Roe v. Workman's Compensation Appeals Board: Something Fishy in California Workers' Compensation Law

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One of the most controversial and least understood aspects of California workers' compensation law is the extent to which an employer who is concurrently negligent can use damages recovered from a third party tortfeasor to offset his workers' compensation liability to an injured employee. The California Supreme Court, in the landmark decision of *Roe v. WCAB,* held that a finding of concurrent employer negligence will act as a *complete* bar to any such offset attempt by an employer, even if as a result, the injured employee receives a double recovery.

This note will analyze the decision in *Roe,* and its effect on the law of workers' compensation in California. In addition, an alternative solution will be posited which attempts to provide a more equitable resolution of this problem.

Initially, however, a detailed examination of the applicable statutory provisions and the relevant prior case law is essential to an understanding of the *Roe* decision.

**Statutory Structure**

An employee injured during the course of his employment can recover workers’ compensation benefits from his employer. These ben-
efits are his exclusive remedy against his employer, and they are determined without regard to the fault of any of the parties involved. The receipt of workers' compensation benefits, however, does not preclude an injured employee from also bringing a common law action for damages against a third party tortfeasor who proximately caused his injuries.

In order to avoid double recovery by the employee and to place the financial burden upon the negligent third party who caused the employee's injury, the California Labor Code provides the employer with subrogation rights.

The subrogation statutes offer the employer two types of relief: reimbursement and credit. The reimbursement sections allow the employer to recover from the third party tortfeasor the benefits which the employer has paid to the employee up until the time of the third party suit. The credit provisions permit the employer to offset the employee's third party recovery against his obligation to pay to the employee any future (i.e., post-trial) workers' compensation benefits.

5. CAL. CONST. art. XX, § 21.
6. See CAL. LABOR CODE § 3852 (West 1971). Section 3852 provides: "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such 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, may likewise make a claim or bring an action against such 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 was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents." Id.
7. CAL. LABOR CODE §§ 3850-64 (West 1971 & Supp. 1975). One court succinctly stated the purpose of the subrogation provisions: "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 compensation." Sanstad v. IAC, 171 Cal. App. 2d 32, 35, 339 P.2d 943, 944 (1959).
9. CAL. LABOR CODE §§ 3852, 3853, 3856(b) (West 1971).
10. The California statute provides: "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
This distinction between the employer's reimbursement rights and his credit rights is fundamental to an understanding of this complex area.

In pursuing his reimbursement rights against the negligent third party, the employer has three options. He may: (1) bring an action directly against the third party, (2) join as a party plaintiff or intervene in an action brought by the employee, or (3) allow the employee to bring 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 attorneys' fees. On the other hand, the employer's credit rights are awarded by the Workers' Compensation Appeals Board (WCAB or the board), which has exclusive jurisdiction in this regard.

The wording of these reimbursement and credit statutes does not distinguish the rights of negligent employers from those of non-negligent employers. It is well settled that a non-negligent employer can use both the reimbursement and the credit provisions to recoup his workers' compensation liability. The rights of a concurrently negligent employer, however, have not been so clearly defined. This note will address the problem of the extent to which the reimbursement and credit provisions should be available to the concurrently negligent employer.

A Partial Answer—Witt v. Jackson

Before 1961, a finding of employer negligence had no effect on 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. Cal. Labor Code § 3858 (West 1971). In addition the statute provides: "The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for 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." Id. § 3861.

13. Id. § 3853.
14. Id. § 3856(b).
15. Id. §§ 3858, 3861.
17. See notes 11-15 & accompanying text supra.
the employer’s reimbursement and credit rights. In *Witt v. Jackson*, however, Justice Traynor, speaking for the California Supreme Court, held that a finding of employer negligence would bar an employer’s assertion of his reimbursement rights. In order to avoid double recovery by the injured employee, the court determined, the third party would be allowed to deduct the reimbursement amount from his judgment.

The decision in *Witt* strongly influenced the court in *Roe v. WCAB*. Therefore, a careful examination of the theory and actual holding of *Witt* is fundamental to an evaluation of the *Roe* decision.

The Theory Underlying *Witt*

At common law there were no contribution rights among joint tortfeasors. In 1957, however, the California legislature abrogated this rule and provided for such contribution. The court in *Witt* was thus faced with two conflicting theories. On one hand, under workers’ compensation law, the employer was exclusively liable to the employee but could, by statute, seek reimbursement from the third party tortfeasor for the amount paid to the injured employee in benefits up to the time of trial. Presumably, this right attached regardless of the employer’s concurrent negligence. On the other hand, by enactment of the contribution sections, the legislature clearly evidenced the intent that joint wrongdoers should share equally in bearing the cost for the injury which they caused.

The Holding of *Witt*

Attempting to reconcile these conflicting statutory schemes, the court held that the old rule which allowed a negligent employer the right of reimbursement had been rendered obsolete by the enactment

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21. *Id.* at 366, 17 Cal. Rptr. at 378.
22. *Id.* The term “reimbursement amount” signifies the dollar amount of the workers’ compensation benefits paid to the employee by the employer *up to the time* of the trial.
25. Cal. Stat. 1957, ch. 1700, § 1, at 3077 (codified at CAL. CODE CIV. PROC. §§ 875-80 (West Supp. 1975)). The pro rata share, or “contribution,” of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them. *Id.* § 876(a).
26. See notes 8-14 & accompanying text *supra*.
of the contribution statutes. Moreover, the court found that since the reimbursement sections do not address the issue of employer negligence, they must be construed to be qualified by the statement in California Civil Code section 3517 that “no one can take advantage of his own wrong.”

Justice Traynor concluded, therefore, that an employer's concurrent negligence precludes him from using the reimbursement benefits paid prior to the time of trial. In order that this holding would not result in double recovery by the employee, Justice Traynor also concluded that the third party could deduct from the judgment against him the amount of workers' compensation benefits which the employee had received.

28. 57 Cal. 2d at 70, 366 P.2d at 648, 17 Cal. Rptr. at 376.
29. See notes 8-14 & accompanying text supra.
32. 57 Cal. 2d at 73, 366 P.2d at 650, 17 Cal. Rptr. at 378. Several commentators have discussed Witt v. Jackson. E.g., Riesenfeld, Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets, 53 CALIF. L. REV. 207, 216-18 (1965); Note, Workmen's Compensation: Employer's Rights Against Third Party Tortfeasors, 50 CALIF. L. REV. 571 (1962); Note, Workmen's Compensation and Third Party Suits: The Aftermath of Witt v. Jackson, 21 HASTINGS L.J. 661 (1970); Note, Workmen's Compensation: The Impact of the Witt v. Jackson Rule on the Law of Third Party Settlements, 17 U.C.L.A.L. REV. 651 (1970). One commentator, then WCAB referee L. Lupton, strongly criticizes the Witt opinion in an excellent article. Lupton, Witt vs. Jackson—Interpretation, 41 CAL. SY. B.J. 690 (1966). Lupton argues that before the decision in Witt, the California position was clear—the concurrent negligence of the employer would not bar his assertion of his reimbursement rights. Id. at 690-91, citing Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950). Although Justice Traynor maintained in Witt that the enactment of sections 875-80 of the Code of Civil Procedure, allowing contribution among joint tortfeasors, rendered the rationale of these past cases “obsolete,” Lupton disagrees. See id. at 691-94. Instead, he persuasively argues that these sections have no application to the workers' compensation area, since the employer is, by statute, expressly not liable in tort to the employee. Id. Moreover, Lupton adds, the North Carolina cases upon which the court in Witt so strongly relied, expressly stated that only “independent negligence” on the part of the employer would bar his reimbursement rights. Id. at 697-99. Lupton points out that independent negligence had been defined by the North Carolina court as “negligence of the employer other than that imputable to him under the doctrine of respondeat superior.” Id. at 697-98, quoting Lovette v. Lloyd, 236 N.C. 663, 669, 73 S.E.2d 886,
The *Witt* case thus established two basic principles. First, in the case of a negligent third party and a concurrently negligent employer, neither party should bear the entire cost for the employee's injury. A proper loss allocation must be made between them, and within the restrictive framework of the workers' compensation system, this allocation is best accomplished by denying the employer his right to reimbursement. Second, the employee should not be allowed a double recovery.

The Issue Not Resolved by Witt

The opinion in *Witt* dealt with the reimbursement sections of the Labor Code. It left unanswered, however, the question of whether a finding of concurrent employer negligence would bar the employer's use of the *credit* provisions as well. It is primarily this question which the supreme court faced in *Roe*.3

*Roe*, an employee, suffered severe industrial injuries in an accident caused by a third party's negligence. He received temporary workers' compensation disability benefits and also filed a damage action against the third party. The employer elected not to join the lawsuit,34 and Roe and the third party settled the suit without reference to the employer's status.35 *Roe* then applied to the WCAB for a permanent disability award.36 The employer asserted his right to credit *pro tanto* Roe's net settlement against his own liability for permanent disability benefits.37 *Roe* sought to raise the employer's concurrent negligence as a bar to his assertion of credit; however, the referee refused to inquire into the employer's concurrent negligence, awarded *Roe* a permanent disability rating of 96½ percent, and ordered that the employer be allowed his credit rights.38 The board refused reconsideration, but the court of appeal reversed and annulled the award. The supreme court thereafter granted a hearing.39

892 (1953). Lupton concludes that in *Witt*, the negligence of the employer was based *solely* on the doctrine of respondeat superior. *Id.* at 699. Hence *Lovette*, although relied upon by the court in *Witt*, was clearly inapplicable to the factual situation in *Witt*. *Id.*

Despite these criticisms, however, *Witt* has been followed consistently, albeit sometimes incorrectly, by the California courts. *Witt*'s longevity, no doubt, is due to the seemingly equitable solution formulated by Justice Traynor to the problem of concurrent employer negligence in the reimbursement situation.

34. *Id.* at 886, 528 P.2d at 773, 117 Cal. Rptr. at 685.
35. *Id.*
36. *Id.* at 886-87, 528 P.2d at 773, 117 Cal. Rptr. at 685.
37. *Id.* at 887, 528 P.2d at 773, 117 Cal. Rptr. at 685. For an explanation of this right to credit, see notes 15-16 & accompanying text *supra*.
38. 12 Cal. 3d at 887, 528 P.2d at 773, 117 Cal. Rptr. at 685.
39. *Id.* Briefly, the structure for processing a workers' compensation claim is as follows. The WCAB is composed of seven commissioners, five of whom must be "ex-
The facts in *Roe* illustrate the typical three-cornered problem involved in a resolution of the credit issue. Three parties, the employer, the third party tortfeasor, and the employee, seek to claim the amount of money which the employer is to pay in future workers' compensation benefits. The employer asserts his right to a credit for this amount under Labor Code sections 3861 and 3858. The third party would like to extend the logic of *Witt*, and upon a showing of concurrent employer negligence, have the credit amount deducted from the damages he must pay the employee. Finally, the employee, by raising his employer's concurrent negligence as a bar to his assertion of credit before the WCAB, seeks a double recovery consisting of both future workers' compensation benefits and damages from the third party. Prior to *Roe*, there were three lines of cases which attempted to resolve this triangular battle.

