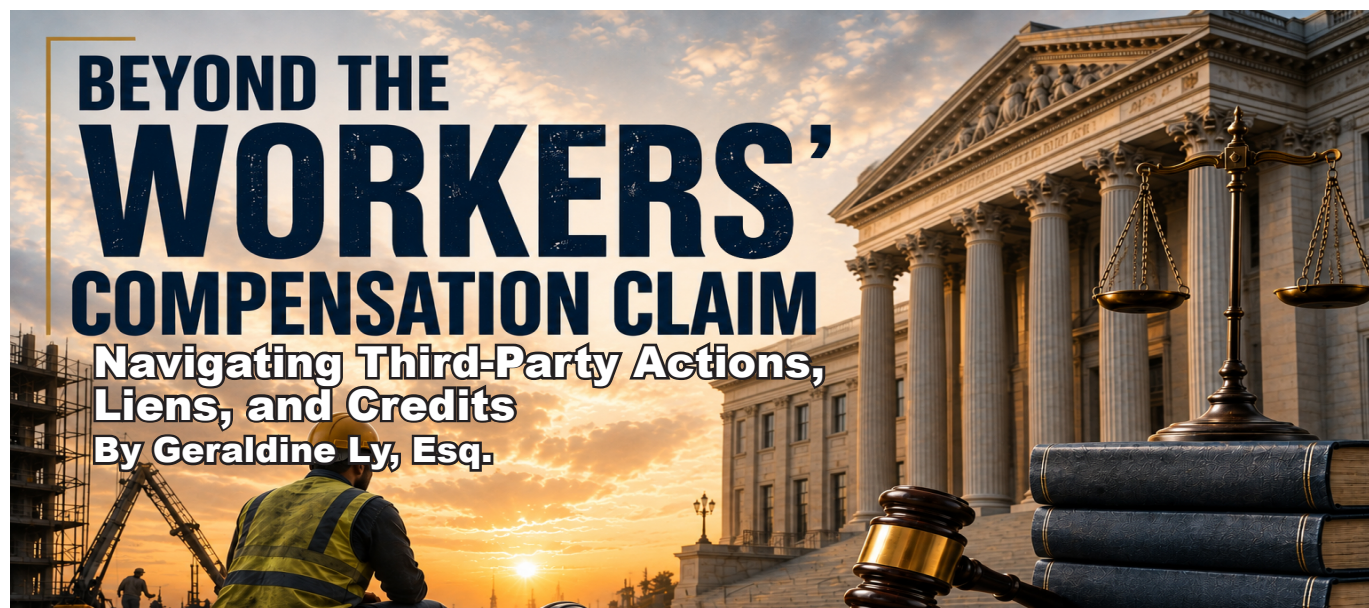




Introduction

The most significant workplace injury cases rarely fit neatly within only the confines of the workers' compensation system. A serious industrial injury may simultaneously give rise to a third-party civil action, a disability discrimination claim, a failure-to-accommodate action, wrongful termination, or claims under the Fair Employment and Housing Act (FEHA). Yet these matters are litigated in separate forums by different attorneys pursuing different objectives.

For all practitioners, understanding the intersection between these claims is critical to maximizing the client's recovery. Decisions made in one case can substantially affect (and sometimes reduce) the value of another. A third-party settlement may trigger issues involving workers' compensation liens, credit rights against the client's workers compensation benefits, and sometimes a complete resorption of the industrial injury case. Evidence developed during a workers' compensation proceeding may later become indispensable in proving civil liability, disability discrimination, failure to accommodate, or retaliation. Likewise, an employer's acts or omissions

which caused an industrial injury may transform an ordinary workers' compensation claim into a substantial claim for serious and willful misconduct.

The civil attorney who recognizes these crossover issues early can often create significant additional value for the client while avoiding costly mistakes.

Identifying Parallel Claims Early

One of the most important responsibilities of a civil attorney is to quickly advise the injured worker to open a workers' compensation claim so that they immediately receive medical treatment and temporary disability benefits while they are recovering. Similarly, an applicant attorney should identify potential claims that extend beyond workers' compensation benefits.

