

DATE: February 9, 1990

TO: Dan Teague, Disability Administrator

FROM: City Attorney

SUBJECT: Reimbursement of LTD Payments upon Receipt of
Third Party Tortfeasor Settlements

Recently you received a letter from attorney Ernest R. Fraley. Mr. Fraley represents City employee Naomi Terry in a civil suit that arose from an automobile accident in which she was involved. Pursuant to City policy, you had requested that Ms. Terry complete an agreement to reimburse the City for the Long Term Disability (LTD) benefits she has received should she recover damages for lost wages from her civil suit. Mr. Fraley has questioned the City's right to reimbursement from third party tortfeasors as the LTD plan has no specific subrogation clause. As a result of Mr. Fraley's question, you have requested a legal opinion regarding the City's right to reimbursement.

Ms. Terry's duty to reimburse the City should she receive lost wage damages from her suit arises from the doctrine of subrogation. As the common law principle of subrogation is equitable, it arises by operation of law and does not depend on a contractual relationship. It is a doctrine that the law recognizes and applies for the purpose of securing justice between the parties. Subrogation in this type of case acts to preclude an individual from receiving double compensation for a single injury. Should Ms. Terry refuse to complete and sign the agreement to reimburse, the City may join in her suit as an intervenor and recover LTD payments through the court process.

The situation in Ms. Terry's case is analogous to the situations contemplated by the Workers Compensation statutes of the California Labor Code, sections 3850 et seq., which deal with subrogation. The difference is that Ms. Terry's case does not involve a work related injury and the City is paying not Worker's Compensation but LTD benefits. Nevertheless, the statutes may be used as guidelines in cases where the employer provides compensation to an injured employee. Labor Code section 3852 specifically provides that employers may recover in a third party suit. It reads as follows:

SECTION 3852. Action against third persons:

Recovery by employer

The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death

against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension or other emolument paid to the employee or to his or her dependents. The respective rights against the third person of the heirs of an employee claiming under Section 377 of the Code of Civil Procedure, and an employer claiming pursuant to this section, shall be determined by the court emphasis added.

Black's Law Dictionary defines emolument as: "The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office." LTD benefits are an emolument arising from City employment.

The court in explaining the purpose of the statutes said the provisions "seek to insure, first, that regardless of whether it is the employee or the employer who sues the third party, both the employee and the employer recover their due, and, second, that, as far as possible, the third party need defend only one lawsuit." The court went on to say that "to the extent that the damages which the employee recovers from a third party simply duplicate the benefits which the employee has already received from the employer, the employee's own recovery provides a fund from which the employer may draw." *Board of Administration v. Glover*, 34 Cal. 3d 906, 912 (1983).

Precisely the same issue is present in Ms. Terry's case. The City is providing Ms. Terry with compensation during her recovery period. A settlement in the civil suit, assuming it is in Ms. Terry's favor, will include damages for lost wages. These damages will duplicate the benefits Ms. Terry is currently receiving through the LTD plan. To allow Ms. Terry to retain

that portion of the settlement that is for lost wages without reimbursing the City for LTD payments would allow her the double recovery that the doctrine of subrogation is intended to eliminate.

Therefore, it is the opinion of this office that Ms. Terry must reimburse the City for any LTD benefits she has received that are duplicated by her civil claim. Please notify this office immediately if Ms. Terry continues to refuse to sign the agreement to reimburse so that we may pursue the City's interest in Ms. Terry's claim as an intervenor in her suit. Finally, although the City has legal recourse to obtain reimbursement from third party tortfeasors, it is recommended that the plan document be amended to include a specific subrogation clause so that future disputes may be avoided.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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