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IN THIS ISSUE...

HOW TO AVOID THE TOP FIVE SUBROGATION MISTAKES

By: Jim Knezovich, Managing Attorney – Civil Litigation/Subrogation Department

The California Labor Code provides employers and insurers in California the valuable right to recover workers' compensation benefits paid to and on behalf of an injured worker from a "third party" who substantially contributed to the cause of the injuries. Many other states eliminated or substantially limited that right.

The workers' compensation claims examiner has the responsibility of identifying subrogation opportunities. To do so, the examiner uses strategies to best protect subrogation rights of the employer and/or insurer. However, while the examiner may be an expert in adjusting a claim, it is not uncommon to have very limited experience in dealing with subrogation. It is likely the examiner is unfamiliar with the terminology and procedural elements involved in civil litigation. This is due to the infrequency of subrogation in workers' compensation claims. Once the question, "Could any person or entity, other than the employer or co-employees, have contributed to the occurrence of the accident?" is asked and answered with a "yes", **immediate** and **effective** action must be taken. If action is delayed, it becomes difficult to avoid costly and irreversible consequences affecting recovery and credit rights. Also affected are lost opportunities to minimize the impact of the injury on the employer's loss history and premiums.

While the pitfalls and complexities of workers' compensation subrogation are many, and as opposing attorneys and insurers become more adept at limiting subrogation rights of employers and workers' compensation insurers, experience proves that five particularly common, but potentially devastating, mistakes must be avoided in order to protect subrogation rights.

Mistake #1:
Relying on the Statute of Limitations to Protect Subrogation Rights

Almost everyone understands one of the most basic rules concerning protection of subrogation rights: there are one or more Statutes of Limitations applicable to every subrogation claim. For workers' compensation subrogation, the Statutes of Limitations applicable to bodily injury and wrongful death claims apply. In California, the Statute of Limitations is typically two years from the date of injury, unless the responsible party is a government entity, which shortens the time limit to six months. In order to toll the two-year Statute of Limitations, a formal Complaint must be on file with the court on or before the second anniversary. Tolling the six-

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LIEN REFORM: SB863 AND BEYOND

By: Kate Kroeger-Lozano, San Francisco & Erin Walker, Oakland

The new lien regulations mandated by SB 863 were specifically designed to limit the number of liens filed and litigated. Despite those designs, the anticipated cost savings currently remain unclear following a year of WCAB decisions and an injunction from the Federal District Court in *Angelotti*. Initially it was hoped that the 2013 Lien Reforms would eradicate virtually all of the exceptions and loopholes previously exploited by medical providers, copy services and interpreters. The passage of the reforms and the initial wave of case law supported defendants. However, by mid-November the *Angelotti* injunction on activation fees was greeted with dismay within the defense community. It is feared that additional litigation on activation and filing fees will follow.

Prior to 2013, lien claimants took advantage of loopholes in the regulations, as well as ambiguities caused by the lack of fee schedules. Those loopholes enabled lien claimants to compel carriers and employers to pay nuisance value settlements rather than incur litigation costs. The following details the progression of lien litigation following the SB 863 reforms.

SB863

Senate Bill 863 lien reforms significantly modified the availability of a lien as a mechanism to contest an employer's determination of the amount payable for medical, copy and interpreter services. The new regulations clearly manifested the Legislature's intent to erase the lien backlogs, end frivolous lien filings, and terminate the seemingly never ending life of "zombie liens". The most significant changes and reactions to those changes include:

- Lien Activation and Filing Fees;
- Temporary Injunction on Payment of Lien Activation and Filing Fees;
- Revised Statue of Limitations; and
- Independent Bill Review.

Lien Activation and Filing Fees

California Labor Code Section 4903.05 reinstituted a filing fee provision for lien claims. Fees of $150 were required for any lien claim filed after 1/1/13. Labor Code Section 4903.06 applies to lien claims filed before 1/1/13 and requires lien claimants to pay a $100 activation fee either: (1) at the time a lien claimant files a DOR, (2) before a Lien Conference if the lien claimants did not file the DOR, or (3) prior to 1/1/14, whichever is sooner. If the activation fee was not paid timely, the lien would be dismissed as a matter of law. A significant amount of litigation took place in early 2013 regarding the timing of payment of the activation fee, as well as determining which providers or parties were subject to the fees. Throughout 2013, the Board consistently issued decisions favorable to defendants, requiring lien claimants to adhere to the specific requirements set forth in the statutes and rules.

***Soto v. Marathon Industries, Inc.* (2013) Cal Wrk Comp PD Lexis, (ADJ7407927, ADJ7407928):** In one of the first cases addressing the lien activation fee, the WCAB dismissed liens whose activation fee was not paid by the start of the 8:30 a.m. Lien Conference. The WCJ initially ordered dismissal of these liens, but the lien claimants showed proof that they paid the fees during the conference, at 10:56 a.m. and 11:06 a.m. The WCJ reversed the dismissals, and defendants filed for Removal. Ultimately, the WCAB held that a lien claimant must show timely payment *prior* to the commencement of the Conference, not merely prior to the party's appearance before the WCJ.

***Figueroa v. BC Doering Co*, (2013) 78 Cal Comp Cases 336**: Originally a Significant Panel Decision, the first Order was rescinded and an En Banc decision by the WCAB issued continuing the strict interpretation of the statutes on payment of the lien activation fee. In this case, the lien claimant did not appear for the Conference, and the lien was dismissed with prejudice. On Reconsideration, the lien claimant argued that defendants could not seek dismissal since it had not served lien claimants with the required medical records or negotiated in good faith. The WCAB held in the En Banc decision that: 1) the activation fee must be paid prior to the commencement of the Lien Conference; 2) if the lien claimant does not pay the activation fee prior to the commencement of the conference, its lien must be dismissed with prejudice; 3) the lien claimant's burden to pay is not tolled by any breach of action of the part of the defendant; and 4) no notice of intention to dismiss is required prior to the dismissal of a lien under these circumstances. This En Banc decision was binding precedent with regard to lien activation fees until the Federal District Court handed down the *Angelotti* injunction (summarized below.)

