

By Kermit Sprang
Bradford & Barthel, LLP

SUBROGATION

Introduction

- Kermit Sprang, B&B Anaheim
 - Background in Subrogation-Started practice in 1974-Subrogation specialist with Hanna Brophy, et al. and now Bradford & Barthel, LLP



SUBROGATION – What is it?

Where an employee's injuries have been caused by someone other than the employer, you can recover the workers' compensation benefits which you have paid, and avoid future payments, by seeking reimbursement from the responsible party.

- The salesman is rear-ended while driving to a sales call;
- The office worker slips and falls on wet tile in the building lobby;
- The construction worker is injured when he falls into a concealed hole dug by another contractor;
- The secretary is injured when her defective chair collapses.



www.bradfordbarthel.com

3

Identifying Types of Claims with Subrogation Potential

- Independent assessment of subrogation potential
 - Classes of injuries likely to present potential
 - Injuries away from the employer's premises
 - Injuries caused by equipment, products
 - Injuries caused by assaults by third parties



www.bradfordbarthel.com

4

Identifying Types of Claims with Subrogation Potential

Aggravations of industrial injuries by non-industrial accidents

- Includes accidents both before and after the industrial accident
- Recovery is limited to the extent of the aggravation
 - This tends to make these cases difficult to prove – dividing out which damages were due to the industrial injury vs. the aggravation can be difficult



www.bradfordbarthel.com

5



- If you have any questions about whether a claim has subrogation potential, pick up the phone and call—that's what we are here for!



www.bradfordbarthel.com

6

Notification By Employee

Labor Code 3853 requires that notice of pending action, including copy of employee's complaint, be provided to employer

Caveat: Even informal notice, i.e., letter, will likely be held to be sufficient by court

Caveat: Obligation to notify applies only to filing action – Employee has no obligation to notify employer that he is trying to settle with third party defendant



www.bradfordbarthel.com

7

Notification By Employee

- Don't count on getting notice – many personal injury attorneys don't know about this requirement, and many that do prefer to ignore it, hoping that the employer will never find out.



www.bradfordbarthel.com

8

Other Signs of Third Party Action

- Records subpoenas, demands for inspection of property or premises, or other request for information from employee or attorney
- Deposition testimony by applicant in WC proceeding.
- Comments by treating, examining doctors in medical report – Additional recipients not involved in WC action



www.bradfordbarthel.com

9

Limitations on Subrogation Rights

- Medical malpractice – “Medical injury compensation reform act (MICRA)”
- No reimbursement rights against health care provider
 - On the contrary, the health care provider can use the WC benefits as an offset against its own liability.



www.bradfordbarthel.com

10

Exceptions:

- Not every accident that occurs in a hospital is “medical malpractice”.
 - “Negligence/Battery” –
 - Patient falls off gurney, out of hospital bed
 - X-ray tech drops machine on patient
 - Defective medical devices, appliances
 - I.E., defective heart valves, artificial joints



www.bradfordbarthel.com

11

Limitations on Subrogation Rights

- General-Special Employment
 - Employment Agencies
 - “Lending” of employees
- Uninsured/Underinsured Auto Liability



www.bradfordbarthel.com

12

Limitations on Subrogation Rights

- Contractual Language
 - No subrogation clauses
 - Indemnity clauses
 - Attorneys fees clauses



www.bradfordbarthel.com

13

Limitations on Subrogation Rights

- Takeover of Insolvent Liability Carrier by CIGA
 - CIGA does not have to reimburse other carriers - including workers compensation carrier—for losses. These are not “covered claims”.
 - The third party defendant is also personally immune from suit.



www.bradfordbarthel.com

14

Preservation of Subrogation Rights

- Statute of limitations

- For personal injury actions, generally 2 years from date of accident
- TAKE THIS SERIOUSLY!!
 - Unlike WC, statutes of limitations in civil actions are strictly enforced. Miss the statute by a single day and your case is over.



www.bradfordbarthel.com

15

Tolling of Statute of Limitations

- If the employee has already filed an action the statute of limitations is tolled for so long as that action is pending
 - This also works in reverse; if the employer has filed an action within the two-year limitation the statute is also tolled for a later intervention by the employee



www.bradfordbarthel.com

16

Compliance with Statute of Limitations

- The statute of limitations is satisfied only by the filing of an action, either by the employee or the employer/carrier
- A letter to the responsible party or its insurance carrier will not toll the statute.



