Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees

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When an employee is injured in an accident which "arises out of and in the course of" his employment, the laws of all states provide a system of statutory compensation. The employee can recover from the employer, or from a statutory fund created by employer contributions, if the statutory conditions are met, despite the employer's lack of fault. In return for statutory benefits, the worker normally surrenders all rights and remedies which he would otherwise have against his employer as a result of the injury.\(^1\)

A compensable injury under workmen's compensation laws may have been caused by the negligence of someone other than the employer. Although the acts of the third person may have been the proximate cause of the injury, the injury could nevertheless have "arisen out of and in the course of employment."\(^2\)

All of the American compensation systems recognize that the worker may have a common law tort action against the third person whose negligence or wrongful conduct has been the proximate cause of his injuries.\(^3\)

In all but two states, once the employer has paid or become liable to pay compensation benefits to a worker who has been injured under circumstances giving rise to common law liability on the part of some third person, the employer has a right to share in any recovery by the worker against the tortfeasor. Reimbursement may be achieved either by assigning the worker's cause of action to the employer or by subrogating the employer to the worker's claim.\(^4\)

Furthermore, in most states, if the employer pursues the action against the third person, recovery is not limited to the amount of compensation paid or payable by him. The employer or insurer can normally recover the third party's full liability to the employee; any amount received in excess of the

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\(^*\) This article was suggested in part by a study made by the author for the New York State Law Revision Commission, as yet unconsidered by the Commission and unpublished. The views expressed herein are not in any sense to be taken as indicating the views or determinations of the Law Revision Commission.

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1. See N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965). An exception is sometimes made for the employer subject to the act who fails to comply with an obligation to insure. The worker often has the alternative of a common law action without the defenses of contributory negligence, fellow servant doctrine and an assumption of risk.


3. In most states this is recognized by the compensation statute itself; in Ohio and West Virginia it is a judicial gloss on the compensation acts. See infra notes 42, 48.

4. The words "employer" and "insurer" are used interchangeably in this study. In some states an employer may join the state insurance fund, may insure with a private carrier, or may self insure. Some states permit only one method of insurance, others permit two of the three varieties. Since the employer may or may not be "the insurer" in fact, I have given the two words the same meaning.
benefits plus reasonable costs of recovery is payable to the worker or his representatives.\(^5\)

When the employee pursues his common law right of action in states such as New York, he must bear the total expense of attorney's fees. These fees are a prior lien on the third party recovery, and the insurer or employer has a secondary lien for his statutory compensation liability. Many feel it is inequitable for the employee to bear the total cost of attorney's fees, since the employee's action has obtained a recovery for the insurer. This question is the focus of this article.

In analyzing the wisdom and necessity of allocating attorney's fees, the article is organized as follows: The first section discusses the theory of workmen's compensation as a system of social insurance, especially as related to third party actions. The second section details the mechanics of subrogation in the various jurisdictions in order to gain a background for the narrower question of apportionment of attorney's fees. The third section describes the statutory provisions dealing with attorney's fees. The state provisions dealing with apportionment of attorney's fees or reduction of the insurer's lien are functionally analyzed, and the New York procedure is detailed. The final portion of the article presents a discussion and an analysis of the apportionment question, leading to a recommendation for modifying New York law.

**Third Party Actions and the Theory of Workmen's Compensation**

Workmen's compensation laws are the result of the movement to replace common law negligence remedies with a concept of industrial or enterprise liability under a form of compulsory insurance.\(^6\) The employee's common law right of action for negligence against his employer is traded for a statutory benefit system which theoretically provides faster, more certain benefits, and which dispenses with the necessity of having to prove fault. Further, common law defenses such as contributory negligence are irrelevant to the statutory scheme.

The concept of industrial liability seems to fit neatly into the problem of industrial injuries. Losses due to accidents can be readily deemed a cost of production of goods or distribution of services which should be paid by the enterprise or those who benefit from its operation. It is assumed that the costs of accidents initially borne by the enterprise will be passed on to the consumer in the form of higher prices. More important, perhaps, is the assumption that most injuries will not be attributable to fault on the part of the employer.\(^7\)

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7. This oft-asserted theory stems from the German social insurance system, but it is unclear whether it has had any real effect upon the development of workmen's compensation.
Why, then, should the employee's cause of action against a negligent third party remain? Professor McCoid lists three reasons for the retention of rights against third parties despite the general acceptance of the enterprise liability concept. First, it is arguable that the risk of accident through the intervention of a stranger to the employment relation is not a normal or inherent risk of employment. In theory, a certain incidence of injury or accidents appear to be typical or unavoidable, and subsequent expenses should be treated as one of the costs of production of goods and services to be assumed by the enterprise and those who benefit just as the cost and repair of machines or materials used is borne by the enterprise and the consumer. Although the insurer bears the cost of compensation liability initially, third party actions permit him to recoup his statutory outlay.