**The Third Party Tortfeasor's Claim**

Although *Witt* did not resolve the issue of a third party tortfeasor's right to deduct future workers' compensation benefits to be paid the employee, a series of four court of appeal decisions later addressed this specific issue, each successive case building on the previous one. In each case, the third party raised the employer's concurrent negligence, either as an affirmative defense or by cross-complaint.
In *Conner v. Utah Construction and Mining Co.*, the employee sued the third party tortfeasor before receiving a permanent workers' compensation award. The third party requested a jury instruction that the amount of temporary workers' compensation benefits already paid and the amount of permanent workers' compensation benefits *to be paid* to the employee be deducted from any judgment against the third party. The appellate court upheld the trial court's rejection of this instruction, labeling the third party claim an "unusual and impractical extension of *Witt v. Jackson.*"

In *Castro v. Fowler Equipment Co.*, the facts were similar to those in *Conner*, but in addition, the third party proffered testimony concerning the monetary value of future benefits which the employee would be entitled to receive under the workers' compensation act. The appellate court again rejected the third party's claim of deduction for these future benefits, stating: "No rating having been made by the Industrial Accident Commission (now WCAB), it is impossible for any court to determine what that rating might be. The Commission has exclusive jurisdiction to determine compensation . . . ." The court added: "Even [if] a rating had been made by the Industrial Accident Commission, it does not necessarily follow that the respondent would receive all that such award would allow as it may be terminated by death or other events . . . ." Thus in *Castro*, the court's rejection of the third party's claim appears to have been predicated on the speculative nature of proof of permanent benefits to be paid.

By contrast, in *Slayton v. Wright*, the issue of speculation was presented very nicely, as one of the two injured employee-plaintiffs had received a permanent disability award prior to trial, while the other had not. Nevertheless, the court rejected the third party's attempt to re-

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44. *Id.* at 275, 41 Cal. Rptr. at 736.
45. *Id.*
47. *Id.* at 419, 43 Cal. Rptr. at 591.
48. *Id.* at 421, 43 Cal. Rptr. at 593.
49. *Id.*
51. *Id.* at 231, 76 Cal. Rptr. at 501. The fact that the permanent disability award was made before trial does not eliminate speculation as to the ultimate amount that the employee will receive in benefits. See note 49 & accompanying text *supra.* The court
duce the judgment against him by the amount of future permanent disability payments already determined and awarded to the one employee, stating:

It would be incongruous to disallow the deduction in Nina Lackey's case and to allow the deduction from Mamie J. Slayton's judgment merely because the former had not received her rating while the latter had been rated. Under such a rationale, the deductions of future benefits would depend upon a purely adventitious occurrence—the time an award issued. Such a result would be unconscionable and strictly dependent upon chance. 52

Thus, the court in Slayton did not consider the absence of speculation to be the dispositive factor. Even though the amount of workers' compensation benefits was already determined as to one employee, the third party was not allowed to extend his "Witt reduction" to include this sum. The court's rationale in Slayton is evident. The third party's rights should not be determined by whether the employee elects to seek his permanent award before trial (thus allowing the third party an extended Witt reduction), or after trial (thereby precluding the increased deduction).

In the final appellate decision on this issue, Patterson v. Sharp, 53 the third party tried a different tack. Instead of asking the trial court for a reduction of the judgment against him by the amount of future workers' compensation benefits, he succeeded in obtaining an order that each future workers' compensation benefit payment from the employer would be sent to the third party rather than to the employee. 54 This diversion of payments to the third party in the future (as opposed to a reduction of the money judgment against him by their prospective dollar amount) minimized the concern expressed in Castro that the third party would enjoy a windfall if the employee were to die before the workers' compensation benefits had been paid in full. 55 Moreover, the court of appeal acknowledged that limiting the third party's Witt reduction to those benefits received until the time of trial would

in Slayton, however, did not decide the case on the basis of this uncertainty. See note 52 & accompanying text infra.

52. 271 Cal. App. 2d at 233, 76 Cal. Rptr. at 502.
54. Id. at 995, 89 Cal. Rptr. at 399. The amount of future workers' compensation benefits had already been determined by the time of trial. Id. at 993, 89 Cal. Rptr. at 401.
55. Id. at 997-98, 89 Cal. Rptr. at 401. See note 49 & accompanying text supra.

To expand, the third party had already been allowed to deduct from the judgment against him the full amount of future workers' compensation benefits, on the theory that the employee would receive all these benefits later and should not be allowed double recovery. If, however, the employee were to die before the benefits had been fully paid, the third party would already have deducted from the judgment against him an amount which the employee would never receive.
arbitrarily determine the extent of his rights according to the amount of time which had transpired between the employee's injury and the time of trial:

[T]he ruling denying a reduction of the third party judgment in the full amount of benefits to be paid in the future means that the effect of the Witt rule itself, in any proper case, will be subject to gross variations by reason of time factors . . . .

The effect of a substantive rule should not be subject to the vagaries of calendaring.56

The court of appeal, although recognizing merit in the trial court's action, nevertheless felt constrained by the language of Labor Code section 595557 to hold that the trial court had no jurisdiction to divert these workers' compensation payments from the employee to the third party.58 The court therefore failed to adopt this ingenious approach.

Conner, Castro, Slayton, and Patterson each rejected the third party tortfeasor's claim to a reduction of the employee's judgment against him by the amount of future permanent disability payments. One-third of the triangular battle had therefore been settled by the courts.

The Employer and the Employee Claims

Prior to Roe, in the leading cases of Nelsen v. WCAB59 and Corley v. WCAB,60 the courts of appeal of the Third and Fourth Districts, respectively, took diametrically opposed positions regarding the concurrently negligent employer's right to assert his credit claim under Labor Code sections 3858 and 3861.61

Nelsen v. WCAB

In Nelsen, an injured employee received temporary workers' compensation benefits and then brought a damage suit against the third


57. Section 5955 provides: "No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct or annul any order, rule, decision or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or the courts of appeals in all proper cases." CAL. LABOR CODE § 5955 (West 1971).

58. 10 Cal. App. 3d at 998-99, 89 Cal. Rptr. at 401-02. The court also based its holding on the fact that Witt applied only to benefits "made" and amounts "received," not to benefits "to be made" and amounts "to be received." Id. at 998, 89 Cal. Rptr. at 397.


61. See note 10 supra.
party. The employer intervened in the action and filed a lien claim. The court found the employer and third party concurrently negligent and allowed the third party his *Witt* reduction. Thereafter, the employee sought permanent disability benefits from the board, and the employer asserted his statutory right to credit the third party recovery against his liability for these future payments. The employee raised the employer's concurrent negligence as a bar to this claim. The board dismissed the employee's defense and allowed the employer his credit. The court of appeal in *Nelsen* annulled the board's order and held that the employee could raise the employer's concurrent negligence as a bar to his assertion of credit. This decision, then, allowed the employee to retain both his third party recovery and his permanent disability award.

The *Nelsen* opinion is important in two respects. First, it held that an employer's concurrent negligence will bar his assertion of credit; and second, it held that the employee (as opposed to the third party in *Witt*) can raise this defense before the WCAB, with the benefits inuring to the employee himself in the form of a double recovery.

The *Nelsen* court based its decision almost entirely on its interpretation and application of *Witt v. Jackson.*63 The court pointed out the distinction between the reimbursement and credit provisions of the subrogation statutes64 and the fact that *Witt* dealt only with the reimbursement sections.65 Nevertheless, the court reasoned that since the court in *Witt* held that the reimbursement sections were implicitly qualified by the statement in Civil Code section 351766 that “no one can take advantage of his own wrong,” the credit provision should be similarly interpreted, thus barring an employer from using them if he is found concurrently negligent.67

In so holding, the court in *Nelsen* had to decide which party should receive the benefits of the ruling—the employee, who would thereby be allowed a double recovery, or the third party, who would thereby receive an increased *Witt* deduction. The court ruled in favor of a double recovery for the employee.

As discussed earlier,68 the court in *Witt* held that the third party should be allowed to deduct the amount of reimbursement from the judgment against him on a finding of concurrent employer negligence in order to prevent the employee from receiving a double recovery.

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62. See CAL. LABOR CODE §§ 3858, 3861 (West 1971).
64. See notes 8-10 & accompanying text supra.
65. 11 Cal. App. 3d at 478-79, 89 Cal. Rptr. at 641.
67. 11 Cal. App. 3d at 478-79, 89 Cal. Rptr. at 641.
68. See notes 19-32 & accompanying text supra.
The court in *Nelsen* dealt with this part of the *Witt* holding by reason-
ing that the reliance in *Witt* on Code of Civil Procedure sections 875
through 880, which allow for contribution among joint tortfeasors, was
"merely to demonstrate that the rationale of prior decisions was no
longer applicable . . . . The decision in *Witt* is in terms not made
to depend upon these sections, which have, in fact, no direct bearing
on the question decided in the *Witt* case." By this reasoning, the
*Nelsen* court attempted to separate the *Witt* holding into two parts.
The court chose to retain, and to extend to the credit provisions, that
portion of *Witt* which holds that the employer may not "take advantage
of his own wrong." At the same time, the court extracted this holding
from the context of *Witt*, which was an attempt to allocate liability for
loss between two wrongdoers. Certainly, the court in *Witt* did not base
its opinion on sections 875 through 880 for these provisions would have
directed that the court allow *equal* contribution between the employer
and the third party, rather than limiting the employer's "contribution"
to the amount of benefits paid to the employee up until the time of
trial. Nonetheless, the court in *Witt* did rely on the legislative intent
behind these sections, that concurrent wrongdoers should each assume
a portion of the loss. To split up the *Witt* holding, retaining one part
and attempting to distinguish the other, is wholly inconsistent with Jus-
tice Traynor's equitable formulation for the distribution of loss between
the third party and the employer.

