WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOLORES ESCAMILLA, ***Applicant,*** **vs.** **CACIQUE, INC.; TRAVELERS INSURANCE COMPANY,** ***Defendants.***	**Case No.** **ADJ7653984** **(Bakersfield District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We issued an Opinion and Order Granting Petition for Reconsideration in this matter on July 11, 2016 to provide an opportunity to study further the legal and factual issues raised by the Petition. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Orders Admitting Evidence, Findings of Fact & Order (F&O) issued on April 18, 2016 by a workers' compensation administrative law judge ("WCJ"). The WCJ found that applicant sustained an industrial injury on October 3, 2010 to her back as a result of a slip and fall; that on October 3, 2010, applicant's employer was insured for workers' compensation liability by Travelers Insurance Company (defendant); that applicant filed a civil lawsuit against her civil attorneys for legal malpractice in the handling of a third-party personal injury lawsuit arising out of her October 3, 2010 industrial injury (legal malpractice lawsuit); that applicant received a net recovery of $179,805.16 from a settlement of the legal malpractice lawsuit (malpractice settlement); and that defendant Travelers was not entitled to a credit against its further liability for compensation arising out of applicant's October 3, 2010 industrial injury as a result of the malpractice settlement. The WCJ ordered that defendant's October 10, 2015 Petition for Credit be denied.

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Defendant contends that it is entitled to credit against its liability for compensation to the extent of applicant's recovery from the legal malpractice lawsuit pursuant to Labor Code[1] sections 3858 and 3861; that its failure to pursue its subrogation rights through lien or a separate third-party claim did not result in a waiver of its right to credit; that the case law supports its right to credit from the legal malpractice lawsuit in order to prevent a double recovery to applicant; and that if the Legislature intended to prohibit credit from legal malpractice recoveries, it would have done so as it has in medical malpractice claims (Civ. Code, § 3333.1) and uninsured motorist claims (Ins. Code, § 11580.2(c)(4)).

Applicant filed an Objection to Petition for Reconsideration (Answer) and contends that defendant's Petition for Reconsideration should be denied because applicant's attorneys breached no duty to defendant, and because allowing a credit against an applicant's legal malpractice claim is dangerous public policy given that legal malpractice does not change defendant's liability for compensation and can be based on a variety of factual circumstances.

The WCJ issued a Report and Recommendation ("Report") wherein he recommends that defendant's Petition for Reconsideration be dismissed because it failed to adhere to procedural filing requirements (Cal. Code Regs., tit. 8, §§ 10205, 10205.12 and 10301), thereby resulting in the failure of the WCJ and the Appeals Board to receive notice that its Petition for Reconsideration was filed beyond the 20-day (plus five days for service by mail) time limit for filing a petition for reconsideration (Lab. Code, § 5900, 5903). The WCJ also recommends denial on the merits because defendant is not entitled to credit for applicant's "fourth party" legal malpractice recovery, and defendant failed to establish that applicant's recovery duplicated her receipt of or entitlement to workers' compensation benefits.

We have reviewed the record in this matter and have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons stated below, our decision after reconsideration is to affirm the F&O.

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[1] All further references are to the Labor Code unless otherwise noted.

BACKGROUND

It is undisputed that applicant sustained an industrial injury on October 3, 2010 as a result of a slip and fall at a Food Max in Visalia, California while working as a merchandiser for defendant Cacique Inc. (F&O, Finding of Fact No. 1; Application for Adjudication of Claim, p. 3.)

On November 22, 2010, defendant decided not to pursue its subrogation rights against Food Max. (App. Exh. 3.)

Defendant paid applicant temporary total disability (TTD) between October 4, 2010 and October 1, 2012 totaling $42,925.19. (Def. Exh. E, Notice Regarding Temporary Disability Benefits, September 28, 2012.) Defendant paid applicant permanent disability (PD) between October 1, 2012 and May 13, 2013 totaling $7,360.00. (Def. Exh. F, Notice Regarding Permanent Disability Benefits, May 10, 2013.) Defendant paid applicant's medical treatment between October 4, 2010 and December 8, 2015. (Def. Exh. D, Benefit Print-Out regarding medical payments.)

On October 10, 2012, Perez, Williams, Medina & Rodriguez (Perez et al.) filed a Complaint for Personal Injuries, Premises Liability and Loss of Consortium on behalf of applicant and her husband against third-party Food Max seeking damages caused by the October 3, 2010 slip and fall. (App. Exh. 4, Complaint for Personal Injuries, Premises Liability and Loss of Consortium (third-party lawsuit)[2].) Applicant and her husband then discharged Perez, et al. based on their belief that Perez, et al. did not timely file their civil complaint against the Visalia Food Max[3]. (App. Exh. 5, Confidential Settlement and Release Agreement, p. 1.)

On July 5, 2013, applicant and her husband filed a Complaint for Legal Malpractice against Perez, et al. and attorney Antonio Rodriguez in Tulare County Superior Court (legal malpractice lawsuit) for their failure to timely file a complaint for their respective personal injuries resulting from the October 3, 2010 slip and fall. (App. Exh. 5, Confidential Settlement and Release Agreement, p. 1.)

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[2] There is no evidence that applicant served defendant with the third-party lawsuit complaint. However, defendant makes no allegation that it was not served with the third-party lawsuit complaint and therefore, the question was not presented for consideration at trial or in the pending Petition for Reconsideration.

[3] There is no evidence regarding the ultimate disposition of the third-party lawsuit; it appears, however, that there is no dispute that it was untimely filed in violation of the applicable two-year statute of limitations (see Civ. Code, §335.1).

On or about September 5, 2013, defendant received notice that applicant's third-party lawsuit against Food Max had failed, and that applicant had filed the legal malpractice lawsuit. (Def. Exh. B, September 5, 2013 Letter from McCormick, Barstow LLP.) There is no evidence that defendant attempted to file its own lawsuit against Perez, et al., nor that it attempted to intervene or file a lien in the legal malpractice lawsuit.

On August 26, 2014, applicant and her husband settled their legal malpractice lawsuit against Perez, et al. for $320,000.00. (App. Exh. 5, Confidential Settlement and Release Agreement (malpractice settlement), pp. 1-2.) The WCJ found that applicant's net recovery from the malpractice settlement was $179,805.16, and applicant does not dispute this amount[4]. (F&O, Finding of Fact No. 4; Answer, p. 2:8-9.) The malpractice settlement states that, "The parties to this Agreement do not intend by its execution and performance to benefit or create any rights in third parties not expressly identified as a party and signatory." (*Id.*, p. 5, ¶16.)

