When Worlds Collide: Workers' Comp & 3rd Party Tort Claims

Judge Lynn M. Egan
Mr. Gerald F. Cooper: Scopelitis, Garvin, Light, Hanson & Feary
Mr. David B. Menchetti: Cullen, Haskins, Nicholson & Menchetti

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TRIAL COURTS LOVE TO ADJUDICATE, BUT....

NO JURISDICTION TO ALTER THIS FORMULA:

WC benefits + 3rd party tort action = Employer lien

WHEN WC & TORT WORLDS COLLIDE...

Start & end with Section 5(b) of the Worker's Compensation Act!

Why?

- The employer may claim a lien on the proceeds of a 3rd party action because Section 5(b) is "designed to allow employers & employees to reach the true tortfeasor responsible for an employee's injuries while preventing employees from obtaining a double recovery." *Gallagher v. Lenart, 226 Ill.2d 208, 223 (2007).*

NOTE: Section 5(b) imposes a **statutory duty upon courts to protect** an employer's WC lien. *Id.*

HOW STRONG IS THE PROTECTION?

- The Illinois Supreme Court has declared the duty to protect a WC lien to be of "utmost importance " (*In re Estate of Dierkes, 191 Ill.2d 326, 333 (2000))* and "crucial" to the WC system.

- As a result, the employer can assert a lien for the full amount of WC benefits paid "upon any award, judgment or fund out of which [the] employee might be compensated." *Sanchez v. Rental Service Corp., 2013 IL App (1st) 083304-U, ¶ 57.*

ANY WIGGLE ROOM?

1. Reduction for attorneys' fees/costs;
2. No recovery for employer/insurer administrative expenses. *Cole v. Byrd, 167 Ill.2d 128, 138-139 (1995)(these do not qualify as necessary medical or rehabilitative expenses contemplated by Section 8(a) of WC Act.)*
3. Allocation???
   - Spouse's loss of consortium – *Blagg v. Illinois F.W.D. Truck & Equipment Co., 143 Ill.2d 188 (1991).*
   - Subsequent Injuries -- *Johnson v. Winebreiner, 2014 IL App (4th) 130649-U, ¶ 30 ("'an employment accident need not be the sole cause or even the principal cause of a claimant's injury to render it compensable under the Act.*** the intervening cause must completely break the causal chain between the original work-related injury & the ensuing condition.'")*

BEST WAY TO AVOID COLLISION INJURY

Know how to evaluate the comp case!

When Worlds Collide:
Workers' Comp & 3rd Party Tort Claims

- Workers' Comp 101
- Exclusive Remedy
- WC Lien

Workers' Comp 101

- Employer/Employee
- Accidental injuries (also repetitive trauma)
- Arising out of /in the course of employment
- Medical causal connection: aggravation
- Benefits:
  - 1) Medical treatment (free choice; 2 docs)
  - 2) Temporary total disability (2/3 AWW)
  - 3) Permanent disability (settlement or award)
- WC S of L = 3 years from date of accident; notice within 45 days
- OD S of L= 3 years from "disablement;" (5 for pnuemconiosis; 25 for asbestosis); disablement within 2 years of last exposure (3 for asbestos); notice "as soon as practicable after date of disablement"

Employer/Employee

- Direction & control
- Nature of the business test
- Loaning/borrowing employers
- Statutory employer (uninsured subcontractor)

Accidental Injuries

- Workers' comp is a no-fault system; neither employer's or employee's conduct increases or decreases liability
- Repetitive or cumulative trauma or stress injuries are covered just like specific incidents
- Physical/physical injuries are covered (fall resulting in broken leg)
- Physical/mental injuries are covered (broken leg leads to chronic pain leads to depression)
- Mental/physical injuries are covered (job stress leads to heart attack)
- Mental/mental injuries are not covered (job stress leads to depression), unless mental stimulus is horrific (witnessing co-worker's arm amputation)