By denying both the negligent employer's claim for credit and the
third party's claim for an enlarged *Witt* reduction, the holding in *Nelsen*
allowed the employee a double recovery for a single injury. The em-
ployee, under *Nelsen*, was permitted to retain all future workers' com-
ensation benefits in addition to the damages recovered from the third
party. The *Nelsen* court's justification for this result is not persuasive.
The court acknowledged the holding in *Witt* that "'the injured em-
ployee may not be allowed a double recovery. . . .'" In its only
attempt to qualify this repudiation of double recovery, the opinion in
*Nelsen* quoted language from *De Cruz v. Reid*, a post-*Witt* supreme
court decision:

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70. 11 Cal. App. 3d at 476, 89 Cal. Rptr. at 640, quoting Chick v. Superior Ct.,
71. Technically, the concurrently negligent employer and the third party tortfeasor
are not joint tortfeasors. Under California workers' compensation law, the employer
is not liable to the employee in tort. CAL. LABOR CODE § 601 (West 1971). For a
full discussion of this issue, see 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 76.21
(1975); Annot., 53 A.L.R.2d 977 (1957).
72. See notes 20-32 & accompanying text supra.
73. 11 Cal. App. 3d at 476-77, 89 Cal. Rptr. at 640, quoting Witt v. Jackson, 57
74. 69 Cal. 2d 217, 444 P.2d 342, 70 Cal. Rptr. 550 (1968).
Witt's prohibition against double recovery "is nothing more than a reference to the usual rule of law existing in negligence actions generally, that a partial satisfaction of the liability by a joint or concurrent tortfeasor will result in a pro tanto reduction of the liability of the original tortfeasor."\textsuperscript{75} When this statement is considered in context, however, it becomes apparent that the Nelsen court's reliance on De Cruz is misplaced. An examination of De Cruz readily reveals that it stands not for the notion that an employee should be allowed a double recovery, but rather for the proposition that he should not be allowed a double recovery in the case of a concurrently negligent employer.

In De Cruz an employee was killed in a work-related accident. His dependents filed a claim with the WCAB for workers' compensation benefits. The employer and employee settled this claim for a specified amount, and the employer further agreed to waive any right to subrogation.\textsuperscript{76} The dependents then brought a successful wrongful death action against the third party tortfeasor. On appeal to the supreme court, the third party claimed that it was error for the trial court not to have deducted from the judgment against him the amount of the settlement agreement between the employer and employee in order to prevent the employee from obtaining a double recovery prohibited by Witt. The supreme court in De Cruz correctly rejected this claim.

Emphasizing the employer's lack of negligence in De Cruz as the factor which distinguished it from Witt, the court reasoned that the Witt reduction and rule against double recovery apply only in the case of a concurrently negligent employer.\textsuperscript{77} Since there had been no showing of concurrent negligence in De Cruz, the third party was not allowed a Witt reduction of the judgment against him.\textsuperscript{78} Consequently, the employee in De Cruz retained the third party damages and the settlement amount. This apparent double recovery, however, resulted only because the non-negligent employer in De Cruz had waived his subrogation rights as part consideration for the settlement with the employee.\textsuperscript{79} In the absence of such a waiver, the non-negligent employer unquestionably would have had the right to reimbursement, thus reducing the


\textsuperscript{76} De Cruz v. Reid, 69 Cal. 2d 217, 221, 444 P.2d 342, 344-45, 70 Cal. Rptr. 550, 552-53 (1968).

\textsuperscript{77} Id. at 225, 444 P.2d at 348, 70 Cal. Rptr. at 555.

\textsuperscript{78} Id. at 223, 444 P.2d at 346, 70 Cal. Rptr. at 554. See note 81 infra.

\textsuperscript{79} 69 Cal. 2d at 221, 444 P.2d at 344-45, 70 Cal. Rptr. at 552-53. The court in De Cruz called the compensation benefits received by the employee because of the non-negligent employer's waiver of his reimbursement rights "payments received . . . from a collateral source." Id. at 223, 444 P.2d at 346, 70 Cal. Rptr. at 554.
third party damages ultimately received by the employee and eliminating the employee's double recovery.\textsuperscript{80}

Furthermore, since the employer had not been found concurrently negligent, the settlement recovery obtained by the employee from the employer was not a "partial satisfaction of the liability by a joint or concurrent tortfeasor [which] will result in a pro tanto reduction of the liability of the other tortfeasors."\textsuperscript{81}

Thus, while the court in \textit{De Cruz} reaffirmed the rule stated in \textit{Witt} that when an employer is concurrently negligent, a double recovery by the employee is not permitted,\textsuperscript{82} it was careful not to extend the \textit{Witt} prohibition against double recovery to the case of an independent recovery by the employee which was gained solely because of the non-negligent employer's waiver of his subrogation rights. It is within this context that the part of the \textit{De Cruz} opinion cited by the court in \textit{Nelsen} must be read.\textsuperscript{83}

Consequently, the appellate court's assertion in \textit{Nelsen} that \textit{De Cruz} somehow qualified the double recovery prohibition in the case of a concurrently negligent employer and thereby lent support to the \textit{Nelsen} court's allowance of double recovery is erroneous. The holding in \textit{Nelsen} must therefore be viewed skeptically.

Further reasoning by the \textit{Nelsen} court is also questionable. The court concluded its opinion by stating that the holding would not impose any additional liability upon the employer:

They [the employers] pay no more than they would have had to pay if, prior to the third party actions, petitioners had received awards and payments for all permanent disability indemnity and other workmen's compensation benefits which they concurrently seek.\textsuperscript{84}

This statement is misleading. Earlier in its opinion the court correctly pointed out the difference between the credit and reimbursement

\textsuperscript{80}. See note 18 & accompanying text \textit{supra}.
\textsuperscript{81}. 69 Cal. 2d at 225-26, 444 P.2d at 348, 70 Cal. Rptr. at 556. See note 75 & accompanying text \textit{supra}. Throughout \textit{De Cruz}, the supreme court stressed the employer's lack of negligence as the factor which distinguished the case from \textit{Witt}. The court stated: "In the case at bench defendants neither introduced nor offered any evidence bearing upon the concurrent negligence of decedent's employer, let alone any evidence that such negligence proximately caused decedent's death. Accordingly, they did not bring themselves within our holding in \textit{Witt} requiring a reduction of the judgment." 69 Cal. 2d at 223, 444 P.2d at 346, 70 Cal. Rptr. at 554.
\textsuperscript{82}. The court stated: "In support of their position that plaintiffs' recovery in the instant case must be reduced, defendants fasten upon our closing observation in \textit{Witt} that 'the injured employee may not be allowed a double recovery'. But this language must be read in the factual context of a concurrently negligent employer." \textit{Id}. at 225, 444 P.2d at 347-48, 70 Cal. Rptr. at 555-56 (citation omitted).
\textsuperscript{83}. See note 75 & accompanying text \textit{supra}.
\textsuperscript{84}. 11 Cal. App. 3d at 479, 89 Cal. Rptr. at 642.
provisions.\textsuperscript{85} Indeed, the thrust of its initial reasoning was that the rule that "no one can take advantage of his own wrong" should be extended to apply to the credit provisions as well as the reimbursement provisions.\textsuperscript{86} Nonetheless, in its subsequent conclusion that its decisions would not result in any new employer liability, the court hypothesized a reimbursement rather than a credit situation.\textsuperscript{87} There is no question that in this hypothetical factual situation the holding would not impose any additional liability, for it merely illustrates the reimbursement situation which was decided in Witt. It is clear that when as in the actual situation in Nelsen, the court considers workers' compensation payments which were not paid by the time of trial but rather will be paid in the future (the credit amount), the Nelsen decision does indeed cast new liability on the employer, for he will be required to subsidize the employee's double recovery consisting of future workers' compensation benefits and damages assessed against the third party.\textsuperscript{88}

In sum, the Nelsen court took the logical position that the reasoning in Witt, which modified the reimbursement provisions in light of Civil Code section 3517,\textsuperscript{89} should be extended to modify the credit provisions. Nevertheless, instead of allowing the third party to deduct from the judgment against him the amount of the credit, a solution which would have been consistent with Witt, the court allowed the employee to retain both the judgment and the future benefits. This position is irreconcilable with both Witt and De Cruz.

Corley v. WCAB

The second pre-Roe appellate decision addressing the issue of a concurrently negligent employer's right to a credit was the later case of Corley v. WCAB.\textsuperscript{90} In Corley, the Fourth District, contrary to the

\textsuperscript{85} Id. at 478-79, 89 Cal. Rptr. at 641.

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 479-80, 89 Cal. Rptr. at 641. The court here mentioned that all the workers' compensation benefits had been paid prior to the third party action. Id. Thus, the court plainly referred to a reimbursement situation. See notes 8-10 & accompanying text supra.

\textsuperscript{88} It is true that the court in Nelsen did not increase the employer's total potential liability beyond the limits of the employee's workers' compensation award. The extent of potential total liability, however, is really not at issue here. Rather, what is in issue is the actual amount which the negligent employer will be required to pay in workers' compensation benefits without receiving any setoff. Before Nelsen, pursuant to Labor Code sections 3858 and 3861, the negligent employer was allowed a setoff against the third party judgment for the amount of post-trial workers' compensation benefits he was obligated to pay (the credit amount). After Nelsen, this setoff was denied. Hence, the employer's total actual liability to the employee was clearly increased by the Nelsen holding.

\textsuperscript{89} CAL. CIV. CODE § 3517 (West 1970).

\textsuperscript{90} 22 Cal. App. 3d 447, 99 Cal. Rptr. 242 (1971).
position taken earlier by the Third District in Nelsen, held that the employer’s concurrent negligence would not bar his assertion of credit.91

The facts in Corley were similar to those in Nelsen; however in Corley, the third party tortfeasor and employee settled their suit without a determination regarding the employer’s negligence.92 Thus, when the employee came before the WCAB and asserted the employer’s negligence as a bar to the employer’s request for credit, he was asking the board not only to deny the employer his credit, if negligence were found, but also to determine whether or not the employer had in fact been negligent.93

The trial referee permitted the employee to introduce evidence of the employer’s concurrent negligence and, after submission of the matter, decided that the board had jurisdiction to adjudicate the issue of the employer’s concurrent negligence.94 The referee then determined that the employee’s injury had been caused by the concurrent negligence of the employer and the third party. Accordingly, the employer was denied credit for any part of the amount recovered from the third party, and an award was issued in favor of the employee.95 The WCAB, on motion for reconsideration, overturned the referee’s decision insofar as it denied the employer his credit, determining that the WCAB did not have jurisdiction to decide the question of employer negligence. The court of appeal in Corley affirmed the decision of the WCAB, holding that the employer’s concurrent negligence does not bar his assertion of credit.96

The Corley court, like the court in Nelsen, based its opinion upon an interpretation of Witt v. Jackson.97 In its application of Witt, however, the court in Corley arrived at a significantly different result.

