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Subrogation Under the California Workmen's Compensation Laws - Rules, Remedies and Side Effects

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SUBROGATION UNDER THE
CALIFORNIA WORKMEN'S
COMPENSATION LAWS—RULES,
REMEDIES AND SIDE EFFECTS

Herbert Lasky*

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I. INTRODUCTION

Workmen’s compensation is a system for alleviating the financial burdens of employees who are the victims of industrial accidents. The system is funded by a compulsory insurance program which makes the cost of such accidents a charge on each industry group in which the accidents occur.

Part of the cost of industrial accidents in California is incurred for injuries which are caused by third-parties not connected with the employer. There are three contenders for the benefits of the insurance premiums collected to pay these costs. The employer’s compensation carrier wants to be reimbursed for its costs; the third-party liability carrier wants to use them to reduce its own accident loss costs; and the employee would like to keep as much as possible to add to his recovery from his personal injury action.

In the legislative policy dealing with workmen’s compensation, concern for the cost of the system has always been an important element.1

The subrogation system implements this concern because it permits employers (through their subrogated compensation carriers) to recover the costs of such accidents when they are caused by outsiders (third-parties).2 At the same time, it preserves the right of the employee to his common law personal injury action but prevents him from getting a double recovery. It does this by allowing him the largest recovery he can get under either workmen’s compensation or common law remedy, but not both.3 The essential element in the subrogation system for accomplishing this result is the employer’s prior lien for reimbursement.

The recent criticisms of the subrogation system come from outside the workmen’s compensation industry.4 They are centered

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1 Cal. Stats., 1957, ch. 2317, p. 145, states, [T]he legislature always has subjected workmen’s compensation insurance to detailed regulation different from that provided for any other class of insurance. In so doing it has protected the solvency of the insurers, benefited the injured workers and their dependents, and enabled the employers to obtain workmen’s compensation protection at the lowest cost consistent with solvency of insurers. . . ."


basically on two charges. It is contended that the compensation carrier's remedies for enforcing its claims make it more difficult to settle personal injury cases, thus contributing to court calendar congestion. It is also claimed that it is unfair to plaintiff's lawyer for the compensation carrier to get a "free ride" on the employee's action, e.g. recover its lien without paying a fee directly to plaintiff's lawyer.

The attitudes of the antagonists can be best illustrated by recent expressions on the subject: A writer in the Journal of the State Bar of California describes the subrogation code sections as "[T]he utterly unjustifiable rules of statute and decision law which enable the employer (or his compensation insurer) to have a free ride on the employee's action against the third party. . . ."

In a different view of the equities, the California Supreme Court said,

[A]fter electing to receive workmen's compensation from the employer or the latter's carrier the employee cannot reasonably be heard to contend that, in disregard and free from the reimbursement rights of those who paid his compensation he should be permitted to settle his claims against a negligent third party without first securing a favorable determination of the negligence issues upon which both employee's and employer's right to recover will initially depend.^6

As can be seen from the variance in view-points, the impact of the Labor Code subrogation provisions has significance depending, as is not unusual, on whose ox is gored. To trial judges the main concern is the apparent greater difficulty in settling cases caused by the desire of the compensation carrier to participate in their settlement; to the plaintiff employees and their attorneys it is the power of the compensation carrier to recover its expenditures by exercising a lien right without itself participating in either the prosecution of the action or payment of plaintiff's attorney's fees; and to the defendants it is the complication introduced by the fact that an additional party means either a more difficult or expensive settlement.

If only the interests of personal injury litigants, their respective bars and the courts were involved, this subject would still merit considerable attention. However, the policy issues here in-

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volved have an even wider range. Subrogation in workmen’s compensation insurance involves California employers because it affects the rates they pay for insurance; it also has a relationship to the level of workmen’s compensation benefits paid and in this regard affects the interest of all employees, not merely those with third-party actions. The connection of such subrogation policies with industrial safety practices is also a matter of concern to the public generally as well as to employers and their employees.

Indicative of the importance of these issues, the California Legislature in its 1971 session adopted amendments to Labor Code Sections 3859 and 3860. Depending on their interpretation, the possible effect of these amendments ranges from a slight modification of existing law to the most fundamental change in the subrogation system since its inception.

This article examines subrogation in the field of workmen’s compensation and the possible effect which these new amendments have upon it. The discussion will also consider the policy issues surrounding these amendments.

II. ECONOMIC BACKGROUND

It is important at the outset to have some picture of the economic background and industry context within which the Labor Code subrogation rules operate.

Workmen’s compensation represents the largest insurance expense of California industry. In 1969, California employers paid $649,380,000.00 for workmen’s compensation insurance. The significance of subrogation in the premium rate structure is reflected by the California Inspection Rating Bureau regulations requiring a ten percent deduction from premium to be given on account of the carrier’s retaining the subrogation privilege with a corresponding increase if the employer retains it.

A. Purpose of Subrogation Provisions

The purpose of the subrogation provisions was summed up in Sanstad v. Ind. Acc. Com., where the court stated:

When compensable injury is the result of a third party’s tortious conduct our statutes preserve a right of action against the tortfeasor. The compensation system was not designed to extend immunity to strangers.

To avoid a double recovery by the employee our statutes provide a system with the general effect of reimbursing the employer, or his substituted insurance carrier, for compensation outlay and of giving the employee the excess of the damage recovery over the amount of the compensation.\(^\text{11}\)

**B. Method of Setting Compensation Rates**

The method of setting workmen’s compensation rates is unique among insurance lines in that an elaborate rate structure is prepared and promulgated by the California Inspection Rating Bureau. Acting as an arm of the Insurance Commissioner, the Bureau establishes a mandatory minimum rate\(^\text{12}\) (which in practice is ordinarily the maximum rate) applicable to each particular industrial classification. This particular approach is inherent in the concept that if industrial accident costs are fairly attributed to a particular industry such costs should be part of the cost of the operation of that industry and ultimately passed on to the consumer of its products.\(^\text{13}\) Workmen’s compensation “is in effect a special tax and a part of the operating expense, just as truly as any other cost of repair or operation.”\(^\text{14}\)

Under this system subrogation recoveries are channeled into the pool of funds available for the payment of losses. The manner in which compensation rates are set by the Insurance Commissioner through the Inspection Rating Bureau, while complicated as to a given industrial classification, is simple in principle. The total actual accident cost of the industry is accumulated and reported every year. Rates are set each October by taking an amount equal to the total estimated accident cost of the industry for the forthcoming year, based upon the experience of the preceding two years, and adding to it a uniform administrative expense factor.\(^\text{15}\)

In computing the total accident cost for the industry, subrogation recoveries are required to be reported and are subtracted before determining the amount of gross premiums necessary to yield an amount sufficient to cover accident losses and administrative expense.\(^\text{16}\) Thus, subrogation recoveries are as much a part of the total revenues used to support the workmen’s compensation system as are insurance premiums, and anything which lowers

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\(^{11}\) *Id.* at 35, 339 P.2d at 944.


subrogation recoveries raises the cost of workmen’s compensation insurance.

C. Miscellaneous Effects

In addition to this general effect on the rate level, an employer may have a direct interest in a subrogation recovery. California uses an experience rating system in which there is a relationship between the amount of an individual’s premium and his loss experience. Furthermore, California’s compensation carriers pay participating dividends, whose size is determined by formulas in which the major factors are the amount of the premium and the employer’s accident loss experience.

Subrogation recoveries should not affect the profit and loss statement of the workmen’s compensation carrier. In theory, such recoveries will be balanced by decreased premium rates in the succeeding years after recovery. However, should a carrier have a better subrogation recovery record than other carriers, this would mean that it would be receiving a greater amount of cash recovery than the amount it would normally lose to lower industry-wide premium rates. A good recovery record is also important to carriers as a means to dispel the clamor of the employers when faced with increased premium rates, due to the ever increasing demand for greater disability benefits.