Medical Causal Connection

- The condition resulting in disability or need for treatment must be medically causally connected to the original injury in ordered to be covered
- Work injury must be "a causative factor;" NOT primary, predominant, major or only factor
- Aggravation of pre-existing condition or degenerative condition is considered to be causation
- There is no apportionment: "If you broke it, you bought it"
- Usually the treating doctor's opinion is used to establish causation by a preponderance of the evidence

In the Course of & Arising Out of

- "In the course of" refers to PLACE and TIME
- Generally, going to and coming from work is not covered
- Parking lots can be "in the course of"
- Traveling employees are always "in the course of"
- Arising out of refers to CONNECTION to the employment
- Need to identify cause of slip & fall in order to be arising out of
- Adcock case

Reporting & Statute of Limitations

- Workers must report injury "as soon as practicable, but no later than 45 days"
- Oral notice is sufficient; defective notice may be sufficient
- Know the difference between the employer's notice requirement ("24 hours") and the law ("45 days")
- Statute of limitations (SOL) is 3 years after the date of the accident; be careful with repetitive stress cases
- SOL can be extended to 2 years after last payment of compensation, whichever is later
- Only filing of Application for Adjustment of Claim can stop SOL from running
- For certain exposure cases (asbestos, radiation), the SOL is 25 years; the SOL for Occupational Disease is very complicated

Medical Treatment

- All reasonable, necessary & related medical treatment is covered
- 100% medical coverage: no limitations, deductibles, co-pays or exclusions
- 2 Doctor Rule: Workers are allowed to pick two doctors of their own choice
- Right to pick is absolute; you don't need to ask permission or get pre-approval
- Referral from one doctor to another does not count as a choice (chain or wheel)
- Preferred provider program since 2011

Temporary Total Disability (TTD)

- TTD pays lost wages when a worker cannot work as result of injuries
- Rate payable: 2/3 of the Average Weekly Wage (AWW)
- AWW = Total Earnings (TE) divided by weeks and parts thereof worked (WW) in the 52 weeks for employer prior to the injury
- TE can include overtime at the straight rate, if OT mandatory, regular and/or consistent
- WW must deduct days not worked (weather, lack of work, leave of absence); not always 52 weeks!
- TTD is payable until injured worker reaches Maximum Medical Improvement (MMI)
- Employer's inability to accommodate light duty is the same as not being able to work at all and leads to TTD

Permanent Disability

- In addition to Medical Treatment & TTD
- Permanent Partial Disability: usually returned to normal work; 10% loss of use of the right arm; calculated based on value of body part at 60% AWW
- Wage Differential: usually returned to other lower paying work; weekly benefit calculated at 2/3 of difference between what could be earning in normal work minus what can earn now
- Permanent Total Disability: usually not returned to work at all; weekly benefit calculated at 2/3 of AWW

820 ILCS 305/8.1b

- **Sec. 8.1b. Determination of permanent partial disability**. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
- (a) **A physician** licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report **shall report the level of impairment in writing**. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
- (b) **In determining the level of permanent partial disability, the Commission shall base its determination on the following factors**: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Exclusive Remedy
820 ILCS 305/5(a)

- **Section 5(a)**. No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization that is wholly owned by the employer, his insurer or his broker and that provides safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.
- However, in any action now pending or hereafter begun to enforce a common law or statutory right to recover damages for negligently causing the injury or death of any employee it is not necessary to allege in the complaint that either the employee or the employer or both were not governed by the provisions of this Act or of any similar Act in force in this or any other State.

Exclusive Remedy
Civil Action Against Uninsured Employer
820 ILCS 305/4(d)