LIEN REFORM: SB863 AND BEYOND *CONT.*

***Mendez v. Pacific Comp Ins. Co* (2013) ADJ6509620, ADJ6509621:** In *Mendez*, a WCAB Panel further clarified the triggering events mandating the filing of a lien activation fee which reversed the WCJ's trial decision. In this case, the lien claimant filed a DOR in 2012 and proceeded to a Lien Conference also in 2012. At Trial in 2013, the WCJ held that the lien claimant had not paid the appropriate activation fee and dismissed the lien with prejudice. On Reconsideration, the WCAB held that the statute mandating the filing of the fee prior to filing a DOR or participating in a Lien Conference only applied as of 1/1/13. The statute does not include a Lien Trial among the timeline for mandatory payment of the activation fee. Further, consistent with AD Rule Section 10208, the Labor Code Section 4903.06 activation fee requirements were not operative at the time this lien claimant filed its DOR. The case was remanded back to the WCJ and the order dismissing the lien rescinded.

Certain lien claimants, including copy service vendors and interpreters, attempted to exclude themselves from the definition of "lien claimants" by withdrawing previously filed liens, and attempting to substitute "Petitions for Costs" under Labor Code Section 5811.

In the En Banc decision ***Martinez v. Allstate Ins. Co., Admin., by Specialty Risk Serv.* (ADJ 613459)**, the WCAB struck down the above interpretation of Labor Code Section 5811. In *Martinez*, a copy service filed a lien in 2012 for copying and related expenses. In January 2013, the copy service filed a Petition for Costs under Section 5811 listing the same costs for which they had previously filed a lien – without withdrawing the prior lien. A judge denied the cost petition finding it subject to Section 4903.06(a). After Appeal to the WCAB, the Board unanimously held that copy service providers cannot use Section 5811 to escape the mandatory lien activation fee. The Board emphasized that the purpose of the Lien Reforms would be frustrated if lien claimants could avoid the fees simply by filing a Section 5811 Petition for Costs. With this in mind, the En Banc decision created a binding precedent to guide WCJ's on handling future attempts to circumvent the lien activation fees requirement. Additionally, in a footnote, the Board commented that it expected to handle Petitions for Costs filed by interpreters in the same fashion.

Injunction on Payment of Activation and Filing fees

Lien claimants challenged the lien activation and filing fees in ***Angelotti v. State of California* ((CV 8:13-cv-01139_GW-JEM; 78 CCC1218 (2013)):** A plaintiff lien-holder argued in Federal Court that the lien activation fee for liens filed prior to 2013 is unconstitutional because:

1. It takes their vested property rights away and amounts to a taking of private property for public use without just compensation (Fifth Amendment);
2. It denies them due process of law because the retroactive fee effectively eliminates their right to seek administrative or judicial relief (to have it adjudicated, must pay the fee) (Fourteenth Amendment).
3. It denies them equal protection under the law because it exempts insurance companies, HMOs, etc. and does so without a rational basis (Fourteenth Amendment).
4. It violates 42 U.S.C. Section 1983 because public officials are enforcing the law under the guise of the state, thus violating the Fifth and Fourteenth Amendment (a violation of Section 1983 first requires a constitutional violation).

The Court dismissed the Fifth Amendment Takings claim and Fourteenth Amendment Due Process claims without leave to amend. However, the Court granted a preliminary injunction based on the Fourteenth Amendment **Equal Protection** claim.

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SOCIAL NETWORKING REVISITED

By: W. Devon Craft, San Jose

The use of social networking sites continues to be a ripe source of information in litigating workers' compensation claims. People will post any and everything about their lives on sites such as Facebook, Twitter, and Instagram, to name a few. And when we say "everything" we mean everything; from where they went on vacation, to relationship trouble, to what they had for breakfast. These sites allow us to look in on the private lives of applicants in a way that traditional surveillance never could.

In our previous article, *Trapped by the Web: Using Social Networking Sites to Investigate Workers' Compensation Claims*, we provided an overview of what social networking is and how it can be used effectively in litigation.[1] We also discussed some of the ethical and legal issues implicated in this emerging type of investigation. While these issues are still in their infancy, there have been interesting legal developments over the past three years, as well as additional issues to consider.

The Basics

Social networking refers to websites that allow people to connect to each other, to share information about common interests and the details of their lives. This is done usually by having a primary page, or profile (in the case of Facebook, this is called a "wall") where a user posts information and updates it periodically, or continuously, with "posts" about their daily activities. These posts can include pictures and videos uploaded by the user. Other popular sites for this are Twitter, where users only post up to 140 character updates, and Instagram, where users only post pictures.

The information posted on sites such as these can be as useful, if not more so, than *sub rosa* footage. Users of these sites tend to let their guard down and divulge personal details about their lives. These details may prove useful to argue causation, extent of injury and apportionment. For example, an applicant may post that he is helping a friend move a week after an alleged back injury. Or, you may discover that an applicant with a shoulder injury is an avid rock climber. With a psychiatric claim, you may discover that an applicant has had recent relationship trouble, deaths in the family or other traumatic experiences. With social media, these useful bits of information are put out into the ether for you to find and utilize.

