Illinois Trial Lawyers Association
Education Fund

WORKERS' COMPENSATION
TRIAL NOTEBOOK
2021

SECTION 5(b) LIENS:

AN EMPLOYER'S RIGHT TO REIMBURSEMENT FROM AN EMPLOYEE'S THIRD-PARTY CLAIM

THOMAS A. REULAND
Chicago

CONTENTS

The Illinois Workers' Compensation Act (the "Act") recognizes that an injured employee pursuing a workers' compensation claim can also pursue a separate cause of action against someone other than their employer—*i.e.* against a third-party. A common example occurs when an employee is injured on the job, pursues workers' compensation benefits to pay for related medical bills, and alleges that the on-the-job injury was due to the negligence of someone other than the employer. Section 5(b) of the Act gives the employer a statutory right to a lien on that recovery from a third-party claim. 820 ILCS 305/5(b).[1]

I. SUMMARY OF SECTION 5(B)'S KEY ELEMENTS

Section 5(b) of the Illinois Workers' Compensation Act recognizes that an injury or death can create "a legal liability for damages on the part of some person other than" the employer. 820 ILCS 305/5(b). The Act authorizes legal proceedings by the injured employee against persons other than the employer. The employer may "claim a lien upon any award, judgment or fund" created by a third-party action. The employer is entitled to notice of the third-party action and has the right to intervene. When recovering a lien, 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. If an employee resolves their third-party action and the employer's rights are not protected by a court order at the conclusion of the third-party action, then 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.

[1] The appendix contains the full text of 820 ILCS 305/5(b).

II. CREATING THE LIEN

When an employee receives, agrees to receive, or starts a proceeding to receive workers' compensation benefits, the employer can assert a lien on any recovery by the employee for injuries caused by a third party. *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 asserted by the employer in the third-party action, the employer may still have an enforceable right of reimbursement for the benefits paid. The Illinois Supreme Court has said that an "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).

Lien rights are distinct from reimbursement rights. *See generally Roberts v. Burdick*, 2021 IL App (5th) 190119, ¶ 52 (not released for publication at time of writing) (discussing lien rights and reimbursement rights available under section 5(b)). The decision in *Scott v. Industrial Commission*, 184 Ill. 2d 202 (1998), illustrates how an employer or its insurer might enforce reimbursement rights even without perfecting a lien on the third-party action. In *Scott*, the workers' compensation insurer intervened in the plaintiff-employee's third-party action, then withdrew. When the third-party action settled, the Industrial Commission's decision about the workers' compensation claim was on appeal and thus not finalized. In a post-appeal proceeding before the Industrial Commission, the insurer successfully claimed credits for the amount received by the employee in the third-party action. The insurer had waived its ability to obtain a section 5(b) lien by withdrawing as a Circuit Court intervenor. Nevertheless, 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 217-18.

III. EMPLOYEE MUST GIVE NOTICE TO EMPLOYER AND PROTECT EMPLOYER INTERESTS WHEN RESOLVING THIRD-PARTY CLAIMS.

An employee's statutory duties under the Act are to notify their employer of the third-party action, reimburse the employer for the workers' compensation benefits, and otherwise protect the employer's interests during settlement negotiations.

Under the Act, an employee 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); *see also Fremarek v. John Hancock Mutual Life Insurance Co.*, 272 Ill. App. 3d 1067, 1075-76 (1st Dist. 1995) (plaintiff's attorney faced sanctions under Illinois Supreme Court Rule 137 for not making a reasonable inquiry into the existence of workers' compensation benefits and a 5(b) lien). 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 (2d Dist. 1960). However, that same court vacated a trial court's order distributing to a 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. *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 (2d Dist. 1990).

The peril of not protecting the employer's rights during settlement negotiations with a tortfeasor is illustrated by *Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill. App. 3d 5 (1st Dist. 2007). In *Smith*, a plaintiff and defendant reached an agreement during a settlement conference

that involved a proposed reduction of the workers' compensation lien. The lawyer for the workers' compensation carrier participated in the settlement negotiations but left the room to call an adjuster about the proposal when the other parties reached a settlement. *Id.* at 6. The appellate court vacated the settlement, reasoning that the lawyer's departure from the negotiating table was not the kind of voluntary or intentional conduct to accept the reduction and waive the full recovery available under section 5(b). *Id.* at 9.

