal. Labor Code § 3858 (1980). When a third-party recovery is effected, and after expenses and attorneys' fees are paid, the carrier is reimbursed under § 3856. It is also relieved from its obligation to pay future compensation benefits based on the amount recovered by the claimant. *Id*. Section 3858 reads as follows:

> ***§ 3858. Relief of employer from liability for compensation; notice to employer before satisfaction of judgment.***
>
> *After payment of litigation expenses and attorneys' fees fixed by the court pursuant to Section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment, if satisfied, without any deduction. No satisfaction of such judgment in whole or in part, shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien. Id.*

California Labor Code § 3861 further clarifies the carrier's right to a credit. Cal. Labor Code § 3861 (1989). However, no satisfaction of the judgment is valid without giving the employer notice and a reasonable opportunity to perfect and satisfy its lien and credit. *Id*. The employer is entitled to a credit against its future obligations to pay further workers' compensation benefits in the amount of the worker's net recovery against the third-party tortfeasor. *State Comp. Ins. Fund v. W.C.A.B.*, 53 Cal.App.4th 579 (6th Dist. 1997). If a workers' compensation carrier settles its claim for reimbursement of past benefits by compromising its lien or otherwise, this does not affect its right to obtain a credit for future benefits. *Bailey v. Reliance Ins. Co.*, 79 Cal.App.4th 449 (2nd Dist. 2000). This is because the employer or carrier, in its independent action against the third-party tortfeasor, cannot recover for workers' compensation benefits not yet determined by the Workers' Compensation Appeals Board ("W.C.A.B."). *Id*. Section 3861 reads as follows:

> ***§ 3861. Credits against employer's liability for compensation; amount of recovery by employee.***
>
> *The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.* Cal. Labor Code § 3861 (1989).

The right to recover a workers' compensation lien is separate and distinct from the right to take a credit against future benefits owed to a worker. The lien allows the employer to be *reimbursed* for money already paid, while the credit is taken against sums which *may become due* in the future. *State Comp. Ins. Fund v. W.C.A.B.*, 130 Cal.App.3d. 933 (Cal. App. 1982). The employer loses the credit right only through express waiver of that credit or settlement, not with the mere satisfaction of a lien claim. Moreover, the waiver of a lien, or failure to assert a lien in a third-party action, does not constitute a settlement or waiver of the credit. *Curtis v. State of Cal. ex. Rel. Dept. of Transportation*, 128 Cal.App.3d 668 (Cal. App. 1982). The reason the credit is distinct from the lien is that the carrier cannot recover for benefits not yet paid. *Herr v. W.C.A.B.*, 98 Cal.App.3d 321 (Cal. App. 1979).

In some instances, an employer's right to a credit is hampered by other statutes. For example, a statute precluding the employer from claiming a credit for the amount the employee receives in settlement of or recovery in a medical malpractice lawsuit for injuries forming the basis of a workers' compensation claim, controls over § 3861 and § 3858 which allow a workers' compensation carrier such a credit. Cal. Civ. Proc. Code § 3333.1 (1997); *Graham v. W.C.A.B.*, 210 Cal.App.3d 449 (4th Dist. 1989), *review denied*.

It should also be noted that the Board has exclusive jurisdiction to determine compensation even where a third-party action is brought before the jurisdiction of the Board has been invoked. *Sanstad v. Industrial Acc. Comm'n*, 171 Cal.App.2d 32 (3rd Dist. 1959). Even if a workers' compensation carrier intervenes into an existing third-party action and consents to the judgment therein, such judgment is not conclusive on the carrier's right of subrogation and/or credit because the commission has jurisdiction over such matters. *Id*. The employee has a duty to notify the employer of any judgment and its imminent satisfaction. Cal. Labor

Code § 3858 (1989). However, no duty of notification falls on the third-party even though the third-party had knowledge of the employer's lien claim. *Popovich v. U.S.*, 661 F.Supp. 944 (C.D. Cal. 1987).