www.bradfordbarthel.com

17

Government Claim Filing Limits

- Time requirements to file claim
 - 6 months from date of accident to file claim with correct agency
 - In theory, additional 6 months after end of 6 month deadline in which to file "late claim"
 - Requires convincing court that "good cause" exists for late filing
 - Court's very reluctant to allow late filing, much more reluctant after first 3 months



www.bradfordbarthel.com

18

Government Claim Filing Limits

- Once the claim is filed the complaint must then be filed within 6 months after the claim is rejection by the agency.
 - From the date of formal rejection,
 - 45 days after the claim is filed if the agency does, nothing—it is then deemed rejected



Content Requirements

- Be very careful to submit the claim to the correct government agency at the correct address
 - the California secretary of state maintains a "roster of public agencies"
 - the county clerk for each county maintains a similar roster for all local agencies within the county
- Be very careful to set forth all of the facts supporting the claim
- The complaint will be limited to matters set forth in the claim



What if you don't file, or you get it wrong? Possible "out"

- If the employee has filed a valid claim, you can piggy-back on that claim, so long as you file a complaint in intervention in the employee's action. You cannot file an independent action
- The employee, however, cannot piggy-back on your claim unless you have alleged his damages in your claim in addition to the workers' compensation benefits.
 - Do so—you will want to be able to assert his damages in your subrogation action



www.bradfordbarthel.com

21

Early Investigation of Subrogation Potential:

- START EARLY! Just because you have a two year statute of limitations does not mean you should wait that long to pursue your subrogation recovery
- Early investigation of liability issues is essential to locate witnesses and preserve evidence



www.bradfordbarthel.com

22

Witness Statements

- Witnesses may disappear
 - Construction accidents – get to the witnesses while still available on the jobsite – after the site is finished they will be very hard to find.
- Over time witnesses will forget possibly crucial details
- Witnesses more likely to give “favorable” recollections if approached early, prior to contact by other investigators.
 - What the witness says in the first statement is what the witness will keep on saying thereafter - get the witness to put your “spin” on the facts



www.bradfordbarthel.com

23

Motor Vehicle Accidents

- Traffic collision reports
 - Pay particular attention to reference in report to photographs taken by officers at the scene. These are the best possible evidence of the accident scene
 - Unlike the traffic collision reports themselves, these photos have a tendency to disappear - get them early



www.bradfordbarthel.com

24

Motor Vehicle Accidents

- 911 records/recording
 - Move quickly – these are preserved only limited time—usually no more than 30 - 60 days
- Photographs of accident scene, all damaged vehicles (not just insured's vehicle)
- Repair estimates and invoices - for all vehicles
- In-vehicle recorders
 - commercial trucks - gps/computer/speed record
 - automobile - computers/data chips
 - data preserved only for short time, generally based on the number of times the engine is started



www.bradfordbarthel.com

25

Motor Vehicle Accidents

- Liability Insurance Policies
 - Confirm the existence of liability coverage on the employee's vehicle
 - If there is no insurance policy covering the accident, the damages recoverable are limited to "economic" damages
 - the workers' compensation benefits are still recoverable, because they are all "economic" damages
 - however, the applicant's "non-economic" damages will not be recoverable, i.e., "pain and suffering"
 - as we shall see later, it is in your interest that these damages are also recovered



www.bradfordbarthel.com

26

Motor Vehicle Accidents

- Preserve the vehicles themselves - in a catastrophic injury, take possession, buy them if necessary, and place them in secure storage.
- You may not know initially the exact cause of the accident - by the time your expert decides what to look for it may be too late.
- If you need accident reconstruction expertise, only the vehicles themselves will provide the necessary detailed information. it is very difficult to reconstruct an accident from photos alone (some reconstruction experts to the contrary.)