To find this juicy information, start with a search engine such as Google or Yahoo. Using only the applicant's name may yield a search result with too many people of the same name. To narrow the search, it is helpful to also include any unique information such as their city of residence, the employer name, or perhaps their *alma mater*. This general information is usually found in a user's profile on a social networking site and can usually be gathered in the investigation phase of a case. At the inception of a claim, the adjuster or investigator can ask for general information so that they can be located on the internet. Defense attorneys can then use a deposition to dig even deeper and question the applicant regarding their physical abilities, recent activities, and other information retrieved from their online profile.

Public is Still Public

It is accepted that when a person purposely divulges information accessible to the general public, it can be discovered and used in criminal, civil, and administrative matters. This is true even when the information is presented in a digital medium; such is the case with social media.[2] In other words, a user has no expectation of privacy when they share information on a public website.[3]

In *Moreno v. Hanford Sentinel, Inc.,* a California Appellate Judge found that posting a rant on MySpace.com was public and that the user waived any privacy interest. California Civil Code Section 1708.8 prohibits invasion of privacy with the exception that:

> this section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel, or employees of government agencies or other entities, either public or private who in the course and scope of their employment, and supported by articulable suspicion, attempt to capture any type of visual image sound recording or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity or other misconduct, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.[4]

SOCIAL NETWORKING REVISTED *CONT.*

However, not all information posted in these sites is readily available to the public thanks to privacy settings. Users can usually limit who sees their posts to "friends" or "friends or friends." To view their posts you would then have to send the user a request that they accept you as a "friend", and once they accept, you can then view all of the information they divulge on the particular website. However, becoming friends with a claimant under false pretenses (i.e. making a false profile so that they do not know they are being contacted by someone associated with their claim) is clearly unethical. It is also unethical for a defense attorney, to "friend" an applicant, and doing so may subject the attorney to disciplinary action in violation of professional responsibility laws.[5]

Fortunately, while it is unethical as a claims adjuster, investigator or defense attorney to "friend" an applicant in order to see their profile, this information can still be accessed by use of court order or subpoena.

Discovery Order

In workers' compensation cases, applicants are often ordered to produce information during discovery. A common discovery order is one compelling the applicant to sign releases for medical records. It stands to reason, then, that an applicant could be ordered to produce social media information when that information is relevant to their case before the WCAB.[6] Several court decisions across the county have demonstrated this principle in recent years.

In *EEOC v. Simply Storage Management LLC*, a magistrate judge ordered employees to produce profile information from their Facebook and MySpace accounts.[7] The judge found that any entries in the users' profiles, either public or private, related to or referring to the allegations in the complaint were discoverable. This was true regardless of whether the user had set their profile to a private status.[8]

In *Bass v. Miss Porter's School*, a case involving a discovery request for social media information, the court upheld the request, stating:

> Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of [p]laintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not limited to [p]laintiff's own determination of what may be "reasonably calculated to lead to the discovery of admissible evidence".[9]

In *Barnes v. CUS Nashville* a magistrate judge found a creative way to resolve the parties' disputes over a request for plaintiffs' Facebook posts.[10] The Judge stated that he would create a Facebook account and have the plaintiffs accept him as a "*Friend*" so that he can review their profiles *in camera*. He ordered plaintiffs to provide their email address so that he can locate them on the website.[11]

However, the same limitations for traditional discovery still apply to discovery requests for social media information. Defendants cannot simply request a court to order production of claimant's social media posts without a basis for the request, and doing so would amount to the often cited and denounced "fishing expedition".[12]

Alternatively the information can be obtained from the site itself by a subpoena. This is a much more difficult process, and given the aim of the workers' compensation system to be swift and efficient, it may not be the best avenue for procuring the relevant information. However, this does provide an answer to the question raised in our prior article: What if the applicant deletes the information from the site? In that case, even if the applicant were ordered to allow defendants access to the profile, the information would no longer be available for viewing.

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FIVE SUBROGATION MISTAKES

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month Statute of Limitations requires that a formal Government Claim be placed on file with the appropriate governmental entity on or before the six month anniversary.

It is strongly recommended that all claims be considered subject to the six-month Statute of Limitations until it is determined absolutely that no governmental entity can possibly bear any fault for the incident. It is important to understand that what initially appears to be a claim not involving a governmental agency may, in fact, be a government claim. For example, a motor vehicle accident caused by an individual driving his own vehicle may be subject to the governmental claim time limits if the individual was in the course and scope of government entity employment at the time of the accident. However, the Traffic Collision Report likely will not mention anything about the employer of the responsible party.

One of the most common and costly mistakes is relying on the Statute of Limitations to preserve the employer's reimbursement and credit rights. While the claims examiner may flag subrogation rights early in the handling of the claim, far too frequently the strategy employed is as follows: (1) obtain a copy of the Traffic Collision Report or other report of the incident; (2) identify the responsible parties and their insurers; (3) place the responsible parties and their insurers on notice of the employer's/insurer's subrogation rights; and (4) update the claim file monthly, noting that subrogation rights are protected since notices were sent out while waiting for resolution of the workers' compensation claim in order to obtain recovery. This common and ineffective strategy typically results in a very poor, or even disastrous, outcome. The employer is made very unhappy as it thought it would recover from the responsible party the benefits paid on the compensation claim. It is difficult to explain to the employer that it is recovering pennies on the dollar after a clear liability motor vehicle accident involving a responsible party carrying liability insurance. The injured worker and her attorney, however, will recover the bulk of the available civil settlement proceeds. This can, and should, be avoided, by taking prompt and effective action.