On October 19, 2015, defendant filed its Petition for Third Party Credit seeking credit "against all a [*sic*] future compensation benefits pursuant to Labor Code section 3861..." (Petition for Third Party Credit, October 19, 2015, p. 3, ¶ 7.) There is evidence that defendant paid further medical treatment benefits after the date of the August 26, 2014 malpractice settlement, i.e. between August 29, 2014 and December 8, 2015. (Def. Exh. D, Benefit Print-Out regarding medical payments.) There is no evidence that defendant is liable for any further compensation. The record does not reflect that any findings, awards or orders have been made in connection with defendant's liability for future compensation.

Applicant's workers' compensation claim went to trial on February 11, 2016. (Minutes of Hearing and Summary of Evidence, February 11, 2016 (MOH).) The parties stipulated that applicant sustained injury to her back arising out of and in the course of her employment with defendant Cacique, Inc. on October 3, 2010 (MOH, p. 2:1-9.) The issue for decision was defendant's Petition for Credit. (*Id.*, p. 2:17-19.) No testimony was taken at trial. (MOH.) Defendant produced and the WCJ admitted the

[4] We note that here, applicant *and her husband* filed the legal malpractice lawsuit, and thus, the malpractice settlement necessarily included applicant's husband's damages. Although applicant does not dispute the net recovery from the malpractice settlement, there is no evidence of that net recovery, nor whether applicant's husband's portion was subtracted from the net recovery of $179,805.16.

malpractice settlement (Def. Exh. A [also App. Exh. 5]); a Benefit Printout (Def. Exh. C); a printout of medical payments (Def. Exh. D); defendant's Notice Re: Temporary Total Disability Benefits dated September 28, 2012 (Def. Exh. E); and a Notice Re: Permanent Disability Benefits dated May 10, 2013 (Def. Exh. F). (MOH, pp. 2-3; F&O, Orders Admitting Evidence.)

Defendant's contentions at trial were identical to those raised in the pending Petition for Reconsideration. (See Pre-Trial Brief and Petition for Credit Pursuant to Labor Code § 3861, January 25, 2016; Petition for Reconsideration, May 12, 2016.)

On April 18, 2016, the WCJ found that defendant was not "entitled to credit against its further liability for compensation arising out of Applicant's specific industrial injury of October 3, 2010 as a result of Applicant's settlement of her civil lawsuit against the Law Offices of Perez, Williams, Medina & Rodriquez." (F&O, Finding of Fact No. 5.) The WCJ explained in his Opinion on Decision that,

> Older authority stands for the proposition that since the underlying damages are overlapping, the public interest in avoiding double recoveries trumps the distinction between a third-party claim directly against the alleged tortfeasor and "fourth-party" actions arising from subsequent errors or omissions. *Monarrez v. WCAB*, (1991) 56 CCC 453 (2nd DCA WDn-alleged legal malpractice); *Myrick v. WCAB*, (1998) 63 CCC 772 (5th DCA WDn-alleged insurance bad faith).
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> More recent authority refines the analysis. Where the alleged negligence of the "fourth party" did not create or increase the employer's compensation liabilities to the employee, the credit that would have been recoverable in a "third party" action is not due. *El Katan v. Barrett Business Services*, (2013) Cal. Wrk. Comp. P.D. (Lexis) 41.
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> It is also noted that, the recovery having been made against the allegedly negligent law firm, the questions of causation, contributory negligence and any allegations of negligence by the employer were not tested. Thus, the characterization of Applicant's recovery as duplicative of compensation liability has not been shown beyond an assumption manifesting a hasty generalization. Private disability insurance would be another example of a situation in which the employee might have recovered proceeds overlapping her compensation entitlements from which the employer would not have been entitled to credit. (F&O, Opinion on Decision, p. 4.)

DISCUSSION

I.

The Legislature established an "elaborate system" for ensuring that an employer or its carrier share in any third party recovery in order to "prevent a double recovery by the injured employee." (*Soliz v. Spielman* (1974) 44 Cal.App.3d 70, 71-72 [40 Cal.Comp.Cases 130] (*Soliz*).

> The subrogation statutes[5] define the rights of action of both the employee and the employer when a third party is responsible for an employee's injury. (*Breese v. Price* (1981) 29 Cal.3d 923, 930–31 [176 Cal.Rptr. 791] (*Breese*); *Sanfax, supra*, 19 Cal.3d at p. 872; *Roe v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 884, 889 [117 Cal.Rptr. 683, 528 P.2d 771].) **The statutory scheme specifically codifies all of the subrogation rights and procedures in order to prevent double recovery**. (*Breese, supra*, 29 Cal.3d at p. 929; *Sanfax, supra*, 19 Cal.3d at p. 872–874; *Travelers Ins. Co. v. Sierra Pac. Airlines* (1983) 149 Cal.App.3d 1144, 1152–1153 [49 Cal.Comp.Cases 808] (*Sierra Pac. Airlines*); *Marrujo v. Hunt* (1977) 71 Cal.App.3d 972, 976 [42 Cal.Comp.Cases 697].) (*El Katan v. Barrett Business Services* (2013) Cal. Wrk. Comp. P.D. LEXIS 41 (*El Katan*), pp. 10-11, emphasis added.)

"There are three ways in which an employer who becomes obligated to pay compensation to an employee may recover the amount so expended against a negligent third party." (*Witt v. Jackson* (1961) 57 Cal.2d 57, 69 [26 Cal.Comp.Cases 252], questioned on other grounds[6].) First, defendant has a right to bring an action directly against the third party pursuant to section 3852. "Any employer who pays, or becomes obligated to pay compensation...may...make a claim or bring an action against the third person." (Lab. Code, §. 3852.) Second, if the employer chooses not to bring a third-party action, but the employee does, defendant may intervene or seek joinder in a third-party action brought by the employee pursuant to section 3853. Finally, the employer may "allow the employee to prosecute the action himself and subsequently apply for a first lien against the amount of the employee's judgment, less an allowance for litigation expenses and attorney's fees" pursuant to section 3856, subsection (b). (*Witt, supra,* 57 Cal.2d at p. 69.)

If defendant chooses not to pursue the negligent third party, or any third-party action is settled (or judgment satisfied) prior to payment or award of compensation benefits, defendant may still seek a credit against its liability for future compensation benefits pursuant to sections 3858[7] and 3861[8]. (*Nelsen v.*

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[5] The "subrogation statutes are sections 3850 to 3864.

[6] *Witt* was questioned as to its holding that a third-party tortfeasor may *completely* defeat reimbursement by proving concurrent negligence of defendant. (*Rodgers v. Workers' Comp. Appeals Bd.* (1984) 36 Cal.3d 330, 334-336 [49 Cal.Comp.Cases 513], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [40 Cal.Comp.Cases 258] [an employer's negligence is only a partial defense to its claimed reimbursement or credit].)