www.bradfordbarthel.com

27

Product Defect Cases

- Isolate, preserve product, machine involved in accident
- If possible, take possession, place in storage
- Do not rely upon employer to preserve it at his factory, jobsite
- Much too likely that item will be repaired and put back in service, or thrown away
- Even if employer keeps item "intact", unlikely to store it carefully enough - so that no deterioration can occur



www.bradfordbarthel.com

28

Product Defect Cases

- Beware of “helpful” interference by potential defendants
 - If product fails, employer’s first instinct is to complain to supplier or manufacturer.
 - Manufacturer will offer to inspect, replace defective product
 - Once defective product is handed over, nearly impossible to get back



www.bradfordbarthel.com

29

Identify, tag the product or machine

- Photograph item immediately after accident to establish condition at that time
- Preserve chain of custody record
 - must be able to account for all custodians of item
 - must be able to prove that there has been no change in the condition of the item after the accident
 - Particularly if item is generic, it important to be able to demonstrate that the preserved item is the item involved in the accident



www.bradfordbarthel.com

30

Collect all documents associated with the product or machine

- Purchase orders & invoices, warranties, marketing materials
- Owners/operators, service manuals, instructional videos
- Maintenance/service records/invoices



www.bradfordbarthel.com

31

Premises Accidents

- Photographs to "Preserve" accident scene—not realistic to expect scene will be cordoned off indefinitely
- Surveillance cameras, video - must be done quickly, before recorded over
 - Loss of surveillance videos is a double problem
 - Defendant will argue that videos "destroyed" because employer didn't like what was on them - may be able to get instruction at trial directing the jury to consider destruction as admission that videos were damaging



www.bradfordbarthel.com

32

Premises Accidents

- Identify possible liable parties
 - Owner, lessee, property manager
 - Security, janitorial services
- Obtain copies of contracts, leases
 - check for no subrogation, indemnity clauses
- Obtain certificates of insurance



www.bradfordbarthel.com

33

Construction Accidents

- Photographs to "preserve" accident scene - further construction is guaranteed to obliterate the evidence at the scene
- Identify contractors, subcontractors
- Obtain copies of contracts, insurance certificates
 - check for "no subrogation", indemnity, additional insured requirements
- Obtain employer's safety records - tailgate/safety meetings
- Obtain copies of construction logs, diaries maintained at the site
- particularly important to obtain witness statements as early as possible construction sites are transient, contracting companies disappear
 - can be extremely difficult to locate witnesses once their work at site is completed



www.bradfordbarthel.com

34

Notification of Defendants of Claim

- Early notification of the defendant and its insurance carrier is essential
- If the employee settles with the defendant before the employer notifies the defendant that it is making a claim, that settlement will bar employer's subrogation claim against the defendant
- If the employee keeps all of the settlement money you can file an action against the employee to recover your payments out of his settlement - collectible?
- You can seek to assert a credit against the employee in the amount of your lost third party claim (in addition to your claim of credit for the claimant's own recovery).
 - Only viable if workers' compensation claim has future value



www.bradfordbarthel.com

35

Effect of Notice of Claim

- Notice can prevent the defendant from paying the employee without making provision for the employer's claim
 - If the defendant does so the employer can sue the defendant anyway
- The threat that the defendant will be exposed to a double recovery should be sufficient to deter the defendant from any unilateral settlement with the employee
- No particular form required - a letter is sufficient
- You can put the defendant on notice any time prior to the actual payment of the settlement
 - Wait that long and the employer will certainly have to pay the employee's attorney a "common fund" attorneys fee



www.bradfordbarthel.com

36

Didn't Give Notice? Now What?

- If you didn't give notice prior to settlement, you may still recover.
 - If you can demonstrate that the defendant was aware of your claim when it settled, that is good enough, even without formal notice
 - Subpoena the liability carrier's claims file - it will probably include a discussion of the fact that the injury was industrial, and that is enough to establish knowledge.