In order for a workers' compensation carrier to properly claim a credit under California law, a petition should be filed with the Workers' Compensation Appeals Board, seeking an order delineating the employer's right to a credit against its future workers' compensation liability. The California Workers' Compensation Appeals Board ("W.C.A.B.") has exclusive jurisdiction over all disputes arising under the California workers' compensation law. See, Herlick, Stanford D., *California Workers' Compensation Handbook*, § 13.4.8 (1999). Where jurisdiction attaches in W.C.A.B. because of an industrial injury, the Board has exclusive jurisdiction over all issues arising under the compensation law. However, where a third-party action is settled after the suit has commenced, the court where the suit was brought must approve of the settlement and set attorney's fees. *Id*. at § 12.5. It is not necessary for a carrier to file a Petition for Credit in a case where there is no genuine issue as to employer negligence. *S.C.I.F. v. W.C.A.B. (Brown)*, 130 Cal.App.3d 933 (Cal. App. 1982). Courts have held that it would be "financially foolhardy" for a carrier to continue paying benefits pending the filing of and ruling on a Petition for Credit. *Id*. The carrier can simply assert the credit automatically. If there is any credible issue of employer negligence, however, it is advisable to file a Petition for Credit. However, the carrier does not need to continue payment of benefits pending a ruling on that petition as long as there is no genuine issue as to whether the payments can be suspended.

The carrier, of course, must be careful if there is any suggestion of a limit on the right to a credit as a result of employer negligence, as the assertion of credit without a reasonable legal basis can result in the imposition of serious penalties. If there is any credible issue as to employer negligence, the carrier should file a Petition for Credit. It is always better to resolve the issue of employer negligence in a civil case given the dramatically pro-worker bent of the W.C.A.B. and the total unfamiliarity of its judges with the issue of negligence. Otherwise, a carrier should simply assert the credit and wait for the worker to file his own petition complaining of same. If the issue of employer negligence has been judicially determined, that issue is binding as *res judicata* on the Board. If not, the Board will have to determine the issue of employer negligence on its own – a scary prospect.

If an employee makes a settlement against a third-party tortfeasor without the participation of the carrier, a credit for any sums received by the employee is to be applied against any future compensation benefits. The amount of the credit is limited to the net amount realized in the third-party action after deduction of reasonable attorneys' fees and costs. Cal. Labor Code § 3860 (1989). In order to obtain the credit, the Workers' Compensation Appeals Board, on petition by the workers' compensation carrier, may issue an order delineating the employer's right to a credit against future workers' compensation liability.

When a third-party case settles, the subrogated compensation carrier is faced with three possible scenarios:

(1) Recover a sum for its past lien and enter into a compromise and release of the underlying workers' compensation claim. This constitutes a settlement of the compensation claim completely, and does not allow the worker to reopen the compensation claim for any reason. Usually, the carrier takes a slightly smaller lien recovery in exchange for the certainty of the closure on the compensation claim.

(2) Take a sum certain as a lien recovery, slightly more than if it had opted for the compromise and release in (1) above, and receive a stipulated amount for future credit. Once the credit is exhausted, the carrier again has to begin making benefit payments. With this option, the plaintiff waives the argument of employer negligence (reducing the credit), and the credit is not delayed.

(3) The plaintiff/worker contests everything, including the lien and the right to a credit. In this case, the trial court must determine the amount of employer negligence so as to determine the appropriate amount of the carrier's credit. If the case settles, then the trial court is out of the picture

> and the employer's negligence is determined by the Workers' Compensation Appeals Board. Where no court has adjudicated the employer's percentage of negligence, this task falls to the Appeals Board. However, this is rarely a good option for the carrier because the Division is extremely pro-worker. The carrier must first meet its threshold of employer negligence (20% employer negligence x $1 million = $200,000). This means the lien is first reduced by the $200,000, and if it is eaten up, then the credit is reduced by the remainder. The carrier has to meet its "threshold" before it receives any lien recovery or a credit.

When employer negligence is involved, many plaintiffs' attorneys are under the mistaken impression that the credit is eliminated, and they may represent the law to you as such but this is not the case. The credit is merely delayed until the carrier has met its "employers' credit threshold". This means that the carrier must continue to pay benefits commensurate with its liability before it can receive credit against further demands for benefits in that case. *Southern Cal. Edison Co. v. W.C.A.B.*, 58 Cal.App.4th 766, 68 Cal.Rptr.2d 265 (Cal. App. 1997). The following hypothetical exemplifies how this works:

> An injured worker receives $75,000 in compensation benefits and then receives a $340,000 settlement from the third-party. The worker nets $194,000 out of the settlement after attorneys' fees and costs. Employer negligence is an issue, and the workers' compensation judge determines that the employer was 25% at fault. The court (where there is a jury trial) or Workers' Compensation Appeals Board (were there is a third-party settlement) determines that the value of the worker's tort damages is $500,000.