III. THE STATUTORY SYSTEM

A. Traditional Approach

The viewpoints of the antagonists in the three-cornered conflict to which we referred at the outset are based on a pattern of advantage and disadvantage which derives from a statutory subrogation system. Until recently, this system existed without essential change since 1927. In essence that system was as follows:

Where an employee is injured by a third-party either the employer or the employee may sue in an independent action. If either party brings such an action, he must give notice to the other and the other may either join as a party plaintiff or con-

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17 CAL. INS. CODE § 11732 (West 1955).
18 Id. §§ 11738, 11757.
19 See note 14, supra, at 24.5.
20 Between 1951 and 1964 weekly benefits for temporary disability rose from $35.00 to $70.00 and for permanent disability from $30.00 to $52.50. [STATE OF CALIFORNIA, REPORT OF THE WORKMEN’S COMPENSATION STUDY COMMISSION, (1965).]
21 CAL. LABOR CODE § 3852 (West 1971).
solidate if he has brought an independent action.\textsuperscript{22} In addition, the employer has the option of claiming a prior lien as to any recovery made by the employee, without himself becoming a party to the action.\textsuperscript{23} In cases where the employer’s negligence is not in issue, the employer has the right to be reimbursed in full for its expenditures prior to any recovery by the plaintiff employee.\textsuperscript{24} In addition, the Labor Code provides that where a recovery of damages is made, whether by suit or settlement, and whether or not the carrier has intervened as a party, the distribution of the proceeds is as follows: (1) plaintiff’s attorney’s fees and litigation expense come off the top of the recovery, and (2) carrier’s lien for its workmen’s compensation expenditures is deducted. Not until the foregoing claims have been met in full will the employee realize any recovery.\textsuperscript{25}

The Code also provides that the employer may recover his future expenditures through the device of the employee’s credit. This means that the compensation carrier receives credit against its liability for future workmen’s compensation benefits to the extent of the net proceeds received by the employee from his recovery in the third-party action.\textsuperscript{26}

There are also provisions requiring the consent of both parties to a settlement.\textsuperscript{27} In the event of settlement both the employer and the employee are entitled to notice and an opportunity to protect their interests.\textsuperscript{28}

The basic approach of this system is to let the employee have the maximum possible recovery from either his common law personal injury action or his statutory workmen’s compensation benefits, but not both. The policy is to let the employer’s workmen’s compensation carrier transfer the cost of industrial injuries caused by third parties to their liability carrier. This is done by giving the compensation carrier a right of action or lien to recover its expenditures.

In order to effectuate this policy the statutory plan gave three basic advantages to the compensation carrier. First, the employer was given his prior lien on any recovery by the employee;\textsuperscript{29} second,
where the action is handled solely by the employee's attorney his fee comes off the top rather than being pro-rated between the employee and the employer; third, the compensation carrier's expenditures are conclusively established as its damages thus eliminating the medical-legal problems of proof confronting the employee.

B. Recent Amendments

It appears that the 1971 legislation was intended in some manner to modify this pattern. Unfortunately, the language employed leaves much to be desired.

Labor Code Section 3859 contained the following language:

No release or settlement of any claim as to either the employee or the employer is valid without the written consent of both.

The recent legislation appears to have been aimed directly at this provision, but whether it hit the mark and, more importantly, just what that mark is, is extremely unclear.

Senate Bill 253 amends Labor Code Sections 3859 and 3860. The operative language of the former provisions and of the new provisions is set forth in its entirety below:

The people of the State of California do enact as follows:

Section 1. Section 3859 of the Labor Code is amended to read:

(a) No release or settlement of any claim under this chapter as to either the employee or the employer is valid except upon written consent of both. The consent of both the employer and the employee filed in court in writing together with the approval of the court, is sufficient in any action or proceeding where such approval is required by law. Proof of service filed with the court is sufficient in any action or proceeding where such approval is required by law.

(b) Notwithstanding anything to the contrary contained in this chapter, an employee may settle and release any claim he may have against a third party without the consent of the employer. Such settlement or release shall be subject to the employer's right to proceed to recover compensation he has paid in accordance with Section 3852.

30 Id. §§ 3856(b), 3860(c).
32 Cal. Stats., 1971, ch. 485, p. 501, § 1. Amended language is underlined, while deletions are lined out.
Section 2. Section 3860 of the Labor Code is amended to read:

3860(a) No release or settlement under this chapter, with or without suit, is valid or binding as to any party thereto without notice to both the employer and the employee, with opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, and opportunity to the employee to recover all damages he has suffered and with provision for determination of expenses and attorney's fees as herein provided.34

(b) Except as provided in Section 3859, the entire amount of such settlement, with or without suit, is subject to the employer's full claim for reimbursement for compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, together with expenses and attorney fees, if any, subject to the limitations in this section set forth.

C. Effect of Recent Amendments

It is clear that the new language gives the employee the right to settle a case without the employer's consent.

The significant question is whether the amendments were intended to deprive the compensation carrier of its right to a prior lien on the recovery in a personal injury action brought by the employee.

The core of the ambiguity lies in the fact that Section 3860(b), as amended, retains the employer's prior lien on the employee's settlement, "Except as provided in Section 3859." But Section 3859 makes no provision concerning lien rights. Consequently, applying normal grammatical usage, there would appear to be no exceptions to the application of the employer's prior lien.

The question then is what effect, if any, is to be given to the language concerning an employee's right to settle his case without the employer's consent but "subject to the employer's right to proceed to recover compensation he has paid in accordance with Section 3852." There appear to be three possible interpretations of these amendments.

Rights of Employee and Employer. This section provides that the employee's claim for compensation does not affect his claim or right of action for damages proximately resulting from his injury or death against any person other than his employer. If the employer pays or is obligated to pay compensation, or salary in lieu of compensation, he may also bring a claim against a third party. In this case the employer can recover the total amount of compensation damages for which he was liable, including all salary, wages, pension or other emoluments paid to the employee or to his dependents.

34 See CAL. LABOR CODE §§ 3858-9, 3860(a), 3861 (West 1971).
1. An employee can settle his case without the consent of the carrier. If he does this, the carrier’s lien for reimbursement for the benefits previously furnished to the employee will come off the top of the recovery with the balance (after previously deducting attorney’s fees) to go to the employee. The carrier would still have the right to go on to trial against the third-party to recover for compensation benefits which have accrued in the future.

2. If the employee settles his case, the carrier must elect whether to accept its first lien on the proceeds of the settlement and give up all other claims against the third-party, or to waive its lien and go on to trial against the third-party in the hope that it will recover more than the settlement.

3. The employee may settle his case without the carrier’s consent. The carrier may prosecute its own case for recovery of its expenditures but has no lien against the employee’s settlement.

The impact of the amendments will vary considerably depending on which interpretation is adopted. As part of the plan of this article, the effect of these amendments will be considered in the context of the previous state of the law. The law of subrogation, as provided in the Labor Code, has undergone considerable development since the California Supreme Court decision of Witt v. Jackson in 1961.

IV. EXISTING LEGAL FRAMEWORK

Workmen’s compensation subrogation law and practice, at least until the recent legislation, could be considered under three major headings: necessity for intervention by the carrier, the lien remedy in practice, and employer negligence.

A. When Employer’s Negligence is Not at Issue

In discussing intervention and the lien practice it will be assumed that employer’s negligence is not an issue in the case.

1. When Intervention is Necessary

While the new amendments do not affect these sections the following discussion is necessary to understand the workings of the subrogation system.

35 Aside from the unilateral settlement provisions, this procedure was the law prior to the adoption of the new amendments. See notes 22, 26, and accompanying text, supra.

a. *Size of Probable Recovery.* Under some circumstances the recovery by the employee suing alone will be too small to cover the amount of the carrier's lien.

Labor Code Section 3854 provides:

> If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom.