[7] "After payment of litigation expenses and attorneys' fees fixed by the court pursuant to Section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment, if satisfied, without any deduction. 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." (Lab. Code, § 3858.)

[8] "The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for

Workmen's Comp. Appeals Bd. (1970) 11 Cal.App.3d 472, 478 [35 Cal.Comp.Cases 442].)

Defendant is correct that "[t]he right to credit in the appeals board proceedings and the right to a lien in the third party action are separate and distinct" and that "[t]he waiver, failure to assert, or settlement of a lien claim in a civil action is not necessarily a settlement or waiver of the credit right." (*Herr v. Workers' Comp. Appeals Bd.* (1979) 98 Cal.App.3d 321, 327-328 [44 Cal.Comp.Cases 1059] citing *Sanstad v. Industrial Acc. Com.* (1959) 171 Cal.App.2d 32 [24 Cal.Comp.Cases 139] and *Pacific G. & E. Co. v. Indus. Acc. Com.* (1935) 8 Cal.App.2d 499 [20 I.A.C. 364].)

The "separate and distinct" nature of these rights informs how a defendant's credit is calculated and applied. Thus, any section 3861 credit is calculated based on "*actual amounts* taken out of the injured's settlement to reimburse employer and not any amount that the employer might have made claim to out of the settlement." (*Herr*, *supra,* 98 Cal.App.3d at p. 329, italics in original.) Properly calculated credit is then "applied against future workers' compensation benefits that [defendant] becomes obligated to pay [applicant] *after* the time of the civil action settlement. No portion of the credit may be applied against any workers' compensation benefits which were included in the lien...filed...in the civil action." (*Ibid*, italics in original.)

Here, defendant made a deliberate choice not to exercise its rights to pursue a third-party claim against Food Max. It also appears that applicant's third-party lawsuit was untimely filed in violation of the two-year personal injury statute of limitations. Thus, defendant chose not to pursue its remedies against Food Max, and there was no other third-party lawsuit in which to join or intervene. There was also no settlement or judgment of any other third-party lawsuit in which to file a first lien, or against which defendant could petition for credit pursuant to section 3958 or 3861.

Instead, defendant seeks credit against the August 26, 2014 settlement of applicant and her husband's legal malpractice lawsuit for "all a [*sic*] future compensation benefits, contending that the "public policy purpose of Labor Code § 3861 is to prevent double recoveries and that Applicant will have

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compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer." (Lab. Code, § 3861.)

such a recovery unless credit is allowed." (Petition for Reconsideration, p. 4:3-7.) "The damages which led the Applicant to file the malpractice suit were those benefits which she may have been able to obtain in a lawsuit filed against the third party tort-feasor." (*Id.*, p. 5:2-6.)[9]

However, the Second District Court of Appeals held in *Soliz, supra,* that an employer has no right of recovery under the subrogation statutes from an employee's legal malpractice lawsuit. (*Soliz, supra,* 44 Cal.App.3d at pp. 71-73[10].) The Court was faced with a question of first impression: "whether the attorneys, by preventing the personal injury action from proceeding, have become liable" to the workers' compensation carrier. (*Id.*, at p. 72.) It was held that applicant's civil attorneys did not assume a duty to the employer or its carrier when they breached their duty to applicant. (*Soliz, supra,* 44 Cal.App.3d at pp. 72-73 citing *Brian v. Christensen* (1973) 35 Cal.App.3d 377 [1973 Cal.App. LEXIS 719].)

> If the employee feels that any recovery in such a suit will not produce enough more than he has already received as workman's compensation, he may, without liability to the employer, allow the statute of limitations to run against his potential claim. If the employee is not liable to the employer for not suing, a fortiori he is not liable where, as here, the failure to sue was due to the (assumed) negligence of others. (*Id.*, at p. 72.)

Thus, in a case involving third-party liability, an employer liable or potentially liable to pay compensation benefits has a statutory right to "make a claim or bring an action against the third person." (Lab. Code, § 3852.) If an applicant fails to file a third-party civil action, the "employer's remedy was to get its own action on file." (*Soliz, supra,* 44 Cal.App.3d at p. 73.)

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[9] Applicant and her husband filed their legal malpractice lawsuit on July 5, 2013. The only evidence produced at trial indicates defendant received notice of that lawsuit on or about September 5, 2013. There is no evidence that defendant attempted to file its own lawsuit against Perez et al, assuming *arguendo* that it could establish a prima facie claim against Perez et al. for any cause of action. There is also no evidence that defendant attempted to join, intervene or file a lien in applicant and her husband's legal malpractice lawsuit.

[10] As in the case pending before us, the applicant in *Soliz* retained attorneys to file a third-party lawsuit, and those attorneys failed to file the action within the relevant statute of limitation period. (*Soliz, supra*, 44 Cal.App.3d at pp. 71-72.) Applicant then filed an action for legal malpractice in which the workers' compensation carrier filed a complaint in intervention and a notice of lien; applicant settled the legal malpractice action and the employer's notice of lien was struck. (*Ibid.*)

Soliz remains the only reported case on this issue[11] and there is no contrary published decision by the California Supreme Court or another California Court of Appeal. Thus, *Soliz* is controlling authority in this case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5.)

Even so, defendant ignores *Soliz* and instead relies on two Appeals Board panel decisions: *Monarrez v. Workers' Comp. Appeals Bd.* (1991) 56 Cal.Comp.Cases 453 (writ den.) (*Monarrez*) and *Myrick v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 772 (*Myrick*). Both *Monarrez* and *Myrick* held that "recovery" in section 3861 may include proceeds from "fourth-party" claims filed by applicant[12] where it is shown that the underlying action relates to third-party negligence for an applicant's industrial injury.

The WCJ and applicant also ignore *Soliz* and instead, rely on the panel decision of *El Katan v. Barrett Business Services* (2013) Cal. Wrk. Comp. P.D. LEXIS 41 (*El Katan*). *El Katan* held that defendant was *not* entitled to a credit against an applicant's recovery in a "fourth-party" legal malpractice lawsuit because neither applicant nor his attorneys owed a duty to defendant to protect its right to recovery under the subrogation statutes. (*El Katan, supra,* pp. 9-11.)

Defendant does not distinguish *El Katan*, but contends that panel decisions are not binding precedent[13], and therefore that *El Katan* has no more precedential weight than *Monarrez* and *Myrick.* However, unlike *El Katan,* neither *Monarrez* nor *Myrick* address the holding in *Soliz.* We are therefore

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[11] Although, see accord, *Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78 [1995 Cal.App. LEXIS 94]) (*Assurance*). In *Assurance*, an insurer attempted to sue a Cumis counsel, appointed to represent its insured, for professional negligence. (*Assurance, supra,* 32 Cal.App.4th at p. 83-84.) Given that a Cumis counsel is only hired when there is a conflict or potential conflict of interest between an insured and an insurer, the Assurance Court found an adverse relationship "between the Cumis counsel's client (the insured) and the nonclient (the insurer)." (*Id.*, at p. 92.) Consequently, the Court held that Cumis counsel cannot be not liable to an insurer for professional negligence for "failing to investigate, prepare, assert, establish or perform similar functions regarding a defense or position in the insurer's favor ." (*Id.*, 32 Cal.App.4th at pp. 83, 92.)

