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WORKERS' COMPENSATION TRIAL NOTEBOOK 2013

Chapter 32

SECTION 5(b) LIENS WORKERS' COMPENSATION LIENS AND EMPLOYERS' RIGHTS TO REIMBURSEMENT

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I. THE APPLICABLE STATUTE: A SYNOPSIS[1]

Section 5(b) of the Illinois Workers' Compensation Act, 820 ILCS 305/5(b), recognizes that injury or death compensable under the Act may occur in circumstances "creating a legal liability for damages on the part of some person other than" the employer. The statute authorizes legal proceedings, commonly called third-party actions, by the injured employee against such persons. The employer is entitled to notice of any third-party action and has the right to intervene in the action. The employer may "claim a lien upon any award, judgment or fund" created by a successful third-party action. However, the employer must pay a "pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim," as well as 25% of the reimbursement as an attorney's fee. Unless the employer's rights are protected by a court order at the conclusion of the third-party action, a release, settlement, or satisfaction of judgment may be invalid without the employer's consent. If three months or less remain before a possible third-party action is barred by the Statute of Limitations and no third-party action has been filed, then the employer may file an action to reimburse itself. The following sections address these provisions in more detail.

II. WHAT MUST OCCUR FOR A WORKERS' COMPENSATION LIEN TO EXIST?

An employee's receiving, agreeing to receive, or instituting a proceeding to receive worker's compensation benefits may give rise to an employer's lien on any recovery by the employee from a third-party. *See* 820 ILCS 305/5(b); *see generally Villapiano v. Better Brands of Illinois, Inc.*, 26 Ill.App.3d 512, 514-15 (1st Dist. 1975) (providing a good discussion of the provisions and purposes of Section 5(b)). Even if a lien is not perfected by the employer in the third-party action, the employer may still have an enforceable right of reimbursement, *Eastman*

[1] 820 ILCS 305/5(b) is reproduced in its entirety in the Appendix.

v. Messner, 188 Ill.2d 404 (1999), for example, by proceeding before the Industrial Commission, *Scott v. Industrial Commission.*, 184 Ill.2d 202 (1998); *Kim v. Alvey, Inc.*, 322 Ill.App.3d 657, 668 n. 5 (1st Dist. 2001).

III. THE STATUTORY DUTIES OF AN EMPLOYEE WHO FILES A THIRD-PARTY ACTION

An employee or personal representative bringing a third-party action "shall forthwith notify his employer by personal service or registered mail, of such fact and of the name of the court in which the suit is brought, filing proof thereof in the action." 820 ILCS 305/5(b). Consistent with this writer's experience, at least one court has observed that "while apparently the provision for giving notice is mandatory, it is seldom used as a matter of practice in this field." *Legler v. Douglas,* 26 Ill.App.2d 365, 375 (2nd Dist. 1960). However, that same Appellate Court ordered a Trial Court to vacate an order distributing to the plaintiff-employee all of the recovery from a third-party action where no reasonable notice had been given to the employer's workers' compensation insurer. The Trial Court was ordered to conduct a hearing to determine the respective rights of the employer, employee, and insurer. *Id.* at 377. This outcome is consistent with Section 5(b)'s provision that no release or settlement of a third-party claim is valid without the employer's consent, unless the employer has been protected by court order. *Insurance Co. of North America v. Andrew*, 206 Ill.App.3d 515, 521 (2nd Dist. 1990).

Indeed, the Illinois Supreme Court has said that "[a]n employee must reimburse his employer for the workers' compensation benefits received even if the employer does not assert a lien." *Eastman v. Messner*, 188 Ill.2d 404, 412 (1999). The decision in *Scott v. Industrial Commission.*, 184 Ill.2d 202 (1998), illustrates how an employer or employer's insurer might enforce reimbursement rights even in the absence of perfecting a lien in the circuit court in the

third-party action. In *Scott*, the workers' compensation insurer intervened in the plaintiff-employee's third-party action, then withdrew. The third-party action was settled. However, at the time of the settlement, the Industrial Commission's decision about the employee's workers' compensation claim was on appeal and not finalized. After the settlement of the third-party action, in post-appeal proceedings before the Industrial Commission, the workers' compensation insurer successfully claimed credits for the amount received by the employee in the third-party action. Even though the insurer had waived its ability to obtain a Section 5(b) lien by withdrawing as a Circuit Court intervenor, because the insurer's lien rights had not been adjudicated in the Circuit Court, the Supreme Court held that the insurer had not waived its ability to claim 5(b) credits given the continued viability of the Industrial Commission proceedings. *Id.* at 217-218.