- Section 4(d): Employers who are subject to and who ***knowingly fail to comply*** with this Section shall not be entitled to the benefits of this Act during the period of noncompliance, but shall be ***liable in an action under any other applicable law*** of this State. In the action, such employer ***shall not avail himself or herself of the defenses of assumption of risk or negligence or that the injury was due to a co-employee***. In the action, proof of the ***injury shall constitute prima facie evidence of negligence*** on the part of such employer and the burden shall be on such employer to show freedom of negligence resulting in the injury. The employer shall not join any other defendant in any such civil action. Nothing in this amendatory Act of the 94th General Assembly shall affect the employee's rights under subdivision (a)3 of Section 1 of this Act. Any employer or carrier who makes payments under subdivision (a)3 of Section 1 of this Act shall have a right of reimbursement from the proceeds of any recovery under this Section.
- An employee of an uninsured employer, or the employee's dependents in case death ensued, may, instead of proceeding against the employer in a civil action in court, file an application for adjustment of claim with the Commission in accordance with the provisions of this Act and the Commission shall hear and determine the application for adjustment of claim in the manner in which other claims are heard and determined before the Commission.
- Keating v. 68th & Paxton LLC, 401 Ill.App.3d 456 (2010)

Exclusive Remedy
Folta v. Ferro Engineering, 2014 IL App (1st) 123219

- This is a case of first impression in Illinois. It is a decision that determines when an employee can sue his employer outside of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* and the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.)* when the employee first learns of his injury after the expiration of the statute of repose under those acts.
- Plaintiff Folta was allegedly exposed to asbestos at a plant owned by defendant Ferro Engineering from 1966 to 1970. Forty-one years after leaving the employ of Ferro Engineering, P was diagnosed with peritoneal mesothelioma.
- Any potential asbestos-related workers' compensation claim against Ferro Engineering was time-barred by the Act's 25-year statute of repose for asbestos-related injuries and the three-year statute of repose for asbestos-related diseases under the Workers' Occupational Diseases Act.
- Ferro Engineering filed a motion to dismiss plaintiff's counts against it, arguing that because plaintiff's injuries arose out of and in the course of his employment, his action was barred by the exclusive remedy provision of the Act 820 ILCS 305/5(a) and the parallel provision in the Workers' Occupational Diseases Act 820 ILCS 310/11.
- Plaintiff argued that the exclusive remedy provision did not bar his action, since that provision does not apply to claims that are "not compensable under the Act."

Folta v. Ferro Engineering
2014 IL App (1st) 123219

- The trial court granted Ferro Engineering's motion to dismiss, and plaintiff now appeals. For the reasons that follow, we reverse and remand.
- Our review of the trial court's construction of the Act and the Workers' Occupational Diseases Act is also *de novo*.
- **The scope of these exclusivity bars is not absolute**. Our supreme court has explained that an injured employee may still bring a common-law action against his employer if he can prove any of the following exceptions: (1) the injury was not accidental; (2) the injury did not arise from his employment; (3) the injury was not received during the course of employment; or (4) the injury is "not compensable under the Act.
- ¶ 29 Thus, we turn to consider the **meaning of the phrase "not compensable under the Act"** as used in *Meerbrey* and its progeny. Plaintiff urges us to find that an injury is not compensable under the Act whenever a plaintiff, through no fault of his own, is barred from seeking recovery under the Act. Ferro Engineering, meanwhile, argues that we should adopt a narrow reading of the phrase and find that an injury is not compensable only if it does not arise out of and in the course of employment.

Folta v. Ferro Engineering
2014 IL App (1st) 123219

- This court has, on multiple occasions, rejected Ferro Engineering's proposed definition of compensability (synonymous with an injury that arises out of or in the course of employment) and instead articulated a definition related to plaintiff's ability to recover under the Act.
- "Recoverability": where plaintiffs' injuries were of such a nature that they could not recover under the Act, the fourth *Meerbrey* exception would apply to allow them to bring a common-law suit against their employer.
- Such an interpretation of compensability is consistent with the purposes of the Act's exclusivity bar as explained by our supreme court ...stated that the exclusivity bar is rooted in the fear of double recovery and the desire to prevent the proliferation of litigation.
- Our holding is confined to the specific fact pattern before us today, in which an injured employee's potential claim under the Act is time-barred before he ever learns of it, thus necessarily depriving him of any potential for compensation under the Act.
- Thus, for the foregoing reasons, we reverse the judgment of the trial court, insofar as we find that plaintiff's suit against Ferro Engineering is not barred by the exclusivity provisions of the Act and the Workers' Occupational Diseases Act, and we remand for further proceedings.
- **PLA to Supreme Court allowed 9-24-14, case argued 5-14-15**