[12] *Monarrez* involves an applicant's legal malpractice lawsuit, and *Myrick* involves an applicant's bad faith insurance lawsuit against the insurance carrier of the employer's general contractor.

[13] WCAB panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).)

bound to give *El Katan* more weight than *Monarrez* or *Myrick* because it is based, in part, on the holding in *Soliz*. The reasoning in *El Katan* is also persuasive based on a similarity in factual circumstances and legal concepts.

In *El Katan*, applicant pursued a third-party lawsuit against a man who allegedly assaulted him, but the case was dismissed because his civil attorney failed to timely file the complaint. (*El Katan, supra*, pp. 4-8.) Applicant then filed a malpractice lawsuit against his civil attorney, which later resolved by settlement. (*Ibid.*) Citing *Soliz,* the panel determined that "defendant has no right of credit as to the proceeds of applicant's suit against his former civil attorneys." (*El Katan, supra*, at p. 16-17.)

> **[W]hile defendant was entitled to share in applicant's proceeds from a successful suit against the third party tortfeasor Shahrestani so as to prevent double recovery, applicant had no independent duty to defendant to successfully sue Shahrestani.** (*Soliz, supra*, 44 Cal.App.3d at p. 72; see Lab. Code, §§ 3852–3854, 3859 [an employer may file its own separate suit against the third party for the payment of benefits that it made to an employee because of the third party's acts]; *County of San Diego v. Sanfax Corp.* (1977) 19 Cal.3d 862, 8873 [140 Cal.Rptr. 638, 568 P.2d 363] (*Sanfax*).) Moreover, as further pointed out by the WCJ and as discussed below, **while defendant had the right to sue Shahrestani, again to prevent double recovery, defendant had no independent right to sue applicant's former civil attorneys.** (*Soliz, supra*, 44 Cal.App.3d at pp. 72–73.) (*El Katan, supra,* p. 9, bold added.)

Assuming *arguendo* these two panel decisions can somehow be reconciled with *Soliz*, defendant produced no evidence that the settlement proceeds from the legal malpractice lawsuit filed by applicant and her husband would *duplicate* any future compensation benefits that may be owed in this case. We concur with the WCJ that "the characterization of Applicant's recovery as duplicative of compensation liability has not been shown beyond an assumption manifesting a hasty generalization." (F&O, Opinion on Decision, p. 4.) In addition, there is no evidence proving how the malpractice settlement was allocated between applicant and her husband. Obviously, defendant has no liability for his loss of consortium damages, and thus, has no basis to request credit for his recovery. (See *Gapusan v. Jay,* (1998) 66 Cal.App.4th 734 [1998 Cal.App. LEXIS 769].)

Therefore, it is our decision after reconsideration to affirm the finding of the WCJ that defendant is not entitled to a credit against the settlement proceeds from applicant and her husband's legal malpractice lawsuit.

II.

Defendant attempts to analogize two statutory exceptions to third-party credit in workers' compensation proceedings: Civil Code section 3333.1 (Medical Injury Compensation Reform Act of 1975 (MICRA)) which prohibits subrogation in or credit against a medical malpractice lawsuit; and Insurance Code section 11580.2(c)(4) which prohibits subrogation in or credit from an applicant's claim against his or her own uninsured motorist coverage.

However, there can be no analogy between a "fourth party" legal malpractice lawsuit and a third-party medical malpractice claim, whether subrogation is or is not allowed in those claims. We also note that Civil Code section 3333.1 permits evidence of compensation benefits in the medical malpractice action, thereby preventing any double recovery to an injured worker. (See Civ. Code, § 3333.1 (a)-(b); *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 501-502, 508 [54 Cal.Comp.Cases 160].) In that sense, it is not actually a "prohibition" on subrogation or credit but rather a statutory mechanism to prevent the *need* for credit. The analogy with Insurance Code section 11580(c)(4) must also fail because a claim against an applicant's personally procured uninsured motorist insurance is still wholly based on a claim against a third-party (an uninsured third party) who proximately caused an applicant's industrial injury.

The WCJ also analogizes recovery from private disability insurance, which she states is "another example of a situation in which the employee might have recovered proceeds overlapping her compensation entitlements from which the employer would not have been entitled to credit." While the uninsured motorist and private disability insurance claims may be analogous, we cannot concur that either are analogous to a "fourth party" legal malpractice lawsuit. Perez et al. owed applicant a professional duty that it breached, causing damages to applicant arising from *that breach of duty*. Perez et al. did not cause applicant's injury for which defendant has become liable for benefits; therefore, recovery for legal malpractice damages literally *cannot* overlap with compensation benefits.

> Defendant overlooks the central underlying proposition in these statutes. They are subrogation statutes. This means that to recover a defendant has to be able to demonstrate that it suffered harm in the form of an obligation to pay benefits because of the conduct of a third party. This defendant cannot do because the subsequent third party (applicant's former civil attorneys) had no legal duty to it and did not cause any harm to it. (*El Katan, supra.*, p. 16.)

III.

We note that "an attorney-client relationship is not a prerequisite to sue for legal malpractice." *(Assurance, supra,* 32 Cal.App.4th at p. 91.) However, in cases finding an attorney had a duty to a non-client, the non-client was an "intended" beneficiary of the work for which the attorney was hired, or was "relying on that work or were to be influenced by it (and the attorney knew or should have known this)." (*Ibid.* citing *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961 [1986 Cal.App. LEXIS 1666].) For instance, an attorney working on a transaction for a client may be held liable to non-clients *with an interest in the transaction* "if harm from negligence is reasonably foreseeable." (*Assurance, supra,* 32 Cal.App.4th at p. 91 citing e.g., *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588 [intended third-party beneficiaries under a will can sue testator's attorney for negligence in drafting will].) Thus, the "predominant inquiry" is whether the services for which the attorneys were retained was to benefit the third party. (*Osornio v. Weingarten,* (2004) 124 Cal.App.4th 304, 330-331 [2004 Cal.App. LEXIS 2160 (Cal.App.6th Dist., Dec. 16, 2004).)

Here, Perez et al. were retained to represent applicant and her husband in a third-party lawsuit against Food Max and there is no evidence that defendant retained Perez, et al. to represent them in the third-party lawsuit[14]. While any employer can choose to ride the coattails of an injured worker's third-party lawsuit, they do so *at their own peril.* An applicant *owes no duty to an employer* to procure its right to recover under the subrogation statutes, and in fact, an employer has its own independent right to proceed against the third-party tortfeasor.