The peril of ignoring 5(b) in settlement negotiations with a tortfeasor is illustrated by *Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill.App.3d 5 (1st Dist. 2007). There, a UPS employee, delivering packages, slipped and fell at a mall, and sued the mall. The Trial Court held a settlement conference with all parties, including Liberty Mutual, UPS' workers' compensation carrier which had paid the employee $143,000 in benefits. The Trial Court recommended that the plaintiff-employee's case against the mall be settled for $110,000 and that Liberty accept $30,000 in satisfaction of its lien. While Liberty's lawyer was out of the room waiting to hear from his adjuster about the $30,000 proposal, plaintiff and the mall agreed to the $110,000 settlement, and the Court adjudicated the worker's compensation lien to $30,000 without counsel for Liberty present. *Id.* at 6. At a later hearing on Liberty's motion to vacate the settlement, the Trial Judge held that Liberty's absence estopped an objection to the Court's order or constituted a waiver of any objection. *Id.* at 7. The Appellate Court reversed, finding that

Liberty's absence from part of the settlement negotiations was not the kind of voluntary or intentional conduct necessary to relinquish the statutory rights accorded by 5(b). *Id.* at 9. The case was remanded with directions that the Trial Court order payment to Liberty in accord with section 5(b). *Id.*

IV. TO WHAT DOES THE LIEN ATTACH?

Generally speaking, the workers' compensation lien attaches to the entire proceeds of the third-party action. The Illinois Supreme Court has stated that "[i]f an employer has made workers' compensation payments, the obligation of reimbursement exists regardless of the amount that the employee recovers. Thus, if the amount of compensation paid by the employer exceeds the employee's third-party recovery, then the employer is entitled to the entire recovery, less fees and costs." *Estate of Dierkes*, 191 Ill.2d 326, 332-333 (2000) (citation omitted).

The employer's right of reimbursement is thus not limited by factors such as the following:

- Recovery in the third-party action being for damages, such as pain and suffering, not compensable under the Workers' Compensation Act, *Page v. Hibbard*, 119 Ill.2d 41, 47 (1987);

- Reduction of the plaintiff-employee's recovery in the third-party action because of the employee's contributory negligence, *Camp v. Star Erection Service, Inc.*, 186 Ill.App.3d 481, 483-484 (3rd Dist. 1989);

- The third-party action being one brought under the Wrongful Death Act, *Padgett v. Industr. Com'n*, 327 Ill.App.3d 655, 659-660 (1st Dist. 2002); *Borden v. Servicemaster Management Services,* 278 Ill.App.3d 924, 930-31 (1st Dist. 1996);

- The third-party tortfeasor's conduct being intentional rather than negligent, *People ex. rel. Illinois State Police v. Hamm*, 58 Ill.App.3d 177, 180 (2nd Dist. 1978);

- The employer's negligence contributing to the injury which gave rise to the worker's compensation case and the third-party action, *Carver v. Grossman,* 55 Ill.2d 507, 516 (1973); *Reeves v. Tepen*, 131 Ill.App.2d 1004, 1007 (4th Dist. 1971).

- The third-party action being one for medical malpractice, so long as the medical malpractice claim arises out of negligent treatment, for which benefits were paid, of the work-related injury, *Kozak v. Moiduddin*, 294 Ill.App.3d 365, 369-370, (1st Dist. 1997); *but see Robinson v. Liberty Mutual Ins. Co.,* 222 Ill.App.3d 443, 448 (1st Dist. 1991).

- The employer's assumption of the defense of the parties sued by the employee, in consideration of those parties dismissing their indemnity action against the employer, *Emberton v. State Farm Mutual*, 85 Ill.App.3d 247 (3rd Dist. 1980).