IV. THE LIEN ATTACHES TO A RECOVERY FROM A THIRD-PARTY ACTION, WITH CAVEATS.

Under the plain reading of the Act, section 5(b) workers' compensation liens attach to the entire proceeds of third-party actions. The Illinois Supreme Court summarized 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, 332-33 (2000) (citation omitted).

The employer's right to reimbursement from a third-party cause of action is strong. It is not limited by factors such as:

- Recovery in the third-party action for damages that are not compensable under the Act, like pain and suffering. *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, 483-84 (3d Dist. 1989).

- The employer's own negligence contributing to the injury that gave rise to the workers' compensation claim 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 for medical malpractice arising out of negligent treatment

of the work-related injury for which benefits were paid. *Kozak v. Moiduddin*, 294 Ill. App. 3d 365, 369-70 (1st Dist. 1997); *but see Robinson v. Liberty Mutual Ins. Co.*, 222 Ill. App. 3d 443, 447-48 (1st Dist. 1991).

- The wife of a deceased employee bringing the third-party action under the Wrongful Death Act. *Padgett v. Industr. Com'n*, 327 Ill. App. 3d 655, 659-60 (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 (2d Dist. 1978).

- Binding arbitration results that are less than what the claimant-employee claimed in damages due to a finding of pre-existing injuries. *Johnson v. Tikuye*, 409 Ill. App. 3d 37 (1st Dist. 2011).

- Alleged misconduct of the insurer and risk management group handling and investigating the underlying workers' compensation claim. *In re Estate of Rexroad*, 2018 IL App (5th) 170342.

- 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 (3d Dist. 1980).

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. However, not all third-party recoveries that may appear related to the work injury are subject to the employer's reimbursement rights. Employer reimbursement rights and lien claims have *not* been recognized when:

- A portion of the recovery in a third-party action is attributable not to the employee's injuries, but attributable instead 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 is predicated on 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." *Terry v. State Farm Mutual Auto. Ins. Co.*, 287 Ill. App. 3d 8, 12-13 (2d Dist. 1997); *see also Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390, 396 (2008). However, language from the underinsured motorist insurance policy can entitle the carrier of the underinsured

policy to a set-off of any workers' compensations benefits. *Country Preferred Ins. Co. v. Groen*, 2017 IL App (4th) 160028, ¶ 27.

- The employee's legal malpractice recovery was 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); *Woodward v. Pratt, Bradford & Tobin, P.C.*, 291 Ill. App. 3d 807 (5th Dist. 1997).

- The employer seeks to recover benefits paid for injuries that occurred before the injury at issue in a third-party action from the proceeds of that same 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).

- An employer fails to present medical evidence that an employee's recovery for medical damages was attributable to an on-the-job car crash instead of a second injury that occurred during on-the-job training after the car crash. *Hunt v. Herrod*, 2019 IL App (3d) 170808, ¶ 22, 125 N.E.3d 436, 442, *reh'g denied* (Apr. 10, 2019), *appeal denied*, 132 N.E.3d 331 (Ill. 2019) (employer "must establish that the payments it made were connected to the injury for which the employee recovered from the third party").

- An employer seeks a recovery for the expenses of administering a workers' compensation claim, rather than for actual benefits paid. *Cole v. Byrd*, 167 Ill. 2d 128 (1995) (insurer not entitled to be reimbursed for the services of a medical rehabilitation coordinator and consultant to the insurer to assure that the injured employee was given proper medical care).

Ultimately, no bright line separates third-party recoveries that are subject to reimbursement claims and those that are not. Three questions help determine whether an employer is entitled to proceeds of a third-party action: "(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). Other key questions that emerge from the case law itemized above include: is the legal theory in the third-party action based in tort or contract, and is the third-party recovery tied to injuries and treatment that were paid for by workers' compensation benefits? In the examples above where reimbursement rights were recognized, the plaintiff was the injured employee or employee's legal representative, and the injuries in the third-party action were

identical to the injuries 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 based on a contract.

V. ENFORCING THE LIEN

Generally speaking, an employer has four ways to enforce a workers' compensation lien. *See generally Chubb Group Ins. Co. v. Carrizalez*, 375 Ill. App. 3d 537, 539-40 (1st Dist. 2007).