www.bradfordbarthel.com

37

Alternative Methods of Subrogation

- Notice of Lien
 - procedure to commence - file "Notice of Lien" with the court where the action is pending and serve on the parties to the action
 - can be filed at any time prior to payment of the judgment by the defendant



www.bradfordbarthel.com

38

Effect of Filing Notice of Lien

- Places parties to action on notice of the existence of a claim for reimbursement by the employer
- In theory, it requires the defendant in the action to pay the lien out of any judgment which it is obligated to pay
- Employer does not become party in third party action
- Not subject to certain types of discovery: interrogatories, requests for admissions, requests for production of documents
- However, still subject to records subpoenas, depositions.
- Note: defendant cannot force employer into action by filing cross-complaint against employer or co-employee



www.bradfordbarthel.com

39

Effect of Filing Notice of Lien

- No right to conduct discovery
- No right to receive pleadings, discovery, or other documents generated by parties
- No right to notice of court hearings
- No right to participate at trial



www.bradfordbarthel.com

40

Advantages (?) of Filing Notice of Lien

- In theory, it allows you to recover your workers' compensation benefits out of the employee's action at very low cost.
- But Beware



www.bradfordbarthel.com

41

Disadvantages of filing notice of lien claim - three primary reasons

- First, the employer is subject to being "settled around" by employee and defendant
 - If employee's settlement recites that it does not include any recovery for workers' compensation benefits, the employer is not entitled to any money out of the employee's settlement
 - In theory, this form of settlement allows employer to pursue recovery of workers' compensation benefits against the defendant separately.
 - This requires the employer to become a party and litigate against the defendant.
 - In practice, these settlements occur immediately prior to trial date, leaving employer with few alternatives
 - To protect its rights the employer must file a complaint in intervention before employee dismisses own action
 - The court may well—almost certainly will—refuse to continue the trial date, forcing employer to put on a trial on very short notice, without benefit of pre-trial preparation or witnesses – or walk away with nothing.



www.bradfordbarthel.com

42

Disadvantages of filing notice of lien claim - three primary reasons

- Second, the employer is left exposed to claims of employer negligence.
- If the case is tried, the employer's right to recover can be reduced, or lost entirely, if it is found to be comparatively negligent for the employee's injuries.
 - Even if not a party, the employer will be bound by the court's ruling on the issue.
 - Because the employer is not a party it cannot participate in the trial to protect its interests, and neither the employee nor the third party will do so.
- After the trial, the court's ruling on employer negligence will be binding on the employer in any subsequent WCAB proceeding
 - The court's ruling will govern when the employer attempts to enforce its credit rights



www.bradfordbarthel.com

43

Disadvantages of filing notice of lien claim - three primary reasons

- If the employee's action settles before trial, and the employer then attempts to enforce its credit rights before the WCAB, the employee may raise the employer's comparative negligence as a defense.
- Because the employee has not been a party to the third party action it will not have had access to the discovery conducted in that action, nor had any opportunity to conduct discovery itself.
- The employee will have the advantage both of his own attorney's preparations in the civil action, and also of the third party defendant's efforts to establish employer's negligence.
- As a result, the employer will be at a huge disadvantage in litigating the issue against the employee.



www.bradfordbarthel.com

44

Disadvantages of filing notice of lien claim - three primary reasons

- Third, if the employee's settlement or judgment does include the workers' compensation benefits, employer will pay "common fund" attorneys fee to the employee's third party attorney
 - Employer will pay same percentage as in the employee's contingency agreement. Premise is that employee's attorney did the work to obtain the employer's recovery, and should be entitled to a fee for doing so.
 - Contingency fees are always at least 33 1/3%--often 40 to 50%--of the employee's recovery. Thus, at best the employer can only recover a fraction of its total payout.
 - In addition to fees, the employer must pay a pro rata share of the employee's litigation expenses, costs, expert witness fees, etc.
- These fees are invariably far higher than the employer would pay its own attorney for the same work
- Recall that argument in favor of filing a lien claim --that it doesn't cost very much. The problem is, that's only true if you lose!



www.bradfordbarthel.com

45

The “Bottom Line”

- If a subrogation case is worth pursuing at all, it should be handled with the same aggressive, pro-active approach you would expect from your workers' compensation defense attorney.
- Caveat: one situation in which claim of lien is appropriate is where employer is barred from subrogation, i.e., a "no-subrogation" clause. In this case, a claim of lien is the carrier's only alternative.
 - Filing a "Notice of Lien" has been deemed to not be a violation of the "no subrogation" language.