The Corley court interpreted Witt as directing an allocation of the economic cost of an injury between a third party tortfeasor and a concurrently negligent employer, with the negligent employer bearing the cost to the extent of workers’ compensation benefits paid, and the third party tortfeasor bearing the cost in excess thereof.98 The court reasoned that both types of subrogation statutes (reimbursement and credit) were enacted to prevent the employee from retaining third party damages as well as workers’ compensation benefits.99 Witt, the

91. Id. at 459, 99 Cal. Rptr. at 250.
92. Id. at 450, 99 Cal. Rptr. at 243.
93. Id. at 450-51, 99 Cal. Rptr. at 244.
94. Id.
95. Id. at 451, 99 Cal. Rptr. at 244.
96. Id. at 459, 99 Cal. Rptr. at 250.
98. 22 Cal. App. 3d at 454, 99 Cal. Rptr. at 246.
99. Id. at 453, 99 Cal. Rptr. at 245.
court stated, did not alter the statutory scheme precluding double recovery; indeed, it expressly reaffirmed that principle. In the absence of the workers' compensation law, the concurrently negligent employer would be a joint tortfeasor, liable for contribution to the third party tortfeasor under sections 875 through 880 of the Code of Civil Procedure. Under workers' compensation law, the insured employer is not liable in tort; instead, he is liable solely for workers' compensation benefits, and his obligation to pay attaches irrespective of negligence. Despite this rationale, the court reasoned that the entire financial burden should not fall on the third party when the employer is concurrently negligent. Therefore, the court in Corley concluded:

Thus understood, the decision in Witt v. Jackson . . . is seen to be an attempt at mitigating this inequity by adjusting the respective rights and obligations between the third party tortfeasor and the concurrently negligent employer.

This analysis of the holding in Witt is eminently sound. The court persuasively argued that Witt was concerned not with the rights of the employee vis-à-vis the employer, but rather with the rights of the employer vis-à-vis the third party. This conclusion is further supported by the fact that the holding in Witt had the effect of leaving the injured employee completely neutral as to the issue of the employer's concurrent negligence. If the employer were found not to be negligent, the employer would obtain reimbursement thereby reducing the employee's third party recovery. If the employer were found to be concurrently negligent, the employee's third party recovery would nevertheless be reduced by the same amount to the benefit of the third party tortfeasor. In neither event could the employee obtain double recovery.

The Corley court then considered the applicability of the Witt rationale to the credit provisions. The court noted that logically, the rationale should be extended to the credit provisions, with the result that the third party would receive a larger Witt reduction from the judgment against him. Nevertheless, the court felt compelled by the Conner, Castro, and Slayton decisions to rule out this possibility. Thus, the court in Corley was left with two alternatives: either to bar the negligent employer's right to credit, thereby allowing, as in Nelsen, an expressly prohibited double recovery for the employee; or to allow the
employer his credit rights regardless of his negligence. The court chose the latter course and offered three main reasons for its decision. First, to decide otherwise would allow the employee a double recovery. Second, the Nelsen approach would lead to a great deal of gamesmanship among the parties involved. Third, the authority of the board to determine the negligence of the employer in cases in which the issue has not previously been decided by a court is questionable.

The first of these lines of reasoning has been previously discussed at some length. The second will be covered in detail later in this note. The third concern of the Corley court, however, requires some comment at this point.

**Scope of WCAB Jurisdiction—The Corley View**

The constitutionality of a board determination of employer negligence was never an issue in Nelsen because negligence had previously been determined by the trial court in the third party action. In Corley, however, the employee and the third party settled without deciding the question of employer negligence. Therefore, a holding in Corley that the employer's credit rights were barred by his concurrent negligence would have required a finding that the board had jurisdiction to decide the issue of employer negligence. Since the court held instead that the employer should be allowed credit regardless of his negligence, its treatment of the issue of the board's jurisdiction to hear a negligence claim is dictum. Nevertheless, in view of the importance of the issue in Roe v. WCAB, the Corley court's analysis should be considered.

The court in Corley reasoned that the WCAB is a tribunal of limited jurisdiction and has no power beyond that granted by the California Constitution. The relevant section of the constitution expressly pro-

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108. See notes 73-88 & accompanying text supra.
110. See 22 Cal. App. 3d at 459, 99 Cal. Rptr. at 250. A holding in favor of the board's jurisdiction was implicit in the Nelsen holding, however. Id.
112. The constitution provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation . . . irrespective of the fault of any party. A complete system of workmen's compensation includes . . . full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State Government." Cal. Const. art. XX, § 21.
vides for the establishment of a compensation system “irrespective of
the fault of any party.”113 Moreover, section 3861 of the Labor Code,
which empowers the board to award the employer a credit, does not
condition this power upon the employer’s lack of negligence.114
Therefore, the court concluded, to find that the board has jurisdiction
to adjudicate the issue of the employer’s negligence would “raise seri-
ous constitutional questions.”115 The court acknowledged, however,
that while these sections “suggest the absence of jurisdiction, they are
not conclusive.”116 The court’s position on this point is certainly per-
suasive; however the opposite position, which supports the jurisdiction
of the board, has considerable merit as well.

In analyzing whether the board has jurisdiction to determine the
employer’s negligence, it is necessary to realize that “fault determina-
tion” may be viewed in two conceptual frameworks. Within the first
framework, the board would predicate the employee’s workers’ com-
pen sation recovery on a finding of employer fault or negligence.
Within the second framework, the board would be allowed to deter-
mine the negligence of the employer solely for the purpose of adjust-
ing the respective liabilities of an employer and a third party tortfeasor.
The first type of fault determination, which concerns the relationship
between the employee and the employer, is clearly inconsistent with
a constitutional mandate of a compensation system based on “no
fault.”117 In contrast, the second type involves the relationship be-
tween the employer and the third party, a relationship not subsumed
under the constitutional no fault standard, and is therefore constitution-
ally acceptable.118

The dissent in Corley articulated three additional reasons which
lend support to the position that the board does have jurisdiction to de-
terminate employer negligence.119 Labor Code section 3861 empowers
the board to determine the employer’s right to credit.120 Indeed, in
Slayton it was held that the board had exclusive jurisdiction in this re-
gard.121 Thus, by implication, it could be argued that the statute like-

113. Id.
114. CAL. LABOR CODE § 3861 (West 1971). See note 10 & accompanying text
supra.
115. 22 Cal. App. 3d at 459, 99 Cal. Rptr. at 250.
116. Id. at 460, 99 Cal. Rptr. at 251.
117. See note 112 supra.
118. The two references in the California Constitution to the “no fault” nature of
the California workers' compensation system are solely in the context of the employer's
obligation to compensate workers for injuries suffered in the scope of their employment.
No language supports the proposition that the “no fault” concept should preclude adjust-
ment of liability between the employer and the third party.
119. 22 Cal. App. 3d at 463-64, 99 Cal. Rptr. at 253 (dissenting opinion).
120. See note 10 supra.
wise authorizes the board to resolve all questions related to the issue of credit, including that of employer negligence. In addition, the decision in Witt did inject the issue of liability, as between the third party and the employer, into the workers' compensation act through its holding that a finding of employer negligence bars the employer's assertion of his reimbursement rights. Finally, Labor Code sections 4551 and 4553 presently grant the board jurisdiction to determine the issue of fault in serious and willful misconduct cases.

In conclusion, then, as to the question of the board's jurisdiction to hear and determine the issue of employer negligence, both the majority's opinion denying jurisdiction and the dissent's position supporting jurisdiction have considerable credibility.

Problems Raised by Corley

Under the holding in Corley, time factors alone significantly affect the substantive rights of both the third party tortfeasor and the employer. For example, the sooner an employee brings an action against a third party, the smaller the amount of workers' compensation benefits he will have received by the time of trial. Thus, the Witt reduction available to the third party if the employer is found concurrently negligent becomes continuously smaller as the trial date is moved closer to the time of injury. On the other hand, the amount to which the employer is entitled as a credit increases, and consequently the third party bears an increasingly large portion of the overall financial burden. Conversely, as the trial date is moved farther away from the date of the injury, the benefit to the tortfeasor and the detriment to the employer are increased. In either case, the proportional shares of the monetary award paid to the injured employee by the third party and the concurrently negligent employer are not in any way tied to their comparative degrees of fault in causing the injury. The allocation of the burden of the cost of the injury is determined solely by the vagaries of time.

123. Id. at 464, 99 Cal. Rptr. at 253.
124. Section 4551 provides: "Where the injury is caused by the serious and willful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, except . . . ." CAL. LABOR CODE § 4551 (West 1971 & Supp. 1975).

Section 4553 provides: "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and willful misconduct of . . . the employer, or his managing representative." Id. § 4553.
In summation, the appellate decisions prior to Roe struggled with the problem of the respective claims of the third party, the employer, and the employee to the monetary amount of post-trial workers’ compensation benefits. Conner, Castro, Slayton and Patterson held that the third party was not entitled to extend his Witt reduction to workers’ compensation benefits to be paid after the time of trial. Nelsen gave this credit amount to the employee, thereby allowing him a double recovery consisting of the workers’ compensation benefits and the damage recovery from the third party. In contrast, Corley denied the employee a double recovery and allowed the employer to claim the credit amount. Presented with this conflict in the courts of appeal, the California Supreme Court granted a hearing in Roe v. WCAB\textsuperscript{126} in order to resolve the credit controversy.

**Roe v. WCAB**

In Roe the supreme court encountered a factual situation identical to that which had confronted the appellate court in Corley.\textsuperscript{127} Contrary to the opinion in Corley, however, the court in Roe held that the employer’s negligence bars his assertion of credit; moreover, the court squarely held that the board has jurisdiction to determine the issue of employer negligence.\textsuperscript{128} The effect of this holding has been to allow the employee to keep both his future workers’ compensation benefits and his third party damage recovery.

The court reasoned that Witt involved the interplay of two policies:

[the] denial of the concurrently negligent employer’s recovery from the third party was premised on the law’s policy to prevent the former from taking advantage of his own wrong; while the latter’s credit for workmen’s compensation against his own tort liability was grounded on the policy of denying the employee double recovery.\textsuperscript{129}

The court considered that its task in Roe was to select one of these policies or to reconcile the two.\textsuperscript{130} Unable to pursue the latter course, the court chose to affirm the rationale in Nelsen that the policy of preventing the employer from profiting from his own negligence outweighs the policy against double recovery by the employee.\textsuperscript{131}

\textsuperscript{126} 12 Cal. 3d 884, 528 P.2d 771, 117 Cal. Rptr. 683 (1974).
\textsuperscript{127} See notes 33-39 & accompanying text supra.
\textsuperscript{128} 12 Cal. 3d at 891-92, 528 P.2d at 776-77, 117 Cal. Rptr. at 688-89. The supreme court in Roe, perhaps ill-advisedly, adopted as its opinion the court of appeal decision written by Justice Friedman and concurred in by Justices Regan and Janes. See id. at 886, 528 P.2d at 773, 117 Cal. Rptr. at 683.
\textsuperscript{129} Id. at 888, 528 P.2d at 774, 117 Cal. Rptr. at 686.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 888-89, 528 P.2d at 774-75, 117 Cal. Rptr. 686-87.
clearly rejected the approach adopted in *Corley*, finding that this approach "embraced the inhibition against double recovery even at the cost of permitting a negligent employer to reduce his workmen's compensation liability."  