First, the employer or its 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 (2d Dist. 1960), which held that the workers' compensation insurer was entitled to reasonable notice of and participation in any hearing about the disposition of a plaintiff's recovery. *See also Scott v. Industrial Commission.*, 184 Ill. 2d 202, 216 (1998).

Second, an employer can intervene in the third-party action to protect its lien rights. *See generally Burdess v. Cottrell, Inc*., 2020 IL App (5th) 190279, ¶ 46-54 *appeal denied*, 167 N.E.3d 632 (Ill. 2021) (not released for publication at time of writing). The employer or its insurer may on motion intervene in the third-party action at any time prior to satisfaction of judgment, *Burdess*, 2020 IL App (5th) 190279, ¶ 52; *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). *But see Koester v. Amergen Energy Co*., 2008 WL 879459, at *4 (C.D. Ill. Mar. 28, 2008) (denying a motion to intervene in federal court action after discussing timeliness factors that include "the length of time the intervenor knew or should have known of its interest in the case"). The intervening employer or insurer cannot control the

plaintiff's lawsuit, be a party at trial, or be subject to discovery in the underlying lawsuit given section 5(b)'s statement that "all orders of court after hearing and judgment shall be made for [the employer's] protection." *Burdess*, 2020 IL App (5th) 190279, ¶¶ 49-50.

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 both entered into without the employer's consent and without protecting the employer's recovery rights. *See Chubb Group Ins. Co. v. Carrizalez,* 375 Ill. App. 3d 537 (1st Dist. 2007)*; Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill. App. 3d 5 (1st Dist. 2007). *Pederson v. Mi-Jack Products, Inc.,* 389 Ill. App. 3d 33, 43 (1st Dist. 2009) is an example of a valid settlement agreement where an employer's consent was not explicitly obtained but the employer's recovery rights were nevertheless protected because the court order enforcing the 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.

Finally, the employer can file its own action against the third-party tortfeasor if the injured employee 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). Like the injured employee, the employer must file its suit before the statute of limitations expires. *Knowles v. Mid-West Automation Systems, Inc.*, 211 Ill. App. 3d 682, 687 (1st Dist. 1991). Notably, principles of *res judicata* apply, which can bar an employee who tries to intervene in the employer's action after the employee's earlier case against a tortfeasor was dismissed with prejudice. *A&R Janitorial v. Pepper Constr. Co.*, 2018 IL 123220 (2018) (noting that the Act is silent about an employee's right to intervene in an employer's action but holding that *res judicata* bars an employee whose initial claim was

dismissed from later intervening in a claim timely filed by her employer).

VI. FORFEITURE AND WAIVER OF THE LIEN

If the employer fails to give notice of its lien, fails to timely intervene, or fails to file any suit, then its inaction may constitute a forfeiture of its lien. *See generally Koester v. Amergen Energy Co*., 2008 WL 879459, at *4 (C.D. Ill. Mar. 28, 2008); *Gallagher v. Lenart*, 226 Ill. 2d 208, 229-31 (2007).

An employer can expressly waive all or any portion of the employer's lien and reimbursement rights. *LaFever*, 185 Ill. 2d at 399; *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 nevertheless set off against the plaintiff's recovery, *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 324 (1989). The employer's waiver may occur even after a jury verdict against the employer in a contribution action, and the waiver will satisfy the judgment against the employer. *LaFever v. Komlite Co.*, 185 Ill. 2d 380, 402-405 (1998); *see also Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991) (if an employer is sued for contribution in a third-party action brought by an injured employee, the employer's liability is capped at the amount of the employer's statutory liability under the Workers' Compensation Act); *Cozzone v. Cozzone v. Garda GL Great Lakes, Inc.*, 2016 IL App (1st) 151479, ¶ 13; *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 668-69 (1st Dist. 2001).