Of course, the employer's right to proceed against a third-party tortfeasor is, however, "derivative of the employee's right" and therefore, "the employer does not have [a] right to sue any party who has wronged an employee, *but only those parties that caused its obligation to pay benefits for the employee's workplace injury.* (*Eli v. Travelers Indem. Co.* (1987) 190 Cal.App.3d 901, 904 [235 Cal.Rptr. 704];

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[14] If the third party complaint is prosecuted by both the employee and employer, they may agree to be represented by the same attorney. (See Lab. Code, § 3856(c).) However, we note that there is an inherent conflict of interest between an injured worker and an employer in any proceeding involving an employer's first lien or petition for credit. (See *Martinez v. Associated Engineering & Construction Co.* (1979) 44 Cal.Comp.Cases 1012, 1021-1022 (Appeals Bd. en banc).)

Sierra Pac. Airlines, supra, 149 Cal.App.3d at p. 1153; see *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 742–743...[a]nd, for the same reason, just like the employee, the employer has to be able to prove the same elements against the third party tortfeasor. (*Breese, supra*, 29 Cal.3d at pp. 929–931; *Sanfax, supra*, 19 Cal.3d at p. 876.)" (*El Katan, supra,* at pp. 12-13, bold added.)

It is obvious that the employer, a stranger to the representation between an applicant and his or her attorneys, cannot establish the necessary elements of duty and breach of duty in a negligence cause of action. Moreover, "an attorney has no duty of care to protect the interests of an adverse party." (*Assurance, supra,* 32 Cal.App.4th at p. 91 citing *Fox, supra,* 181 Cal.App.3d at 961.)

> In determining whether an attorney can be held negligently liable to a person other than the attorney's client, "the adverseness [between the person and the client] is the key variable in [the] decision about whether a cause of action should be allowed." [citations] ...
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> So too does California's strongly held view of the lawyer's duty of "undivided loyalty" to his or her client. (See *Fox v. Pollack, supra*, 181 Cal. App. 3d at pp. 961-962 (citations) ... (*Assurance, supra,* 32 Cal.App.4th at p. 92, bold added.)

An employer and an employee are in an adverse relationship to each other in any subrogation or credit proceedings because the right to recovery under the subrogation statutes cannot be resolved without addressing the contributory negligence of the employer, and if any is found, the contributory negligence of the applicant. (*Martinez v. Associated Engineering & Construction Co.* (1979) 44 Cal.Comp.Cases 1012, 1021-1022 (Appeals Bd. en banc).)

Accordingly, given that defendant cannot claim a section 3861 credit against the settlement proceeds of applicant and her husband's legal malpractice lawsuit, it is our decision after reconsideration to affirm the F&O.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on November 16, 2016 by a workers' compensation administrative law judge is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

JOSÉ H. RAZO

I CONCUR,

CHAIR

KATHERINE ZALEWSKI

CONCURRING, BUT NOT SIGNING

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 15 2018

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DOLORES ESCAMILLA
CHAIN COHN STILES
LAURA G. CHAPMAN & ASSOCIATES

AJF:abs

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOLORES ESCAMILLA, ***Applicant,*** **vs.** **CACIQUE USA, INC.; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,** ***Defendants.***	**Case No. ADJ7653984** **(Bakersfield District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to the decision filed on April 18, 2016.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication

Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

JOSÉ H. RAZO

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 11 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DOLORES ESCAMILLA
CHAIN COHN STILES
LAURA G. CHAPMAN & ASSOCIATES
MALMQUIST, FIELDS & CAMASTRA

abs

[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case Number(s): ADJ 7653984 (BAK)

Applicant Dolores Escamilla v. Petitioners-Defendants Cacique USA, Inc. and Travelers' Property Casualty Company of America

Workers' Compensation Judge: Robert K. Norton
Date of Injury: May 17, 2014
Recommendation: Dismiss for defective filing or deny.

Report and Recommendation on Petition for Reconsideration

I. Introduction: Petitioners-Defendants Cacique USA, Inc. and Travelers Property Casualty Company seeks reconsideration of the Findings of Fact & Order of April 18, 2016 which denied their petition for credit against further workers' compensation liability on account of Applicant's "fourth party" settlement with her former civil attorneys for alleged mishandling of her "third party" civil suit.

Applicant Dolores Escamilla, born , while employed in the State of California on October 3, 2010[1] as a Merchandizer[2] by Petitioner Cacique USA, Inc. sustained an injury to her back when she slipped and fell while making a delivery to Food Maxx #455. On October 3, 2010, Petitioner Cacique USA, Inc. was insured for workers' compensation liability by Petitioner Travelers' Property Casualty Company.

Applicant Dolores Escamilla brought a civil lawsuit before the Superior Court of California-Tulare County designated as Case 252535 wherein she sued the Law Offices of Perez, Williams, Medina and Rodriquez for alleged negligence in the handling of a civil lawsuit against Food Maxx #455. Following mediation and settlement of her lawsuit, Applicant obtained a net recovery of $179,805.16. Petitioners sought credit against their liability for workers' compensation benefits on account of Applicant's recovery. *Petition for Credit Pursuant to Labor Code Section 3861 10/13/2015.* Applicant objected to the requested credit. The parties were unable to resolve their dispute. Following Trial on February 11, 2016,

[1] Applicant was 35 years of age at the time of her injury of October 3, 2010.
[2] Occupational Group has not been litigated.

Findings of Fact & Order issued on April 18, 2016. Petitioner's petition for credit was denied. *Minutes of Hearing 2/11/2016; Findings of Fact & Order 4/18/2016.*

By timely but defectively filed petition, Petitioners seek reconsideration. Petitioner's advocates, who are external users of the Electronic Adjudication Management System (EAMS) filed the pending petition as "Correspondence Other" on May 12, 2016.[3] The pending petition was verified and sufficiently served. *Defendant's Petition for Reconsideration 5/12/2016 p. 7 (verification); Proof of Service 5/12/2016.*[4]

Petitioners alleged that unless reconsideration is "immediately accepted" they will be "significantly prejudiced and irreparably harmed" by their inability to recoup costs and benefits that may be provided or ordered prior to an award of credit. *Defendant's Petition for Reconsideration 5/12/2016 p. 1 lines 22-25.* Authorized grounds for reconsideration are thereafter asserted consistent with Lab.C. §5903 {a}, {c} and {e}. *Defendant's Petition for Reconsideration 5/12/2016 p. 1 line 26 to p. 2 line 3.*

