Prosecuting work-related personal-injury cases

Will the client be better off than relying on the Workers' Comp remedy?

By J. Kevin Morrison

Many of us are called upon to represent a potential client who has suffered an on-the-job-injury in order to pursue the accompanying personal-injury (or "third-party") claim against the person or entity that caused the injury. Often, especially in cases of serious injury and long-term disability, workers' compensation benefits are insufficient, and folks are justifiably looking for full financial compensation from the person who caused their injury.

Before agreeing to prosecute a personal-injury action on behalf of the person receiving workers' compensation benefits, we need to take a close and hard look to make sure it is in the best interests of the client. Like voters are rhetorically asked, "Are you better off than you were four years ago?" it is crucial to ask whether our client will be better off because of the lawsuit than he would be if he had only his workers' compensation claim. There are always "no brainer" cases where a third-party lawsuit will undoubtedly be to the financial benefit of the injured worker. But, there are occasions, perhaps many more than some would think, where it may *not* be to the client's benefit to prosecute the third-party case.

This article explores some of the complexities and pitfalls to watch out for the next time you encounter such a call to your practice. I have identified some of the more common issues and situations to analyze before commencing filing suit and prosecuting a third-party case on behalf of an injured worker already receiving workers' compensation benefits. These are as follows:

- Credit[1]
- Reimbursement
- Not enough money to satisfy client after everyone's paid
- Inadequate insurance coverage
- Tough liability/No employer fault: Why prosecute?

Credit

This issue is something that should *always* be considered before prosecuting a third-party case on behalf of an employee who is receiving workers' compensation benefits. What is "credit"? Assuming you are successful in prosecuting the personal-injury case, and you obtain a monetary settlement or judgment on your client's behalf, the employer[2] will assert a credit in the amount of your client's *net recovery* against the ongoing workers' compensation claim. "Net recovery" is defined as what your client puts in his pocket, after litigation expenses, attorney's fees, and any reimbursement to the employer for benefits paid.[3]

So, let's use the following example for illustration. Your client is on the job, driving to a work appointment, when another driver runs a red light and causes a collision. You settle the personal- injury case for $100,000. At the time of the settlement, the employer has paid $25,000

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in workers' compensation benefits, the litigation expenses are $5,000 and the attorney's fee is $33,000. Since there is no employer fault to reduce the employer's right of reimbursement (see below), the employer wants all $25,000 of its money back and obtains full reimbursement for its paid benefits. In this example, your client's net recovery is $37,000. So, once the $100,000 settlement is disbursed, and the client receives his net share totaling $37,000, the employer files a Petition for Credit at the Workers' Compensation Appeals Board. Since the employer did nothing negligent to cause the injury, the Petition is granted. The employer now has a credit of $37,000, which means the employer will not pay the next $37,000 in workers' compensation benefits it otherwise would have been obligated to pay for the same injury. However, in this example, your client has an injury which results in a permanent disability rating of 30 percent, which equates to $30,130.[4] Furthermore, your client needs ongoing medical care and treatment for the injury, like physical therapy and injections, which will cost thousands of dollars. The employer's credit wipes out your client's ongoing permanent disability benefits and medical care. The employer stops paying any permanent disability benefits it was paying and denies any medical treatment for the injury. While the lawyer in this example who has settled the case has generated a fee for himself and a $37,000 net settlement for the client, is the client better off because of the third-party case?

Of course, it is possible that your client may have alternative ways of procuring medical treatment. But, what if your client is laid off from work and has no health coverage? How will he pay for his treatment?

In other examples, an employer's credit rights can be defeated with evidence of employer negligence. However, in many cases (such as the above example) the employer did nothing wrong and will be entitled to full credit.

In every case, credit must be analyzed, addressed and discussed with the client before prosecuting the third-party claim, or you could have a very dissatisfied client on your hands (one who is not hesitant to contact a lawyer to investigate claims of malpractice).

Reimbursement

When an employee has been paid workers' compensation benefits, or benefits have been provided on his behalf (like medical treatment), the employer has a right to obtain reimbursement from the responsible party for the amount of workers' compensation benefits it has already paid out.[5] This is sometimes called "subrogation." In these difficult economic times, employers are looking for ways to generate revenue, and actively pursuing subrogation is a way they think they can generate revenue. I've noticed that employers are increasingly aggressive in pursuing full reimbursement lately. Before undertaking a third-party case, there are a number of things you have to analyze about reimbursement.