Folta v. Ferro Engineering
2015 IL 118070

- In this case we are asked to consider **whether an employee can bring an action against an employer outside of the Workers' Compensation Act and the Workers' Occupational Diseases Act**, when the employee's injury or disease first manifests after the expiration of certain time limitations under those acts. For the following reasons, **we hold** that under these circumstances, the **employee's action is barred by the exclusive remedy** provisions of those acts.
- Specifically, we are asked to consider whether these provisions bar an employee's cause of action against an employer to recover damages for a disease resulting from asbestos exposure which arose out of & in the course of employment **even though no compensation is available under those acts due to statutory time limits on the employer's liability.** The question is one of law, which we review *de novo*.

Folta v. Ferro Engineering
2015 IL 118070

- Both acts contain an exclusive remedy provision as part of the *quid pro quo* which balances the sacrifices and gains of employees and employers
- Employee can escape the exclusivity provisions of the Act if the employee establishes that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) **was not compensable under the Act**
- *Pathfinder*, *Collier* and *Meerbrey* "stand for the proposition that whether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." These cases do not stand for the proposition that whether an injury is compensable is defined by whether there is an ability to recover benefits for a particular injury sustained by an employee. In all of these cases, the exclusivity provisions barred a common-law cause of action
- We don't look at the facts surrounding the injury and whether it is compensable. Rather, assuming favorable facts, it is not legally compensable.
- Eg. not meeting the causation standard. That is why this case was important for WC practice.

Folta v. Ferro Engineering
2015 IL 118070

- This court has held that despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries.
- Section 6(c) of the Workers' Occupational Diseases Act does bar Folta's right to file an application for compensation. That section provides that,"[i]n cases of disability caused by exposure to asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred."
- Based on the plain language of this section, this provision acts as a statute of repose, and creates an absolute bar on the right to bring a claim.
- The fact that through no fault of the employee, the right to seek recovery under the Acts was extinguished before the claim accrued because of the statute of repose does not mean that his acts have no application or that Folta was then free to bring a wrongful death action in circuit court

Folta v. Ferro Engineering
2015 IL 118070

- We reject Folta's assertions that to hold that the exclusive remedy provisions bar her cause of action would violate the Illinois Constitution's guarantees of equal protection (Ill. Const. 1970, art. I, § 2), prohibition against special legislation (Ill. Const. 1970, art. IV, § 13), **and the right to a certain remedy** (Ill. Const. 1970, art. I, § 12).
- Reject the remedy clause argument because it is "merely an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form. *Cassens*
- But why not some remedy?
- Dissent: This court has described the Workers' Compensation Act as "a humane law of a remedial nature whose fundamental purpose is to provide employees and their dependents prompt, sure and definite compensation...It is instructive to look at the majority's interpretation of the exclusive remedy provisions in terms of the consequences of that interpretation. According to the majority, the acts are the employee's exclusive remedy for workplace injuries, even where, as here, plaintiff never had an opportunity to seek such compensation because his occupational mesothelioma was not manifest until long after the statutory time limitations had elapsed."

Folta v. Ferro Engineering

- May be rare facts but holding in Folta may impact on other instances where there is a legal bar
- Eg. Recreation activity, intoxication
- As we amend the Act, the more that is excluded, the more injuries without remedies
- *Missouri Alliance For Retired Americans, Et Al., Appellants, V. Department Of Labor And Industrial Relations, Division Of Workers' Compensation, Respondent*
- The removal of certain injuries and accidents from the scope of the act places workers who have suffered those injuries outside the workers' compensation system. Those workers now can recover under the common law as they no longer fall within the exclusivity provision of the act as set out in section 287.120.