The court in *Roe* offered three principal rationales in support of its position. First, the court found that it is the third party rather than the employer who provides the employee with the double recovery. Second, the court reasoned that the subrogation provisions contained in the Labor Code are "primarily procedural, substantive only in isolated aspects." Third, relying principally on the procedural delegation of authority which the board receives under section 3861 of the Labor Code, the court concluded that the board has jurisdiction to determine the issue of employer negligence.

The first of these rationales appears to be the heart of the opinion in *Roe*. The court cited *De Cruz v. Reid* for the proposition that *Witt v. Jackson* was not "a sweeping interdict against double recovery." The essence of the court's argument is contained in the following paragraph:

Especially if he is vulnerable to the charge of negligence, the employer may avoid participation in the third party lawsuit; the third party, as defendant, may litigate or settle without seeking credit for the workmen's compensation payments. When the employer/carrier then goes before the appeals board protesting the employee's double recovery, one asks: "What's Hecuba to him or he to Hecuba, that he should weep for her?" If the employer's negligence contributed to the accident, the double recovery was gained not from him but from the third party, who did not claim a deduction for employer negligence. If the employer was free of negligence, he gained (but did not assert) a subrogated right to recover his compensation payment as damages.

The court's analysis here completely confuses the distinction between the reimbursement sections and the credit sections of the subrogation statutes. The court in *Roe* was presented with the issue of what role the employer's concurrent negligence should play in the credit situation. Nonetheless, the situation which the court described above in

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132. *Id.*
133. *Id.* at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687.
135. 12 Cal. 3d at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687 (1974).
136. *Id.* at 891, 528 P.2d at 776, 117 Cal. Rptr. at 688. See note 10 & accompanying text *supra*.
137. 12 Cal. 3d at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687. For a full discussion of *De Cruz*, see notes 74-83 & accompanying text *supra*.
explaining the effect of its holding involves reimbursement rather than credit. This confusion between the two distinct types of remedies led the court to the erroneous conclusion that its decision would affect not the employer, but only the third party.

The fact that the Roe court described a reimbursement situation above is clear. For example, the court stated: "the double recovery was gained not from the employer but from the third party, who did not claim a deduction for employer negligence."\footnote{139} Under Roe itself, however, as well as under the earlier appellate decisions discussed previously,\footnote{140} the third party can claim a deduction only for benefits paid up to the time of trial (the reimbursement amount); he can never claim a deduction for future workers' compensation benefits (the credit amount).\footnote{141} Moreover, the Roe court went on to state: "If the employer was free of negligence, he gained (but did not assert) a subrogated right to recover his compensation payments as damages."\footnote{142} This statement, too, describes a reimbursement situation in which the employer, by choosing not to join the third party suit, has voluntarily waived his right to "recover" payments made before trial.

The factual situation described by the Roe court thus envisions the highly unlikely circumstance in which at trial the third party does not assert the employer's negligence (the "Witt defense") and the employer does not assert his right to reimbursement. Only in this event can an employee, in a reimbursement situation, obtain the double recovery to which the Roe court referred in its statement above.

Furthermore, because the facts hypothesized by the court in Roe describe a reimbursement situation, the court's statement that the employer was protesting the employee's double recovery in front of the WCAB is incorrect and misleading. The board has no jurisdiction to award the employer his reimbursement remedy; only a court can grant reimbursement.\footnote{143} The employer could not, then, have protested the employee's double recovery of the reimbursement amount in front of the board. Under these contrived circumstances, the employer should certainly not be complaining about the employee's double recovery, because the damage he has suffered is solely the result of his own over-
sight in neither filing a lien claim in the damages action between the third party and the employee nor bringing an independent action against the third party.

By contrast, in the context of a credit situation, which is the matter exclusively affected by the Roe decision, the holding in Roe will indeed cause the employer to lament the extent of the employee's recovery. In holding that an employer's concurrent negligence bars his right to a credit, the court in Roe sharply curtailed the employer's remedies. The negligent employer will not be allowed to utilize the credit provisions which permit him to offset the third party recovery against his liability for future workers' compensation benefits. The employer, then, must subsidize a double recovery by the employee consisting of future worker compensation benefits and the third party recovery.

The second part of the three-pronged rationale of the court in Roe focused on an analysis of the Labor Code subrogation provisions, sections 3858 and 3861. The court initially described these provisions as "primarily procedural, substantive only in isolated aspects." In addition, the court distinguished between the literal meaning of the statutes and the manner in which these provisions have been interpreted "substantively" by the case law. Then, however, the court modified its original description of the statutes stating that section 3858 is "more substantive than procedural," as it relieves the employer from paying post-trial compensation up to the amount of the employee's damage recovery. This section's "procedural implementation," the court maintained, is section 3861, which designates the WCAB as "a forum for adjudicating the employer's untried claim for reimbursement or credit." Furthermore, the court stated that the Witt opinion had construed sections 3858 and 3861, had held that they were qualified

144. For a similar discussion in relation to the Nelsen case, see notes 84-85 & accompanying text supra.
145. 12 Cal. 3d at 890, 528 P.2d at 776, 117 Cal. Rptr. at 688.
146. The court, however, urged that "it is doubtful . . . whether a double recovery is created by a settlement which does not cover the totality of claims, including those of the employer." 12 Cal. 3d at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687. Assuming for argument's sake that this statement is true, the court's holding is not restricted to only the settlement situation but will extend to a prior judgment, as well. See 12 Cal. 3d at 892, 528 P.2d at 777, 117 Cal. Rptr. at 689. In the latter case, the employee's double recovery is apparent.
147. Id. at 895, 528 P.2d at 779, 117 Cal. Rptr. at 891 (Burke, J., dissenting).
148. See note 10 & accompanying text supra.
149. 12 Cal. 3d at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687.
150. Id. at 889-90, 528 P.2d at 775, 117 Cal. Rptr. at 687.
151. Id. at 890, 528 P.2d at 775, 117 Cal. Rptr. at 687.
152. Id. at 890, 528 P.2d at 775-76, 117 Cal. Rptr. at 687-88.
153. Id. at 890, 528 P.2d at 776, 117 Cal. Rptr. at 688.
by Civil Code section 3517\textsuperscript{154} and had therefore concluded that a negligent employer is precluded from taking "advantage of the reimbursement remedies that those sections provided."\textsuperscript{155} The Roe court determined that the WCAB had therefore erred in viewing section 3861 as substantive authority for granting the employer his credit regardless of his concurrent negligence, since "[t]he employer's concurrent negligence will defeat his claim to credit."\textsuperscript{156}

It is submitted that the above reasoning is plainly incorrect in parts, and completely misleading as a whole. The court's "procedural-substantive" analysis of the subrogation statutes is unsound. The workers' compensation system is set up entirely by statute; it has no common law origins.\textsuperscript{157} It is therefore difficult to understand the court's statement that the subrogation provisions are "primarily procedural, substantive only in isolated aspects," since the only substantive rights which the parties have within the workers' compensation system are established by the statutes themselves.\textsuperscript{158} Moreover, the only authority cited by the court in support of this statement is totally inapposite.\textsuperscript{159}

The court complicated this analysis by the contradictory statement that section 3858 "is more substantive than procedural,"\textsuperscript{160} while section 3861 is merely its "procedural implementation."\textsuperscript{161} This statement is only partially correct. Section 3861 does authorize the board to determine the credit issue.\textsuperscript{162} Nevertheless, section 3861 also creates substantive rights. Whereas section 3858, by its wording, allows the employer a right to credit against the employee's third party judgment only, section 3861 allows the employer his credit rights against the employee's judgment and settlement with the third party. Thus,

\begin{itemize}
  \item \textsuperscript{154} CAL. CIV. CODE § 3517 (West 1970).
  \item \textsuperscript{155} 12 Cal. 3d at 890, 528 P.2d at 775, 117 Cal. Rptr. at 688, quoting Witt v. Jackson, 57 Cal. 2d 57, 72, 366 P.2d 641, 648, 17 Cal. Rptr. 369, 377 (1961).
  \item \textsuperscript{156} 12 Cal. 3d at 890, 528 P.2d at 776, 117 Cal. Rptr. at 688.
  \item \textsuperscript{158} Id. at 661-64. See Nelsen v. WCAB, 11 Cal. App. 3d 472, 477, 89 Cal. Rptr. 638, 640 (1970).
  \item \textsuperscript{159} The only case law which the court cited in support of its position was a footnote in a decision of the court of appeal. 12 Cal. 3d at 887, 528 P.2d at 775, 117 Cal. Rptr. at 687, citing Van Nuis v. Los Angeles Soap Co., 36 Cal. App. 3d 222, 228 n.2; 111 Cal. Rptr. 398, 401 (1973). This reliance on Van Nuis is misplaced. In this footnote, the appellate court had referred to only the 1972 amendments to sections 3859 and 3860, declaring that "the amendments affect only the procedure for enforcing a claim for reimbursement . . . ." Van Nuis v. Los Angeles Soap Co., 36 Cal. App. 3d 222, 228 n.2, 111 Cal. Rptr. 398, 401 (1973).
  \item \textsuperscript{160} 12 Cal. 3d at 890, 528 P.2d at 775, 117 Cal. Rptr. at 687. See note 151 & accompanying text supra.
  \item \textsuperscript{161} 12 Cal. 3d at 890, 528 P.2d at 775, 117 Cal. Rptr. at 687. See note 152 & accompanying text supra.
  \item \textsuperscript{162} See note 10 & accompanying text supra.
\end{itemize}
section 3861 is not merely a "procedural implementation" of section 3858. Indeed, in Roe itself, Labor Code section 3858 would not have offered the employer any possible relief, for he attempted to assert a credit against the third party settlement, which is exclusively covered by section 3861.

The distinction which the court drew between the literal meaning of the subrogation statutes and the manner in which these statutes have been interpreted "substantively" by the case law is also faulty. The court's reasoning implies that courts are free to disregard the literal meaning of statutes which they interpret. Thus, the opinion seems to suggest that the courts establish the "substantive" law of workers' compensation, while the statutes are somehow of secondary importance. This proposition not only is unsupported by the two examples cited by the court, but also is a gross distortion of the proper relationship between statutory and case law. Contrary to the position taken by the court in Roe, it seems axiomatic that courts are free to interpret, but not to disregard, the wording of applicable statutes.

The court's most serious error in this second part of its three part rationale is its confusion of the reimbursement and credit situations. The court stated that section 3861 gives the board the authority to adjudicate the employer's untried claim for "reimbursement or credit." In so stating, the court apparently misread section 3861. As pointed

163. See note 150 & accompanying text supra.

164. 12 Cal. 3d at 889-90, 528 P.2d at 775, 117 Cal. Rptr. at 687. In its first example, the court maintained that although section 3852 by its literal wording would allow a double recovery, decisional law, primarily Witt v. Jackson, has imposed a "substantive" limitation on the employee's double recovery of damages. Id. This reading of section 3852 is inaccurate. Section 3852 expressly provides for the employer's subrogation rights, in order to preclude a double recovery by the employee. See notes 6-7 supra. Thus the court in Witt, rather than overruling the statutory language, as the court in Roe implied, merely gave the statutory language its full meaning.

