

CONTRIBUTION REMINDERS AND SETTLEMENT STRATEGIES

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Contribution Overview

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- Cumulative Traumas (CTs) with more than one defendant
 - ▣ Multiple employers and/or insurance carriers
- Reimbursement v. Contribution
 - ▣ Reimbursement covers amounts previously paid on a claim, subject to proof, and applies across claims
 - ▣ Subject to WCAB jurisdiction pursuant to Labor Code §5300(a) *The Kroger Co., dba Ralphs Grocery Co. v. WCAB (Marquez)* (2016) 81 CCC 648 (writ denied)
 - ▣ Contribution includes all amounts paid to settle a claim including future medical treatment, etc. within one claim
 - ▣ Pursuant to Labor Code §5275, all disputes regarding right of contribution in accordance with §5500.5 are subject to arbitration



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What is at stake?

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- Settlement value
 - ▣ Amounts paid to resolve liability for future speculative costs including future medical treatment, new and further disability, additional temporary disability, etc.
- If their liability is not resolved, co-defendants remain on risk and have no reason or obligation to share the in the cost of a settlement
- Reimbursement can be sought pursuant to §5500 with proof, but co-defendants will have a strong argument against paying for any additional costs
- Litigation Costs
 - ▣ Whether a settlement covers a specific defendant is a matter that can be heard by the WCAB



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Questions to Ask When Settling a CT

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1. Are there multiple defendants?
2. Have all potential defendants been joined?
3. Was there an election?
4. Are all defendants signing the settlement documents?
5. Has a Petition for Contribution been filed?



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Joinder

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- CCR §10382 allows the appeals board to order the joinder of additional parties not named in the application whose presence is necessary for the full adjudication of the case.
 - ▣ Any person against whom any right to relief is *alleged* to exist may be joined as a defendant
 - ▣ Subject to 10-day notice requirement and opportunity to be heard prior to joinder
- Only defendants joined prior to the first hearing may participate in discovery and the proceedings
 - ▣ Liability of defendants joined after the first hearing shall not be determined until supplemental proceedings are instituted (LC 5500.5(b))

When in doubt, file a Petition for Joinder



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Elections



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- Labor Code §5500.5(c) allows an injured worker to elect to proceed against any one or more employers in any claim for occupational disease or cumulative trauma resulting from more than one employment
- Also applies to when there is one employer with multiple insurance carriers
- Generally, an insurance carrier is elected against rather than an employer



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Limits on Elections



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- An election can only be made against a defendant joined *prior* to the first hearing
- No elections against CIGA if other insurers are available
- WCJs have the discretion to decline an election and select a carrier to administer an Award. *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 CCC 602 (appeals board *en banc*)
- An Order approving election is subject to a petition for removal and can be set aside with a showing of significant prejudice or irreparable harm. *Solorzano v. Jellco Container*, 2017 Cal. Wrk. Comp. P.D. LEXIS 22.



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Effect of an Election

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- Once an election is made, settlement of the case with the elected defendant resolves liability for *all* defendants
- All employers who may be held liable for benefits are *jointly and severally* liable for any settlement award that issues in the case.
- Whether an applicant has elected against the settling insurer will often determine whether a settlement resolves an entire cumulative claim or only a portion of the claim. *Ventura v. Dana Point Cleaners*, 2019 Cal. Wrk. Comp. P.D. Lexis 114, See *Rodriguez*, 2015 Cal. Wrk. Comp. P.D. Lexis 480.
- A Petition for Contribution is still required. *The Rex Club v. WCAB (Oakley-Clyburn)* (1997) 62 CCC 441



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When/How to Elect

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- There is no prescribed timeframe or form required for elections
- Applicant need only clearly express intent to elect against a given party or parties
 - ▣ Usually in a formal pleading or letter
- An election can be made in the settlement documents. *Rodriguez v. Sweet Temptations USA, Inc.*, 2015 Cal. Wrk. Comp. P.D. Lexis 480



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Effect of No Election



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- Without an election, there is no presumption that a settlement covers liability for any defendants other than those who sign the documents. *Verdoulis v. Ink Systems, Inc.*, 2016 Cal. Wrk. Comp. P.D. Lexis 509.
- Liability remains open for all defendants who did not sign the settlement documents
- Greatly reduces the amount of contribution