Further, Section 3855 of the Labor Code states:

> If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages.\(^{37}\)

The effect of the above-quoted language is that when the compensation carrier is a party in an action its damages would be conclusively established by proving the amount of its actual expenditures.\(^{38}\) Hence, the carrier need not introduce medical testimony to demonstrate the necessity and reasonableness of the expenditures.

It is clear from the above that evidence of the employer's expenditures would *not* be admissible if the employer is not a party to the action and the employee has offered evidence of his own loss of earning capacity. Therefore, if the carrier wished to insure that the damages recovered are sufficient to cover the amount of its expenditures it must intervene so that the jury could be instructed as to the conclusive effect of the carrier's expenditures. This can have important tactical benefits for both the carrier and the employee. Assume the case is one in which the carrier has paid workmen's compensation benefits amounting to $5,000 and the jury verdict is $4,000. In this situation the litigation costs and fees of the employee's attorney would come off the top; the remainder would go to the carrier and would be substantially less than the full amount of his lien. Of course, the employee would recover nothing. If, however, the carrier intervened, the jury would be instructed that the carrier must receive its $5,000 and that the

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\(^{37}\) In practice, the employer may introduce the amount expended on disability compensation, notwithstanding the fact that the employee must introduce evidence of his loss of future earning capacity.  

\(^{38}\) See note 31, supra.
employee would be entitled to any common law damages to which he might recover over and above the carrier's lien. Thus, there would be the likelihood that the employee would be awarded something in excess of the carrier's lien.

b. Death Cases. Another situation in which the carrier must intervene to protect its interest is a death case where the death occurred after the employee had already received substantial benefits due to his injury.

Labor Code Sections 4700-4709 provide for death benefits of $23,000 for a surviving widow and children. If the heirs receive such benefits, and also sue in a civil action for wrongful death, the carrier's lien for the $23,000 would apply against any recovery. It should be noted, however, that the heirs do not have a cause of action for earnings lost and medical treatment incurred prior to the death of the decedent. Therefore, if the carrier wishes to recover for temporary disability and medical expenditures, made prior to death, it must file its own action.

c. “Catch All” Situations. There is a third category of situations where it is advisable for the carrier to file an independent action. This includes generally any case in which its interest will not be adequately protected without intervention. Perhaps the carrier's lien is so large in relation to plaintiff's likely recovery that there is no incentive for plaintiff's counsel to take the laboring oar or major burden of litigation expense. While there are situations in which this can be handled by a proper representation agreement between plaintiff's counsel and the carrier, there are others in which the basic conflict of interest between the employee and the carrier makes such an agreement impossible.

2. When Intervention Is Not Necessary and Lien Remedy Is Appropriate

a. Carrier's Statutory Remedies. If the situation is one in which the lien approach is advisable, it was clear prior to the 1971 amendments that the carrier would file a notice of lien in the main action and wait for further developments. The carrier need not take any more active role in the litigation as the legislature has provided a formidable group of remedies to protect the carrier's right to full reimbursement without becoming a party to the action.

Labor Code Section 3859 provides that no release or settlement of any kind as to either the employer or employee is valid

40 CAL. LABOR CODE §§ 3856(b), 3857 (West 1971).
without the written consent of both. Section 3860 provides that "No release or settlement, under this chapter, with or without suit, is valid or binding as to any party thereto without notice to both the employer and the employee, with opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay and . . . opportunity to the employee to recover all damages he has suffered. . . ." Furthermore, "No satisfaction of such judgment in whole or in part, shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien." Section 3862 provides that any employer who has perfected a lien upon a judgment is entitled to a writ of execution to enforce payment of said lien either against the third-party or against the employee.

Rounding out the carrier's remedies are the sections providing for priority of reimbursement. Assume the carrier paid an employee $5,000 in temporary disability compensation, $2,000 for medical treatment and $8,000 in permanent disability indemnity. The employee then engages an attorney and sues a third-party tortfeasor. The carrier files a notice of lien claim but does not become a party to the action; the employee gets a judgment for $30,000; his attorney is paid $1,000 for the litigation expense. The priorities of reimbursement required by the Labor Code are these: First, $1,000 litigation expense to plaintiff's attorney; second, a reasonable attorney's fee, let us assume $12,000; third, the carrier's lien in full of $15,000; and last, the balance of $2,000 to the employee. If the recovery had been only $15,000, assuming a reasonable attorney's fee were only $6,000 plus $1,000 litigation expense, the carrier would have received $8,000 toward its lien and the employee nothing.

It is the above group of sections dealing with lien remedies on which the recent amendments bear most directly. While it is not intended here to argue a particular construction of these amendments, it must be pointed out that the principal reason why the meaning of the amendments is ambiguous is that they do not, in terms, repeal or delete any of the remedies set out in Labor Code Sections 3859, 3860, and 3862. While it is clear that the new Section 3859(b) gives the employee an unqualified right to settle his case without the carrier's consent in spite of Labor Code Section 3859(a), what is not clear is how much of the remaining sections stay in effect, and in particular, do the carrier's prior lien rights stay in

41 Id. § 3858.
42 Id. §§ 3856(b), 3860(b).
43 Id. §§ 3856(b), 3860(c).
effect, as set out in Labor Code Sections 3860(b)(c)(d)(e) and (f)?

b. Various Interpretations of the Amendments. If, under the amendments, the employee may settle, but the carrier can still take its lien off the top after deducting plaintiff's attorney fees and expense, this would appear to affect only one significant situation.

It has been theoretically possible for a carrier to refuse consent to a settlement in a situation in which it was receiving payment of its lien in full, but did not feel that the net proceeds to the employee gave the carrier a sufficient "employer's credit" to insulate it from future liability under the workmen's compensation laws. The employer's credit afforded by Labor Code Sections 3858 and 3861 operates as the following facts illustrate:

The employee at the time of securing a judgment in a civil action has not yet received a permanent disability award. He netted $8,000 from his third-party action after deducting attorney's fees, litigation expense, and the carrier's lien. He subsequently receives an award of $10,000 from the Workmen's Compensation Appeals Board. He will be entitled to only $2,000 more from the compensation carrier. This is because the compensation carrier is permitted by Section 3861 of the Labor Code to deduct the employee's net recovery from the $10,000 permanent disability award which it would otherwise have been obligated to pay. Hence, the employer (or his subrogated carrier) is allowed a "credit" equal to the amount of the employee's net third-party recovery, thus preventing a double recovery by the employee.

Under the old law the carrier could refuse to permit the employee to settle unless the employee gave it a "third-party compromise and release" from all future workmen's compensation liability. This power to block settlement is clearly eliminated by the new amendments.

Another possible construction of the amendments is that the legislature made the carrier's right of full reimbursement out of a settlement an exclusive, rather than optional, alternative to its right to proceed to recover its full expenditures; therefore, while

[44] CAL. LABOR CODE § 3860(c-f):
(c) Establishes attorney's fees from the proceeds of the suit or settlement.
(d) Sets distribution of attorney's fees and court costs where the employer brings the suit.
(e) Sets distribution of attorney's fees when both employer and employee bring suit and each has separate counsel.
(f) Provides that the amount of fees and expenses will be set by the court in case of a settlement agreement.

the carrier can no longer compel the employee to release it from future compensation liability the carrier can sue on its own to recover the expenditures accruing after the date of the employee's settlement. However, under this view if the carrier chose to try to prosecute its claim for full recovery of its total expenditures it would have to give up its right to a present lien on the settlement.

At the other end of the spectrum is the possibility that when the employee was given the right to settle without his employer's consent, he was also given the right to have his settlement free of the employer's right to a prior lien. If this is the interpretation given the amendment it clearly would have the greatest effect on existing practice. How substantial the effect would be on the disposition of the cases, or on the problems of court congestion, is not certain.