Petitioners argue that 1) the legislative intent of Lab.C. §3861 was to allow credit to prevent double recoveries, 2) the applicable case law supports awards of credit to preclude double recoveries, 3) legislative intent in precluding credit in medical malpractice and uninsured motorist claims but not legal malpractice claims supports allowing credit, and 4) Petitioner's failure to pursue a lien claim in the civil action does not bar an award of credit. *Defendant's Petition for Reconsideration 5/12/2016 p. 3 line 14 to p. 6 line 2.*

Applicant has filed a timely[5], verified and properly served Answer to the pending petition. *Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 5 (verification & Proof of Service).* Applicant argues therein that 1) Defendant's petition for reconsideration does not meet the requirements set forth in Labor Code §5902, and 2) Employer's rights are derivative of the employee's rights. *Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 2 line 16 to p. 4 line 6.*

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[3] May 12, 2016 was the 24th day after the Findings of Fact & Order of April 18, 2016.
[4] Lien Claimant EDD was served. Two other lien claims had been withdrawn prior to the filing of the pending petition. Thus, the service of the pending petition appears to have been sufficient.
[5] Applicant's Answer was filed on May 23, 2016, the 8th day after the filing of the pending petition as "Correspondence-Other."

Dismissal of the petition for defective filing is recommended. The pending petition was filed by Petitioner's advocates as "external users" within the Electronic Adjudication Management System (EAMS) as "Correspondence-Other" rather than "Petition for Reconsideration." As a result, the existence of the pending petition was not noticed until the filing and review of Applicant's Answer.

A petition for reconsideration must be filed within twenty days (plus five days for service by mail) of the final order, decision or award. Lab.C. §5900{a}, §5903. A pleading is "filed" via EAMS when it is filed in accordance with the applicable regulations. 8 CCR §10205{t}; 8 CCR §10301{r}. The applicable regulation require that documents be filed with functional cover and separator sheets and must employ an accurate document title. 8 CCR §10205.12{b}.

Compliance with these regulations is essential for the orderly administration of the California workers' compensation system. Proper filing electronically triggers notification and work-flow regarding the pending petition. Improper filing does not. In this case, neither the Appeals Board nor the undersigned PWCJ were made aware of the filing of the pending petition until filing and review of Applicant's Answer. By then, the time limit for the proper filing of a petition for reconsideration has expired.

It is understood that dismissal of the pending petition because Petitioner's advocates failed to compose and use an accurate cover sheet can be seen as a harsh remedy. Nevertheless, it is not unreasonable to hold sophisticated parties represented by experienced legal counsel to the standard of knowing the difference between a Petition for Reconsideration and "Correspondence-Other." Ultimately, the Appeals Board will receive the level of compliance with its procedural requirements that it is prepared to enforce. Moreover, fairness to those who make the effort to fully comply with the applicable rules requires that those rules be enforced against those who do not.

If a decision on the merits is desired notwithstanding the defective filing of the pending petition, it is recommended that the pending petition be denied. The undersigned PWCJ properly found that Petitioners had not demonstrated an entitlement to credit against compensation liability on account of Applicant's civil recoveries for her "fourth party" legal malpractice claims or did they establish that Applicant's recovery in this particular case was duplicative of her workers' compensation entitlements.

II. Facts: Applicant Dolores Escamilla was hired by Petitioner Cacique USA Inc. on or about April 9, 2007. Her job duties included making deliveries to retail grocery outlets. On October 3, 2010 she was making such a delivery to Food Maxx #455 in Visalia, California. She slipped and fell and sustained the injury giving rise to the present workers compensation claim. *Petition for Reconsideration 5/12/2016 p. 2 lines 5-13; Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 1 lines 26-28.*

Applicant's injuries were significant. Petitioner alleges payment of temporary disability indemnity at the rate of $414.45 per week for the maximum 104 week period required by law in the total amount of $42,925.00. Permanent partial disability indemnity has been advanced at the rate of $230.00 per week during the period from October 1, 2012 to May 13, 2013 in the total amount of $ 7,360.00. Industrial medical treatment has been provided in the total amount of $111,765.04 including spinal surgery on June 29, 2012. *Petition for Reconsideration 5/12/2016 p. 3 lines 4-12; Defendants' Exhibits C, D, E & F (benefit print-outs and letters).* The parties have reportedly sought the expert opinion of Stephen Choi, M.D. as an Agreed Medical Evaluator. They have been informed thereby that Applicant's condition was not yet permanent and stationary as late as April 23, 2015. *Petition for Reconsideration 5/12/2016 p. 3 lines 12-13.*[6]

Applicant retained the Law Offices of Perez, Williams, Medina & Rodriquez to represent her in the present workers' compensation claim. *Application for Adjudication 1/21/2011.* Her initial workers compensation attorneys allegedly did not file a "third party" civil suit on her behalf against Food Maxx alleging negligence in the maintenance of its business premises at Store #455 within the time allowed by law. *Petition for Reconsideration 5/12/2016 p. 2 lines 13-19; Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 2 lines 1-7; Correspondence of Perez, Williams et al. (Case Activity General Report) 3/14/2013.*

On February 20, 2013, Applicant dismissed her initial attorneys. *Notice of Dismissal of Attorney 2/20/2013.* She thereafter brought suit against them alleging professional negligence. Her lawsuit was heard as case 252535 before the Superior County of California for the County of Tulare. *Findings of Fact & Order 4/18/2016 p. 2 (Finding of Fact #3); Applicant's Exhibit 04: Civil Compliant*

[6] Dr. Choi's report has yet to be offered in evidence but there does not appear to be any dispute regarding its content.

10/10/2012; Petition for Reconsideration 5/12/2016 p.2 lines 16-19; Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 2 lines 6-7.

Applicant and her former attorneys elected mediation of their litigation. On September 4, 2014, they achieved a civil settlement in the gross amount of $320,000.00 with a net recovery to Applicant of $179,805.16. *Findings of Fact & Order 4/18/2016 p. 2 (Finding of Fact #4); Applicant's Exhibit 05: Civil Settlement Documents 9/04/2014; Petition for Reconsideration 5/12/2016 p. 2 lines 20-24; Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 2 lines 8-9.*

On October 19, 2015, Petitioners filed their petition for credit against further liability for workers compensation benefits on account of Applicant's civil recovery. *Petition for Credit Pursuant to Labor Code Section 3861 10/13/2015.*

Applicant promptly objected to the requested credit. Applicant argued that credit pursuant to Lab.C. §3861 is applicable only to "third party" actions which could have been brought by the employer and not legal malpractice actions which involve the alleged breach of duties owed to the Applicant but not her employer or its workers' compensation carrier, the alleged breach of which did not cause or increase compensation liability. Applicant relied upon the cyber-published WCAB panel decision in *El Katan v. Barrett Business Services.*[7] *Objection to Petition for Credit 11/10/2015 p. 2 line 12 to p. 3 line 17.*

The present parties were unable to resolve their dispute. Trial was held on February 11, 2016. *Minutes of Hearing 2/11/2016.* Findings of Fact & Order issued on April 18, 2016. Petitioner's petition for credit against their liability for further workers' compensation benefits in the present case on account of Applicant's civil recovery was denied. *Findings of Fact & Order 4/18/2016 p. 3 (Order).* The undersigned PWCJ opined that Petitioners had not shown that credit was permissible at all and, furthermore, had not shown that even if credit was potentially available, Petitioners had not proven that Applicant's civil recovery duplicated her remaining workers' compensation entitlements.[8] *Findings of Fact & Order 4/18/2016 pp. 3-4.*

Whereupon, Petitioners seek reconsideration.