The second example cited by the court in Roe is also inaccurate. The court stated that the literal wording of sections 3852, 3854, 3856, and 3860(b) "permit the employer's unqualified recovery of compensation payments from the negligent third party; yet substantive law rejects his claim if he has been concurrently negligent." 12 Cal. 3d at 889-90, 528 P.2d at 775, 117 Cal. Rptr. at 687. Again, the court has mischaracterized these statutory provisions. Contrary to the Roe court's assertion, Justice Traynor in Witt v. Jackson expressly stated: "[T]here is nothing in the Labor Code to suggest that the Legislature contemplated that a negligent employer could take advantage of the reimbursement remedies that those sections provide. In the absence of express terms to the contrary, these provisions must be deemed to be qualified by Civil Code section 3517 which provides that 'No one can take advantage of his own wrong.'" 57 Cal. 2d at 72, 366 P.2d at 649, 17 Cal. Rptr. at 377. This statement by the court in Witt clearly indicates that rather than contradicting the language of the statutes, the court was attempting to give the language its intended effect.

165. 12 Cal. 3d at 890, 528 P.2d at 775-76, 117 Cal. Rptr. at 687-88. See note 152 & accompanying text supra.
out previously, the employer can recover his reimbursement only by one of the three methods provided in sections 3852, 3853 and 3856 (b). With all three of these methods, the determining body is a court, not the WCAB. In contrast, section 3861 empowers only the board to hear the employer’s claim for credit.167

Perhaps the most flagrant example of the Roe court’s confusion of the reimbursement and credit provisions is the finding that the court in Witt v. Jackson construed sections 3858 and 3861 and determined that they were qualified by Civil Code section 3517, which provides that “no one can take advantage of his own wrong.”168 The court’s reliance here on Witt is entirely misplaced. In Witt, the court did not even consider sections 3858 and 3861, as it was concerned solely with the reimbursement sections, 3852, 3853, and 3856(b).169 By stating that Witt construed sections 3858 and 3861 to be unavailable to a concurrently negligent employer, the Roe court is begging the very question which it had to decide: whether or not an employer’s concurrent negligence bars the assertion of his credit rights.

In the third portion of the opinion, the court in Roe considered whether the board has jurisdiction to decide the issue of employer negligence, concluding that it does have this power.170 The court reviewed the California constitutional provision for workers’ compensation171 and reasoned that directing the board to grant an automatic credit to the employer, without regard to the issue of his negligence, would manifest a preference for the employer/carrier over and against the interests of the injured workman, who “is the prime object of constitutional solicitude.”172 The court reasoned further that allowing the board to decide whether the employee may keep his entire damage recovery or whether the employer is to be permitted his credit would not inject considerations of fault into the adjudication of disability benefits.173 Therefore, granting the board jurisdiction to determine the negligence issue would violate neither the spirit nor the letter of the constitutional compensation system of “no fault.”174 The court dismissed the

166. See notes 8-14 & accompanying text supra.
167. See note 10 & accompanying text supra.
170. 12 Cal. 3d at 892, 528 P.2d at 777, 117 Cal. Rptr. at 689.
171. CAL. CONST. art. XX, § 21.
172. Id. at 891, 528 P.2d at 776, 117 Cal. Rptr. at 688.
173. Id.
174. Id.
argument against jurisdiction based on the board's lack of expertise in this area on the ground that Labor Code sections 4551 and 4553\textsuperscript{175} already require the board to decide the much more difficult issue of fault in the case of serious or willful employer misconduct.\textsuperscript{176} Finally, by way of dictum, the court indicated that the board and the trial court should be bound to accept each other's prior adjudications of employer negligence, while each should be free to decide the issue if it remains unsettled.\textsuperscript{177}

As discussed previously,\textsuperscript{178} the issue of board jurisdiction to determine employer negligence was debated skillfully in the majority and dissenting opinions in \textit{Corley}. In \textit{Roe}, also, the court treated this issue effectively.\textsuperscript{179}

\textbf{The Dissenting Opinion in Roe}

In a vigorous and cogent dissent in \textit{Roe}, Justice Burke, with Justice Clark concurring, disagreed with the majority's application of \textit{Witt} to the credit situation.\textsuperscript{180} Justice Burke attacked the majority's holding, claiming that it "results in an inequitable and wholly unjustified double recovery by the employee . . . ."\textsuperscript{181} Furthermore, he suggested that the majority had confused the employer's right to a \textit{credit} with his right to \textit{reimbursement}.\textsuperscript{182}

The dissenting opinion maintained that to extend the \textit{Witt} rule beyond the parameters of the reimbursement situation would upset the relative equities of the parties as envisioned by Justice Traynor.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{175} See note 124 \& accompanying text \textit{supra}.
\item \textsuperscript{176} 12 Cal. 3d at 892, 528 P.2d at 777, 117 Cal. Rptr. at 689.
\item \textsuperscript{177} \textit{id}.
\item \textsuperscript{178} See notes 110-24 \& accompanying text \textit{supra}.
\item \textsuperscript{180} 12 Cal. 3d at 894-98, 528 P.2d at 777-81, 117 Cal. Rptr. at 689-91 (Burke, J., dissenting).
\item \textsuperscript{181} \textit{id}. at 892, 528 P.2d at 777, 117 Cal. Rptr. at 689.
\item \textsuperscript{182} \textit{id}. at 893, 528 P.2d at 779-80, 117 Cal. Rptr. at 689-90.
\item \textsuperscript{183} The dissenting opinion stated: "Under the majority's holding the employee recovers both the full amount of the judgment against (or settlement with) the third party, and the full disability award of the Workmen's Compensation Appeals Board without any reduction whatever to eliminate duplicative payments. To the extent that the amount of the judgment or settlement overlaps the employee's compensation award the employee recovers double compensation for the same injury, a result expressly interdicted by this court in \textit{Witt}." \textit{Id}. at 894, 528 P.2d at 779, 117 Cal. Rptr. at 691 (Burke, J., dissenting).
\end{itemize}
Therefore, Justice Burke concluded that the employer should be allowed his statutory right to a credit, regardless of his negligence. To bar the negligent employer's right to a credit, the dissenting opinion continued, unduly punishes him, as he has already been amply penalized by the denial of his right to reimbursement. Finally, Justice Burke questioned the constitutionality of the board's jurisdiction to determine the issue of employer negligence.

In essence, the dissent in *Roe* is very similar in reasoning, and identical in result, to the appellate court holding in *Corley v. WCAB*, a case discussed at some length earlier in this note.

**Practical Problems Created by Roe**

In an interpretation of any aspect of the workers' compensation system, the interest of the employee should be considered primary. The supreme court's decision in *Roe*, although ostensibly benefiting the employee by allowing him a double recovery, will raise a number of serious problems in practice.

**Increase In Workers' Compensation Insurance Rates**

The method for determining workers' compensation rates is unique; it is based on an elaborate rate structure prepared and promulgated by the California Inspection Rating Bureau. Acting as an arm of the insurance commissioner, the bureau established a mandatory minimum rate, which in practice is ordinarily the maximum rate, applicable to each particular industrial classification.

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 applied 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. Computation of the total accident cost for the industry takes into account a subtraction for subrogation recoveries, which are required to be reported. Once the accident cost is determined, the amount of gross premium necessary to yield an amount sufficient to cover accident losses and administrative expense is set.

The effect of the decision in Roe will be to reduce significantly the number of subrogation recoveries, thus forcing a rise in premiums throughout the system. At a time when there is considerable outcry for an increase in workers' compensation benefits, the Roe decision will prove the great silencer. An employee who is “graced” with the fortuitous circumstance of being injured by the concurrent negligence of his employer and a third party will receive an unprecedented double recovery. The allowance of double recoveries, however, will be at the expense of employees as a whole. Premiums must escalate in order to subsidize the select employees' double recoveries. As a result, employee groups' demands for more substantial benefits will meet with little sympathy, since such increases would push the premiums even higher. Thus, the fortune enjoyed by the few will be to the detriment of the many.

The Harmful Effect on Labor Code Section 3856(b)

The court in Roe expressed the concern that under the Corley approach, a concurrently negligent employer could avoid the third party lawsuit and then capitalize on the third party's damage payments by means of a credit from the appeals board. The court apparently overlooked a number of prior cases which had addressed this specific issue. In a series of four court of appeal decisions, it was held that

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195. See 3 Cal. Workers’ Comp. Rptr. 146 (1975).
196. The actual amount of this predicted increase in premiums can only be determined actuarily.
197. 12 Cal. 3d 890, 528 P.2d at 776, 117 Cal. Rptr. at 688.
the issue of employer negligence could be raised and litigated by the third party in the employee’s suit even though the employer was not a party to the action. Normally, concurrent employer negligence is asserted by the third party as an affirmative defense.\textsuperscript{199} The justification\textsuperscript{200} for allowing this assertion regardless of the employer’s absence from the suit stems from the court’s holding in \textit{Witt} that the employer’s negligence bars his right to reimbursement “whether the action is brought by the employer or employee.”\textsuperscript{201} It would be manifestly unfair to predicate the third party’s assertion of his \textit{Witt} defense simply on whether the employer seeks reimbursement by intervening in the employee’s action or instead avoids the proceedings and asserts his lien on the employee’s recovery after trial.\textsuperscript{203} The rationale behind the holding in \textit{Witt} is that the employer is not a “necessary or indispensable party” if his concurrent negligence is raised as a defense, because the employee is in effect a trustee and can adequately protect the employer’s interest.\textsuperscript{203} This trustee notion is in turn based on the fact that an employee has nothing to gain or lose by a finding of employer negligence when a \textit{Witt} defense is asserted.\textsuperscript{204} Moreover, the employer enjoys certain procedural safeguards.\textsuperscript{205}

Thus, under the authority of these appellate decisions prior to \textit{Roe}, an employer cannot avoid litigation of the issue of his concurrent

\textsuperscript{199} \textit{See} City of Sacramento v. Superior Ct., 205 Cal. App. 2d 398, 23 Cal. Rptr. 43 (1962) (third party raised this issue by way of cross-complaint).


\textsuperscript{201} 57 Cal. 2d at 72, 366 P.2d at 649, 17 Cal. Rptr. at 377.