In the above scenario, taken directly from *Southern Cal. Edison Co. v. W.C.A.B.*, 58 Cal.App.4th 766, 68 Cal.Rptr.2d 265 (Cal. App. 1997), the "employer's credit threshold" is $125,000 ($500,000 x 25%) and the employer is entitled to a future credit of $69,000 ($194,000 - $125,000). However, the credit cannot immediately take effect, because the "employer's credit threshold" ($125,000) must first be met. Put another way, the employer/carrier must contribute an additional $125,000 before it can start claiming a credit. However, the carrier can count its past lien payments ($75,000) toward meeting this threshold. Therefore, the carrier must pay an additional $50,000 ($125,000 - $75,000) before it can claim a credit.

It should be remembered that the past lien will only count toward meeting the employer's credit threshold if it has not been reimbursed for the past lien and any portion of the lien which is reimbursed will not count toward meeting the threshold. Practically, however, subrogation practitioners in California rarely, if ever, see the plaintiffs' attorneys making a claim for credit for the amounts a carrier is reimbursed. Either they don't think about it, or they don't know about it, but that's okay, because it is very bad law. It has the effect of double-charging the carrier to the extent of its third-party recovery and permitting a double recovery by the injured worker, to the extent of the carrier's third-party recovery - something subrogation is supposed to remedy. Any opportunity to revisit this issue before the California Supreme Court, or Sacramento's Third District Court of Appeals (which is much more pro-employer than the Second District where *Tate* was decided) to possibly reverse this law, should be acted upon. It should also be noted that, in the case of a settlement (as opposed to a jury verdict in the trial court), where there is no agreement with plaintiff's counsel regarding the credit (which should be the goal), the Workers' Compensation Board judge will determine the injured worker's total tort damages and percentage of employer negligence, rather than the trial court judge. This is bad, and should be avoided if at all possible, because this judge is going to be extremely pro-claimant in his or her leanings.

California remains a state in which subrogated workers' compensation carriers must obtain subrogation counsel to intervene into an existing third-party action, or file one on its own behalf. Not only are the mechanics of workers' compensation subrogation in California complicated and laden with potential traps and pitfalls, but the trial lawyers know they have the ability to settle around idle and inattentive carriers - and they often do.

PROPERTY SUBROGATION

RYAN WOODY PRESENTS AT 5TH ANNUAL NATIONAL PROPERTY SUBROGATION STRATEGIES EXECUSUMMIT

"ECONOMIC LOSS DOCTRINE: THE MONSTER IN THE PROPERTY SUBROGATION CLOSET"

The economic loss doctrine is a major obstacle to property subrogation programs in almost every state - but it is not insurmountable. On April 30, 2008, Attorney Ryan Woody, a senior associate with MWL, presented *"Economic Loss Doctrine: Monster in the Property Subrogation Closet*" at the 5th Annual National Property Subrogation Strategies ExecuSummit in Atlantic City, New Jersey. This presentation focused on how the Economic Loss Doctrine affects property subrogation efforts. But more specifically, it discussed the many variations of the doctrine, important exceptions to the general limitation on tort suits, current trends nationwide, and predictions for the doctrine's future. According to ExecuSummit, excellent feedback has been received on this presentation. If your company/group is interested in having MWL come in and present this seminar, please contact our marketing coordinator, Jamie Breen, at jbreen@mwl-law.com.