Exclusive Remedy

Burge v. Exelon Generation, 2015 IL App(2d) 141090

- Plaintiff's injuries arose out of and in the course of his employment with Exelon Nuclear Security (ENS)
- Plaintiff filed and settled a workers' compensation claim against ENS
- ENS is a limited liability company organized pursuant to an agreement making Defendant Exelon the sole member of ENS
- ENS provided security services on Defendant's premises pursuant to a contract
- Defendant used a third-party administrator for workers' compensation benefits and "paid all monies for the ENS account" and Defendant "paid the worker's compensation benefits of all employees of ENS"
- Plaintiff appeals from an order of the circuit court of Ogle County granting the motion of Defendant Exelon to dismiss Plaintiff's' complaint. Defendant successfully argued that Plaintiff's exclusive remedy against Defendant was under the Workers' Compensation Act
- ***We reverse***

Burge v. Exelon Generation
2015 IL App(2d) 141090

- We find nothing in the Agreement that gives ENS any right to control Defendant. Indeed, quite the opposite appears to be true. Because ENS has no right to control, Defendant, is not ENS's agent. No exclusive remedy protection
- The question we are left with is whether Defendant's role, if any, in paying Plaintiff's workers' compensation settlement confers immunity, pursuant to Section 5(a), from a common-law action for damages
- Defendant argued that, because it had reimbursed ENS for workers' compensation payments, and because of its authority to manage ENS's affairs, it was cloaked with the same immunity as ENS
- We agree with Plaintiff that immunity under section 5(a) of the Act cannot be predicated on Defendant's payment of workers' compensation unless Defendant was under some legal obligation to pay
- Accordingly, Defendant has failed to establish a basis for claiming immunity under Section 5(a) of the Act, and it was error to dismiss Plaintiffs' complaint

Exclusive Remedy

Reichling v. Touchette Regional Hospital, 2015 Il App (5th) 140412WC

- The Plaintiff appeals the circuit court's order granting summary judgment in favor of the Defendant Touchette on the basis that her premises liability action was barred by the exclusive remedy provision of Section 5(a) of the Workers' Compensation Act because she was Touchette's borrowed employee at the time of her injury
- Plaintiff fell while working at Touchette as a registered nurse through ReadyLink, a temporary healthcare staffing agency.
- ReadyLink settled the workers' compensation claim
- Touchette was not a party to the WC claim
- Plaintiff filed premises liability action against Touchette

Reichling v. Touchette Regional Hospital 2015 Il App (5th) 140412WC

- Undisputed material facts
- Through ReadyLink, Plaintiff worked as a temporary registered nurse at Touchette and other healthcare facilities
- ReadyLink and Touchette had a written agreement
- Under the agreement, ReadyLink was responsible for paying the workers and for ensuring that any and all Worker's Compensation coverage obligations and any other employment law requirements for personnel provided under the agreement
- Touchette is responsible for scheduling, supervising, and evaluating the workers. Under the agreement, Touchette is responsible for determining the proper patient treatment.

Reichling v. Touchette Regional Hospital 2015 Il App (5th) 140412WC

- The exclusive remedy provision of the Act is part of the *quid pro quo*, pursuant to which the employer assumes a new liability without fault but is relieved of the possibility of large damage verdicts
- The two-prong inquiry required to determine whether a borrowed-employee relationship existed is: (1) whether the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work; ***and*** (2) whether there was an express or implied contract of hire between the employee and the alleged borrowing employer.
- Because the undisputed material facts demonstrate that Touchette directed and controlled the plaintiff's work and that she consented to the borrowed-employee relationship with Touchette, there is no genuine issue of material fact as to whether Touchette was a borrowing employer
- Not collaterally estopped from claiming that it was her employer by the workers' compensation award finding that ReadyLink was her employer (argument waived because not brought up in trial court)

Exclusive Remedy
Laffoon v. Bell & Zoller, 65 Ill.2d 437 (1976)