\textsuperscript{205} A copy of the pleadings must be served on the employer, and he must be afforded a reasonable opportunity to be heard if he chooses to intervene. Carden v. Otto, 37 Cal. App. 3d 887, 897, 112 Cal. Rptr. 749, 755 (1974); Brandon v. Santa Rita Technology, Inc., 25 Cal. App. 3d 838, 846, 102 Cal. Rptr. 225, 230 (1972). One case held that the third party could bring the employer into the action by means of cross-complaint, if and only if “there is a satisfactory showing that a justiciable issue can be raised that said employer \textit{has} been concurrently and contributorily negligent.” City of Sacramento v. Superior Ct., 205 Cal. App. 2d 398, 400, 23 Cal. Rptr. 43, 44-45 (1962).
negligence by deciding not to intervene in the employee's third party suit. If an employer so chooses, however, he need not enter into the suit, as he is not a necessary or indispensable party to the action.\textsuperscript{206}

The court's holding in \textit{Roe} destroys the rationale of these cases, that should the employer decide not to join the third party suit, the employee can act as a trustee for the employer on the issue of his concurrent negligence. The employee, under \textit{Roe}, will have a vested interest in proving that the employer was concurrently negligent, since such a showing will effect a double recovery.\textsuperscript{207} Although both the employer and the employee are cast as party plaintiffs, realistically they will be staunch adversaries.\textsuperscript{208} Since they will no longer share a trustee relationship, the employer will become a necessary and indispensable party whenever the issue of concurrent employer negligence is raised by the third party.\textsuperscript{209}

This result will have a far-reaching effect on the statutory system established by the legislature. Before the decision in \textit{Roe}, one of the three reimbursement remedies available to the employer was provided in section 3856(b) of the Labor Code,\textsuperscript{210} which establishes the right of the employer not to join the employee's suit. After \textit{Roe}, this statutory provision will be effectively nullified, for the employer will be forced to join the lawsuit once the issue of his negligence has been raised by the third party.\textsuperscript{211} If such an issue is at all plausible, the third party will raise the employer's negligence as a defense, as he has nothing to lose and much to gain. Consequently, section 3856(b) will

\textsuperscript{206} One opinion held, however, that under certain special circumstances, the employer could be made a necessary party. See notes 199, 205 & accompanying text supra.


\textsuperscript{208} See \textit{Lasky}, supra note 189, at 24-25.


\textsuperscript{210} \textit{CAL. LABOR CODE} § 3856(b) (West 1971).

\textsuperscript{211} See notes 198-209 & accompanying text \textit{supra}. See \textit{Gilford} v. State Compensation Ins. Fund, 41 Cal. App. 3d 828, 116 Cal. Rptr. 615 (1974). The court in \textit{Gilford} held that the employee could not raise the issue of employer negligence in the trial court action against the third party. In so holding, the \textit{Gilford} court stressed the importance of maintaining the statutory scheme which allows an employer to elect not to join the third party suit. The court stated: "To hold that the employee has the right to raise the issue of [the] employer's negligence in his suit against the third-party tortfeasor would effectively destroy the employer's choice [not to join the law suit] which is explicitly provided for in the [Labor Code]." \textit{Id.} at 834, 116 Cal. Rptr. at 619. See \textit{CAL. LABOR CODE} § 3856(b) (West 1971). But see Levels v. Growers Ammonia Supply Co., 48 Cal. App. 3d 443, 121 Cal. Rptr. 779 (1975).
become a meaningless provision. The merits of such a result are certainly open to question.\textsuperscript{212}

**Increased Gamesmanship**

The California Constitution empowered the legislature to establish a statutory system of workers' compensation "to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character . . . ."\textsuperscript{213} The holding in *Roe*, rather than encouraging employees to seek workers' compensation benefits "expeditiously," will actually motivate them to delay seeking such benefits in an attempt to maximize their double recoveries\textsuperscript{214} and will thus frustrate the legislature's intent.

For example, under *Roe*, if an employer is negligent, the employee is allowed to keep all workers' compensation benefits paid after the third party suit, as well as the judgment against the third party.\textsuperscript{215} Under these circumstances, it is decidedly in the employee's interest to minimize the amount of workers' compensation benefits received before trial, since they are subject to the third party's *Witt* reduction, and to maximize the benefits received after trial. Therefore, rather than encouraging the employee to seek workers' compensation benefits quickly, the *Roe* decision will prompt the employee to seek a larger total recovery by delaying the pursuit of his full workers' compensation award.

The third party, on the other hand, will make every effort to encourage the employee to secure pre-trial workers' compensation benefits and will attempt to delay the trial as long as possible. In this manner, the third party in a case involving a concurrently negligent employer will secure the largest possible *Witt* reduction of the judgment against him.

**Li v. Yellow Cab—Major Uncertainty in Present Law**

Approximately four months after *Roe*, the California Supreme
Court decided the case of *Li v. Yellow Cab Co.* In *Li*, the court abolished the rule of contributory negligence in California and replaced it with a doctrine of "pure" comparative negligence. The court, however, expressly chose not to resolve the issue of how comparative negligence will affect contribution and indemnification rights among joint tortfeasors, nor did it decide how comparative negligence should operate in multiple party suits. These express omissions by the court in *Li* have introduced substantial uncertainty into a major area of California workers' compensation law, as it is unclear whether or not comparative negligence principles should be applied to the *Witt* and *Roe* subrogation situations.

The Committee on Standard Jury Instructions, in the revision of its *Book of Approved Jury Instructions* (BAJI), takes the unequivocal position that comparative negligence does apply in the *Witt* situation. By contrast, members of the California Applicants' Attorneys Association contend that *Li* should apply neither to the employer's credit rights before the WCAB nor to his reimbursement rights in the third party suit.

It is submitted that comparative negligence should be applied to the subrogation area of workers' compensation. The opinion in *Li* appears to offer no basis for the conclusion that the court intended to exclude from the effect of its holding the broad area of subrogation rights in the workers' compensation field. Indeed, the thrust of the decision, which was to abolish the harsh "all-or-nothing" rule of contributory negligence, is subverted if a negligent employer is denied all credit and reimbursement remedies regardless of the extent of his negligence.

It has been argued that to allow the negligent employer a percentage recovery of the reimbursement and credit amounts, under comparative negligence principles, would destroy the rationale underlying *Witt* and *Roe*, that an employer should not "profit from his own wrong." This argument, however, is fallacious. The employer

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216. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). The decision in *Li* was filed March 31, 1975.
217. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
218. *Id.* at 823, 826, 532 P.2d at 1239-40, 1241, 119 Cal. Rptr. at 871-72, 873.
219. *Id.*
221. 3 CAL. WORKERS' COMP. RPTR. 120-21 (1975); Steinberg, *Should Comparative Negligence Apply to Witt v. Jackson*, 3 L.A. TRIAL LAWYERS ASS'N ADVOCATE, July, 1975, at 1-2, 8. As of the date of the writing of this note, there has been no appellate court or legislative response to this question.
222. 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
would not “profit” by an application of comparative negligence concepts, for he would still be denied his reimbursement and credit rights to the extent that he has caused the employee’s injuries.

The entry of comparative negligence into the workers’ compensation arena would in no way disturb the employee’s absolute right to recover workers’ compensation benefits irrespective of fault.\textsuperscript{224} Comparative negligence would apply only to the situation in which the employer seeks reimbursement or credit based on his assertion that a third party has, at least partially, caused an employee’s injuries.

Merely concluding that comparative negligence should be applied to the \textit{Witt} and \textit{Roe} subrogation situations does not answer the more difficult question of how the doctrine should be applied.\textsuperscript{225} The court in \textit{Li} provided no guidelines whatever. One commentator has described a few of the many potential applications of comparative negligence to the reimbursement and credit situations.\textsuperscript{226} It is beyond the scope of this note to address this issue in depth within the context of the present law. The legislature should formulate definite guidelines to assist the courts and the WCAB.

\textbf{The Need for Legislative Action}

The opinion in \textit{Witt} v. \textit{Jackson} was an effort by the California Supreme Court to make certain that a concurrently negligent employer would not be allowed to shift the entire financial burden of an employee’s injury to a third party tortfeasor. Within the reimbursement context, the rationale and solution proposed in \textit{Witt} work well. In the credit situation, however, the California courts have been faced with a problem for which there has been no satisfactory solution. Substantial difficulties inhere in the claims of all three parties who seek the credit amount. The third party’s claim is replete with jurisdictional and administrative infirmities.\textsuperscript{227} On the other hand, the decision in \textit{Corley} demonstrates that permitting the employer to claim the amount renders the substantive rights of the parties subject to the vagaries of calendaring.\textsuperscript{228} Finally, consideration of the circumstances in \textit{Roe} reveals that recognizing the employee’s claim to the credit amount creates practical problems and leads to the ill-advised result of allowing a double recovery.\textsuperscript{229}

\begin{footnotes}
\item[224] CAL. CONST. art. XX, § 21.
\item[226] \textit{Id.}
\item[227] See notes 41-58 & accompanying text \textit{supra}.
\item[228] See note 125 & accompanying text \textit{supra}.
\item[229] See notes 189-215 & accompanying text \textit{supra}. Future cases interpreting \textit{Roe} may well narrowly define the boundaries of \textit{Roe’s} allowance of double recovery. In one
\end{footnotes}
The problem with which the courts struggle in this area is the overlap and conflict between the fault concept fundamental to tort law and the no-fault basis of workers' compensation law. Until the decisions in *Roe* and *Nelsen*, an employee's rights against his employer were based solely on workers' compensation law, in which the issue of negligence was irrelevant. In contrast, the claims of both the employee and the employer against the third party, as well as the claim of the third party against the employer, have always been based entirely on allegations of negligence. The situation is further complicated by the fact that technically the employer and third party are not "joint tortfeasors;" the employer and the third party lack the requisite mutual liability in tort because of the employer's exclusive liability to the employee under workers' compensation law. Both the majority and the appellate decision interpreting *Roe*, the court was faced with a case in which an employee had suffered a work related injury allegedly caused by his employer and a third party. In the employee's suit against the third party, the employer had been found concurrently negligent. The third party's liability to the injured employee-plaintiff had been founded not on ordinary negligence, but on former subdivision (a)(3) of section 3601 of the Labor Code ("a reckless disregard for the safety" of the plaintiff "and a calculated and conscious willingness to permit injury or death" to him). *Fuller v. Capital Sky Park*, 46 Cal. App. 3d 727, 729-31, 120 Cal. Rptr. 131, 132-33 (1975).

The employee argued that he should be allowed a double recovery because under these circumstances, the third party should not be allowed his *Witt* reduction. The employee cited *Roe* in support of his claim for double recovery. The Third District in *Fuller* rejected the employee's claim. The *Fuller* court stressed once again the importance of not allowing a plaintiff-employee a double recovery and therefore narrowly limited *Roe* to its facts. The court maintained that the fact that the third party had not asserted his *Witt* defense in the trial court had been the *sine qua non* of the *Roe* court's departure from the normal rule of not allowing double recovery. *Id.* at 731-34, 120 Cal. Rptr. at 133-35.

The *Fuller* court's interpretation of *Roe* is faulty. Under *Roe*, regardless of whether the third party raises his *Witt* defense in the trial court, the employee would secure a double recovery by proving employer negligence before the board. Despite the *Fuller* court's faulty analysis of *Roe*, however, the court clearly evidenced its intent strictly to limit *Roe* and to reaffirm the "sound legal theory" of not allowing double recovery to the injured employee. *Id.* at 731-34, 120 Cal. Rptr. at 133-36.