Theoretically, under this construction, every case could be settled by the employee, leaving the compensation carrier to pursue its own action independently. This might mean substantial dilution of the value of the lien remedy to the compensation carrier since that carrier might have to consider every case one in which it might be necessary to file suit to protect its interests. The significance of this factor is impossible to forecast. Generally, liability carriers do not like to settle these cases without disposing of both claims. This is because in third-party cases, as distinct from ordinary two-plaintiff cases, there is the possibility of overlapping damages. The value of the employee's case from a settlement standpoint is substantially determined by his medical expenses and out of pocket wage loss as well as the seriousness of his future disability. This is true from the standpoint of putting a dollar figure on his case even though the compensation carrier is entitled to be reimbursed for the medical expenses and disability payments which form part of the plaintiff's special damages. There is the possibility in a good liability case that if the liability carrier settles with the employee and subsequently loses to the compensation carrier it will pay twice for the same injuries; the weaker the case the less this possibility exists, of course. In the case where the injuries are serious but the liability prospects look poor, (for example a good contributory negligence defense is available), the employee may have a better chance than the carrier because of a sympathy factor. In this instance a separate settlement could look more attractive to the liability carrier.

c. Importance of Carrier's Prior Lien. One definite conclusion can be drawn. The right to a prior lien on settlement gives the compensation carrier's case a greater proportionate settlement value than the employee's case. If the right to a prior lien is eliminated,
that proportionate settlement value cannot be more than plaintiff's and conceivably could be less. The logic of this is best demonstrated by an example.

Assume the employee has a 60 percent chance of recovery and the estimated judgment value of his case is $100,000.00. Therefore, the settlement value of the employee's case is $60,000.00. Assume the carrier's lien is $10,000. With a prior lien the settlement value of the carrier's case is substantially more than $6,000.00. This result is obtained because the employee settled for $60,000, paid $20,000 to his attorney, and the full $10,000 to the compensation carrier and kept $30,000 for himself (in addition to the $10,000 he previously received as compensation benefits). He would be getting the same recovery he would have received had workmen's compensation benefits not been available. Thus, if the same employee were in the same accident, received the same injuries and had the same attorney, but while driving his own automobile on his own time on a weekend rather than on the job, he would have the same accident claim but no workmen's compensation claim; he would have settled for the same $60,000 because that represented the best evaluation of his chances.

However, if the carrier no longer has a first lien on the settlement then the settlement value of the case to the carrier is only $6,000 (60 percent of $10,000), because the employee would then have the power to avoid reimbursing the carrier out of the settlement of his case. The compensation carrier's probability of success against the third-party would be subject to all of the same weaknesses as the employee's case, except of course as to establishing damages.

Analysis of whether that result is desirable is not concluded by saying that the compensation carrier should not be allowed to "ride the coattails" of the employee. The other side of the coin is that to require the compensation carrier to compromise its lien claim is to give a double recovery to the employee. This was lucidly pointed out by a court which dealt with an analogous issue under the federal workmen's compensation act. In Petition of Sheffield Tanker's Corporation, the court said:

Assume the following somewhat lengthy facts modeled after those in the case at bar:

1) The insurance carrier has paid the employee $1,000 in compensation and medical benefits and has a lien for this amount.
2) This is the full amount of compensation and medical benefits which the employee is entitled to receive under the Act.

3) The employee has obtained a third party judgment for $5,000; and
4) Under the normal method of distribution the employee will actually receive $3,000 of the judgment, after $1,000 for the insurance carrier’s lien and $1,000 for litigation costs have been deducted. At this point the employee says to the insurance carrier: “Since you are to be reimbursed $1,000 out of my $5,000 third-party judgment, you must pay a prorated share of the $1,000 litigation costs which I have incurred in procuring the judgment; your share is $200 and to simplify matters we will just deduct the $200 from your $1,000 lien and reimburse you $800.

If the employee’s method of distribution is followed, in effect, both the third party and the insurance carrier have compensated the employee. The actual result may be summarized as follows:
1) The third party has paid a judgment of $5,000 ($4,000 more than the Act provides for the employee);
2) The employee has actually received the original $1,000 in compensation payments and medical benefits and $3,200 of the third party judgment, or a total of $4,200; and
3) The insurance carrier is still $200 out of pocket. Although it may be argued that the insurance carrier has paid $200 in “litigation costs” rather than “compensation” equivalent to a double recovery, the amount paid is directly reflected in the net amount received by the employee.
As such it constitutes a double recovery and contravenes the Congressional intent embodied in the Act. (Emphasis supplied.)

One other factor should be mentioned which might tend to lower the compensation carrier’s subrogation recoveries. If the lien on settlements were eliminated, some cases might be settled on terms more favorable to the employee than before because the carrier may feel that it can avoid the expense of further litigation by giving the employee a greater share of the settlement. On the other hand, the compensation carrier’s litigation expense is necessarily lower than the employee’s. This is because the attorney for the compensation carrier, in establishing the damages element of his case, does not have to cope with medical-legal issues and expensive witness fees as does the employee’s attorney. As noted before, the compensation carrier’s damages are simply proven by showing the benefits paid.47 This would tend to minimize the effect of litigation expense as an inducement to settlement.

d. Jury Instructions. Because of the overlapping of items of injury to the employer and the employee due to the employer’s compensation expenditures, proper jury instructions are needed to insure that no double recovery will result to the employee.48 In principle, no difficulty is presented. In a case in which the employer is a party, he is entitled to recover the amount of his ex-

47 See note 31, supra.
penditures, e.g. medical, temporary disability, and payments for permanent disability indemnity. The employee is entitled to recover all of his actual wage loss as well as pain and suffering, loss of future earning capacity, and estimated future medical expense. The only overlap comes in the area of past medical expenditures, temporary disability payments, and the permanent disability award, if any. A proper jury instruction would be: 1) that the employer is entitled to recover the amount of his expenditures for workmen’s compensation benefits including medical and temporary disability payments made, 2) that the employee is entitled to recover common law damages as conventionally described, and 3) that from the employee’s recovery must be subtracted the amount he has previously received from the employer and the balance, if any, will be his common law damages. However, confusion can and has resulted where these principles have not been applied. BAJI Instruction 15.10 lends to the confusion because this instruction is appropriate only where the carrier is not a party and is merely relying on a lien. It is not appropriate where the carrier is an actual party because it would prevent the trial court from instructing the jury to subtract from the employee’s damages the amount he has previously received from the carrier.

3. Problem of Attorney’s Fees

The Labor Code sections which permit the compensation carrier to file a lien in lieu of an independent action or intervention and thus recover its expenditures without sharing in payment of the fees for plaintiff’s attorney or litigation expenses, are responsible

49 BAJI 15.10 When Employee Receives Workmen’s Compensation and Sues Third Party For Same Injury:

It appears from the evidence that plaintiff has received certain workmen’s compensation benefits by way of medical care and compensation for the (same injury) (injury connected with that) for which he seeks damages from the defendant in this action, and that these sums were paid by . . . Employer or employer’s compensation insurer, . . . which was (plaintiff’s employer) (the workmen’s compensation insurer for plaintiff’s employer).

Payment of workmen’s compensation benefits is based upon the mere fact that a compensable industrial accident occurred, and does not depend upon the blame or fault. In the event plaintiff does not obtain a judgment in his favor in this case, he is not required to repay his employer nor his employer’s insurer any amounts paid to him or paid on his behalf by his employer or his employer’s insurer.