However, if a plaintiff-employee does not prosecute their case to judgment but settles with the third-party tortfeasor while the workers' compensation claim remains pending, the plaintiff may avoid a set-off depending on the language of plaintiff's settlement agreement with the third-party tortfeasor. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461. In

McMackin, while the employee's workers' compensation claim remained pending, the employee entered into a written settlement agreement with the third-party tortfeasor. *Id.* at ¶29. The settlement agreement expressly did not release the employer from workers' compensation claims or third-party contribution claims, *id.* at ¶7, and contained no prohibition on the employee entering into a settlement agreement with his employer about the pending workers' compensation claim, *id.* at ¶26. After plaintiff settled with the third-party tortfeasor, he obtained from his employer a waiver of the employer's 5(b) lien. *Id.* at ¶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. *Id.* at ¶¶32, 34. The Court reasoned that the tortfeasor's settlement agreement did not provide for any set-off, *id.* at ¶32, that the workers' compensation case was still pending when the settlement was made and the tortfeasor's settlement agreement did not prohibit settlement of the pending workers' compensation claim, *id.* at ¶26, and that the section 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, *id.* at ¶25. *McMackin* thus highlights the significance of both the sequencing of the plaintiff's settlement against the third-party tortfeasor and obtaining a section 5(b) lien waiver, as well as the language in the release plaintiff signs with the third-party tortfeasor.

An employer's waiver of a 5(b) lien must be explicit. *Gallagher*, 226 Ill. 2d at 238. The document 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 workers' 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 (overruling *Borrowman v. Prastein*, 356 Ill. App. 3d 546 (4th Dist. 2005)); *see also Cooley v. Power Construction Co.*, 2018 IL App (1st) 171292, ¶¶ 7, 21-24 (holding that an indemnification provision between companies lacked the explicitness required to waive a section 5(b) lien even when the provision states that the indemnitor "expressly and specifically agrees that its obligations to indemnify, defend and save harmless shall not in any way be diminished by any statutory or constitutional immunity it enjoys from suits by its own employees or from limitations of liability or recovery under worker's compensation laws"). Broad language, such as "*Each* party waives *any* right to *ever* reopen this claim under *any* section of the Act" is not sufficiently explicit to constitute a waiver, and the wise practitioner should expressly refer to section 5(b) and the rights it bestows when drafting waivers. *See Burgess v. Brooks*, 374 Ill. App. 3d 545 (5th Dist. 2007).

VII. CALCULATING THE LIEN AMOUNT

At times, an employee's recovery from a third-party action is less than the benefits provided by the employer or the benefits that the employer might pay in the future. In this scenario, when the compensation paid by the employer exceeds the employee's third-party recovery the employer is entitled to the entire third-party recovery, subject to fees and costs. Section 5(b) requires the reimbursed employer to pay 25% of the reimbursed amount as an attorney's fee as well as a pro rata share of all costs and expenses. 820 ILCS 305/5(b); *Estate of Dierkes*, 191 Ill. 2d 326, 333 (2000).

A. Attorney's Fee of 25%

The attorney's fee payable by the employer to the attorney bringing the third-party action is 25% of the gross amount of the reimbursement. Section 5(b) codifies this percentage. This

statutory 25% controls even if the employee contracted with the attorney bringing the third-party action for a higher percentage. In other words, a contingent fee contract between a personal injury lawyer and an injured client that does not involve the employer will not change the statutory 25%. *Estate of Dierkes*, 191 Ill. 2d at 335; *Swets v. Tovar*, 284 Ill. App. 3d 1003, 1010-11 (1st Dist. 1996).

The employer is not entitled to a reduction of the 25% fee it must pay under the Act. For instance, the employer's own liability for negligence or contribution 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's negligence has nothing to do with the employer's statutory right to recover full reimbursement for its workers' compensation payments to the employee.").

An employer cannot avoid paying the 25% fee by selling or assigning its lien rights, even when the sale or assignment occurs before settlement of the third-party action. In *Evans v. Doherty Construction, Inc.*, 382 Ill. App. 3d 115 (1st Dist. 2008), an employer, who paid $152,000 in workers' compensation benefits, was made a third-party defendant in a construction negligence case involving multiple defendants. 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 section 5(b), but also held that the timing of the transaction did not free the employer from the obligation to pay 25% of the $90,000 as fees. *Id.* at 121.

The 25% fee may not be due from an employer when its employee makes a recovery

through uninsured motorist coverage purchased by his employer. *Terry v. State Farm Mut. Auto. Ins. Co.*, 287 Ill. App. 3d 8, 12, (2d Dist. 1997) (concluding that "section 5(b) of the Act that refers to a legal liability to pay damages refers to liability in tort, not contractual liability under an underinsured motorist policy"). In *Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390 (2008), employee Billy Taylor recovered workers' compensation benefits from Pekin, his employer's workers' compensation insurer after Taylor was injured by an uninsured motorist while driving a vehicle that his employer insured. Taylor then recovered more money in an uninsured motorist arbitration against his employer's auto carrier, again Pekin. Based on the contractual terms of the employer's auto policy, Pekin took a set-off against the arbitration award for what Pekin paid as workers' compensation. Plaintiff-employee then sought 25% of the set-off as fees. The Supreme Court noted that 5(b) attorney's fees are payable only for legal services in third-party actions but not in contractually based uninsured motorist proceedings. *See id.* at 396-97.