- The defendants maintain, basically, that section 5(a) of the Workmen's Compensation Act provides them with immunity from an action for damages by an employee of an uninsured subcontractor when they are required to pay compensation benefits to that employee under section 1(a)(3) of the Act. The plaintiffs respond that section 5(a) was intended to provide immunity only to the employer of that employee, and alternatively, if the defendants' interpretation of section 5(a) is correct, that interpretation is violative of their rights to due process and equal protection.
- It was logical and reasonable to impose the liability for compensation benefits upon the general contractor, because he was in a position to hire subcontractors who possessed the necessary insurance. To bestow immunity upon the general contractors would reward those employing subcontractors who have no workmen's compensation coverage but yet are bound by the provisions of the Workmen's Compensation Act; and it would penalize those general contractors who, mindful of the purpose and spirit of said Act, only employ insured subcontractors.
- Accordingly, we must interpret section 5(a) as conferring immunity upon employers only from common law or statutory actions for damages by their immediate employees. To hold otherwise in light of the present factual situations would be violative of the injured employee's right to due process and equal protection of the laws.

Exclusive Remedy
Lagerstrom v. Dupre, 185 Ill.App.3d 1020 (1989)

We determine that the trial court's summary judgment was properly entered in favor of defendant. The Workers' Compensation Act provides an exclusive remedy for plaintiff to attempt to recover damages from defendant for plaintiff's personal injuries following his return to work. The Act states in pertinent part that "[no] common law or statutory right to recover damages from the employer, his insurer or the agents or employees of any of them for injury sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." Ill. Rev. Stat. 1985, ch. 48, par. 138.5(a).

The Illinois Supreme Court has held that a physician who is retained by a workers' compensation insurance carrier to examine the fitness of a claimant is deemed an agent of the insurance carrier.

Furthermore, recovery under the Workers' Compensation Act is permitted for subsequent work-related injuries if these later injuries would not have occurred but for the initial work-related injuries.

Exclusive Remedy

Senesac v. Employer's Voc. Res., 324 Ill. App.3d 380 (2001)

- Here, the allegations of the complaint state that Robin's subsequent "emotional" injury occurred during rehabilitation and job placement and was distinct from the physical injury that prevented Robin from returning to his former employment. Robin, therefore, was not injured while taking a work-related risk to serve his employer, and he, in fact, was looking for a new job. In *Unger,* the plaintiff was injured while participating in an examination at his work, during working hours by a co-employee, and for the purpose of continuing his employment. Again, in the present case, Robin could not return to his former job and was looking for a new job when he was injured. Defendants' allegedly intentional conduct was not related to either Robin's return to work with Bade Appliance or his continued employment with Bade Appliance.

Zick v. Industrial Commission
93 Ill.2d 353 (1982)

- Claimant next argues that, even if her treating physicians were guilty of malpractice, respondent remains liable. She cites several cases which hold an employer is liable for new injuries, or for the aggravation of an injury, due to medical malpractice. (*E.g., Huntoon v. Pritchard* (1939), 371 Ill. 36; *Lincoln Park Coal & Brick Co. v. Industrial Com.* (1925), 317 Ill. 302.) Further, she points out that she was obligated to seek medical treatment, and it would be unfair to deny her recovery if her disability resulted from such treatment.
- Respondent submits that claimant advanced the malpractice issue to obscure the fact that she received treatment in response to a congenital condition. It further argues that the treatment was unreasonable and unnecessary, and that therefore the employer should not be held responsible for claimant's current disability.
- Claimant's malpractice argument must fail. As claimant concedes, many of the relevant cases involved malpractice committed by doctors who were provided by the employer, or to whom an employee was referred by the employer. Contrary to claimant's contention, this court, in awarding compensation, emphasized the fact that the doctor was selected by the employer.

WC Lien
Section 5(b) (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.**

WC LIEN -- Section 5(b)

- 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.**

WC Lien -- Section 5(b)

- 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.