If you decide that the plaintiff is entitled to judgment against the defendant, you will find his damages in accordance with the court’s instructions on damages and you will return your verdict in the plaintiff’s favor in the amount so found without deducting therefrom the amount of any such compensation benefits paid to or for the plaintiff. The law provides a means by which the rights of the person paying such compensation benefits will be protected.

for much of the resentment and controversy about the role of the compensation carrier in third-party litigation. Thus, say the critics, the carrier unfairly gets the benefits of the work of the employee's attorney but does not pay any of his fees or costs.\textsuperscript{51}

Various efforts have been made to challenge these priorities in the hope that judicial interpretation could in some manner transmute them, but all have failed. Thus, in Foulks v. Ortman,\textsuperscript{52} the employee sued for personal injuries and the carrier intervened to recover its expenditures. There was a settlement for $30,000; the court fixed reasonable attorney’s fees at $9,877.64 and litigation expense at $366.97. Attorney’s fees were apportioned three-fourths to the employee’s attorney and one-fourth to the intervenor’s attorney. The only dispute between the parties was the fact that the trial court apportioned the remaining $19,755.39 in proportion to the ratio of the carrier’s claim ($15,767.95) to the total amount of the settlement and thus gave the carrier $10,380.07 and the employee $9,375.32. On appeal, the court held that Section 3860(b) required that the carrier receive in full its lien claim in the amount of $15,767.95. This left $3,987.44 for the employee.

At first glance this appears harsh. However, it should be recalled that this particular employee had previously received $15,767.95 from the compensation carrier on account of his injury. If we add the compensation benefits to his net third-party recovery he is receiving exactly what he would have received if there had been no workmen’s compensation benefits and he had incurred the same attorney’s fees and litigation expense.

\textsuperscript{51} See Comment, Attorney’s Fees In Third Party Actions, 21 Hastings L.J. 717 (1970), in which the author begins with a thorough discussion of the entire attorney fee problem under Labor Code §§ 3856 and 3860, wherein the employee is actually paying his attorney to effect a recovery for both himself and the employer, with the employer not paying any share of the attorney’s fee. It is the author’s contention that these statutes, as they were construed prior to the amendments discussed in this article, are violative of the due process clause of the Fourteenth Amendment in that the courts are allowing the current law to discriminate between the parties to the action.

As the law currently stands, it can have a divisive effect upon the employee’s attorney. Where the attorney normally is working upon a contingent fee basis, he could be faced with a stipulated judgment which is less than the amount of compensation paid. This situation is quite probable where the maximum limits of the third party’s liability insurance do not equal the total compensation payment. As illustrated by the comment, the courts in awarding fees and costs could determine that since the attorney did not effect a recovery for his client, he is therefore not entitled to a fee for his labors. A similar discussion, as to the determination of attorney’s fees, is presented concerning Labor Code § 3861, which allows the employer credits for future compensation owed on temporary or partial disability arising from the same accident. The author concludes by stating that Labor Code §§ 3856 and 3860 create an unfair, if not unconstitutional, burden on the employee, as well as placing his attorney in a vulnerable position. It is his desire that a more equitable method be derived for the distribution of attorney’s fees in third party actions.

\textsuperscript{52} 242 Cal. App. 2d 189, 51 Cal. Rptr. 300 (1966).
One important question remains in doubt. This is a situation in which both the employee and the carrier are represented by separate counsel. The statute provides for the determination by a court of reasonable fees where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. In *Eldridge v. Trucking Ins. Exchange*, the carrier had intervened; there was a stipulated judgment for the policy limit of $10,000 and the carrier's lien exceeded the stipulated judgment. The court held that, after allowing a fee to carrier's attorney, the carrier was entitled to the balance of the $10,000, in full, without any allowance for fees to plaintiff's attorney.

It appears to the writer that the equitable solution to the division of fees in such cases should be found by measuring the value of the services rendered by each attorney for his client. This can be accomplished by taking into consideration the nature of the services as well as the dollar recovery which they effected. The basic approach of *Foulk v. Ortman* seems correct; first, compute a reasonable fee for the total recovery secured without regard to which attorney rendered the services, and then divide that fee on the basis of the respective services actually rendered by each attorney in achieving that recovery.

B. When Employer's Negligence Is an Issue

If the issue of employer negligence is present, the situation is considerably more complicated. It is essential that the carrier intervene if it wishes to present a defense. Thus, in this posture of litigation all of the contests are three-cornered.

All of the problems start with the simple fact that three parties want the same thing; namely, the amount of money which the compensation carrier furnished to the employee for workmen's compensation benefits. The third-party defendant wants to deduct the amount from what he pays to the employee-plaintiff for his personal injuries, the compensation carrier wants to recover it all from the third-party, and the employee wants to keep as much of it as possible out of his recovery from the third-party.

The principal questions are these: 1) What is the effect of a

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finding of employer negligence on the rights of each of the parties? 2) How does the issue of employer’s negligence affect the special statutory rules governing settlement of these cases? 3) What is the effect, if any, of statutory safety regulations governing the conduct of employers in the position of the compensation carrier in the three-cornered conflict?

1. Employer’s Concurrent Negligence Now a Defense—Witt v. Jackson

Prior to 1961 if the plaintiff-employee sued a third party for personal injuries and won, his employer or compensation carrier had a lien on the recovery for all past benefits paid, and could take further credit against any future workmen’s compensation liability up to the full amount of the plaintiff’s net recovery. The only defense to the suit was the plaintiff’s contributory negligence (or his failure to establish liability). Independent negligence on the part of an employer was not a defense.

Witt v. Jackson changed this rule. In that case plaintiff Witt was a police officer passenger in an auto driven by a fellow police officer. Their auto collided with one driven by a third-party, Jackson. Witt sued Jackson. His employer, the City of Los Angeles joined in the action to recover its compensation benefits previously paid. Jackson raised, in addition to the standard defenses, that of employer negligence and claimed a set-off in the amount of compensation benefits paid against any judgment recovered by plaintiff. At the time the law in California and in the great majority of jurisdictions was clear—employer’s negligence was not a defense. The California Supreme Court abandoned its precedent and followed the few jurisdictions which made employer negligence a defense. It reasoned that its earlier rule was based on the common law principle of non-contribution between tortfeasors, i.e. between the defendant and the concurrently negligent employer, and that the statutory abolition of that principle eliminated that reason for the rule and left the court free to consider the question de novo. The high court found persuasive the reasoning of the North Carolina Court in Lovette v. Lloyd where that court stated:

It is contrary to the policy of the law for the employer, or his subrogee, the insurance carrier, to profit by the wrong of the employer.

The California court found this reasoning buttressed by the

57 CAL. LABOR CODE §§ 3856, 3861 (West 1971).
59 236 N.C. 663, 73 S.E.2d 886 (1953).
60 Id. at 673, 73 S.E.2d at 891-892.
Civil Code Section 3517 which provides that "No one can take advantage of his own wrong." It then disposed simply of an issue which has since proven to be pregnant with difficulty by saying, "Since, however, the injured employee may not be allowed double recovery, his damages must be reduced by the amount of the workmen's compensation he received." The result was to give to the third-party a new partial defense to a personal injury in the course of plaintiff's employment.

2. Effect on Future Benefits Not Yet Paid

The effect of the new rule was clear enough in a situation as in Witt where all of the workmen's compensation benefits involved had been paid out before the trial.

The difficulties stem from the fact that typically at the time an employee-plaintiff in a personal injury case secures a judgment, he still has future rights to workmen's compensation benefits.

Workmen's compensation benefits include, in addition to medical treatment and temporary disability compensation, a permanent disability indemnity based on a determination of the percentage of disability as defined under the workmen's compensation laws. These payments are not in a lump sum as with common law damages, but in weekly payments at the maximum rate of $52.50 for 160 weeks.

If at the time of verdict, the employee has workmen's compensation benefits awarded and not yet paid, third-party defendants, applying the logic of Witt, argue that if they are entitled to the employer's past expenditures as a set-off against the employee's judgment then they should be entitled to the benefit of a credit for future expenditures as well.