www.bradfordbarthel.com

46

Complaint in Intervention

- In the past, this was the usual way in which subrogation rights were enforced
 - assumes that employee has already filed an action
- Procedure to commence
 - File Complaint in Intervention in employee's pending action;
 - The court will customarily require that a motion be filed seeking an order allowing intervention. After the motion is granted the Complaint in Intervention can then be filed.



www.bradfordbarthel.com

47

When to File

- Can be filed at any time employee action pending - statute of limitation tolled
 - Employer has absolute right to intervene at any time prior to commencement of trial.



www.bradfordbarthel.com

48

Effect of Filing

- ⑤ Affords employer all of the rights, duties of a party
 - Employer can conduct discovery, participate in trial
 - Employer can conduct trial if employee "settles around" employer
 - Defendant's knowledge that employer is prepared to do so often deters attempt to "settle around" employer
 - Employer prepared to resist defendant's claims of "employer's negligence" at trial



www.bradfordbarthel.com

49

Effect of Filing

- ⑤ Evidence will also be useful if employee raises employer negligence issue in petition for credit proceeding.
 - Discovery in civil action often the only way in which this evidence can be obtained.
- ⑤ Filing of Complaint in Intervention, and active participation in action by subrogation attorney, should defeat claim by plaintiff's attorney to an attorneys' fee out of employer's recovery.



www.bradfordbarthel.com

50

Recovery after Verdict

- The verdict will be based on the employee's total damages, as determined by the jury.
- Employer has "first right of recovery" – the employer gets its money back before the applicant, or the applicant's attorney, gets anything.
- Filing of Complaint in Intervention, and active participation in action by subrogation attorney, should defeat any claim by plaintiff's attorney to an attorneys' fee out of employer's recovery.
 - Participation in discovery, court appearances, and settlement activity should constitute sufficient participation to deter fee claim.



www.bradfordbarthel.com

51

Independent Action by Employer

- Used to pursue subrogation where employee has not filed action, or filing unknown.
- Employee may be satisfied with workers' compensation benefits, or have been unable to secure attorney due to large size of workers' compensation payments.
- If employee later files own action court will consolidate actions.



www.bradfordbarthel.com

52

How to File

- File complaint, commencing independent action.
Give notice to employee. Serve summons and
complaint on defendants.
- When to file
 - Within two years from date of accident
- Effect of filing
 - Exactly identical to filing Complaint in
Intervention, except employee not party
 - Advantages and disadvantages largely same
as for complaint in intervention



www.bradfordbarthel.com

53

Recoverable Amounts

- Measure of damages is employee's
damages, not amount of WC benefits.
- The action is tried as though the employee
was the plaintiff, and the judgment is the
same judgment which would be entered if
the employee was a party.



www.bradfordbarthel.com

54

Out of Total Recovery, Order of Payment is:

- First, employer's attorneys fees & litigation expenses
 - What? Recover Attorneys Fees? YES!!
- Second, reimbursement of employer's workers' compensation payments
- Third, remainder paid to employee
 - This benefits the employer – moneys paid to the employee can be taken as credit by employer
 - The possibility of getting money out of the action is usually sufficient to obtain the employee's cooperation



www.bradfordbarthel.com

55

The verdict's in, but the employer was negligent

- In order to determine the monetary recovery to the employer it is necessary to consider two elements:
 - First, the total potential value of the claim - ignoring all issues of comparative negligence, what is the total value of the employee's case, without any reduction for negligence by any party?
 - Second, the comparative negligence of the each of the parties to the claim; the employee, the employer, the defendant.



www.bradfordbarthel.com

56

Employer's Recovery – Example

- Example:

- Total value of employee's claim: \$500,000
- Total value of workers' compensation benefits: \$100,000

In order to determine the potential value of the claim to the employer, the total value of the claim is multiplied by the employer's comparative negligence. The resulting number is the "threshold amount" the amount of money which the employer will have to pay out in workers' compensation benefits before its right to reimbursement takes effect. This is then deducted from the employee's recovery to determine the employer's own recovery



Continuation of Example:

- 0% comparative negligence for both employee and employer, 100% comparative negligence for defendant.
- Verdict for employee = \$500,000
- To determine employer's recovery, first calculate the "threshold", then subtract from employers WC benefit payments
 - $0\% \times \$500,000 = \0.00 . $\$100,000 - \$0.00 = \$100,000$.
- Therefore, employer recovers \$100,000
- Employee recovers \$400,000.
 - The employer has a statutory "first right" of recovery. Therefore, the employee only recovers what is left over after the WC benefits paid are deducted from the verdict. This is to prevent the employee from receiving a "double recovery".
- Defendant pays total of \$500,000



Negligent Employer – Example

- Employee, 0%, defendant 90%, employer, 10%
 - Verdict for employee = \$500,000
 - To determine employer's recovery, first calculate the "threshold", then subtract from employee's verdict:
 - $10\% \times \$500,000 = \$50,000$.. $\$100,000 - \$50,000 = \$50,000$.
 - Therefore, employer recovers \$50,000
 - Employee's recovery is still \$400,000, because all of the WC benefits are still deducted from his verdict.
 - Defendant pays total of \$450,000 - it gets credit for amount which employer does not recover due to comparative negligence.



www.bradfordbarthel.com

59

Negligent Employee – Example

- Employee, 90%, defendant 10%, employer, 0%
 - Verdict for employee = \$50,000 ($500,000 \times 90\% = \$450,000$. $\$500,000 - \$450,000 = \$50,000$).
 - Employer's threshold is still \$0.00.
 - Employer recovers \$50,000. Why not \$100,000?
 - Employer cannot recover more than the value of employee's recovery, regardless of amount of WC benefits paid.
 - This is an issue which is not well understood, even by many attorneys who claim to be subrogation specialists. The measure of damages in a subrogation action is never the WC benefits themselves; it is always the value of the employee's claim.



www.bradfordbarthel.com

60

Negligent Employee – Example

- Note that the employer is not liable for the injured employee's comparative negligence
- This is a departure from the usual liability situation, where an employer is liable, on "respondent superior" principles, for the negligence of its employees
 - This exception applies only to the injured employee. The employer remains liable for the negligence of any co-employee



www.bradfordbarthel.com

61

Negligent Employer and Employee -- Example

- Employee, 50%, defendant 40%, employer, 10%
- Verdict for employee = \$250,000 ($\$500,000 \times 50\% = \$250,000$). $\$500,000 - \$250,000 = \$250,000$)
- To determine employer's recovery, first calculate the "threshold", then subtract from employee's verdict:
 - $\$500,000 \times 10\% = \$50,000$. $\$100,000 - \$50,000 = \$50,000$
 - Note that even though employee's actual verdict value is \$250,000, threshold is still calculated on case value without deduction for employee's negligence.
- Employee recovers \$150,000. ($\$250,000 - \$100,000 = \$150,000$)
 - Remember, even though the employer only recovers \$50,000, the entirety of the employer's WC payments are still deducted.
- Defendant pays total of \$200,000



www.bradfordbarthel.com

62

Credit Rights

- Subrogation also contains an additional element, the creation of an offset against benefits which would otherwise have had to have been paid in the future. The offset is referred to as "credit".
- In any case in which the injured employee's workers' compensation case remains open and has substantial future value, the preservation of your credit rights is essential, both for their own value and for the leverage they provide in resolving the workers compensation case itself.



www.bradfordbarthel.com

63

Credit Example:

- Employee's action has \$500,000 total value.
- No comparative negligence on the employee
- Employer has already paid \$100,000 in WC benefits, and will probably pay \$150,000 more.
- Employer has 20% - 50% comparative negligence
 - The actual amount of comparative negligence found by the jury will depend on whether the employer's position is represented at the trial.
 - If the employer doesn't participate in the trial it virtually guarantees that its comparative negligence will be increased, because no one else will protect it.
 - The third party defendant will attempt to push it up in order to decrease its own share of the liability, and the employee really doesn't care.



www.bradfordbarthel.com

64

Credit Example – No Recovery at Trial

- Best case scenario: with a \$500,000 case value and 20% comparative negligence the “threshold” is \$100,000, equal to the amount which the employer has already paid.
Recovery at trial, \$0.00.
- If the focus of your subrogation effort is solely on the recovery of money, this is a case that you’re going to walk away from.