In California, no specific Rule of Professional Conduct expressly states that an attorney must advise a client of all possible other claims or cases. Rather, that duty arises from the attorney's duties of competence and communication, and it has been developed primarily through case law. (CA Rules of Prof. Conduct 1.1; *Nichols v. Keller* (1993) 15 Cal. App. 4th 1672.) Even an attorney retained for a limited purpose

(here, a workers' compensation case) has a duty to advise the client of reasonably apparent alternative claims or remedies, or at least to advise the client to seek other counsel regarding those potential claims.

The workers' compensation system provides an exclusive remedy against the employer for industrial injuries, but it does not protect negligent third parties. Construction sites, delivery operations, transportation accidents, product failures, and premises liability situations frequently involve third-party defendants whose negligence contributed to the injury.

Similarly, the employer's response to the industrial injury may create separate employment law claims. Following a work injury, employers often fail to engage in the interactive process, refuse reasonable accommodations, terminate injured workers because of work restrictions, or retaliate against employees who pursue workers' compensation benefits. Applicant attorneys are often the first legal professionals to hear the client's complete story. Questions about modified duty, accommodation requests, disciplinary actions, attendance policies, and post-injury termination should become

part of every intake involving a serious injury. (The crossover employment issues will be addressed in a subsequent article.)

A workers' compensation claim worth tens or hundreds of thousands of dollars may be accompanied by a civil or employment case worth substantially more since the client's workers' compensation recovery is limited and cannot include loss of earning capacity, loss of future earnings, nor general damages (pain and suffering). But, a large verdict or settlement in a civil matter may have terminating effects on the workers compensation claim.

Workers' Compensation Lien Stands in Line First

California's workers' compensation statutes provide employers and carriers with substantial reimbursement rights when an injured employee recovers against a third party. These rights are intended to prevent double recovery and shift ultimate responsibility to the negligent third party.

Under Labor Code sections 3850 through 3865, the employer or carrier may seek reimbursement for benefits paid and may assert a lien against the employee's third-party recovery. An employer who has paid workers' compensation benefits has three ways for pursuing reimbursement from the third party:

1. The employer may bring an action directly against the third party. (Lab. Code § 3852.)
2. The employer may join as a party plaintiff or intervene in an action brought by the employee. (Id., § 3853.)
3. The employer may allow the employee to prosecute the action and then apply for a first lien against the resulting judgment or settlement. (Id., § 3856.)

The employer's recovery is determined by whether the employee institutes a civil suit against the third party. If the employee has not filed a civil suit, the employer will be required to file one. If the employee files a civil suit, the employer can join in the employee's action. Or, the employer can file a lien in the employee's civil case for the amount of workers' compensation benefits it has paid. The employer's lien will not prevent the employee from settling a case directly with the third party, but a lien may protect the employer's right to recover monies it has paid in the event of a judgment in the civil suit in some circumstances. Furthermore, the employer is not required to participate in a civil suit but may:

1. Settle its claim with the injured employee and third party. (Id., §§ 3859, 3860.) Credit the injured employee's recovery in civil proceedings against its liability for workers' compensation benefits. (Id., §§ 3858, 3861.)

In *Duncan v. Walmart Stores Inc.* (2017) 18 Cal. App. 5th 460, the Court explained that under Labor Code section 3856(b), the Legislature has declared that, after attorney fees and costs have been paid, the employer is entitled to full reimbursement for the compensation it paid to the employee, and the employee is entitled to the remaining portion of the judgment only after the employer has been fully reimbursed. It believed that ensuring that the employer is fully reimbursed for the compensation it paid before the employee recoups anything other than attorney fees and costs is consistent with the overall purpose of the workers' compensation system.

California courts have long recognized that workers' compensation reimbursement rights are subject to equitable principles including the requirement that a carrier contribute to the attorney's fees

and costs incurred in creating the recovery fund. The application of the common fund doctrine is an essential negotiating tool when the carrier asserts a lien without its own separate subrogation claim. (*Kaplan v. Industrial Indemnity Co.* (1978) 79 Cal.App.3d 700.)

Employer Negligence and the Battle Over Liens and Credits

No discussion of crossover litigation is complete without addressing *Witt v. Jackson* (1961) 57 Cal.2d 57, one of the most important decisions affecting the rights of injured workers in third-party cases.