The first thing to keep in mind is that you are required to notify the employer about your claim or lawsuit.[6] If you fail to properly notify the employer, and you settle the third-party case, your client may get sued by the employer for equitable indemnity. I'm guessing if that happens, you may get a call from your client or his new attorney!

As simple as it sounds, another thing to consider is the amount of workers' compensation benefits paid. If the case goes to verdict, the verdict will be reduced by the amount of workers' compensation benefits paid. In significant-injury cases, with larger medical expenses and temporary disability payments made, even if you are able to eliminate much of the reimbursement to the employer with employer negligence, at a minimum, there will be an offset against any verdict/judgment for the amount of workers' compensation benefits paid. No double recoveries are allowed. A $1million verdict sounds great, but with $750,000 in workers' compensation benefits paid, your client's net share will be quite low, after costs and fees are deducted.

There are ways to defeat reimbursement of course. The most obvious way is evidence of "employer fault" as set forth in *Witt v. Jackson*.[7] If the employer or a co-employee was somehow negligent in contributing to the injury, the employer's right to reimbursement may be reduced or eliminated. The law has established a formula for this, as follows: total civil damages multiplied by employer fault equals threshold.[8] Threshold is the number at which the employer starts getting reimbursed. Here's an example: let's say that the total civil damages of your client's case (without regard to fault or collectability) is $250,000; the employer paid $50,000 in workers' compensation benefits, but is 50 percent at fault for causing the injury. The threshold is $125,000 (50 percent of $250,000). Since the employer has to pay out $125,000 in workers' compensation benefits **before** it receives any reimbursement, and has only paid $50,000 so far, it still has to pay $75,000 in future benefits, and is not entitled to reimbursement. So, that's great, no money back to the employer. Be careful, though, as the employer eventually will have a right to a credit, if there is enough exposure to future workers' compensation benefits. In this example, if your client collects another $75,000 in workers' compensation benefits, the employer will then claim a credit in the amount of his third-party recovery. In catastrophic cases, this is always an issue.

There are other ways to reduce the employer's right of reimbursement, usually by negotiation, but that's an article for another day.

Not enough money to satisfy client

As I said at the outset, if your client is not going to be better off because of the lawsuit, why pursue it? There are many times when the client's net recovery

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is not going to be significant enough to be worth the time and trouble of a case; for example, cases involving clear liability but relatively low insurance coverage, no employer fault, and significant workers' compensation benefits paid. Picture a rear-end collision with serious injuries, triggering lots of workers' compensation benefits, but caused by a driver with minimum limits of $15,000. Your client will receive little or nothing (unless he was smart enough to have a large uninsured motorist policy). Why pursue such a case, just to benefit the employer? The same can be said for a larger case: an auto collision in the course and scope of employment, and this time the negligent driver has $250,000 in coverage. However, the injuries are significant, and the employer has paid out $75,000 in medical bills, $50,000 in temporary disability benefits, and the client is still treating for his injuries. You don't want to settle the case to trigger a credit if there is no employer negligence, and furthermore, your client may be entitled to a large permanent disability award in his workers' compensation case. This case may not be worth pursuing.

Inadequate financial responsibility/ Low insurance limits

This often goes hand-in-hand with the "not enough money to satisfy the client" pitfall, but not always. You are usually not going to have this problem on a construction-site injury, where most contractors carry at least a $1 million CGL policy, and often more. However, in most auto cases and some premises cases, it is often a problem. In the Bay Area, the estimated percentage of uninsured motorists ranges from 14 to 21 percent, depending on the County.[9] And we all know that many of the insured motorists carry California's minimum limits of $15,000 per person. So, many times auto cases simply aren't worth pursuing if the at-fault driver is not financially responsible, and the employer has paid significant workers' compensation benefits. The same scenario can exist in premises liability cases against homeowners with low liability limits. There are many times, of course, when you will not be able to find out the amount of coverage until you have filed suit and have the right of discovery to adequately reassure yourself of the amount of coverage.