However, not all third-party recoveries, apparently related to the work injury, are subject to the employer's reimbursement rights. In fact, as one court has observed, there has been a "constant struggle between plaintiffs trying to avoid workers' compensation liens and employers trying to attach such liens." *Borden,* 278 Ill.App.3d at 930. Employer reimbursement rights and lien claims have not been recognized in cases such as the following:

- An action, or that portion of the recovery in the third-party action, attributable not to the employee's injuries *per se*, but to the loss of consortium suffered by the employee's spouse on account of the work injury, *Schrock v. Shoemaker*, 159 Ill.2d 533, 540 (1994); *Page,*119 Ill.2d 41, 47-48;

- The recovery of the injured employee under an underinsured motorist insurance policy, because Section 5(b) of the Act "refers to liability in tort, not contractual liability under an uninsured motorist policy," even one paid for by the employer, *Terry v. State Farm Mutual Auto. Ins. Co.*, 287 Ill.App.3d 8, 12-13 (2nd Dist. 1997); *see also Taylor v. Pekin Insurance Co.*, 231 Ill.2d 390, 396 (2008), discussed in §VII A below;

- The employee's legal malpractice recovery against an attorney who failed to timely file an appropriate third-party action arising out of the work injury, *Eastman v. Messner*, 188 Ill.2d 404, 414 (1999);

- Where the employer seeks to recover from the proceeds of a third-party action benefits paid for injuries which occurred before the injury at issue in the third-party action, *Sheppard v. Rebidas*, 354 Ill.App.3d 330 (1st Dist. 2004); *Robinson v. Liberty Mutual Ins. Co.,* 222 Ill.App.3d 443, 448 (1st Dist. 1991).

There seems to be no bright line separating third-party recoveries subject to reimbursement claims and those which are not. One court has suggested that three questions

help determine whether the proceeds of a third-party action are reachable by the employer: "(1) Who is the plaintiff? (2) In what capacity has the plaintiff brought the lawsuit against the third-party? and (3) What injuries does the plaintiff seek recovery for?" *Borden v. Servicemaster Management Services,* 278 Ill.App.3d 924, 930 (1st Dist. 1996). One may also fruitfully ask: what is the legal theory in the third-party action (tort or other), and does the third-party action seek to recover elements of damages for which benefits were paid because of the work injury or its aggravation? In the foregoing examples where reimbursement rights were recognized, the plaintiff was the injured employee or a person suing as the employee's legal representative, and the injuries in the third-party action were identical to the injuries (or aggravations of them) for which benefits were paid. In at least some of the cases where reimbursement was not allowed, the plaintiff was not the worker, was not suing for the worker's injuries, or the theory was contractual.

V. THE EMPLOYER'S OPTIONS FOR ENFORCING THE LIEN

An employer who pays worker's compensation to an employee has at least four means to enforce the lien. *See generally Chubb Group Ins. Co. v. Carrizalez,* 375 Ill.App.3d 537, 539-40 (1st Dist. 2007).

First, the employer or his insurer may give notice of the lien to the tortfeasor and/or the tortfeasor's insurer. The employer's insurer doing so was a factor in *Legler v. Douglas,* 26 Ill.App.2d 365 (2nd Dist. 1960), holding that the worker's compensation insurer was entitled to reasonable notice of and participation in any hearing about the disposition of plaintiff's recovery.

Second, the employer or its insurer may on motion intervene in the third-party action, and may do so at any time prior to satisfaction of judgment, *Kim v. Alvey Inc.,* 322 Ill.App.3d 657, 668 n. 5 (1st Dist. 2001), or disbursement of settlement proceeds in the third-party action. *See*

Gallagher v. Lenart, 226 Ill.2d 208 (2007) (employer intervened to protect lien after settlement of third-party action, even though employer had previously been a contribution defendant and had obtained summary judgment in its favor). While the intervening employer or insurer can neither control the plaintiff's lawsuit nor participate in the trial, *Legler,* 26 Ill.App.2d at 375, "all orders of court after hearing and judgment shall be made for [the employer's] protection." 820 ILCS 305/5(b). While intervention in a third-party action pending in State Court may be at any time prior to satisfaction of judgment, *Kim, supra*, the Federal Rules of Civil Procedure have been held to require early intervention and the denial of a motion to intervene filed twenty three months after the third-party case was filed and "five or six" months after the employer knew of the existence of the third-party case. However, the Federal District Court acknowledged that the employer still had the right to file a separate suit to enforce the lien. *Koester v. Amergen Energy Co., LLC*, 2008 WL 879459 (C.D. Ill., March 28, 2008).