Another appellate decision relying on the erroneous reasoning in *Roe* that it is the third party rather than the employer who is hurt by the employee's double recovery concluded that the employee can raise the issue of employer negligence in the trial action. This holding was directly opposite to the decision reached in an earlier appellate decision, *Gilford v. State Compensation Ins. Fund*, 41 Cal. App. 3d 828, 116 Cal. Rptr. 615 (1974), yet the court did not even mention the *Gilford* opinion. *See* *Levels v. Growers Ammonia Supply Co.*, 48 Cal. App. 3d 443, 121 Cal. Rptr. 779 (1975). *See also* notes 137-147 & accompanying text *supra*.

The final appellate decision interpreting *Roe* held that the employee could appeal the trial court's determination that the employer had not been negligent. *See* *Short v. State Compensation Ins. Fund*, 52 Cal. App. 3d 104, 125 Cal. Rptr. 15 (1975).


231. *CAL. LABOR CODE* § 3601 (West 1971).
dissent in *Roe v. WCAB* indicate that legislative action is needed to remedy this perplexing situation.\(^{232}\) Moreover, in view of the uncertainty raised by the opinion in *Li* as to the applicability of comparative negligence principles to subrogation situations such as those in *Witt* and *Roe*,\(^{238}\) the need for legislative action is imperative.

### A Possible Alternative

Any proposed solution to this triangular problem must consider carefully the respective equities of the three participants involved: the employee, the employer, and the third party. After reviewing the alternatives proposed by other commentators\(^{234}\) and evaluating the paths followed by other states,\(^{235}\) this author believes that the most advantageous solution would be a "modified comparative negligence" scheme.

As under present law,\(^{236}\) the employee under this modified comparative negligence scheme would be allowed to seek workers' compensation benefits as well as to bring an action against the third party tortfeasor. Contrary to current law, however, the employee would be required to seek his full workers' compensation award before bringing

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232. 12 Cal. 3d at 892, 898, 528 P.2d at 777, 781, 117 Cal. Rptr. at 689, 693.

233. See notes 216-226 & accompanying text supra.


235. In Florida, within one year of the injury, the employee alone has the right to bring suit against the third party. The employer can file a lien in the action for the amount of workers' compensation benefits "paid or to be paid." The employer is allowed to recover automatically 50% of the lien amount, regardless of his negligence. *Fla. Stat. Ann.* § 440.39 (West 1966 & Supp. 1975). If this one year period lapses, the employer can bring the suit against the third party on behalf of the employee. If successful, the employer recovers all amounts paid or payable to the employee, regardless of employer negligence. *Id.; see Pyles v. Bridges*, 283 So. 2d 394 (Fla. App. 1973).

In New York, indemnification is allowed between a concurrently negligent employer and a third party tortfeasor. *See Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *North Carolina allows a third party tortfeasor to reduce his judgment by the workers' compensation benefits “paid or to be paid” in the case of a concurrently negligent employer. The negligence of the employer, however, must be independent, and not based on the doctrine of respondeat superior. *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953); *Brown v. Southern Ry. Co.*, 204 N.C. 668, 169 S.E. 419 (1933).


suit against the third party.\textsuperscript{237} The purpose for such a requirement is two-fold; first, pursuant to the California Constitution,\textsuperscript{238} to encourage the “expeditious” determination of workers’ compensation benefits; and second, to determine fully the extent of employer liability for workers’ compensation benefits before the third party suit.

In the court action between the employee and the third party, the proposed solution would allow the employer to file a lien on the judgment for the amount of workers’ compensation benefits \textit{paid and to be paid}. All three parties, the employer, the employee, and the third party, would be made necessary and indispensable parties to the action. The court (or jury), after presentation of the evidence, would determine under the comparative negligence principles adopted in \textit{Li} the respective percentage liabilities of the three parties.

As under current law, the jury would award the employee damages which, pursuant to \textit{Li}, would have been reduced by the employee’s percentage of comparative negligence.\textsuperscript{239} The court would then reduce the employer’s lien by the dollar amount corresponding to the percentage of the initial damages for which the employer had been adjudged liable. The amount of the employer’s lien would thus constitute the maximum amount of his liability to the employee. The third party would then pay either the difference between the recovered damages and the amount of the lien or the difference between the recovered damages and the employer’s percentage share of the initial damages, whichever is greater. In essence, the third party would be allowed to deduct from the judgment against him the amount by which the employer’s lien had been reduced as a result of the employer’s concurrent negligence.

A discussion of two hypothetical situations may prove helpful in illustrating this proposed solution. Assume the following facts: (1) The employee’s total workers’ compensation award was $1000, and the

\textsuperscript{237} See note 6 \& accompanying text supra. The potential statute of limitations problem involved here can be handled in one of two ways: (1) by tolling the statute of limitations on the employee’s third party action while the employee seeks his workers’ compensation award or (2) by allowing the employee to file the action against the third party, so that the employee may conduct discovery, and permitting a motion to delay the trial until after the workers’ compensation award is received.

\textsuperscript{238} See note 112 supra.

\textsuperscript{239} See \textit{Li v. Yellow Cab Co.}, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). For the purposes of this discussion, the terms “judgment” and “verdict” will be used interchangeably. The term “initial damages” refers to the sum which corresponds to the amount of injury which the jury determines the plaintiff has suffered. The term “recovered damages” refers to the amount of damages the plaintiff is entitled to recover under comparative negligence principles. Thus, recovered damages are equal to the initial damages reduced by the plaintiff’s (employee’s) percentage share of negligence in causing his injury. The term “recovered damages” describes a sum equal to the amount of the plaintiff’s (employee’s) judgment.
employer filed a lien in the third party action for that amount. (2) The jury found the employee to be 20% negligent, the third party to be 60% negligent, and the employer to be 20% negligent. (3) The jury found the initial damages to be $10,000 and, after reducing this amount by 20% (the employee's percentage of negligence) awarded the employee recovered damages of $8,000.

The employer would theoretically be liable for 20% of the initial damages (20% of $10,000), or $2,000. Since he is not a joint tortfeasor, however, the extent of his liability is limited to the amount of his lien, $1,000. The third party then pays either the difference between the recovered damages and the amount of the lien, or the difference between the recovered damages and the employer's percentage share of the initial damages, whichever is greater. Here, the employer's lien is less than the employer's percentage share of the initial damages ($1,000 as compared to $2,000). Therefore, the third party pays the difference between the recovered damages ($8,000) and the lien amount ($1,000), or $7,000 total. The employee in this case recovers $8,000, since he is entitled to the workers' compensation award ($1,000) or the tort judgment ($8,000), whichever is greater. Of this amount, $7,000 has been paid by the third party, and $1,000 has been paid by the employer. The employer's lien rights were nullified by his degree of negligence.

The second hypothetical situation is the same as the first, except that one fact is altered: the employer's negligence, instead of 20%, was found to be 5%; thus, the third party was found to be 75% negligent. Under these facts, the employer's percentage share of the initial damages is $500 (5% of $10,000). Therefore, the employer's lien of $1,000, rather than being nullified, is merely reduced by $500, allowing him a subrogation recovery of $500 ($1,000 minus $500). The third party pays the remainder of the employee's recovered damages above the percentage share, since the percentage share is now less than the employer's lien amount. The third party's share is thus $8,000 minus $500, or $7,500. As in the first hypothetical situation, the employee retains the tort recovery ($8,000), since it is again larger than his workers' compensation award ($1,000). The employer has recovered $500 of his lien, and the third party has paid the difference between the $8,000 and the $500, or $7,500.

The apparent inequity in this scheme of forcing the third party potentially to pay far beyond his actual percentage degree of participation in causing the injury is due to the fact that under workers' compensation law, the employer is not a joint tortfeasor. Therefore, the employer's liability is never more than the dollar amount of his workers' compensation liability. Actually, the third party is placed in a much
better position under this solution than under present law, which limits the employer's "contribution" to the reimbursement amount.

This modified comparative negligence scheme has many beneficial qualities. Most important, the proposed solution fully provides for the injured employee by allowing him to recover either the compensation award or the amount of the judgment against the third party, whichever is greater. On the other hand, the employee is not allowed a double recovery.240

This solution, by enabling the employer to file a lien for amounts paid or to be paid, eliminates the distinction between reimbursement and credit. This distinction, although necessary to an understanding of current California law,241 is an artificial device which determines the rights of the parties on the basis of arbitrary time factors.242 Under the proposed solution, the rights and obligations of the employer and the third party are determined on the basis of their respective degrees of fault in causing the injury. Nevertheless, in keeping with current law, the employer is not a joint tortfeasor, as his liability to the employee is derived exclusively from workers' compensation law rather than from tort law. Consequently, the employer can never be required to pay more than the maximum amount of his workers' compensation liability. The proposed solution thus preserves the present limitation on the employer's liability. Furthermore, wording this solution in terms of "lien rights" eliminates the purely theoretical inconsistency involved in requiring "contribution" from the employer, who under workers' compensation law is not a joint tortfeasor.243

This proposed solution would allow the employee to secure his workers' compensation benefits quickly, with the minimum of legal hurdles. The issue of negligence would not have to be determined by the WCAB, as the issue would always be decided by the forum most suited for such a determination—the courts.244

240. It might be argued that in a situation like that in the hypotheticals, there is no double recovery, even if the employee recovers both his tort judgment (recovered damages) and his workers' compensation award, since the total of the two is less than the employee's initial damages. However, this argument fails to recognize that under comparative negligence principles, the plaintiff (employee) is entitled only to his recovered damages, an amount equal to the initial damages reduced by his percentage share of fault in causing his injury. Therefore, to allow the employee both his recovered damages and his workers' compensation award is properly deemed a double recovery. Moreover, under the contributory negligence scheme, the plaintiff in the hypothetical situations would have been denied any recovery.

241. See notes 8-18, 33 & accompanying text supra.

242. See notes 125, 212-215 & accompanying text supra.


Under the proposed solution, the employer would not be able "to profit from his own wrong," for his subrogation recovery would be diminished by the degree of his participation in causing the injury. Contrary to current law, however, he would not be denied all subrogation rights if he were found to have been only slightly negligent. The third party would also be treated fairly under this scheme. At worst, if the employer were found not to have been negligent, the third party would be able to deduct nothing; his condition would be no worse than it is presently. At best he would be allowed a deduction for all workers' compensation benefits paid or to be paid, which would be a much broader remedy than that currently available.

Finally, this proposal would eliminate the gamesmanship which the current law so clearly engenders. The workers' compensation system could once again "accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character . . . ."  

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245. See note 128 & accompanying text supra.
246. See notes 213-15 & accompanying text supra.
247. CAL. CONST. art. XX, § 21.
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