Tough liability/No employer fault

This category of case can also result in little or no benefit to your client if not properly and adequately analyzed. If a case is very difficult to win, you will have to spend lots of money and time to prove up your case and still might be defensed (or lose a motion for summary judgment). If the employer did nothing to contribute to causing the injury, its right of reimbursement is iron-clad, and it will get reimbursed for all of the benefits it paid from your hard-fought case. By way of example, let's say a client slips and falls at a work conference in an out-of-town hotel bathroom. The fall was unwitnessed, and the theory of liability is that the bathroom floor was wet and the hotel should have warned its guests about the wet floor. Since the fall was unwitnessed, it's going to be your client's word against the hotel's word about whether there was a sign up. Unfortunately, the fall resulted in serious injuries, including surgeries, a large income loss and loss of earning capacity. We know the employer did nothing to cause the fall, and that it paid out a whole lot of money in workers' compensation benefits. Guess who's going to be holding their hand out asking for reimbursement after the case settles for a substantial sum, with a lot of hard work and money spent on your part? The case may not be worth pursuing if the settlement only generates a large credit against ongoing workers' compensation benefits, and the employer ends up getting the lion's share of the settlement. It is rare when the employer decides to prosecute these types of cases on its own without the involvement of the employee's attorney.

A strategy that I have used on cases like these is to reach an agreement with the employer *before* instituting litigation, with some sort of a sliding scale for reimbursement and a waiver of credit against certain benefits. If the employer is realistic, it knows that whatever is generated from the third-party case will be "found money." It will get the opportunity to obtain some money back in reimbursement, but not enough to make the employee's third-party attorney turn down the case because of credit and other issues raised above.

An example would be the employer gets 25 percent of any settlement or judgment after the litigation costs and agrees to waive credit for the employee's net recovery.[10] This is, in my opinion, a "win-win" for everyone. Your client has an incentive to be better off since there will be no credit and only some reimbursement, the employer has the opportunity to obtain money back on a case it never would have prosecuted on its own, and the attorney has the opportunity to get compensated for his hard work and creativity if he prevails.

Make sure the agreement is in writing and enforceable (signed by the employer or someone authorized by the employer) *before* you prosecute the case.

Conclusion

Many clients who are injured on-the-job and are receiving workers' compensation benefits are benefited by pursuing a concurrent damages lawsuit against the tortfeasor. But, many are not, and many pitfalls exist when you pursue such a claim. A third-party recovery can end up hurting your client more than helping. Make sure you properly analyze the risks and complexities and discuss the issues with your client before plunging into litigation, and both you and your client will be better off.

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Morrison

Kevin Morrison exclusively represents individuals and families who have been harmed as a result of the negligence of others. He is experienced in prosecuting construction site, defective products, automotive and premises liability cases, and has become an expert legal advisor on the overlap of California's third party and workers' compensation system. Morrison is a partner at Jones, Clifford, Johnson, Dehner, Wong, Morrison, Shepard & Bell, LLP *in San Francisco, is on the Board of Directors of the SFTLA, and has tried cases both throughout the Bay Area and in southern California. He can be reached at: kmorrison@jonesclifford.com.*

Endnotes

[1] The terms "credit" and "reimbursement" are often mistakenly used interchangeably, but refer to two very different concepts in this context. Think of credit being about future benefits your client may be entitled to receive, and reimbursement referring to the past benefits already paid. Be wary of how you use these terms, especially in settlement documents.

[2] In this article, the term "employer" will refer to both the employer and the workers' compensation insurance carrier who pays or administers worker's compensation benefits to or on behalf of the worker.

[3] See Labor Code sections 3858 and 3861.

[4] Generally, this amount will increase by 15 percent if the worker is unable to return to work, and will decrease by 15 percent if he is able to return to work. (Lab. Code, § 4658(d).)

[5] See Labor Code sections 3852, et seq.

[6] See Labor Code sections 3853, et seq.

[7] 57 Cal.2d. 57.

[8] See *Arbaugh v. Procter & Gamble Mfg. Co*. (1978) 80 Cal.App.3d 500, 505; *Aceves v. Regal Pale Brewing Co*. (1979) 24 Cal.3d 502, 512.

[9] See http://www.insurance.ca.gov/0400-news/0200-studies-reports/1200-uninsured-motorist/

[10] This is, of course, just one example, and you are only limited by your creativity and how realistic the employer is.

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