Third, an employer may protect its lien by asserting the invalidity of the employee's settlement agreement with a third-party tortfeasor, when that settlement agreement was entered into without the employer's consent *and* without protecting the employer's recovery rights. *Chubb Group Ins. Co. v. Carrizalez,* 375 Ill.App.3d 537 (1st Dist. 2007), is an example. There, the Appellate Court reversed a Trial Court's dismissal of a compensation carrier's suit to collect its $3,072 lien from a tortfeasor whose insurer, State Farm, had paid the employee $3,600 in settlement of an on-the-job car crash claim. Because the settlement was reached without the compensation carrier's consent, the Appellate Court held that the release was invalid as to the employer (and its subrogee), *id.* at 542. The Appellate Court also found that section 5(b) may itself be sufficient notice to the tortfeasor and his insurer of the employer's rights, *id.* at 543, and was not persuaded that the employer's claim was barred by *laches* even though the employer's

suit was filed 17 months after the car crash settlement, *id.* at 544. *See also, Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill.App.3d 5 (1st Dist. 2007), discussed in Section III above. However, when a court order enforcing a settlement between a plaintiff-employee and a third-party tortfeasor expressly provided that the employer "will be compensated out of the parties' settlement, in accordance with" the Act, the employer's consent to that settlement was not required. *Pedersen v. Mi-Jack Products, Inc.*, 389 Ill.App.3d 33, 43 (1st Dist. 2009).

Finally, the employer is statutorily empowered to file its own action against the third-party tortfeasor if the injured employee has failed to do so and if three months or less remain before the expiration of the statute of limitations. 820 ILCS 305/5(b); *Villapiano v. Better Brands of Illinois, Inc.*, 26 Ill.App.3d 512, 514-15 (1st Dist. 1975). However, the employer must file its suit before the Statute of Limitations expires. In a case where the plaintiff-employee filed his third-party action two days before the Statute of Limitations ran, the employer had no right to file its own suit after the statute ran, even though the employer was named a third-party defendant and the plaintiff-employee was proceeding *pro se* after his attorneys had withdrawn. Furthermore, the employer could not, without the plaintiff-employee's consent, intervene as a party-plaintiff and independently control and prosecute the claim. *Pedersen,* 389 Ill.App.3d at 40 (1st Dist. 2009).

VI. ESCAPING THE LIEN

An employer can forfeit its lien by failing to timely exercise any of the foregoing options. If the employer fails to give notice of its lien, fails to intervene or fails to file any suit, its inaction may constitute a forfeiture of its lien. *See generally Gallagher v. Lenart*, 226 Ill.2d 208, 229-31 (2007). However, as cases cited above indicate, reviewing courts seem reluctant to find forfeitures.

An employer can, however, expressly agree to waive all or any portion of the employer's lien and reimbursement rights. *LaFever v. Komlite Co.*, 185 Ill.2d 380, 399 (2000); *Henson Robinson Co. v. Industr. Com'n.*, 386 Ill. 232, 238 (1944). For example, a waiver may be given in consideration of being dismissed as a contribution defendant in a third-party action, *Lannom v. Kosco*, 158 Ill.2d 535, 543 (1994), although the amount of the lien waived is set off against the plaintiff's recovery. *Wilson v. Hoffman Group, Inc.*, 131 Ill.2d 308, 324 (1989).

However, if the plaintiff-employee does not prosecute his case to judgment, but settles with the third-party tortfeasor while his worker's compensation claim remains pending, the plaintiff may avoid a set-off depending upon the language of plaintiff's settlement agreement with the third-party tortfeasor. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461. In that case, while his worker's compensation claim remained pending, the plaintiff-employee entered into a written settlement agreement with the third-party tortfeasor (¶29). The settlement agreement expressly provided that it did not release the employer from worker's compensation claims or third-party contribution claims (¶7), but contained no prohibition on the employee entering into a settlement agreement with his employer about the pending worker's compensation claim (¶26). After plaintiff settled with the third-party tortfeasor, he obtained from his employer a waiver of the employer's 5(b) lien (¶8). The *McMackin* Court held that the third-party tortfeasor, who may have been entitled to a set-off had the employee's case been tried to verdict, was not entitled to a set-off against amounts payable under its settlement agreement with the employee (¶¶32, 34). The Court cited as reasons that the tortfeasor's settlement agreement did not provide for any set-off (¶32), that the worker's compensation case was still pending when the settlement was made and the tortfeasor's settlement agreement did not prohibit settlement of the pending worker's compensation claim (¶26), and that the 5(b) lien was only later waived by