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[7] (2013) Cal.Wrk.Comp.P.D. Lexis 41.

[8] The undersigned PWCJ opined that "Thus, the characterization of Applicant's recovery as duplicative of compensation liability has not been shown beyond an assumption manifesting a hasty generalization." *Findings of Fact & Order p. 4 (Opinion on Decision).*

III. Discussion: Petitioners argue that 1) the legislative intent of Lab.C. §3861 is to allow credit to prevent double recoveries, 2) the applicable case law supports awards of credit to preclude double recoveries, 3) legislative intent in precluding credit in medical malpractice and uninsured motorist claims but not legal malpractice claims supports allowing credit, and 4) Petitioner's failure to pursue a lien claim in the civil action does not bar an award of credit. *Defendant's Petition for Reconsideration 5/12/2016 p. 3 line 14 to p. 6 line 2.* Applicant argues in response that 1) Defendant's petition for reconsideration does not meet the requirements set forth in Labor Code §5902, and 2) Employer's rights are derivative of the employee's rights. *Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 2 line 16 to p. 4 line 6.*

The arguments presented in the pending petition and Applicant's answer appear to concern only the first of two issues decided by the undersigned PWCJ in the Findings of Fact & Order of April 18, 2016. The first issue is the legal question of whether the employer is ever entitled to credit against the employee's recovery in a "fourth party" lawsuit. The second problem is a "proof problem" of whether Petitioners demonstrated that Applicant's civil recovery duplicated Applicant's remaining workers' compensation entitlements such that the public policy interest in avoided duplicative recoveries is even applicable.

The first two arguments of the pending petition are correct, so far as they go. When the employee obtains a civil recovery from a third party whose alleged negligence caused the work injury, credit against the employer's remaining compensation obligations is expressly authorized by Lab.C. §3861 and supported by case law manifesting a public policy interest in avoiding duplicative recoveries. *Petition for Reconsideration 5/12/2016 p. 3 lines 14 to p.5 line 12.* Likewise, the fourth argument of the pending petition also appears to be correct. The employer does not waive potential credit in the workers' compensation proceeding by failing to intervention or file a lien claim in the third party civil action. *Petition for Reconsideration 5/12/2016 p. 5 line 21 to p. 6 line 2.*

But Applicant is correct that the civil recovery in this case was not a third party recovery. It was not premises liability claim against Food Maxx #455 for allegedly causing Applicant's slip and fall. It was one step removed from that. No one alleges that Applicant's former attorneys caused her injury. Instead, Applicant alleged that her former attorneys breached their obligations as her attorneys by failing to file a third party suit against Food Maxx #455 within the time allowed by law. Applicant's suit alleged the violation of duties which were not owed to the employer or its compensation carrier.

There is legal authority on whether the distinction between a third party action and a fourth party action makes any difference to the employer's potential credit rights. Petitioners rely on two cases that seem to indicate that when civil damages of the "fourth party" lawsuit duplicate compensation entitlements, credit is available to avoid duplicative recoveries.

The first case is *Monarrez v. WCAB (Interstate Restaurant Supplies)* [(1911) 56 CCC 453 (2nd DCA WDn). In that case, as in the present case, the employee obtained a fourth party recovery from civil attorneys who allegedly failed to fail a third party action in premises liability on his behalf. Credit was denied at the Trial level but reconsideration was granted on the basis that the damages alleged in the legal malpractice suit was "at least in part" were the same damages that should have been alleged against the third party property owner. Critically, the potential recovery did not extend to the entire civil recovery:

> The Appeals Board found that Interstate was entitled to a credit for its future workers' compensation obligations against that portion of the legal malpractice recovery that represented the tort injury recovery if the tortious attorney had properly filed and pursued a complaint, with the amount of credit possibly affected by any comparative negligence of Interstate, an issue that was not yet determined. *Monarrez,* supra, 56 CCC at pp. 453-454, emphasis added.

The result in *Monarrez,* supra, was followed in *Myrick v. WCAB (Marchman Roofing)* [(1998) 63 CCC 772 (5th DCA WDn)]. In that case, the employee brought a third party negligence action against a general contractor. The contractor's liability carrier declined to defend him. The contractor brought a fourth party suit against the insurance company for breach of contract and insurance bad faith and then assigned that action to the employee. The employee was able to recover. Credit on the recovery was denied at the Trial level on the basis that the recovery was not from a third party within the meaning of Lab.C. §3852 and §3861. The Appeals Board granted reconsideration and allowed credit reasoning that even though the recovery derived from an assigned action in insurance bad faith, the financial recovery compensated the employee for the alleged negligence of the third party contractor. *Myrick,* supra, 63 CCC at p. 774. A writ of review was denied.

More recently, however, a seemingly-contrary result was reached *El Katan v. Barrett Business Services, Inc.* [2013 Cal.Wrk.Comp.P.D. Lexis 41). In that case, the employee security guard was assaulted by a third party named Shahrestani. He retained counsel and brought suit against Mr. Shahrestani for personal injury. Unfortunately, his civil attorneys failed to give required notice of a civil trial and did not appear themselves for Trial, resulting in the dismissal of the third party action. The employee thereafter brought a fourth party suit against his former attorneys from which he obtained a settlement. The employer filed a lien in the third party action which was expunged when the civil case was dismissed after non-appearances at Trial. The employer thereafter sought credit against its remaining compensation liabilities but was denied at the Trial level.