Matthiesen, Wickert & Lehrer has been providing seminars to clients for more than a decade throughout North America and remain one of the leaders in continuing subrogation education for the insurance industry. While there are costs in both time and travel associated with presentation of seminars and classes, we offer these programs completely free-of-charge to clients for whom we handle a volume of work. Many of our clients have sent us more recovery work to get discounts on our seminars or, if the volume of work referred is sufficient, to receive our seminars completely free-of-charge. The cost and timing of seminars for newer and potential clients and friends of our firm must be discussed on a case-by-case basis as there may be some travel and/or presentation costs involved - although our goal is keep costs down in order to make our seminars affordable - we are all about cost-effectiveness. Please feel free to contact our marketing coordinator, Jamie Breen, at jbreen@mwl-law.com regarding obtaining a cost estimate for one of our seminars anywhere in North America (we come to you) or for coordinating the scheduling of such seminars. A complete list of the seminars offered by MWL, along with course descriptions, can be found on our website at www.mwl-law.com.

WORKERS' SUBROGATION SUBROGATION

TEXAS SUPREME COURT SPANKS PARTIES FOR ATTEMPTING TO SETTLE AROUND COMPENSATION LIEN

Texas Mutual Ins. Co. v. Ledbetter, 2008 WL 918575 (Tex. 2008).

On April 4, 2008, the Texas Supreme Court issued a particularly strong, pro-workers' compensation subrogation opinion in a case in which the plaintiff's attorney attempted to gerrymander a third-party settlement by dismissing all claims in a death case, except for claims of the deceased's estate. The case should send a strong message to plaintiffs and defendants alike, that conspiring to avoid repayment of a workers' compensation lien in Texas can carry heavy consequences.

Charles Ledbetter was electrocuted while working on a job for his employer. The workers' compensation carrier, Texas Mutual Insurance Company, paid $6,000 in funeral expenses and began paying $1,258 monthly death benefits to his widow and minor son. The family settled the third-party case for $4.5 million two weeks before trial, and the carrier quickly intervened. At the settlement hearing, the family dismissed all claims except those of the deceased's estate, and claimed the carrier wasn't subrogated to the estate's recovery, but could pursue the defendant on its own. The recovery allocated $2,388,545.40 to Ledbetter's estate (for pain and suffering before death); $2,063,912.60 to their attorney; $47,542.00 to the ad litem; and nothing to the widow, minor child, adult daughters, or compensation carrier. Ledbetter had died intestate, so his widow was entitled to one-third of the estate and his children to the remainder. But there was no evidence regarding expenses or expected distributions provided by Ledbetter's estate, or any testimony regarding how this settlement benefitted the minor. To the contrary, the ad litem stated that the only reasons for approving the settlement were (1) the minor would get nothing until he was 18 or older, and (2) his mother "understands her obligation to her child" in the meantime. The trial court noted the carrier had done nothing to further the litigation and had only recently intervened, struck the late-filed intervention, and approved the settlement, even though the non-suit and dismissal purportedly meant it no longer involved a minor.

The court of appeals held the trial court erred in striking the carrier's intervention, and in allocating 100 percent of the settlement to the estate, citing the limited evidence that Charles suffered pain before his death and the undisputed evidence that his widow and son suffered the loss of their sole means of support. However, the court of appeals declined to set aside the trial court's non-suit and reinstate Ledbetter's wife and son as parties. The Supreme Court reversed, invalidating the gerrymandering attempt, and holding that the trial court did not give the carrier "first money". The court held that a carrier can even intervene AFTER a judgment if it is getting manipulated by the parties, and that a third-party is liable to the carrier for conversion of the lien if it is complicit in the scheme. Although the exact cause of action against the third-party was not made clear, it should be referred to as "reimbursement pursuant to Texas Labor Code Chapter 417." The court said:

> *"When an injured worker settles a case without reimbursing a compensation carrier, everyone involved is liable to the carrier for conversion - the plaintiffs, plaintiffs' attorney, and defendants. As between those parties, we have held that generally those who received the funds unlawfully (the plaintiffs and their attorney) should disgorge them rather than making the tortfeasors pay twice."*

The court ordered the carrier's intervention reinstated, and remanded the case with instructions for the trial court to protect the carrier's subrogation interests.

The case reinforces the notion that the carrier's right to reimbursement is a "first money" right, and sends a stern warning to all parties not to infringe on the carrier's statutory right of reimbursement. However, the carrier came perilously close to losing its rights by not actively intervening and becoming involved in the third-party litigation in a timely fashion. Subrogating carriers, especially those with large subrogation interests, should get subrogation counsel involved promptly in order to properly prevent the needless expense of having to undo gerrymandered settlements such as the one in *Ledbetter*.