WC Lien

Sanchez v. Rental Service, 2013 Il App (1st) 083304-U

- Don't mess around with the WC lien!
- This statutory right to reimbursement has been consistently upheld.
- An employer's reimbursement of workers' compensation payments from an employee's third party recovery is crucial to the WC scheme
- We conclude that Section 5(b) of the WCA is clear, unambiguous and susceptible to only one logical interpretation. The provision allows the employer to recoup the total amount of compensation that he paid to the employee
- Supreme Court has reiterated unwavering application of the statute
- If an employer has made WC payments the obligation of reimbursement exists regardless of the amount that the employee recovers and the employer is entitled to the entire recovery
- Obligation of reimbursement exists regardless of the amount that the employee recovers

WC Lien
Gallagher v. Lenart, 226 Ill.2d 208 (2007)

- The injured party was operating a truck for the employer when his truck collided with another truck that was driven by the truck driver, who was an employee of the truck driver's employer. The injured party filed a workers' compensation claim against his employer and the employer paid him such benefits.
- The parties then settled his claim and executed two documents, a settlement contract and a resignation agreement.
- The injured party and spouse then filed a personal injury claim against the truck driver and truck driver's employer. The truck driver and the truck driver's employer subsequently settled that lawsuit, and agreed to pay certain amounts to the injured party and spouse. The employer moved to intervene in the case to assert its workers' compensation lien against the settlement proceeds.
- The trial court found that the employer waived its lien, relying on Borrowman (2005); the appellate court disagreed.
- The state supreme court found that for waiver to occur, the settlement contract or the resignation agreement would have to have explicitly referenced the workers' compensation lien and neither document did so.

WC Lien
Cozzone v. Garda GL Great Lakes, 2016 IL App (1st) 151479

- **An employer's maximum liability in a third-party suit for contribution is limited to its liability to its employee under the Act**. Kotecki. When an employee settles a claim for workplace injuries with a third-party tortfeasor, the worker's settlement proceeds are dedicated to repaying workers' compensation benefits back to his employer...The employer protects its rights to repayment by asserting a lien on the worker's recovery in an amount equal to the amount of workers' compensation due the worker...Alternatively, **to avoid or satisfy its liability for contribution to a third party, the employer may waive its workers' compensation lien and agree to forego any reimbursement for workers' compensation payments** made to the employee. By waiving its lien, the employer satisfies any judgment that has been entered against it for contribution.
- There appears to be no sound reason to deviate from the analysis in Lafever merely because, as in this case, the employer's liability for contribution was determined by verdict after plaintiff settled with the underlying defendants and received an assignment of defendants' contribution claims against the employer; **the employer's maximum contribution liability is still limited to the amount of its workers' compensation obligation.** While the belated lien waiver creates an immediate financial detriment to the estate, it is permitted by the governing statutes and controlling case law. Accordingly, we affirm the order allowing Fellows to waive its workers' compensation lien.

WC Lien

Fremarek v. John Hancock, 272 Ill.App.3d 1067 (1995)

- Plaintiff's counsel filed motion to adjudicate WC lien.
- **Court inquired, "Under what authority can I do that?"** Counsel responded, "I believe the Court has discretion to adjudicate a lien especially when the lien is twice the amount, more than twice the amount of the distribution to the plaintiff. I believe that liens cannot exceed a third of the settlement that is going to be available to the plaintiff." The court summarily reduced the lien to $ 1,000.00 and entered an order to that effect.
- WC lien holder LM cashed the $1000 check
- WC lien holder LM moved to vacate adjudication. The court then granted LM's cross motion to adjudicate and reduced the lien, in accordance the statutory guidelines set forth in Section 5(b) of the WC Act to $ 9,425.75.
- On appeal, we are asked to consider 1) whether the circuit court correctly ruled that Liberty Mutual's negotiation of the check under these circumstances does not constitute an accord and satisfaction, and 2) **whether the circuit court erred in denying Liberty Mutual's motion for sanctions**. We answer each question in the affirmative.