the employer, thereby extinguishing the tortfeasor's right to contribution from the employer and justifying dismissal of the tortfeasor's contribution claim against the employer (¶25). *McMackin* thus highlights the significance of both the timing or sequence of the plaintiff's settlement of his case against the third-party tortfeasor and his obtaining from his employer a 5(b) lien waiver, as well as the language in the release plaintiff signs with the third-party tortfeasor.

To be effective, the lien waiver must be explicit. *Gallagher,* at 226 Ill.2d at 238. The document containing a purported waiver, usually a settlement agreement, must contain "unmistakable settlement language to that effect." *Id.* at 239. Silence about the employer's lien will not waive the lien, even when a worker's compensation settlement agreement and an accompanying employee resignation agreement both contain broad general release language with respect to the employee's rights and claims. *Id.* at 241, expressly overruling *Borrowman v. Prastein*, 356 Ill.App.3d 546 (4th Dist. 2005).

As to language which may count as an "unmistakable" waiver, the saga of *Burgess v. Brooks*, 374 Ill.App.3d 545 (5th Dist. 2007), *judgment vacated* 225 Ill. 629 (2007), *on remand*, 376 Ill.App.3d 842 (5th Dist. 2007), provides guidance. In *Burgess*, the worker's compensation settlement agreement between the employer and the employee, approved by the Industrial Commission, expressly stated: "*Each* party waives *any* right to *ever* reopen this claim under *any* section of the Act." 374 Ill.App.3d at 547 (emphasis added to original by the Appellate Court). When the case was first before the Appellate Court, the Appellate Court found this language to refer to both parties and to waive all their respective rights, including the employer's 5(b) rights. *Id.* Then the Supreme Court decided *Gallagher*, and, shortly after doing so, vacated the Appellate Court's decision in *Burgess*, and directed the Appellate Court to "reconsider its judgment in light of *Gallagher*...to determine if a different result is warranted." *Burgess,* 225

Ill.2d 629 (2007). On remand, the Appellate Court changed its holding and determined that the above-quoted waiver provision was not sufficient to waive the employer's 5(b) rights. *Burgess*, 376 Ill.App.3d at 846. Following *Gallagher*, the Appellate Court reasoned that the waiver provision, "while appearing to cover 'any right' to 'this claim under any section' of the Act, failed to specifically mention the employer's right to a lien pursuant to Section 5(b) of the Act." *Id.* at 846. Read together, *Gallagher* and the second *Burgess* decision dictate that any contract provision attempting to memorialize the waiver of 5(b) rights should expressly refer to Section 5(b) and rights thereunder.

Partial escape from a lien claim may be possible if an employer or insurer seeks recovery for the expenses of administering a workers' compensation claim, rather than for actual benefits paid. The employer is entitled to reimbursement only for "compensation paid or to be paid by" the employer to the employee or the employee's personal representative. 820 ILCS 305/5(b). Thus, an insurer was not entitled to be reimbursed for the services of a professional nurse who acted under its control as a medical rehabilitation coordinator and as a consultant to the insurer to assure that the injured employee was given proper medical care. *Cole v. Byrd*, 167 Ill.2d 128 (1995).