When the responsible party's liability policy limits may become an issue in the civil bodily injury or wrongful death claim, **timing is critical**. **In addition to items (1) through (3) of the strategy above**, the workers' compensation claims professional must **immediately** do the following to maximize the subrogation outcome:

1. Confirm the applicable policy limits with the adverse insurer.

   The adverse insurer must obtain consent from its insured to disclose the policy limits. Ask verbally, and by correspondence, that consent be obtained. If the adverse insurer is unwilling or claims inability to get consent from its insured, explain that it is your intent to provide sufficient information to determine at the earliest time whether there is adequate coverage. This is to determine whether the bodily injury claim can be resolved quickly for the policy limits. Explain what benefits have been paid to date and what is likely to be paid, including medical treatment not yet paid for or billed. Frequently, even if the insurer has not obtained consent from its insured, it is willing to provide sufficient "hints" about the level of coverage. Also, certain insurers write only "non-standard" policies amounting to the statutory minimum, $15,000. Under some circumstances, the Traffic Collision Report provides sufficient information that suggests minimum limits are applicable; i.e. an 18 year-old driver of a 1990 Toyota Camry is not likely carrying high policy limits.

2. Obtain the insurer's written commitment to tender the applicable policy limits.

   If the employee suffered an injury for which there is a **possibility** that:

   a. the combination of medical and indemnity benefits paid to date,
   b. plus benefits expected to be paid
   c. plus lost earnings not covered by workers' compensation,
   d. plus future medical expenses,
   e. plus expected future lost earnings,
   f. plus the employee's probable general damages for pain and suffering,

   will exceed the applicable policy limit, every effort should be made to obtain a written commitment by the insurer that they will tender the policy limits to resolve all claims. This is done by "inviting" the insurer to offer the limits, keeping in mind that the employer or workers' compensation insurer cannot demand settlement for the policy limits without the consent of the injured worker. However, the goal at this step is to obtain a **written offer** from the adverse insurer to settle for the limits. Once accomplished, the examiner has done what is necessary to obtain the best possible subrogation outcome for the employer. At that point, contact may be made with the injured worker or her civil attorney (if represented), advising that the policy limit has been tendered, that consideration needs to be given to investigating whether the responsible party has the ability to add personal funds to a settlement (e.g. run an "asset check"), and whether the injured worker is in agreement with settling for the tendered policy limits (including agreeing on a division of the available settlement proceeds, and an agreement regarding Labor Code Section 3861 credit rights).

If these two steps cannot be accomplished quickly, it is recommended that the subrogation matter be referred to subrogation counsel at the earliest opportunity.

Why is this two-step process so critical? Why is immediate action so important? Because the employer is in a race with the injured worker's civil attorney to accomplish this same goal: to get the adverse carrier to tender the policy limits.

California law provides that if the injured worker is represented, and the employer/workers' compensation insurer is not represented nor "actively participating" in subrogation efforts, the injured worker's civil attorney is entitled to a contingency fee on the entire settlement amount. The employer is then obligated to accept a reduction in its recovery recognizing the injured worker's attorney's fees. This is known as the "Common Fund Doctrine." However, if the employer/workers' compensation insurer, or its subrogation attorney, is the first to obtain the commitment from the adverse carrier to pay the policy limits, no reduction in recognition of attorney's fees is required; i.e. the employer may be entitled to **full recovery**. Then the injured worker's attorney is mandated to take the contingency fee only on the part of the settlement allocated to the injured worker.

As an example of the dramatic effect of following this recommended strategy: assume a clear-liability motor vehicle accident with benefits paid up to $12,000 in the first few weeks. The responsible party carried a $30,000 policy limit. If the claims examiner or subrogation counsel obtains a commitment from the adverse carrier to tender the policy limits first, the employer is entitled to the first $12,000. The remaining $18,000 is directed to the injured worker and her attorney. The attorney then takes a 1/3 contingency fee, or $6,000, leaving $12,000 for the injured worker. That $12,000 amounts to a credit in favor of the employer against further workers' compen-

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FIVE SUBROGATION MISTAKES *CONT.*

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sation benefits otherwise payable. Value to the employer: $12,000 cash + $12,000 credit = $24,000.

However, if the injured worker's attorney is offered the policy limits first, the attorney is entitled to a $10,000 fee, or 1/3 of the policy limit. In turn, the employer is entitled to two-thirds of its $12,000 claim, or $8,000. The employee will receive the balance at $12,000. Value to the employer (cash plus credit): $20,000. The larger the applicable policy limit, the more dramatic the effect, and the larger the loss to the employer.

Mistake #2:
Failing to Pursue Subrogation When the Injured Worker Caused the Accident

California is a "comparative fault" state for bodily injury claims. This means that all parties determined to have **any** liability for causing the incident may be held responsible for a portion of the damages.

A common mistake is to conclude that there is no subrogation potential just because the Traffic Collision Report notes the injured worker's partial or primary liability. That liability can even include being cited for a Vehicle Code violation. Frequently, though, further analysis reveals additional useful information. That information can come in the form of witness statements or the injured worker's version of the facts disclosing that one or more of the other parties involved in the accident, or even some other entity, may bear some element of fault. It could be that another driver's speed or inattention contributed to the resulting accident. It could be that the design of the roadway was improper and contributed to the occurrence of the accident and resulting injuries.

Particularly when damages may be substantial, even a small degree of fault on another party may result in the potential for a substantial recovery and credit rights.

Mistake #3:
Assuming that Lien Rights are Protected by Placing the Third Party on Notice

The Labor Code provides the employer/insurer with certain rights to claim a lien against the injured worker's third party recovery for the amount of medical and indemnity benefits paid. In order to protect those lien rights, at the very least, the employer/insurer/administrator must assure notification of its lien rights to the injured worker's civil attorney, the responsible third parties, and the third parties' insurers.

It should be understood that notification of a lien, and nothing else, will, at best, allow for a recovery of two-thirds of the total benefits paid. This is due to the "Common Fund Doctrine" discussed above. However, this two-thirds recovery amount is really nothing more than a plaintiff attorney's starting point for negotiations. This is especially true if credit rights will effectively result in the injured worker recovering nothing more from the civil claim than he or she would have received through the workers' compensation claim.