B. Pro Rata Share of Expenses

The employer must pay a pro rata share of the employee's reasonable expenses in the third-party action. But does one calculate the pro rata share before or after subtracting the 25% attorney's fee? 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 (2d 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, 631-32 (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:

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

Glenn (the Fifth District) uses an alternative formula which shifts more of the expenses onto the employer than the *Overlin* approach, namely:

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

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 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 benefits that will continue into the future even after the third-party action is resolved. Other times, the total amount of benefits is not 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. *Bayer v. Panduit Corporation*, 2016 IL 119553; *Estate of Glenn v. Johnson*, 198 Ill. 2d 575, 581 (2002). The employer remains subject to the statutory attorney's fee of 25% and its pro rata share of the expenses as to both past and future benefits. *Bayer v. Panduit Corporation*, 2016 IL 119553, ¶ 28; *Zuber v. Illinois Power Co.*, 135 Ill. 2d 407, 416 (1990).

The calculation of the section 5(b) attorney's fee on the net present value future workers' compensation benefits must have some kind of basis on the record. *Estate of Glenn*, 198 Ill. 2d at

580. An employer can achieve reimbursement for future benefits in ways that include suspension of future benefits and escrow of the third-party recovery. However, the Illinois Supreme Court seems not to have specified a single way to secure the employer's credit or reimbursement against future workers' compensation payments from a recovery in a third-party action. *See generally Estate of Glenn v. Johnson*, 198 Ill. 2d 575, 581-82 (2001); *Freer v. Hysan Corp.*, 108 Ill. 2d 421, 425 (1985) (discussing approaches). Cases from the First District provide some helpful illustrations of acceptable methods.

In *Vandygriff v. Commonwealth Edison Co.*, 68 Ill. App. 3d 396 (1st Dist. 1979), the First District 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 workers' compensation benefits paid, 25% of the third-party recovery as attorney's fees, and the employee's court costs in the third-party action.

In *Shelby v. Sun Express, Inc.*, 107 Ill. App. 3d 362 (1st Dist. 1982), the First District applied an escrow approach. The court affirmed a trial court's order escrowing a $900,000 settlement of an employee's third-party action. The employer had already paid approximately $127,000 in workers' compensation benefits when the third-party action settled. The employer wanted immediate reimbursement of those payments even though the employee's workers' compensation application was not finalized. The *Shelby* court held that no disbursement from the escrow was necessary until a final determination of the workers' compensation claim. *Id.* at 366.

D. Interest Not Included

An employer is not entitled to interest on its section 5(b) recovery. *Williamson v. Asher*, 2013 IL App (1st) 122038. In *Williamson*, 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 workers' compensation benefits. Interest was part of the widow's eventual recovery in the third-party claim. Because the plaintiff-widow recovered interest, the workers' compensation lien holder wanted a pro rata share of the interest. 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 Shelby v. Sun Express, Inc.*, 107 Ill. App. 3d 362 (1st Dist. 1982); *Kirk v. Walter E. Deuchler Associates, Inc.*, 96 Ill. App. 3d 99 (2d Dist. 1981).

VIII. CONCLUSION

In many respects, section 5(b) invites a simple statutory reading that can boil down to this practical outcome: An employer is entitled to recover all of the workers' compensation benefits paid to an employee who recovers money from a third-party claim after the employer pays a share of attorney fees and case costs. However, the devil is in the details with this decades-old statute. Countless nuances emerge given the moving pieces of many people with money at stake, including the tortfeasor, the tortfeasor's insurance company, the employer, the employer's workers' compensation carrier, the employee's own underinsured liability insurance carrier, and of course the injured employee and possibly their surviving family members. Familiarity with the nuances introduced in this chapter will help attorneys maximize recoveries for their clients while also safeguarding resolutions from subsequent claims and avoidable appeals.

APPENDIX

820 ILCS 305/5(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.

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 any time 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.