An employee's argument, that her recovery in her third-party action was not what she had hoped for, proved to be an invalid basis for escaping a 5(b) lien in *Johnson v. Tikuye*, 409 Ill.App.3d 37 (1st Dist. 2011). Johnson was hurt in a car crash while on the job. In her lawsuit against the negligent driver, Johnson attributed all of her medical expenses and lost wages to the crash. Her claim, which was disposed of through arbitration, resulted in less of a recovery than Johnson sought because the arbitrator determined that some of her damages were attributable not to the crash, but to pre-existing back problems. When the employer's 5(b) lien was litigated

(after the employer intervened) Johnson argued that the lien ought to be reduced because of her pre-existing condition. Johnson thus made inconsistent arguments: at the arbitration hearing against the negligent driver, Johnson argued that all of her medical expenses and lost wages were attributable to the car crash; at the hearing on the 5(b) lien, she argued that her medical expenses and lost wages were only minimally related to the car crash. The Appellate Court found that the Trial Court's reduction of the worker's compensation lien based on Johnson's inconsistent argument was error, and that the employer was entitled to the entire arbitration award (which was less than the worker's compensation paid) minus 25% for fees and applicable expenses.

Finally, an employee cannot escape reimbursing all worker's compensation benefits paid to the employee simply based on the identity of the party paying the benefits. In a case where benefits were initially paid by an insurer, and then, when that insurer became insolvent, by the Illinois Insurance Guaranty Fund, the First District Appellate Court in an unpublished opinion held that whether the injured employee was paid benefits by the Fund or by another insurance carrier, the employer has the right to reimbursement for the full amount paid, minus attorney's fees and expenses as provided in Section 5(b). *Sanchez v. Rental Service Corp.*, 2013 Ill.App. (1st) 083304-U.

VII. CALCULATING THE EMPLOYER'S REIMBURSEMENT: FEES AND EXPENSES

Section 5(b) requires the employer who is reimbursed to pay as an attorney's fee 25% of the reimbursed amount as well as a pro rata share of all costs and expenses. 820 ILCS 305/5(b). If the compensation paid by the employer exceeds the employee's third-party recovery, then the employer is entitled to the entire recovery, subject to fees and costs. *Estate of Dierkes*, 191 Ill.2d 326, 333 (2000).

A. Attorneys Fees

Unless the employer agrees otherwise, the attorney's fee payable by the employer is 25% of the gross amount of the reimbursement, even if the employee has contracted to pay the attorney bringing the third-party action a greater fee. That is, the employer's statutory fee obligation is not altered because the employee entered into a contingent fee contract with his or her attorney for a fee greater than 25%. *Estate of Dierkes*, 191 Ill.2d at 335; *Swets v. Tovar*, 284 Ill.App.3d 1003, 1010-1011 (1st Dist. 1996). However, the Supreme Court in *Dierkes* also said " '[i]f this does not satisfy the amount owed the attorney under [an] attorney-client agreement, then the attorney must seek any additional amounts from the client.' " 191 Ill.2d at 335 (quoting *Mounce v. Tri-State Motor Transit Co.*, 150 Ill.App.3d 806, 811 (3rd Dist. 1986)).

Just as the employee's contractual obligations to his own attorney may not increase the fee the employer owes under the Act, the employer is not entitled to a reduction of the 25% fee, for example because the employer was successfully sued as a contribution defendant. That is, the employer's own negligence or contribution liability will not reduce the employer's obligation to pay fees and expenses. *Silva v. Electrical Systems, Inc.*, 183 Ill.2d 356, 366 (1998).

An employer cannot avoid paying the twenty-five percent fee by selling or assigning its lien rights, even when the sale or assignment occurs before settlement of the third party action. *Evans v. Doherty Construction, Inc.*, 382 Ill.App.3d 115 (1st Dist. 2008). In *Evans* the plaintiff-employee was hurt in a construction accident and sued multiple defendants. His employer, who paid $152,000 in worker's compensation benefits, was made a third-party defendant. Before trial, the direct defendants purchased the employer's lien rights for $90,000 and agreed to dismiss the third-party action. Later, when the defendants settled with the plaintiff-employee, the employer claimed it did not owe an attorney's fee on the $90,000 because the $90,000 was

not a "reimbursement" and had been agreed to before the plaintiff-employee settled his case. Both the Trial and Appellate Courts not only rejected the employer's statutory interpretation that the sale was not a reimbursement under 5(b), but also held that the timing of the transaction did not free the employer from the obligation to pay twenty-five percent of the $90,000 as fees as well as a pro-rata share of plaintiff's expenses. *Id.* at 121.