If there is any possibility of allegations of employer fault, notification of lien rights alone may be meaningless and will not protect recovery rights. It is a common mistake to misunderstand this concept. If employer fault is either alleged in pleadings, or merely a possibility if actual pleadings have not been filed, the injured worker may legally "settle around" the lien. It is critical to be aware that whenever employer fault is a **possibility**, it is necessary to employ subrogation counsel to defend against such allegations. In the event that the injured worker filed a civil Complaint, it is necessary for the employer/carrier to **intervene** in the lawsuit to protect against these allegations and to protect recovery rights.

Mistake #4:
Settling the Workers' Compensation Claim Before the Civil Claim Settles

A key goal in adjusting workers' compensation claims is to move the claim to resolution at the earliest opportunity. However, when a favorable subrogation opportunity exists, early resolution of the workers' compensation claim can result in significant detriment to the employer/carrier. Instead, the examiner, in coordination with the employer, must focus on the strategic and economic advantages of **delaying** resolution of the claim by (1) keeping benefits as low as legally possible until the civil claim resolves, at which time (2) the maximum percentage of recovery may be obtained from the third party, and (3) the civil recovery by the injured worker "funds" the

FIVE SUBROGATION MISTAKES *CONT.*

resolution of the workers' compensation claim. This last item is accomplished either via Third Party Compromise & Release, or via Labor Code Section 3861 Credit applicable against further workers' compensation exposure. The concept is quite simple, and a valuable element of a subrogation opportunity, beyond recovering benefits already paid. The goal is to **use other people's money** to fund settlement of the workers' compensation claim. That "other money" is coming from the responsible third party, rather than from the employer or workers' compensation insurer.

Under most circumstances, it is a mistake to settle the workers' compensation claim prior to settling the civil claim, especially with a Compromise & Release. That leaves the subrogation attorney with only one option: attempt to recover as much of that money as possible. A skilled subrogation attorney may effectively negotiate the best outcome for the employer by having multiple options available. One option is reducing the recovery in exchange for extinguishing exposure on the workers' compensation claim with a Third Party Compromise & Release, or with a significant third-party credit. It is particularly important when employer fault is involved. In that circumstance, the credit issue should be resolved contemporaneously with the recovery aspect to avoid the need to file a Petition for Credit. Such a Petition can require a full-blown liability trial at the WCAB.

Mistake #5:
Not Understanding the Difference Between "Reimbursement" and "Credit"

Subrogation is commonly understood as referring to efforts at obtaining reimbursement of benefits from the responsible third party. While this may be accurate, it is only half the story. In fact, subrogation is two-sided. In addition to reimbursement, or recovery of benefits paid through the date of a civil settlement, subrogation also includes obtaining credit against further benefits otherwise payable on the workers' compensation claim.

The term "credit" in referring to subrogation and/or third party matters, is commonly misunderstood. "Credit" as referred to in Labor Code Section 3861, is **the net civil recovery obtained by the injured worker** (after deducting the civil attorney's fees, costs of suit, reimbursement to the employer, and possibly liens for self-procured medical expenditures relating to the subject claim). It has nothing to do with the amount of recovery obtained by the employer. Whether the employer recovers 100% of the benefits paid, or obtains no recovery at all, the credit amount is always the net civil recovery received by the injured worker.

While the employer is entitled to credit in the amount of the applicant's net civil recovery (assuming that there are no potential legal preclusions, such as in medical malpractice claims), the credit may not be asserted immediately unless there is no employer fault, or unless there is an agreement among the parties, typically via a Credit Stipulation. This agreement is normally a condition of the agreement as to the amount of the recovery to the employer. Absent an agreement, or facts that would constitute no basis for a claim of employer fault, it is necessary to file a Petition for Credit with the WCAB before the credit may be asserted.

Avoiding these five "classic" subrogation mistakes will maximize the chances of obtaining the most favorable subrogation outcome for the employer and/or workers' compensation insurer. That in turn will reflect confidence and professionalism in the claims examiner. ◆

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LIEN REFORM: SB863 AND BEYOND

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The Court found the exemption of insurance companies, HMOs, etc troubling. The Court first noted that even where a plaintiff is not a part of a suspect class; a plaintiff may raise an equal protection claim by showing that a governmental policy treats groups differently and is not rationally related to a legitimate legislative goal.

Here, the Court expressed reservation about the motivation behind the lien activation and filing fees. The Court reasoned that if the exempted parties are not large players in the lien filing problem, why exempt them at all? If this is a revenue generating mechanism, why not charge everyone? In any event, the Court held that the plaintiffs at least plausibly suggested a discriminatory purpose, i.e. that non-exempted lien claimants are being discriminated against or targeted unreasonably.

The Court noted that in the Ninth Circuit a preliminary injunction can be granted if there are "serious questions going to the merits and a hardship balance tips sharply toward the plaintiff." Here, the Court found a serious enough question coupled with the possibility of high financial prejudice to the plaintiffs. The harm was also likely irreparable because liens will be dismissed unless the fee is paid or an injunction is granted. Application of the law could bankrupt the plaintiffs because (1) the aggregate amount of fees needed to activate the liens is substantial, and (2) failure to pay those fees would result in forfeiture of the liens. The Court also made some minor points about the public interest and balance of equities, none of which were dispositive.

Lien-holders have also filed at least two additional lawsuits in both federal and state courts alleging that the lien activation fees and filing fees are unconstitutional under both the Federal and California Constitutions. Plaintiffs argue that the lien activation and filing fees are unconstitutional under state law (specifically the California constitutional provision authorizing the Legislature to create a workers' compensation system) because the law acts as an encumbrance on applicants & lienholders in violation of Cal. Const. Art. XIV Section 4. The state complaint is filed as a class action lawsuit requesting permission to represent the interests of all parties similarly aggrieved.

