



# Workers' compensation liens in the absence of employer fault

## The early bird gets the worm

By JACK BOLLIER

California Workers' Compensation liens are less punitive than a Medicare lien, and less complicated than an ERISA lien, but no less significant in their potential impact on the economic feasibility of your personal-injury case. Comp liens often threaten a greater share of a civil settlement because they include not only medical payments, but also include wage loss and disability, which is like a form of general damages. Ideally, the third-party case of a worker injured on the job will have ample evidence of employer fault to defeat the employer's lien and credit rights. This article aims to offer practical advice in the *absence* of employer fault.

If you have a third-party case where comp benefits have been provided, you must start your negotiations as soon as possible and before the comp lienholder asserts itself. If you move quickly, you can create a settlement fund that protects your lien and maximizes the recovery to your client by requiring the lienholder to equitably reduce its claim.

### Why pre-litigation recovery is best

If a case lacks evidence of employer fault, it is critical to educate the client on the likelihood of recovering additional money, beyond their comp recovery, through a civil settlement. After all, in the event of a settlement, the comp lien must be dealt with and any new money paid to the client might only serve as a credit against the employer's obligation to fund future medical care. As such, the client may see the civil settlement as little more than a cash advance which must be set aside for future treatment. This may serve

as little incentive to pursue a third-party claim and give even greater pause when weighed against the obligations accompanying litigation and its depositions, discovery, and medical examinations. Therefore, resolving the matter pre-litigation is preferred.

### Making a demand

The goal must be to resolve the case with a demand letter and without filing suit. This establishes that you as the plaintiff's attorney are solely responsible for procuring the funds and thus protects your first lien and control over a significant portion of the recovery. (Lab. Code, §§ 3856, subd. (b), 3860, subd. (c).) Apprehensive liability carriers know that finalizing any settlement requires the consent of both the employee and employer. (Lab. Code, § 3859.) You should make a request that the policy or settlement demand simply be "tendered." This will establish the date and amount for which the liability carrier is willing to settle the case, even if formal settlement and payment does not occur until some point in the future.

The plaintiff's exclusive creation of the settlement funds obligates the comp lienholder to reduce its claim under the Common Fund Doctrine to account for its fair share of attorneys' fees and costs. (*Quinn v. State of California* (1975) 15 Cal.3d 162, 175-176.) However, the comp carrier can defeat application of the Common Fund Doctrine if it can show that it retained an attorney that "actively participated" in the creation of the settlement funds. (*Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1278.) It is unlikely that the comp carrier has even retained counsel to recover its lien pre-suit, which thus precludes a finding of its active

participation at this early stage of the case.

It is most likely that the comp carrier has, without the assistance of an attorney, asserted its lien pre-suit by simply providing written notice to the liability insurance carrier and including an itemized accounting of its payments. This is insufficient to establish active participation, which requires a "conscientious effort . . ." (*Hartwig v. Zacky Farms* (1992) 2 Cal.App.4th 1550, 1557.) If the liability carrier has made its settlement offer in response to a thoughtful demand letter with a substantive analysis of the facts in law, there will be a clear record that plaintiff's counsel, and not the comp carrier, was the active participant in procuring the settlement.

Another reason to resolve the matter early is that, if you serve the demand after filing suit, you will also be required to put the employer on formal notice of the litigation. (Lab. Code, § 3853.) This will result in an appearance by an attorney on behalf of the employer. While you can still resolve the case through your "sole" efforts, now there will be a dispute about who procured the settlement funds. Consequently, the priority of your lien and applicability of the Common Fund Doctrine will be in doubt; two items which were needed to provide leverage over the comp lien holder.

### Appeal to the liability carrier

If you find yourself dealing with a stubborn liability carrier or defense counsel, educate them as to how a global settlement becomes more difficult if there is any delay in tendering a reasonable offer of settlement. Show how the plaintiff will be put in a much more difficult



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position if legitimate offers are not made until after suit is filed and the employer appears. In this scenario the plaintiff's negotiating position is weakened with its attorney's lien and right to Common Fund reductions in dispute. The plaintiff nets less and is less likely to enter a global settlement. This will lead to drawn-out litigation and increase costs for everyone involved, including the liability carrier. However, if offers are made early-on, then plaintiff's leverage over the comp carrier is strengthened and the plaintiff is likely to net more money and, therefore, more likely to settle globally, reducing costs for everyone.

### Leverage plaintiff's need for future care

Depending on how the underlying workers' compensation case is settled, the applicant (plaintiff) can receive coverage for future care; these settlements are made by "stipulation and order." For some applicants, coverage for this care is important and should not be bargained

away. However, with the cooperation and advice of the applicant's workers' compensation attorney, settlement of the comp case can be made on terms relieving the employer of liability for future care; these settlements can be made by "compromise and release." This route clearly requires the client's informed consent and may not be suitable for catastrophic injury cases. But, if appropriate, settlement by compromise and release with a waiver of future medical care might appeal to the comp carrier as part of a global settlement of the comp case and comp lien. The comp carrier avoids liability for future care and, in exchange, the plaintiff receives a reduction or waiver of the comp lien. There are obvious risks with this strategy, but there are also rewards if you cooperate and coordinate with your client's comp attorney.

### Conclusion

Workers' compensation liens present unique impediments to the viability of a

personal-injury case that might not otherwise be worth the time and effort of both the attorney and the client. With the client's informed consent, these cases can be profitable if resolved with a demand letter before the workers' compensation insurance carrier has the opportunity to retain counsel. Approaching a case with this strategy can be in the best interest of both the plaintiff and the defendant insurance carrier.

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