Prior to *Witt*, an employer whose negligence contributed to an employee's injuries could still seek reimbursement from the employee's third-party recovery for workers' compensation benefits paid. The California Supreme Court rejected that result, holding that a negligent employer should not be permitted to benefit from its own wrongdoing. The Court concluded that where employer negligence contributes to the industrial injury, the employer's reimbursement rights must be reduced by its proportionate share of fault.

For civil attorneys, *Witt* remains one of the most powerful tools available when confronting a workers' compensation lien. Every serious third-party case should be evaluated not only for the negligence of the defendant, but also for evidence of employer fault. Unsafe work practices, inadequate training, Cal/OSHA violations, defective equipment, insufficient supervision, and failures to enforce safety protocols may all support a *Witt* defense.

The significance of employer negligence expanded after the California Supreme Court's decision in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board* (1978) 22 Cal.3d 829. In that case, the Court examined the

relationship between employer negligence and the employer's right to assert future credit against workers' compensation benefits. The Court reaffirmed the principle that an employer should not obtain a financial advantage from its own negligence and recognized limitations on the employer's ability to claim future credit when employer fault contributed to the injury.

The issue was also addressed in *Roe v. Workmen's Compensation Appeals Board* (1974) 12 Cal.3d 884. There, the Supreme Court applied Labor Code §3861 and held that the employer's claim of credit in the injured workers' compensation claim should have been denied based on the employer's concurrent negligence. *Roe* remains an important authority for understanding how credits are calculated and applied following a third-party settlement.

Together, *Witt*, *Roe*, and *Associated Construction* establish a critical principle: civil and applicant attorneys must evaluate both reimbursement rights (payments made in the past) and credit rights (benefits to be paid in the future) whenever a third-party recovery is involved. In cases involving limited policies and those that are catastrophic involving significant future medical treatment or permanent disability exposure, the future credit may ultimately have a greater financial impact than the civil recovery itself.

This is why discovery concerning employer negligence should never be viewed as solely a civil litigation issue. Evidence obtained through Cal/OSHA records, site inspections, supervisor depositions, safety manuals, and incident investigations may dramatically increase the client's net recovery by reducing or eliminating reimbursement and credit rights. Working with the client's workers' compensation attorney can assist in obtaining these relevant

records, often at no cost.

From a practical standpoint, civil attorneys should ask four questions whenever a cross-over workers' compensation case exists:

1. Does the employer or carrier have a valid lien?
2. Did employer negligence contribute to the injury?
3. Is there a basis for a *Witt* reduction or elimination of the lien?
4. What future credit rights may survive settlement, and how can they be limited or negotiated?

Failing to address these issues early may result in a favorable civil settlement that ultimately produces a disappointing net recovery for the client. Conversely, a carefully developed *Witt* defense can transform the economics of the entire case and significantly increase the client's ultimate recovery.

Future Credit Issues

Before a civil case is settled, the workers' compensation lien is resolved, and the settlement funds are distributed, you should prepare your client for third-party credit issues affecting their workers' compensation claim and future benefits. Effective advocacy requires viewing the workers' compensation case and the civil action as components of a single recovery strategy.

Employers frequently seek a credit against future workers' compensation obligations based upon the employee's third-party net recovery. Labor Code section 3861 states that "the appeals board is empowered to and shall allow, as a credit to the employer to be applied against their liability for compensation, such amount of any recovery by the employee for their injury, either by settlement or after judgment, as has not heretofore been applied to payment of

expenses or attorneys' fees...." The rationale is straightforward: if the employee has already recovered damages from a third party, the employer should receive a "credit" against future benefits that would otherwise be payable, hence no double recovery. Another dagger to the injured employee is that there is no deduction for general damages from the client's net civil recovery; the full net recovery is assessed as third-party credit against their workers' compensation claim.

The determination of future credit rights is litigated in the workers' compensation appeals board arena and is governed by general tort law and utilizing experts to determine case value. Even if the employer's negligence was not raised nor determined in the civil case, the appeals board may decide that issue independently in the employer's claim for credit. The employer must establish an evidentiary and legal basis for its assertion that it's entitled to credit by filing a petition, identifying the amount of the claimed credit, and providing a description of the benefits against which the employer seeks a credit. (Lab. Code § 3861; Cal. Code of Regulations 10555.) The petition must also include a copy of the settlement or judgment, if available, and an itemization of any credit applied to expenses and attorneys' fees.