Aftermath: The Department of Industrial Relations (DIR) issued a press release on 11/15/13 indicating that as of 11/19/13 it will no longer require lien activation fees. Plaintiffs have filed a Notice of Appeal with the Ninth Circuit and will appeal dismissal of their takings and due process claims. The DIR indicated that it is exploring avenues of appeal, but has not made a decision. The only way to appeal the grant of a preliminary injunction is through an interlocutory appeal to the Ninth Circuit. The DIR has not indicated that it will appeal the preliminary injunction.

It is important to remember that the *Angelotti* decision is not a final decision. The injunction is temporary.

Although the WCAB stopped collecting lien activation fees on 11/19/13, the WCAB held that unless an aggrieved lien claimant filed a Petition for Reconsideration within 25 days of a lien's dismissal for failure to pay the fee, requests for reinstatement of liens will not be granted.

In ***Dante Santino v. Strategic Alliance Staffing***, the WCAB granted the timely Petition for Reconsideration by a lien claimant whose lien was dismissed for failure to pay the activation fee. The following day, 11/27/13, the WCAB granted the timely Petition for Reconsideration from a lien claimant in ***Elva Varela Castro v. Distinctive Industries***. In both cases the WCAB relied on the *Angelotti* decision to rescind the Order Dismissing Lien for Failure to Pay Activation Fee. Both cases were returned to the WCJ for further proceedings. In a third case, ***Gustavo Ramirez v. Medway Plastic*****,** the Petition for Reconsideration was dismissed on 12/3/13 because it was not timely filed. The WCAB noted that the decision in *Angelotti* could not help a lien claimant who did not file a Petition for Reconsideration within 25 days from the date of the Order Dismissing.

Revised Statute of Limitations

Another major Lien Reform was the implementation of a new and shorter Statute of Limitations. Under prior law, a lien could be filed within six months after a final Order or Award; one year from the date of services, or five years from date of injury, whichever was later. Many lien claimants circumvented the prior statute by arguing that they did not receive service of a final Order or Award, arguing that the statute was tolled.

LIEN REFORM: SB863 AND BEYOND *CONT.*

This statute, along with the accompanying "loophole" claim of non-service of an Award or Order, allowed lien claimants to unexpectedly pop up (like zombies) several years or decades later to demand payment for unpaid dates of service. This caused a multitude of problems for carriers as many files were closed or destroyed by the time these lien claimants began demanding payment. In addition, the statute placed the burden on employers and carriers to identify any and all potential lien claimants for all unpaid or partially paid bills. A popular interpretation of the law required service of settlement documents on nearly any provider involved in a workers' compensation case, whether or not a lien had been filed. Some workers' compensation judges went even farther by issuing decisions finding that any payment by a carrier to a provider put the carrier on notice of a potential lien claim, and obviated the need for a provider to file a lien.

The new law finally provides a statute of limitations with teeth. The burden is on providers to do all necessary work to perfect their recovery rights. Providers now must file a lien or risk losing the right to seek payment. The new statute requires providers of services prior to 7/1/13 to file their liens within three years from date of service. For all services after 7/1/13, the lien must be filed within 18 months of date of service. Labor Code Section 4903.5.

A WCAB Panel provided its interpretation of the three year timeline in ***Charles Kindelberger v. City of Los Angeles*** (ADJ586942). The WCJ ruled that Labor Code Section 4903.5(a) disallowed any treatment provided more than three years prior to a provider's filing of a lien, where there were 12 years of services provided. The WCAB disagreed with this interpretation and found that the section's three-year time limit meant three years from the **last** date that treatment was provided. The WCAB stated that in cases of ongoing treatment, the last date of treatment provided is the relevant date for application of the statute of limitations. It rejected defendants' contention that the first nine years of treatment should not be recoverable based on the three-year limitation for filing a lien. The Board concluded that there is no separate statute of limitations defense for every date of treatment. Instead the relevant date is the date of last treatment provided when applying the three-year statute of limitations for filing a lien.

Independent Bill Review

Labor Code Sections 4603.2(e), 4603.3, 4603.6, 4622 set forth the procedural rules for the newly enacted Independent Bill Review (IBR). Emergency Regulations 8 CCR Section 9792.5, et seq. applies to all bills issued in industrial claims as of 1/1/13 until updated regulations are passed. The new rules with regard to IBR mandate that any provider disputing the amount paid under a bill must first apply for "Second Bill Review". That Second Bill Review must be requested within 90 days of the provider's receipt of the EOR, or appeals board decision. The bill review company must conduct a second review and issue a decision within 14 days of receipt of the request.

If the second review does not resolve the dispute, the providers' only remaining recourse is IBR. The request for IBR must be submitted within 30 days from service of the second bill review using DWC form IBR-1. The burden is on the provider to first seek a second bill review, and then request IBR. The IBR determinations, currently handled by Maximus, are final and binding on the parties.

After the enactment of the SB 863 reforms, defendants expected to see the end of frivolous lien litigation. Prior to the reforms, lien claimants persistently filed DORs and attended all Lien Conferences, even though they had already been paid in accordance with, or in excess of fee schedule, with the hope of pressuring defendants to pay them an additional amount. Although the IBR process and lien statute of limitations regulations currently remain unscathed, the *Angelotti* decision has already impacted lien conferences. Lien claimants are once again emerging to demand additional payments, crowding trial calendars with inflated claims, and attempting to turn the WCAB into a (now free) lien collection agency. However, the *Angelotti* injunction is an interim decision for the pendency of the litigation only, and hopefully the final decision will result in the constitutionality of the activation fee being upheld. ◆

SOCIAL NETWORKING REVISTED

(CONTINUED FROM PAGE 5)

A subpoena of the social network service's records may produce the deleted information depending on its storage policies. Further, a protective order, instructing the site to not delete any information relevant to the case, may also be sought so that the site must save the information even if the applicant attempts to delete the material.