WC Lien
Zuber v. Illinois Power, 135 Ill. 2d 407 (1990)

- **The reimbursement in the second paragraph of section 5(b) is not limited to amounts accrued by the time of judgment or settlement**, but rather includes as well the future compensation payments the employer is relieved from making by reason of the third-party recovery. An employer benefits from the third-party recovery both when it is repaid workers' compensation benefits already paid to the plaintiff and when it is relieved of its obligation to make compensation payments in the future. It is appropriate to impose fees and costs in relation to both benefits, and clearly section 5(b) was intended to achieve that end.
- Under the approach adopted by the appellate court here, the duration of the employer's weekly payments of fees and costs will correspond to the period during which the plaintiff would have received compensation benefits but for the third-party recovery. In this way, then, the employer will pay for the benefit it receives from the third-party recovery as that benefit accrues. It is apparent that this approach eliminates the risk that the employer will be required to pay a fee on a benefit it never realizes, should the compensation award terminate early.

WC Lien
Bayer v. Panduit, 2015 IL App (1st) 132252

- Plaintiff filed a motion for attorney fees and costs against his employer, Area, under the Workers' Compensation Act, citing section 5(b) of the Workers' Compensation Act and the holding in Zuber v. Illinois Power Co.,135 Ill. 2d 407 (1990), **requesting the court to enter an order compelling Area to pay attorney fees in an amount representing 25% of future workers' compensation benefits that had been suspended by statute** as a result of the underlying settlements and verdict in the negligence action ($64 million?)
- **Circuit Court granted Plaintiff's motion as to attorney fees relating to future workers' compensation payments**, requiring employer to pay 25% attorney fees to Plaintiff's counsel "for future medical bills, lost wages, long term care, and any other compensation and benefit compensable under the Illinois Worker's Compensation Act...no double recovery of attorney's fees. Recovery shall go to assist Plaintiff in the 1/3 payment of attorney's fees."
- **Reversed by Appellate Court as to "suspended future medical payments."**

Bayer v. Panduit
2015 IL App (1st) 132252

- **Whether the circuit court erred in granting Plaintiff's motion for attorney fees against his employer in the workers' compensation claim**
- On appeal, employer does not dispute the payment of attorney fees for Plaintiff's permanent total disability benefits, but does dispute the payment of attorney fees "for suspended medical bills, long-term care, or other compensable benefits." Employer contends that neither the Workers' Compensation Act nor Zuber supports the notion that an injured employee is entitled to recovery of attorney fees for "suspended future medical payments"
- **Based on the plain language of section 5(b), we find that the WC Act does not require an employer to pay attorney fees for suspended future medical payments**. Under section 5(b), the pool of money from which an employer has a right to reimbursement is "the amount of compensation paid or to be paid by him to such employee...including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act."

Bayer v. Panduit
2015 IL App (1st) 132252

- **Section 8(a) of the WCA requires the payment of medical services to be made "to the provider on behalf of the employee," rather than directly to the employee**
- Thus, because section 5(b) provides that an employer shall pay 25% attorney fees to the employee's attorney "out of any reimbursement received by the employer pursuant to this Section" and "the proceeds out of which the employer is reimbursed," we find that, **construing both sections 5(b) and 8(a) together, the plain language of the Act does not require the employer to pay attorney fees on "suspended future medical expenses"**
- Zuber merely expressed the holding that section 5(b) allows for the assessment of fees and costs for both *past* and *future* compensation payments, but makes no mention of whether those "future compensation payments" included "suspended future medical expenses"

Bayer v. Panduit
2016 IL 119553

- Opinion Filed September 22, 2016.
- **Reverses Appellate Ct. unanimously**
- Where, as here, an employer's obligation to continue payments for future expenses compensable under the Act has been suspended because the recovery from a third party exceeds the amount the employer owes, the employer will cease making actual payments to the injured worker
- **For purposes of determining an employer's obligation to pay the statutory 25% attorney fees, however, the language and purpose of section 5(b) of the Act require that these circumstances be treated the same**. We specifically so held in Zuber.
- If credit for future wage payments qualifies as "reimbursement" of compensation benefits for purposes of section 5(b), and Area Erectors has never disputed that it does, **there is no principled basis for holding that credit for future medical payments does not likewise qualify as "reimbursement" and therefore trigger the same obligation to pay the statutory attorney fees.**

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MARCH 9, 2017

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