No twenty-five percent fee is payable by an employer when its employee makes a recovery under uninsured motorist coverage purchased by his employer, even when that recovery is reduced by a prior worker's compensation award. *Taylor v. Pekin Insurance Co.*, 231 Ill.2d 390 (2008). While driving on the job, Taylor was injured by an uninsured motorist. Taylor recovered worker's compensation from Pekin, his employer's worker's compensation insurer, and then recovered more money in an uninsured motorist arbitration against his employer's auto carrier, again Pekin. In accord with the terms of the auto policy, Pekin took a set off against the arbitration award for what it had paid for worker's compensation. Plaintiff-employee then sought twenty-five percent of the set off as fees. The Supreme Court held that no third-party action was involved in such a situation, and that 5(b) attorney's fees are payable only for legal services in third-party actions, not in contractually required uninsured motorist proceedings. *Id.* at 396-397.

B. Expenses

In addition to the statutory fee, the employer must also pay a pro rata share of the employee's reasonable expenses in the third-party action. According to one court, the "most logical reading of the statute" requires that the employer's share of the expenses be calculated on the amount to be reimbursed after the 25% fee is subtracted. *Overlin v. Windmere Cove Partners, Inc.*, 325 Ill.App.3d 75, 78 (2nd Dist. 2001), *appeal denied*, 198 Ill.2d 595 (2002).

However, another court adopted a different approach, calling its approach "the only way" to properly calculate the employer's share of expenses: divide the entire workers' compensation lien by the third-party recovery, and use the resulting fraction to determine the employer's share of the expenses. *Estate of Glenn v. Johnson*, 319 Ill.App.3d 625, 631-632 (5th Dist. 2001), *reversed on other grounds*, 198 Ill.2d 575 (2002). (This approach was considered and rejected in *Overlin*, 325 Ill.App.3d at 77-78).

Overlin (the Second District) thus calculates the employer's share of the expenses using this formula:

$$\text{Expenses} \times \frac{\text{75\% of benefits paid}}{\text{Total Recovery}} = \text{Employer's Share}$$

Glenn (the Fifth District) uses:

$$\text{Expenses} \times \frac{\text{Total benefits paid}}{\text{Total Recovery}} = \text{Employer's Share}$$

Because the employer pays more of the expenses using the *Glenn* formula rather than the *Overlin* formula, the *Glenn* formula is more favorable to the plaintiff employee.

Without commenting on the availability of an alternative formula, the First District Appellate Court noted in *Evans v. Doherty Construction, Inc.*, 382 Ill.App.3d 115 (1st Dist. 2008), that the Trial Court had entered an order calculating an employer's pro-rata share of expenses "according to the rule enunciated in *Overlin*...." *Id.* at 118-19.

C. Future Benefits

Some workers' compensation awards provide for continuing or future benefits or have not been finalized when the third-party action concludes. Under Section 5(b) the employer is entitled to reimbursement for benefits paid both before and after the conclusion of the third-party action. *Estate of Glenn v. Johnson*, 198 Ill.2d 575, 581 (2001). However, the employer is

subject to the statutory attorneys' fee and its pro rata share of the expenses as to both past and future benefits. *Zuber v. Illinois Power Co.*, 135 Ill.2d 407, 416 (1990).

In cases where an employee will receive future workers' compensation payments after a settlement or judgment of a third-party action, the Appellate Courts have suggested different ways to calculate and achieve reimbursement, including suspension of future benefits and escrows of the third-party recovery. In *Vandygriff v. Commonwealth Edison Co.*, 68 Ill.App.3d 396 (1st Dist. 1979), the Appellate Court suspended payments required of the employer until exhaustion of the entire "net" recovery of the employee in the third-party action. The Court calculated that net recovery by subtracting from the total recovery in the third-party action three items: past worker's compensation benefits paid, 25% of the third-party recovery as attorney's fees, and the employee's court costs in the third-party action.

An escrow approach was used in *Shelby v. Sun Express, Inc.*, 107 Ill.App.3d 362 (1st Dist. 1982). In *Shelby*, the Appellate Court affirmed a Trial Court order escrowing a $900,000 settlement of an employee's third-party action. The employer had already paid approximately $127,000 in worker's compensation benefits at the time of that settlement. The employer wanted immediate reimbursement of those payments, plus the interest earned by the escrow on the amount of those payments. However, the employee's workers' compensation application was still pending and not finalized. The Appellate Court held that no disbursement from the escrow was necessary until a final determination of the workers' compensation claim and thus the lien. *Id.* at 366. The Court also held that the employer was not entitled to any interest from the escrow. *Id.* at 366-67.