From the injured worker's perspective, future credit can become a significant issue in continuity of care and monetary payments. Further medical treatment, temporary disability, medication, transportation, and essential permanent disability payments will cease if the client's net civil settlement surpasses the value of those workers' compensation benefits.

Accordingly, civil attorneys should evaluate credit exposure and, in coordination with the applicant attorney, inform the client before finalizing any third-party settlement. The amount of the settlement alone does not determine the client's ultimate recovery. The more important

question is how to provide continuity of care and indemnity benefits until future credit issues are resolved or litigated.

Coordinating Civil and Workers' Compensation Cases

The greatest opportunities—and risks—arise when multiple cases proceed simultaneously. Civil law practitioners should have a symbiotic relationship with the applicant attorney. Attorneys in the various practice areas must avoid inconsistent positions in order to maximize the client's recovery. When properly coordinated, the combined value of the workers' compensation, civil, and employment cases often exceeds the sum of their individual parts.

Medical evidence developed in the workers' compensation case may support injury claims and bolster special damages in personal injury litigation. Life care plans can be utilized in all areas of practice and the costs can be diffused among the firms. Depositions taken in a third-party action may uncover employer negligence relevant to a *Witt* etc. defense and reductions in third-party credit claims. Employment records obtained through the workers' compensation claim substantiate wage loss and other economic losses, and may be helpful to reveal violations of wage-and-hour issues, illegal or absent employment policies, and various other evidence concerning work restrictions, accommodations, or retaliatory motives.

Often, the workers' compensation claim proceeds sooner and faster than a civil lawsuit. Not only is the injured worker entitled to immediate medical treatment and temporary disability, the applicant attorney may also seek a neutral medical-legal evaluation for compensatory or causation issues. (Lab. Code §§ 4060, 4061, 4062 et seq.) These medical-legal reports serve as a detailed second opinion for the civil practitioner in assessing the extent of the client's injuries and loss of earning capacity. Conversely, the applicant attorney should coordinate which

other medical-legal opinions which it cannot obtain through the workers' compensation case, such as neuropsychological evaluations, so that the civil attorney can retain such experts.

Practice Tips for Attorneys

The importance of immediate coordination with other practitioners cannot be overstated. The devil is in the details, and finding out as much as possible during the initial intake stage can reveal other claims and recovery for your client.

Several practical lessons emerge from these crossover issues.

For applicant attorneys, screen every significant injury case for third-party liability. A simple intake question regarding who controlled the premises, equipment, or worksite may reveal a valuable civil action. When settling the workers' compensation claim, have the civil attorney review the language in the settlement documents so that the terms and statements do not conflict with theories or claims in the civil case.

For both civil and workers' compensation attorneys, investigate employer negligence immediately. Evidence supporting a *Witt* defense often disappears quickly. Safety records, witness statements, and photographs should be preserved as early as possible.

For civil attorneys, do not enter into a settlement nor allow the client to sign a settlement agreement without coordinating the settlement process with the applicant attorney. Language in settlement and release agreements may detrimentally affect the client's right to further medical treatment and indemnity compensation.

Finally, evaluate every settlement through the lens of the client's net recovery. A large settlement may provide little benefit if

reimbursement and credit issues are ignored.

Conclusion

Attorneys must do far more than litigate in a bubble. Serious industrial injuries frequently generate overlapping workers' compensation, civil, and employment law claims that require coordinated analysis and strategic planning. Understanding workers' compensation liens, *Witt* defenses, and future credit issues allows attorneys to maximize recovery while protecting their clients from avoidable pitfalls.

The attorney who recognizes these crossover issues early is often able to transform a routine workers' compensation matter or third-party case into a comprehensive recovery strategy that maximizes compensation to the client.



Geraldine Ly, Esq. Attorney Geraldine Ly has been representing injured workers and plaintiffs for over 32 years, obtaining numerous six-, seven-, and eight-figure judgments, settlements, and awards for her clients in personal injury, workers' compensation, and civil rights matters. In addition to injury law, Ms. Ly has defended clients in criminal cases. She has been named a Southern California Super Lawyer since 2015 and one of the Top Women Attorneys by Los Angeles Magazine since 2016. For the last eight consecutive years, she has been recognized as one of AVVO's and Orange Coast Magazine's Top Attorneys in the area of Workers' Compensation.