The argument was first squarely presented in Castro v. Fowler Equipment Co. In that case the employer was found to be concurrently negligent; and evidence was offered during the trial as to the estimated monetary value of the employee's future compensation benefits. The third-party argued that there was no way to prevent an injured employee from making a double recovery unless the third party was permitted to offset against his judgment not only past benefits received but future benefits. The trial judge refused

64 Id. § 4658; see also note 115, infra.
to admit evidence of the monetary value of future benefits, saying that such testimony by an expert as to what the Industrial Accident Commission would rule is too speculative and conjectural and that it would be improper to permit a jury to decide what the Commission would award the employee at a hearing. The appellate court approved this reasoning. It also reasoned that to deprive the plaintiff of a present lump sum damage recovery because of what he could expect to receive in the future from the Workmen's Compensation Appeals Board would deny him a common law right without fair equivalent. For example, weekly benefit payments under the workmen's compensation laws could be terminated by death or other events, whereas at common law if a party recovered a lump sum judgment his estate could keep it although he died the next day.

3. Disability Rating Process

In order to appreciate the reasons for the court's unwillingness to decide the value of the employee's future rights to workmen's compensation benefits it is necessary to understand the workmen's compensation permanent disability rating process. While based upon what is referred to as a permanent disability rating schedule, it is fundamentally a body of administrative regulations which gives effect to the factors which constitute the basis for a permanent disability rating. Use of the schedule avoids the necessity for taking expert testimony in each case on the subjects of industrial processes, physical requirements of the occupation, the human anatomy in relation to the particular disability, the state labor market, etc.

The process of determining a disability rating involves both a specific set of administrative procedures and the use of a body of physical disability rating specialists known as the Permanent Disability Rating Bureau. This Bureau is an official part of the administrative organization of the Workmen's Compensation Appeals Board.

4. Case of Award Made Before Trial

If at the time of the employee's verdict the Workmen's Compensation Appeals Board has already made a permanent disability award, the problem of determining the amount of the employee's damages has been eliminated. In Slayton v. Wright the court said

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66 CAL. LABOR CODE § 4658 (West 1971).
67 *Id.* § 4660(b).
68 DIVISION OF INDUSTRIAL ACCIDENTS ADMINISTRATIVE DIRECTOR'S REGULATIONS 9725-9766.
69 CAL. LABOR CODE § 124 (West 1971).
70 271 Cal. App. 2d 219, 76 Cal. Rptr. 494 (1969); see also Patterson v. Sharp,
that it would be incongruous to allow the deduction in the case of any employee who had received a permanent disability award and to disallow the deduction where an employee had not received an award since the deduction of benefits would depend on the purely adventitious occurrence of the time an award was issued. The Slayton court refused to permit the deduction of a permanent disability award that had not yet been paid (either in full or in part).

This left, as the only remaining possibility, a choice between allowing the employee to receive a double recovery (in contradiction to the supreme court in Witt) or allowing the negligent employer the benefit of his statutory credit against future disability payments although depriving him of the right to recover past benefits paid. In Nelson v. Workmen's Compensation Appeals Board,\textsuperscript{71} the Third District Court of Appeal decided this question. It held that the employee would be entitled to a double recovery.

If the Court cannot allow a lien where the employer was concurrently negligent, logic dictates that the Board cannot allow a credit where the employer's negligence has been previously determined in the employee's third-party action.\textsuperscript{72}

As a result of this decision, the party that gets the benefit of an adjudication of employer's negligence depends on the stage of the employee's proceeding before the Workmen's Compensation Appeals Board. Thus, if the employee has secured an award, and has been fully paid under it, the full benefit of a decision against the employer will go to the third-party, and the employee will not receive a double recovery. Conversely, if no disability payments have been made, the employee will secure a complete double recovery to the extent that his permanent disability payments duplicate the amount of his common law damages for loss of earning capacity.

Another and more fundamentally serious problem created by Nelson is the anomalous position in which it places the employer with regard to the employee. Normally, the employer and employee are not adversaries. Indeed one of the purposes of the workmen's compensation laws was to eliminate negligence actions by the employee against the employer. Yet, under this rule it will be to the interest of the employee to see that his employer is proven negligent even though the case is presented to a court or jury in the posture


\textsuperscript{71} 11 Cal. App. 3d 472, 89 Cal. Rptr. 638 (1970), hearing was denied by the California Supreme Court on November 18, 1970.

\textsuperscript{72} Id. at 479, 89 Cal. Rptr. at 642.
of both employer and employee as parties plaintiff. It is entirely possible as a result of the Nelson rule, if it should stand, that the plaintiff will have more to gain from a finding of employer negligence than the third-party, since frequently the total value of permanent disability indemnity and lifetime medical care is greater than the sum of medical benefits and temporary disability payments.

5. Case of Settlement Before Trial and Award

Consider the case in which the issue of employer's negligence has been raised and there is a settlement before trial. Thus, there is no decision on the issue of employer's negligence. Under Labor Code Section 3861, where there is a settlement before trial the employer is entitled to a credit against future compensation benefits. This credit is to be deducted from the proceeds recovered by the employee. By settling the case, a negligent employer could secure the benefit of the credit whereas if he went to trial he would lose it. Of course, this factor may be taken into account by plaintiff's counsel in negotiating the terms of a settlement, but practical difficulties limit his leverage. Thus, only the third-party, who under the cases gets no benefit from the future credit rights, has the standing to maintain the Witt defense because he is the defendant, not the plaintiff. Therefore, if a compensation carrier waived its claim for past benefits paid, and the third-party made a satisfactory settlement offer to the employee-plaintiff, there would appear to be no basis for the employee to proceed to establish the employer's negligence. This would then allow the employer to obtain a credit settlement toward future compensation.

In the writer's opinion the foregoing factors show that the Nelson decision has introduced an undesirable degree of gamesmanship into this three-cornered conflict. This, plus the undesirability of double recovery, makes it preferable that either the third-

73 If Sections 3859 and 3860 [CAL. LABOR CODE §§ 3859, 3860 (West 1971)] are interpreted to mean that the employer no longer has a lien on the employee's recovery (see III. The Statutory System, § C. Effect of Recent Amendments, supra) from a third party action it would be consistent to provide that the employer's lien on settlements concerning future benefits should also be abrogated. Yet § 3861 has not been amended. This failure to amend § 3861 would seem to compel the result that the amendments to §§ 3859 and 3860 were not intended to eliminate the employer's or compensation carrier's lien on the employee's recovery against a third party tortfeasor.

74 As this article is being written there is pending before the Workmen's Compensation Appeals Board a proceeding in which an employee is attempting to try the issue of employer's negligence before a referee. The carrier has contested the jurisdiction of the Board on the ground that Article XX, Sec. 21 of the California Constitution provides for "a complete system of workmen's compensation . . . irrespective of the fault of any party . . ."
party or the compensation carrier retain the benefit of the employer's credit. To give it to the third-party would be consistent with Witt. To give it to the compensation carrier, though conceptually inconsistent (i.e. "profit from his own wrong"), this would not be impractical. As was pointed out earlier, the premium rate setting mechanism in the workmen's compensation system automatically translates subrogation recoveries into reduction of over-all premium rates; the negligent employer does not get the principal benefit of the subrogation recovery although employers in general do.

C. Settlement in the Employer's Negligence Cases

Until recently there was considerable confusion as to settlement procedures in cases where employer negligence was in issue since Labor Code Sections 3859 and 3860(b) appear in unambiguous terms to give the carrier an absolute right to prevent settlement of any case in which it has not received full reimbursement for its expenditures. However, the judicial adoption of Witt v. Jackson presents a situation in which a negligent employer could be entirely deprived of his lien rights if the case went to trial. Yet, if literal effect were given to the statutory language, the employer would have an absolute right to recover the same amount in full if the case were settled. One case upheld the literal interpretation of these sections; three others applied judicial interpretations which in effect gave the parties the right to settle without the consent of the carrier where employer's negligence was a genuine issue.

1. Right to Settle Without Carrier's Consent

In Brown v. Superior Court of San Bernardino the California Supreme Court set out the applicable principles as follows: the employee, having elected to accept the benefits of the Labor Code in receiving a compensation award, owes to the employer an obligation not to prejudice his rights of recovery in a third-party action.