After a grant of reconsideration to study the issue, the WCAB panel affirmed the denial of credit. The panel indicated:

> Yet, as a basis for its assertion of a credit, defendant minimizes its lack of ability to prove the necessary elements of the action, and focuses on the resulting harm. It claims that the amount of recovery applicant obtained from his suit against his attorneys was in lieu of payment for what he should 'have received from Shahrestani and cites to *Monarrez v. Workers' Comp. Appeals Bd.* (1991) 56 Cal.Comp.Cases 453, a writ denied case. Defendant overlooks the central underlying proposition in these statutes. *They are subrogation statutes*. This means that to recover a defendant has to be able to demonstrate that it suffered harm in the form of an obligation to pay benefits because of the conduct of a third party. This defendant cannot do because the subsequent third party (applicant's former civil attorneys) had no legal duty to it and did not cause any harm to it.
>
> Defendant paid benefits to applicant because applicant was battered by a third party. Not only is defendant unable to pursue suit against applicant's former civil attorneys for the tort of malpractice, but defendant was not legally harmed by applicant's former civil attorneys because defendant was not obligated to pay any additional benefits to applicant because of applicant's former civil attorneys' failure to competently represent him. Defendant did have a right to file suit against Shahrestani, and defendant would have had a right to credit

against any recovery from Shahrestani. But, defendant has no right of credit as to the proceeds of applicant's suit against his former civil attorneys. *El Katan,* supra (italics and underlying in original).

The pending petition acknowledges the existence of the more-recent decision in *El Katan,* but correctly notes that all three cases are panel decisions that have not been certified as "significant panel decisions" by the Appeals Board and, therefore, have equal precedential weight. *Petition for Reconsideration 5/12/2016 p. 5 lines 7-12.*

Assuming that these three cases are, in fact, in conflict, the undersigned PWCJ committed no error by following *El Katan,* supra, as the most recently decided of the three. *Findings of Fact & Order 4/18/2016 p. 4 (Opinion on Decision).* Trial-level WCJs and WCAB panels must follow the *en banc* decisions of the Appeals Board and the decisions of higher courts. Trial-level WCJs should follow those panel decisions designated as "significant panel decisions" when applicable. Moreover, where other panel decisions are in harmony, a Trial-level WCJ should typically follow that consensus in the interest of promoting consistency in the application of the law.

However, when the persuasive precedents seem to reach inconsistent results, the authority of the Appeals Board entrusted to the undersigned PWCJ necessarily includes selecting from among the competing precedents. Put another way, the undersigned PWCJ did not err by following *El Katan,* supra, as the most recently decided case notwithstanding the seemingly-contrary authority of *Monarrez,* supra, or *Myrick,* supra.[9]

Moreover, it appears that the seemingly-contrary decisions analyzed above are not necessarily inconsistent. In *Monarrez,* supra, and *Myrick,* supra, the party seeking credit was able to demonstrate that the civil damages giving rise to the "fourth party" recovery duplicated the remaining workers compensation entitlements and, therefore, credit was allowed. As quoted above, however, the WCAB panel in *Monarrez,* supra, was aware of the possibility that the civil damages might be different from the compensation entitlements and the WCAB panel in *El Katan* so found.

[9] Applicant correctly argues that Petitioner's assert that the undersigned PWCJ exceeded his authority, but do not thereafter address their own claim. *Applicant's Objection to Petition for Reconsideration*

Thus, these cases are not inconsistent. If Petitioners were able to prove that the fourth party civil damages duplicated the third party damages and thereby overlapped the remaining compensation entitlements then the public policy hostility to double recoveries is applicable and credit may be due. If, on the other hand, in the absence of evidence that the civil recovery duplicates the residual compensation entitlements, there is no doubling of the recovery and credit was appropriately denied.

Thus, the second issue discussed above; the "proof problem." In addition to following *El Katan*, supra, the undersigned PWCJ opined that:

> It is also noted that the recovery having been made against the allegedly negligent law firm, the questions of causation, contributory negligence and any allegations of negligence by the employer were not tested. Thus, the characterization of Applicant's recovery as duplicative of compensation liability has not been shown beyond an assumption manifesting a hasty generalization. *Findings of Fact & Order 4/18/2016 p. 4 (Opinion on Decision).*

The "proof problem" is felt to be an independently sufficient justification for the denial of credit. Petitioners had the affirmative of the issue and the burden of proof on their claim for credit. Lab.C. §5705, §3202.5. Yet Petitioners did not provide witness testimony or documentary evidence to analyze the civil recovery and demonstrate how, if at all, compensation entitlements were duplicated. Thus, it is sufficient that the petition for credit was denied as unproven.[10] Likewise, Applicant's civil damages for past and future medical treatment are not limited to workers' compensation industrial medical care within the parameters of the Medical Treatment Utilization Schedule (MTUS) or the payment rates suggested by the Official Medical Fee Schedule (OMFS).

The parties note that subrogation credits are prohibited in medical malpractice cases subject to the Medical Injury Comprehensive Reform Act (MIRCA) and to any recovery the employee is able to obtain from policies of uninsured motorist coverage. Petitioner argues that the law can exclude certain types of recoveries from potential credit, has not done so in the case of legal malpractice recoveries and, therefore, legal malpractice recoveries are potentially subject to credit.

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[10] For example, Petitioners allege that they have already satisfied their obligation to indemnify Applicant for 104 weeks of temporary disability. *Petition for Reconsideration 5/12/2016 p. 3 lines 4-9.* Thus, any portion of the civil recovery for wage losses could not duplicate Petitioner's future obligation for temporary disability, since the later describes an empty set.

Petition for Reconsideration 5/14/2016 p. 5 lines 13-20. Applicant responds that the existence of these exceptions refutes Petitioner's argument of over-ridding public policy against potential duplicative recoveries. *Pre-Trial Statement of Points & Authorities 2/09/2016 p. 4 lines 13-28; Applicant's Objection to Petition for Reconsideration 5/23/2016 p. 3 line 26 to p. 4 line 6.*

The analogy to MICRA is felt to be false. The Medical Injury Comprehensive Reform Act, by its nature, was an extraordinary response to the extraordinary situation of hyper-escalating medical malpractice insurance premiums which required a special re-allocation of the social costs of medical injures in order to ensure that medical practitioners remained available to provide necessary medical treatment.

On the other hand, the analogy to uninsured motorist coverage is felt to be sound. Applicant contracted for necessary legal services in her own right and for her own benefit in a way that did not require the consent or participation of her employer or its workers' compensation carrier just as a prudent motorist will obtain insurance coverage against the possibility that otherwise-culpable drivers will not have obtained appropriate motor vehicle insurance. Applicant entitlement to the benefit of her contract for competent legal services and her entitlement to the benefit of her contract for uninsured motorist coverage did not create duties owned to her employer or its compensation carrier.

IV. Recommendation: Dismissal of the pending petition on account of its defective filing is recommended. If a decision on the merits is desired, it is recommended that the pending petition be denied. The undersigned PWCJ had the delegated authority to follow the more-recent decision in *El Katan,* supra, notwithstanding seemingly-contrary authority and correctly rejected Petitioners' claim for credit as unproven.

DATE: June 6, 2016

Robert Norton
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE: ON ALL PARTIES AS SHOWN ON THE ATTACHED SERVICE ROSTER
BY:
ON: June 6, 2016