The Supreme Court seems not to have specified a single way to secure, from a recovery in a third-party action, the employer's credit or reimbursement against future worker's

compensation payments. *Freer v. Hysan Corporation*, 108 Ill.2d 421, 425-26 (1985); *see also*, *Estate of Glenn v. Johnson*, 198 Ill.2d 575, 581-82 (2001). However, when a Trial Court calculates the statutory attorney's fee on the net present value of an employer's future worker's compensation benefits, there must be a basis in the record for determining that value. *Estate of Glenn v. Johnson*, 198 Ill.2d 575, 580 (2001).

In all events, Section 5(b) of the Act requires the Circuit Court, in a third-party action in which the employer has intervened, to make "all orders of court after hearing and judgment" for the employer's protection.

D. Interest

The employer is not entitled to interest on the employer's 5(b) recovery. *Williamson v. Asher, et. al.*, 2013 IL App. (1st) 122038. In *Williamson*, complex wrongful death litigation resulted in a trucker's widow waiting over six years for a recovery, as did her deceased husband's employer who had paid her worker's compensation benefits. Interest was part of the widow's eventual recovery. Because the plaintiff-widow recovered interest, the worker's compensation lien holder wanted a pro rata share of it. The Appellate Court found no authority in the Act for a lien holder to recover interest on the lien, and therefore denied interest on the lien holder's recovery. *See also Kirk v. Walter E. Deuchler Associates, Inc.*, 96 Ill.App.3d 99 (2nd Dist. 1981), and *Shelby,* 107 Ill.App.3d 362 (1st Dist. 1982).

VIII. CONCLUSION: A CAUTIONARY TALE

Fremarek v. John Hancock Mutual Life Insurance Co., 272 Ill.App.3d 1067 (1st Dist. 1995), dealt with what the Appellate Court called "the humble issue of the adjudication of a statutory workers' compensation lien." *Id.* at 1068. In that case, plaintiff-employee Fremarek settled both his workers' compensation claim and his third-party action. He then convinced a

Circuit Court to adjudicate a substantial workers' compensation lien to $1,000. Fremarek argued both that the Circuit Court had authority to fully extinguish the lien and that the lien could not exceed one-third of plaintiff's recovery. The Appellate Court held that neither argument could have been made had plaintiff's counsel made a reasonable inquiry into existing law concerning Section 5(b), and imposed Rule 137 sanctions on plaintiff's counsel. *Id.* at 1075-76. While it may sometimes be debatable whether a given recovery is subject to a 5(b) lien (see part IV above) or how expenses or future obligations are calculated (see part VII above), "creativity" with the employer's well-established rights may be punished rather than rewarded.

APPENDIX: 820 ILCS 305/5(b)

(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act. If the employee or personal representative brings an action against another person and the other person then brings an action for contribution against the employer, the amount, if any, that shall be paid to the employer by the employee or personal representative pursuant to this Section shall be reduced by an amount equal to the amount found by the trier of fact to be the employer's pro rata share of the common liability in the action.

Out of any reimbursement received by the employer pursuant to this Section the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement.

If the injured employee or his personal representative agrees to receive compensation from the employer or accept from the employer any payment on account of such compensation, or to institute proceedings to recover the same, the employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party.

In such actions brought by the employee or his personal representative, he shall forthwith notify his employer by personal service or registered mail, of such fact and of the name of the court in which the suit is brought, filing proof thereof in the action. The employer may, at any time thereafter join in the action upon his motion so that all orders of court after hearing and judgment shall be made for his protection. No release or settlement of claim for damages by reason of such injury or death, and no satisfaction of judgment in such proceedings shall be valid without the written consent of both employer and employee or his personal representative, except in the case of the employers, such consent is not required where the employer has been fully indemnified or protected by Court order.

In the event the employee or his personal representative fails to institute a proceeding against such third person at anytime prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.