www.bradfordbarthel.com

65

Credit Example – Credit Rights

- This case still presents an opportunity for great benefit to the employer because of the potential for credit rights.
 - At 20% comparative negligence the \$100,000 “threshold” means that the employer will be entitled to a credit, starting immediately, for the entirety of the employee's net recovery, probably around \$200,000 after attorneys fees and costs are paid. That will completely wipe out the employer's future liability.
 - However, at 50% comparative negligence the “threshold” rises to \$250,000, and the employer will have to pay the employee another \$150,000 before its credit rights attach.



www.bradfordbarthel.com

66

Using Credit to Terminate the Workers' Compensation Case

- In many cases the most valuable result of a subrogation case isn't recovering the moneys already paid out, but terminating the workers' compensation action via "third party compromise and release".
 - This is a form of settlement in which the third party's payment to the employee substitutes for the payment which would otherwise be made by the employer.



www.bradfordbarthel.com

67

Using Credit to Terminate the Workers' Compensation Case

- The driving forces to induce the employee to agree to such a settlement are twofold:
 - First, the employee's agreement to reduce its recovery of the benefits which it has already paid out.
 - At the point where the third party case is settling, the applicant wants as much of the money as possible, and his attorney wants to maximize his fee from that case – 30-50% of the third party recovery vs. 15% of a workers' compensation settlement.



www.bradfordbarthel.com

68

Using Credit to Terminate the Workers' Compensation Case

- Second, the employee's realization that because of the employer's credit rights the value of his workers' compensation case has been reduced or eliminated.
 - This second element is absolutely crucial to inducing the employee to agree to the settlement
 - Even a relatively modest credit right can induce an applicant to end the WC case, particularly where the future value of the WC case is primarily in future medical
 - With the credit in place, the applicant has to receive the services, pay for them himself, and submit the bills as an offset against the credit. Only when enough bills have been submitted to wholly offset the credit does your obligation to pay resume.
 - An applicant who would have happily gone on treating forever when someone else was going to pay for it, will be much less interested in preserving that right when he learns that he's going to pay for it out of his own pocket.



Breadth of Offset Generated by Credit Rights

- Credit rights offset nearly everything.
 - All temporary disability, permanent disability, and medical benefit obligations, whether past or present
 - It is not limited to liabilities incurred after the date of the order.
 - It doesn't matter when the obligation came due or the service was performed, it is offset.
- All attorneys fees, interest, and penalties in the WC case
 - If as a result of your credit there is no money to pay the applicant's attorney a fee, that is his problem.



Limitations on Credit Rights

- The only charges which it will not offset are Serious & Willful and 132a obligations use of credit rights against lien claimants



www.bradfordbarthel.com

71

Use of Credit Rights Against Lien Claimants

- Credit applies against all vendors bills, regardless of type or date incurred.
- Even a relatively small credit can virtually eliminate creditor's claims
 - No creditor will want to be first in line to take its claim to trial, obtain an order of payment, and then have their claim offset by the credit so they recover nothing.
 - As a result, all are deterred from proceeding.



www.bradfordbarthel.com

72

Perfecting Credit Rights

- Once the subrogation case is over, and the employer has obtained credit rights, how does it go about perfecting them?
- There is apparently some question in the WC claims community about the proper way of asserting credit rights.
 - Some adjusters believe that credit rights may be taken unilaterally - that benefits may be terminated without any further formal action.
 - There is some old case law which supports this position, but it has been superseded by later decisions.



www.bradfordbarthel.com

73

Perfecting Credit Rights

- The only safe way to take a credit right is to file an immediate petition for credit with the board.
 - If the amount of the credit substantially exceeds the value of the workers' compensation benefits you can probably safely terminate benefits during the interval between filing the petition and the hearing.
 - If there is any question about the adequacy of the credit as an offset against the entirety of the WC benefits, you must continue paying benefits until the credit order is issued.



www.bradfordbarthel.com

74

Thank you!

Kermit Sprang

B&B Anaheim

Office: (714) 526-9120

Cell: (714) 773-2586

ksprang@bradfordbarthel.com



www.bradfordbarthel.com

75