Using the Information in Litigation

Now that you have your juicy information, what do you do? This largely depends on the timeline of the case. The first 90 days are the most important as you are usually determining whether to accept or deny the claim. If information contradicting the applicant's claim is found during this period, the claim will likely be denied, saving money in the long run. Thus, it is important to hire an investigator familiar with internet discovery in the first 90 days of the claim to identify and access the applicant's online profiles.

Once the case is underway, the information can then be used in preparation for applicant's deposition, for comment by the medical-legal evaluator, and to present to a judge to show applicant's actual activities and abilities, as well as attack the applicant's credibility.

If the information is discovered prior to the deposition, the defense attorney can question the applicant regarding particular physical abilities that are demonstrated on their profile. While there is no authority dictating when evidence found on a social media site must be served on the opposition, it is likely that the same rules for *sub rosa* footage would apply.

Sub rosa footage must be disclosed prior to trial, but there is no requirement that it be disclosed prior to the deposition.[13] If a demand for such evidence is made, the evidence must be divulged before trial. How long before trial is not set in stone. It is has been found that five days prior to a Mandatory Settlement Conference, when a demand was previously made, was too late and the evidence was not admitted at trial.[14] Also, if *sub rosa* is used for a medical evaluation prior to applicant's deposition, then the evidence must be divulged at that time. This likely applies to social media evidence as well.

If the social networking evidence goes to the applicant's disability or other medical issues, it will likely need to be reviewed by a medical-legal evaluator. Such is the case with *sub rosa*. While *sub rosa* does not need to be disclosed prior to a deposition, the California Labor Code requires that "nonmedical records relevant to determination of the medical issues" be "served on the opposing party 20 days before the information is to be provided to the evaluator."[15] Pictures and video will likely prove more persuasive as the doctor can assess what the applicant is objectively doing, rather than a text posting describing past, present, or future events.

Once you have established that there is a discrepancy between the applicant's claims and the information on their online profile, the judge will have the final say regarding admissibility and weight. While the judge will likely rely on the findings of the med-legal evaluator, the judge does have the authority to make his own determination based on the medical evidence and *sub rosa*.

In *Regents for the University of California at Los Angeles v. WCAB,* defendants obtained *sub rosa* footage and did not have it shown to one of the medical evaluators in the matter.[16] The workers' compensation judge took the footage into consideration when making a determination on permanent disability. As such, even if the social media evidence is not reviewed by the med-legal evaluator, it should follow that a judge can still review it for its applicability to medical issues.

The judge can use the social media evidence for not just medical questions, but for all aspects of the case. For example, an applicant may be working while he is collecting temporary disability, or that he claims to have been injured at work, when a reference is made on his profile that he was in a car accident the night before the alleged work-related injury.

Admissibility

For a judge to see the information from the applicant's profile, it must be admitted as evidence in a proceeding before the Worker's Compensation Appeals Board (WCAB). Workers' compensation courts generally have a lower threshold of admissibility. The California

SOCIAL NETWORKING REVISTED *CONT.*

WCAB is not bound by the "common law or statutory rules of evidence and procedure," however, the WCAB "may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties."[17] As such, the WCAB will apply general rules of evidence when evaluating admissibility.

The first two requirements for admissibility are relevancy and probative value versus prejudicial effect. For example, if the social media evidence tends to show that the applicant can or cannot do any of activities he claims, or has an influence on any of the benefits being received (such as working while receiving TTD) then the relevancy requirement should be easily met. Further, it is unlikely that the evidence would be so prejudicial as to be excluded despite its usefulness to the case. This is especially true in workers' compensation where the case is not presented to a jury. First, the judge would already have to view the evidence to decide if is too prejudicial, and second, the judge would likely not be as emotionally affected by prejudicial information and only view the evidence as intended.

The more likely hurdles to admissibility of social media evidence are hearsay and foundation. To make sure that social media evidence that contains hearsay, whether it is text, pictures, or video, is admitted, there will need to be a sufficient foundation. It has been noted that "even with workers' compensation's relaxed evidentiary rules,

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UPCOMING CONFERENCES

PARMA 2014 Conference - *Public Agency Risk Managers Association*

The 2014 PARMA Conference is taking place on 2/9/14 – 2/12/14 at San Jose Convention Center, San Jose.
Visit the PARMA website for further details: http://parma.com/

2014 CWC & Risk Conference - "*The Risk Professionals Bleacher Report"*

We will once again be a sponsor for 2014 CWC & Risk Conference at Dana Point, CA.

Date: 9/10/14 – 9/12/14
Charity Golf Tournament: 9/9/14
Location: St. Regis, Dana Point
Executive Director: Lanette Hanson
Theme: Sports
100 Industry Expert Speakers
1200 Attendees
140 Exhibitors

Swing by our exhibit table and say Hello! We would love to see you!