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Verdoulis v. Ink Systems, Inc. 2016 Cal. Wrk. Comp. P.D. Lexis 509

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- Defendant, National Fire Company of Hartford adjusted by CNA (hereinafter CNA), entered into a compromise and release (C&R) of three cases including two cumulative traumas
- After the OACR issued, the applicant attempted to elect against another defendant, American Insurance, for one of the cumulative traumas included in the C&R
- Because there was no evidence of an election or other expressed intention for CNA to administer benefits to the benefit of American Insurance. The WCAB determined only CNA's liability was resolved
- Since the liability of American Insurance was not resolved, CNA could only seek contribution pursuant to Labor Code §5500 for any amounts paid to the applicant for the C&R that it could prove was paid for any period of the cumulative trauma covered by American Insurance



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Court Considerations When There Is No Election

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- DOES THE SETTLEMENT INTEND TO SETTLE LIABILITY FOR ALL DEFENDANTS?
 - In *Verdoulis*, the WCAB determined that no evidence existed to show that the settlement expressly intended to resolve liability for any defendants other than CNA



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Potential Ways to Show Intent

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- Clear language in the settlement documents expressly outlining all defendant who which liability is being resolved
- Petition for Contribution prior to settlement
- Letters to co-defendants providing notice of intent to resolve liability for all defendants with proof of service



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Unjoined Defendants

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- Expressed intent to settle liability only applies to *parties* to the case at the time of settlement
- In *Ventura v. Dana Point Cleaners*, a defendant, Wasco, included language in the settlement documents expressly reserving the defendant's "right to contribution from any and all agents/assignees/TPAs, Insurance Co. during CT period, including but not limited to Zenith."
- The WCAB determined the language was insufficient to reserve contribution rights against Zenith because Zenith was not yet joined as a party defendants at the time of settlement. However, Wasco may still be able to seek reimbursement under Labor Code §5500 generally
- **When in doubt, file a Petition for Joinder**



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Petition for Contribution

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- Triggers proceedings for apportionment or the right of contribution pursuant to Labor Code §5500.5(e)
- Generally, an actual petition for contribution must be filed.
- Time limit to file is one year from the date of an Award
 - This includes awards for TD benefits etc. if the issues are tried prior to the issuance of a final award. *The Rex Club v. WCAB (Oakley-Clyburn) (1997) 62 CCC 441*



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The Rex Club v. WCAB (Oakley-Clyburn) (1997) 62 CCC 441

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- SCIF was an elected defendant in a CT
- In 1989, a Findings and Award issued addressing TD benefits only
- In 1994, a C&R was approved settling all issues
- Later in 1994, SCIF filed a Petition for Contribution seeking reimbursement from co-defendant the Rex Club
- The Rex Club opposed the petition arguing that it was untimely because it issued more than one year after the initial Award from 1989
- On appeal, the WCAB split the difference and determined the petition was untimely for 1989 Award but timely for the 1994 Award, but SCIF could not seek reimbursement for TD benefits paid to the applicant pursuant to the 1989 Award but could seek reimbursement for the benefits covered by the C&R
- **Lesson:** File a Petition for Contribution in CT claims following any Award or Order for benefits



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Defenses Against Contribution

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- When a Petition for Contribution from your client is received, always check if there is an election
- Confirm when any Awards issued, was the Petition filed within one year?
- Generally, contributing to a reasonably negotiated settlement is in your client's best interest



The lack of election and clear language of intent can serve as a tool to reduce exposure for contribution



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Reference Sheet

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- **Contribution & Elections:** §5500.5(c)
- **Limits on Elections:** *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 CCC 602 (appeals board en banc)
 - **Standard of Review:** *Solorzano v. Jelco Container*, 2017 Cal. Wrk. Comp. P.D. LEXIS 22.
- **Effect of No Election:** *Verdoulis v. Ink Systems, Inc.* 2016 Cal. Wrk. Comp. P.D. Lexis 509
- **Settlement Limited to Parties:** *Ventura v. Dana Point Cleaners* 2019 Cal. Wrk. Comp. P.D. Lexis 114
- **Joinder:** CCR §10382
- **Petition for Contribution:** §5500.5(e)



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