

MEDICAL MALPRACTICE AND WORKERS' COMPENSATION SUBROGATION IN CALIFORNIA.

There are two issues in every workers' compensation subrogation claim, Cash Recovery and Credit. Unfortunately, either type of subrogation in medical malpractice suits is almost impossible. The issue is codified in Civil Code Section 3333.1.

The purpose of Civil Code Section 3333.1, (as it has been repeatedly mentioned throughout the case law involved in this issue), was to reduce skyrocketing health costs by reducing medical malpractice insurance and lowering overall judgments, to protect the California health care delivery system and not for purposes of granting a double recovery to a plaintiff employee injured through malpractice.

The code specifically states that a third party payer (source of collateral benefits, which workers' compensation is considered) cannot subrogate in medical malpractice suits. I have attached a copy of the code section to this memo for review and further information. Based on this statute, there is no question or "wiggle room", a cash recovery is **NOT** possible.

Credit is a different question.

The most recent case concerning the issue is Graham v. WCAB.

In the Graham case, Plaintiff Graham was injured in a work-related incident and eventually sued the treating doctor for medical malpractice. The case settled and the comp carrier claimed entitlement to credit rights under Labor Code 3861.

The comp carrier based its arguments upon earlier case law (basically, 1986 case known as McCall v. WCAB, which held that an employer/comp carrier has a right to claim full credit for settlement received by an employee in a medical malpractice action). The Graham case further interpreted Civil Code Section 3333.1, which holds that a comp carrier or employer has no rights of subrogation recovery in medical malpractice cases. Graham holds that an employer should **NOT** be allowed rights of credit under Labor Code Section 3861 as there was no finding of a "double recovery". The civil settlement took into account the prior payments from the workers' compensation carrier, and the settlement was for pain and suffering only as the plaintiff dismissed his allegation of future disability and medical treatment (future special damages). Therefore, there would be no overlapping benefits being paid.

The Graham case makes clear that credit cannot apply, however the court did find circumstances where credit may apply.

If the parties to the civil case are unaware of our payments or do not use them to reduce the value of the civil case, and there **IS** a settlement including future disability and medical treatment (future special damages) you can file with the WCAB for credit. The credit amount would only be to the portion of the settlement for the future special damages and if the settlement doesn't delineate what portion of the settlement is General vs. Special damages, the

issue would have to be tried at the WCAB level. Unfortunately, this would be an uphill battle as we would come against the liberal construction of the Labor Code and Judges that aren't used to making determinations in regards to civil settlements.

In Conclusion, Subrogation in Medical Malpractice Suits is almost impossible and can only be obtained as credit rights under very minimal circumstances.