75 For a provocative suggestion on the alternative to the Witt rule see Comment, Workmen's Compensation and Third Party Suits: The Aftermath of Witt v. Jackson, 21 HASTINGS L.J. 661 at 677 (1970), in which the author suggests possible solutions to this current dilemma.
76 See II. Economic Background, § B. Method of Setting Compensation Rates, supra.
78 See text accompanying note 74, infra.
Where the issues of defendant's negligence and contributory negligence of the employee have been determined in the case, 82 there is no reason to ban a compromise by the employee of his claim free of the employer's reimbursement rights. The employer is not prejudiced by such a settlement since thereafter his prospects of recovery would be neither lessened nor enhanced by such a settlement and the employee's recovery under these circumstances does not include the compensation amounts received by him from the employer.

In Brown the California Supreme Court made clear that it sanctioned settlement without reimbursement of the employer's lien if the issues of negligence and contributory negligence were adjudicated favorably to the employee and thus to the employer. Presumably this would have practical effect mainly in cases in which there would be a remaining issue of employer negligence. It would also include cases where conceivably, although there was no issue of employer's negligence, the third-party contested the accuracy of the compensation carrier's claimed expenditures or their applicability to the injury in question.

The most significant effect of the Brown decision is that it makes it desirable for the third-party to settle without the compensation carrier in cases where there is a strong employer negligence defense but it makes it undesirable to make such a settlement if the defense of employer's negligence is weak and the other defenses are stronger.

2. Effect of New Amendments on Brown

The effect of the 1971 amendments on the scope of the Brown decision again raises questions comparable to those discussed previously. If the employer's first lien on the proceeds of a settlement is still in effect then presumably the Brown rule is essentially unchanged. Thus, the employee and third-party could still settle without reimbursing the employer's lien if there is an issue of employer's negligence in the case and the case could proceed to trial on that issue alone.

Again, at the other end of the spectrum, if the effect of the amendments is to eliminate the employer's lien on settlements in its entirety, then the Brown rule would be superseded. Under this view, if the compensation carrier or employer went to trial alone he would have to prove all the elements of the plaintiff's case, not merely defend against the employer's negligence.

82 Either through stipulation of defendant or by prior trial. Id. at 432, 476 P.2d at 108, 90 Cal. Rptr. at 740.
D. Standards for Employer Negligence

As a result of the rule in Witt v. Jackson\textsuperscript{88} and more recently Brown v. Superior Court,\textsuperscript{84} the law of employer's negligence assumes an importance which it has not had since the days when workmen's compensation statutes eliminated employer's fault as an issue.

The most significant recent development has been the decision in Ruiz v. Minnesota Mining and Mfg. Co.,\textsuperscript{85} which confirms that in a strict liability case, employer's negligence as a defense is limited to facts amounting to assumption of the risk. The court said that this rule applies in cases of strict liability whether or not workmen's compensation is involved. In Ruiz, the employees of a cushion manufacturer sued on account of injuries they received through the inhalation of fumes from the glue used in assembling cushions. Their employer's compensation carrier intervened to recover for compensation benefits paid. The theory of plaintiff's action was that the defendant manufacturer was strictly liable because it had failed to give proper warning as to the toxicity of the product. The manufacturer pleaded employer's concurrent negligence. At the trial there was evidence which would have supported jury findings that the ventilation in the work area was insufficient and that the employer failed to supply respiratory protective equipment. The trial judge instructed the jury that if it found for plaintiff on the theory of strict liability it must find for the intervenor compensation carrier.

On appeal from the directed verdict for the compensation carrier, the manufacturer contended that the Witt v. Jackson\textsuperscript{86} policy principle that "one should not profit by his own wrong" should preclude the employer's right to use the strict liability doctrine which bars contributory negligence as a defense. The majority opinion disagreed, stating the governing principle as follows:

Contributory negligence on the part of a user of such a product is not a defense to the imposition of this marketer's liability when the user's contributory negligence consists of either a failure to discover the defect in the product or to guard against possibility of its existence. On the other hand if the user discovers the defect and is aware of the danger and nevertheless unreasonably uses the product to his injury, his contributory negligence bars him from recovery.\textsuperscript{87}

Special statutory rules govern the status and duties of an

\textsuperscript{88} 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).
\textsuperscript{84} 3 Cal. 3d 427, 476 P.2d 105, 90 Cal. Rptr. 737 (1970).
\textsuperscript{85} 15 Cal. App. 3d 462, 93 Cal. Rptr. 270 (1971).
\textsuperscript{86} 57 Cal. 2d 57, 73, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 378 (1961).
employer. The dynamic nature of the policy problems in this area is illustrated by recent legislative amendments; however, these changes do not apply to pending actions or causes of action arising before April 1, 1972, but not yet filed. The prior rules will therefore govern most litigation for the next three to five years.

The recent amendments did not abrogate California Labor Code Sections 6300 through 7804, which set out a broad pattern of statutory obligations on the part of employers with regard to safety in employment. Specific parts deal with safety in railroads, buildings, mining, ships, tanks and boilers, and volatile flammable liquids. In addition, Sections 6500-6604 provide for issuance of orders, rules, and regulations which spell out in extensive detail the obligation to maintain employee's safety imposed by the code sections. Title 8, California Administrative Code "Industrial Relations" contains industrial safety orders issued by the Division of Industrial Safety, compiled by particular industry classifications.

The breadth of the obligation imposed by the foregoing laws and regulations is expressed in Section 6400:

Every employer shall furnish employment and a place of employment which are safe for the employees therein.

Section 6401:

Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees.

and Section 6402:

No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe.

Relying on the broad sweep of this language, plaintiffs and third-party defendants in these cases frequently argue that the duties of the employer as thus elaborated are so onerous that they amount virtually to absolute liability and that consequently in a case in which employer negligence is in issue a carrier's lien claim should be subject to a very high discount. This is an over-

89 CAL. ADMIN. CODE §§ 3200-8722 (West 1971).
90 CAL. LABOR CODE § 6400 (West 1971).
91 Id.
92 CAL. LABOR CODE § 6401 (West 1971).
93 CAL. LABOR CODE § 6402 (West 1971).
enthusiastic contention. The standard is still reasonableness and the statutory language imposing a duty on the part of an employer to furnish a safe place to work and use methods and instrumentalities which are safe for the employee merely codifies the common law rule requiring a master to use due care in furnishing a safe place to work, safe tools, and instrumentalities of employment for his employees. The duty of an employer to furnish a safe place of employment or safe equipment is merely to use ordinary care.

In addition, it is well established that the duty to comply with the safety provisions of the labor code is non-delegable, and violation of either the code sections or the safety orders constituted negligence per se. Therefore, the detailed safety regulations set out in the Industrial Safety Orders and the labor code were of key importance in this area of litigation since they greatly simplified the process of determining the applicable standard of care. In cases arising after April 1972, however, Labor Code sections 6500-6604, which set the duty to provide a safe place of work, will no longer be admissible in civil actions. Thus, a plaintiff may not introduce evidence of the existence of a safety order issued under those sections of the Labor Code, nor may he seek a jury instruction stating that defendant's violation of the sections or safety orders constitutes negligence per se. A plaintiff may still argue that specific activities or conditions were negligent; he is merely denied the assistance of a statutorily-defined standard in establishing that negligence.

In addition, the concept of "statutory employer" was extremely important. Labor Code Section 6304 statutorily define employer to "include every person having direction, management, control, or custody of any employment, place of employment, or any employee." This definition was obviously broader than the traditional definition of "employer."

This was an important distinction because the status of "statutory employer" imposed upon such an employer all of the particularized duties under the labor code and safety orders to which we

have referred above, even though he did not carry the particular employee on his payroll.