CAJPA 2014 Fall Conference & Training Seminar - *California Association of Joint Powers Authorities*

Date: 9/16/14 – 9/19/14
Visit the CAJPA website for further details: http://www.cajpa.org/

SOCIAL NETWORKING REVISTED

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defense counsel has to establish that any information from an employee's social networking account was posted by the employee, because individuals can open […] accounts under the names of other people."[18] Additionally, even if the account was established by the applicant, it is possible that another person gained access to the account and made the post without the applicant's knowledge. To overcome this objection, the individual who conducted the search and gathered the information should testify as to how they found the site and provide a printout of the posting. Further, defendants can use other posts by the applicant indicating a pattern or style to show similarity with the disputed post. Once the defendant establishes foundation, the workers' compensation judge should admit the evidence and assign weight to that piece of evidence based on the credibility of the applicant.[19]

Conclusion

Social networking is here to stay and will only become more prevalent as time goes on. It can be a useful tool when we know how to use it, but we must be mindful of the legalities involved. The prevailing idea is that public is still public. Presuming that you can access information without having to pry your way by "friending," generally the information discovered is "fair game". Even if the information is protected by privacy settings, if it is relevant to the litigation, it will likely be accessible by court order, and admitted into evidence. Until tighter rules are in place re-defining what is "public", social networking remains a primary investigation tool in California workers' compensation. Don't forget to use it. ◆

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1 Trapped by the Web: Using Social Networking Sites to Investigate Workers' Compensation Claims, William Craft, Fall 2010, http://www.lflm.com/assets/files/pdf-articles/WC_Newsletter_Fall2010_Social_Networking.pdf (Last visited December 26 ,2013).

2 *See* 18 U.S.C. § 2511(2)(g).

3 See *Courtright v. Madigan*, No. 09-CV-208-JPG, 2009 WL 3713654, (S.D. Ill. Nov. 2009).

4 See *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858. (Ct. App. 2009), California Civil Code §1708.8 .

5 *See*, Trapped by the Web: Using Social Networking Sites to Investigate Workers' Compensation Claims.

6 *See Grady v. Superior Court*, 139 Cal.App.4th 1423, 1446 (Ct. App 2006).

7 *EEOC v. Simply Storage Mgmt., LLC* 270 FRD 430 (S.D. Ind. May 11, 2010).

8 *Id.*

9 *Bass v. Miss Porter's School*, No. 3:08-cv-1807(JBA), (D. Conn. Oct. 27, 2009).

10 *Barnes v. CUS Nashville*, No. 3:09-cv-00764 (M.D. Tenn. June 3, 2010).

11 *Id.*

12 *McCann v. Harleysville Ins. Co. of N.Y.*, 2010 NY Slip Op 08181 (4th Dep't Nov. 12 2010). http://www.nycourts.gov/reporter/3dseries/2010/2010_08181.htm (Last visited December 19, 2013).

13 *Downing v. WCAB*, 16 CWCR 76 (2012).

14 *Garden Grove Unified School District v. WCAB,* 69 Cal.Comp.Cases 280 (2004).

15 Labor Code § 4062.3(a)(2)-4062.3(b).

16 *Regents of University of California at Los Angeles v. Workers' Compensation Appeals Board*, 60 Cal.Comp.Cases 1124 (1995).

17 California Labor Code §5708.

18 Gregory Duhl, Jaclyn S. Milner, *Social Networking and Workers' Compensation Law at the Crossroads*, 31 Pace Law Review, 1, at 45 (2011).

19 *Id* at 46.

NEW REGULATIONS: WHEN?

By: Ryan Shores, Pasadena Office

Although the bulk of the SB 863 laws have already taken effect, there are several parts of the new law that were drafted as emergency regulations requiring additional action by the WCAB. Some of these regulations are set to be implemented on 1/1/14. Due to the nature of the administrative rulemaking process, and a large amount of input from the various stakeholders, some of the regulations that were supposed to take effect on 1/1/14 may not be finalized in time. Nonetheless, to insure that everyone has access to the most current information, below is a quick resource guide showing where to access these regulations. This information will be updated once the regulations are finalized.

Finalized Regulations and Fee Schedules:

Official Medical Fee Schedule: Physician Fee Schedule
http://www.dir.ca.gov/dwc//DWCPropRegs/OMFSPhysicianFeeSchedule/OMFSPhysicianFeeSchedule.htm

Supplemental Job Displacement Benefit (SJDB) Regulations
http://www.dir.ca.gov/DWC/DWCPropRegs/SJDB_Regs/SJDB_Regs.htm

Regulations and Fee Schedules Still In Progress:

Copy Services
http://www.dir.ca.gov/dwc/sb863/RegulationTimeline.htm

Independent Medical Review Regulations
http://www.dir.ca.gov/DWC/DWCPropRegs/IMR/IMR_Regs.htm

Independent Bill Review Regulations
http://www.dir.ca.gov/DWC/DWCPropRegs/IBR/IBR_Regs.htm

MPN Regulations
http://www.dir.ca.gov/dwc/DWCPropRegs/MPNRegulations/MPN_Regulations.htm

Home Health Care Fee Schedule
http://www.dir.ca.gov/dwc/sb863/RegulationTimeline.htm

FIRM ANNOUNCEMENTS

Administrative Functions Relocate

On 12/16/13, LFLM relocated its Firm Aministration from 255 California Street, San Francisco to 555 12th Street, Oakland. This encompassed a move of the Firm's Accounting, including Billing, Collections, and Accounts Payable, along with Human Resources and Information Technology Support. A number of attorneys also moved from San Francisco to Oakland including the Firm's Managing Partner, Jim Pettibone. The Firm continues to maintain a San Francisco presence with 26 Attorneys and 21 Support Staff still located at 255 California Street. The Oakland office is now comprised of 15 Attorneys and 15 support staff in addition to the Firm Administration.

Kevin Calegari continues as the Managing Partner of the San Francisco office, and Lucy Greenway remains as the Managing Partner of the Oakland office.

New Managing Partner

We are pleased to announce that after working in the Sacramento office for over 20 years, Demetra Johal, a native of the Los Angeles area, recently moved back there to serve as Managing Partner in the Firm's Los Angeles office in Pasadena.

New Partner

We are pleased to announce that Nicholas S. Pavlovich of the Firm's Fresno office became a new LFLM partner on 1/1/14. Congratulations Nick!

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