Under this definition, the duties of a statutory employer had been imposed upon contractors\textsuperscript{100} and property owners,\textsuperscript{101} provided they met the necessary control tests. However, the mere power to exercise general supervision and control to bring about the satisfactory completion of work done by an independent contractor has not made one a "statutory" employer.\textsuperscript{102}

As a result of this broadened definition of "employer" it was possible that in the same case the jury might be asked to decide the negligence of both the actual employer and a third-party "statutory" employer. However, the fact that a jury might have found that such a "statutory" employer had violated his duty to provide a safe place of work did not necessarily compel a finding that the actual employer was also negligent. In Souza v. Pratico,\textsuperscript{103} the court reversed the lower court judgment which had denied recovery to a compensation carrier. The trial court had thought that if the general contractor had violated the obligations of a statutory employer, the sub-contractor—actual employer—must necessarily have violated the duty to furnish a safe place of work. The appellate court said that it is not the law "that where there is liability in the general contractor, it must inexorably follow that liability shall co-exist against the sub-contractor employer."\textsuperscript{104} However, the new amendments vitiate the "statutory employer" rules. They narrowly re-define "employer," reverting to the common law definition. This change will primarily affect an injured construction employee, who may no longer predicate the liability of a general contractor defendant on the stringent standard previously in effect.

E. Implied Indemnity

One more legal area remains for completing the juncture between the law in industrial third-party litigation and the main branch of negligence law in California. That is the integration of the law of implied indemnity into the field of workmen's compensation. This was foreshadowed in Maloney v. Rath,\textsuperscript{105} where the California

Supreme Court imposed a non-delegable duty on an auto owner to keep the auto in a safe operating condition. The court said that one of the bases for imposing such a duty is the party's ability to obtain indemnity against the party primarily liable.\textsuperscript{106} The list of comparable non-delegable duties set out by the court in \textit{Maloney v. Rath}\textsuperscript{107} includes the duties of employers and suppliers to comply with the safety provisions of the Labor Code.

The doctrine of implied indemnity has developed extensively in California in recent years.\textsuperscript{108} It has been generally summarized as a concept under which one of several negligent parties is entitled to shift the entire loss from an accidental injury to others as a result of contract or equitable considerations. This is not the place to develop the distinctions between primary and secondary liability, active versus passive negligence, and the like—problems with which the courts are grappling in the field of implied indemnity. However, it would appear that where an employer has been charged with legal responsibility as a result of a violation of a safety order because of the failure of some other party to perform a duty owed to the employer, or for which the third-party was primarily liable, then the employer would be entitled to be indemnified by that party. If the third-party was the one who had pleaded the defense of employer negligence that defense should not apply as between he and the employer. Thus, the employer or his compensation carrier should recover his compensation payments, although guilty of what could be deemed "passive negligence."\textsuperscript{109}

The federal courts have had closely analogous experience in interpreting the Federal Employers Liability Act.\textsuperscript{110} That act is a particularly apt basis for comparison since it applies to railroad workers and seamen who are not covered by workmen's compensation. The duty with which the federal courts are concerned is that of an employer to furnish a safe place of work. The cases under the act and related laws, such as the Jones Act,\textsuperscript{111} make it clear that the non-delegability of the duty to furnish a safe place of work does not deprive the employer of a right of indemnification from any other tortfeasor against whom he would have such right under principles of indemnity.\textsuperscript{112}
V. CONCLUSION

It should be clear from the preceding comments that any change in the workmen's compensation subrogation system which lessens the effectiveness of the compensation carrier's prior lien means that subrogation recoveries will be less and the bigger "share of the pie" will be divided between employees and third-parties. The share going to the employees will be double recovery; the portion going to third-parties will represent compensation premiums which are now being used to reduce the accident loss of liability carriers. These facts, in themselves, do not necessarily have any compelling significance. However, before the final balance is drawn, all of the interests should be considered.

There are more interests involved than merely those of the immediate parties to third-party actions. The subrogation system affects the interests of employees who do not have personal injury actions and their employers. As previously noted, the workmen's compensation system relies upon subrogation recoveries as a source of revenue. There is a continuing need in the workmen's compensation system to increase benefits to keep pace with advancing living standards and inflation.113

The theory of permanent disability indemnity is that it will tide the employee over during the period of adjustment to his lower earning capacity. At present, the permanent disability indemnity is $52.50 per week, which does not appear adequate for this purpose.

When proposals to raise benefits are submitted to the legislature, the practice is to have the proposal "costed" by the Insurance Commissioner in terms of the impact on premium rates. For example, it was reported that in April, 1971, Assemblyman Willie Brown, Jr. introduced a package of new compensation bills114 which include one proposal to increase temporary disability compensation from $87.50 to $150.00 per week, and to raise death benefits from the present top of $52.50 per week to $150.00 per

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113 Thus, a declared objective of our workmen's compensation laws is that the injured working man should receive 65 percent of his "average weekly earnings" during his period of disability [CAL. LABOR CODE § 4653 (West 1971)] but this objective is not currently attained because its implementation is dependent upon legislative control of benefit ceilings. At present, the maximum temporary disability payment is $87.50 per week. [Id. § 4453].

114 Cal. Assembly Bill 971 (April, 1971).
week. The temporary disability proposal was estimated to cost $34,076,806, or an increase of 11.2 percent in the premium rate.\footnote{SMART'S CONFIDENTIAL INSURANCE BULLETIN, April 12, 1971. At this writing it appears that the legislature will adopt benefit revisions under which temporary disability payments will rise to $105.00 per week, and permanent disability payments will rise to $70.00 per week. Without these increases the State Insurance Department would have lowered the basic compensation premium. Thus, the new increases are again financed in part by improved loss experience. SMART'S CONFIDENTIAL INSURANCE BULLETIN, October 1, 1971.}

It is therefore evident that there is a direct correlation between benefit levels and premium costs in legislative policy. It was previously pointed out\footnote{See text accompanying notes 19, 20, & 111, supra, and notes 20 and 111, supra.} that if a compensation carrier reduces a lien claim to facilitate a settlement, the employee is achieving a double recovery to the extent of the reduction. Thus, an increase in premium expense to finance the cost of double recovery would, to a certain extent, be at the expense of all other employees who did not have third-party actions. This cost would be a charge against revenues, which otherwise could be used to increase benefit levels.\footnote{See note 20, supra, at Tables 2.13, 2.14.} This demonstrates the old adage that "there is no such thing as a free lunch."

One other interest is affected by subrogation policy and that is the public interest in sound industrial safety practices. The relationship to our subject is made clearer if we consider the following: If our sole purpose were to minimize court congestion the rule of \textit{Witt v. Jackson} could be abolished. This might simplify the litigation and bring about more settlements, but on better terms for the compensation carrier. However, if that were the result, perhaps a side effect would be to diminish the employer's incentive to good safety practices. The employer's subrogation recovery might improve his premium experience rating and dividend entitlement, in spite of the fact that his negligence contributed to the accident.

Recent commentators have suggested that, whether or not the moral connotations of the fault system are appropriate, there is substantial value in a system which fixes the responsibility for accidents.\footnote{See G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); G. Calabresi, Some Thought On Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 500-7 (1961); R. Keeton, Is There A Place For Negligence In Modern Tort Law?, 53 Va. L. Rev. 886, 888, 892-894 (1967).} This enables us to try to promote better safety practices by appropriate inducements—such as differential premium rates—and also to better determine the true costs of economic activities.

If this approach is correct then anything that tends to focus
the responsibility for accidents is good, *e.g.* experience rating systems, indemnity doctrines, and subrogation systems.

It is beyond the scope of this article to attempt to make the policy determination as to what form future formulations of Labor Code subrogation policy should take. The purpose was to show that the issues involved in questioning present policies are much broader than as framed by critics. A decision considered solely in terms of eliminating "the compensation carrier's free ride" or eliminating the obstructions inherent in three-cornered settlement conferences can have many side-effects which go far beyond the range of such a simplistic analysis.