Second, tort theory as well as the concept of enterprise liability conclude that compensation should be provided at the least cost to society and that the enterprise is a better risk-distributor or bearer than the injured employee. Yet, the third person, responsible for the employee's injuries under common law negligence principles, may not necessarily be a poor risk bearer. Indeed, the third person may often be an enterprise. Thus, the third person may be a relatively good risk bearer or distributor as compared with the injured person. Even if the third person is also an employee, he may possess a greater ability to bear the risk since his earning capacity may not have been impaired.

A primary objective of both tort and workmen's compensation law should be to prevent accidents as well as to provide compensation for injuries. To impose some sort of liability on third persons may achieve some of the same desirable effects as the imposition of strict liability on enterprises which have the ability to prevent accidents. The possibility of encouraging even third persons who are individuals to take greater care should not be ignored.

The most persuasive argument in favor of retaining some opportunity for recovery against third persons, however, is more practical and obvious. Since compensation acts are designed to protect the worker and his family, this objective is furthered by the retention of any and all rights not directly inconsistent with the basic compensation scheme. The benefits provided by existing compensation acts are not expected to be full payment for all losses suffered.

law in the United States. Like many areas in American life, we have been much too busy with day-to-day practical problems to be overly concerned with theory. See Witte, The Theory of Workmen's Compensation, 20 Am. Lab. Leg. Rev. 411 (1930).

8. See McCoid, supra note 6, at 395-403.
9. Id. at 398-99.
10. See J. Boyd, The Law of Compensation for Injuries to Workmen 10 (1913); H. Sommers and A. Sommers, Workmen's Compensation 26 (1954). See also Witte, supra note 7. Professor Witte asserts that the employer, not the consumer or the industry as a whole, bears the burden of compensation in many cases. He argues that the better rationale is that the compensation law applies a means of sharing the burden between the employer and the employees with the "least social cost." See also W. Prosser, Torts 383 (2d ed. 1955).
11. See 2 F. Harper and F. James, supra note 6, at §§ 11.4(3), 12.4(3).
12. See McCoid, supra note 6, at 401.
Thus, no recovery is allowed for pain and suffering, and disfigurement and other injuries which do not affect earning capacity are generally not compensated.\textsuperscript{13} Most important, the bulk of compensation benefits are determined on the percentage of loss of earning capacity which the worker has suffered. “A compensation system, unlike tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others.”\textsuperscript{14} Thus, compensation acts provide only a percentage of the loss of earning capacity. Many statutes limit the amount that can be received in any week. Where disability is partial or temporary, the benefits are further restricted by stipulating a maximum number of weeks in which benefits may be paid. The amount of compensation to which an injured employee is entitled depends on the “benefit rate,” usually a percentage of weekly wages ranging in various states from 50-80 percent.\textsuperscript{16} This amount is normally limited in two ways. First, most states impose a maximum weekly payment. Second, a maximum total compensation is often imposed.\textsuperscript{16}

A study of compensation cases in Illinois, with a fairly liberal set of benefits, indicates that only twelve to fifty percent of actual wage loss is covered by compensation benefits.\textsuperscript{17} In the nation as a whole the estimate has been made that workers recover at best only one-third of the total economic loss to them resulting from industrial accidents.\textsuperscript{18} Survivor’s benefits are even less successful in loss replacement. Estimates of the percentage of loss replaced by death benefits range from as little as twelve percent to a high of 70 percent, while New York replaces only slightly more than one-third of the loss resulting from a worker’s death.\textsuperscript{19} Although medical benefits are not limited in New York, funeral expenses are limited to 400 dollars.\textsuperscript{20}

A brief sketch of New York’s statutory benefits will illustrate this point. Most injuries cause “temporary and total” incapacity, that is, complete inability to perform any work for a relatively short period of time. This disability must last a minimum of seven days, and no benefits are allowed for the first seven days of disability unless the disability extends beyond fourteen days.\textsuperscript{21}

New York provides a recovery of two-thirds of the average weekly wage,
but limits benefits to 85 dollars a week.\textsuperscript{22} Thus, an employee who earns an average weekly wage of 150 dollars recovers only 56 percent of that amount due to the weekly ceiling. Although one-fourth of compensation acts provide for a supplementary allowance for workers with dependents, New York law does not.\textsuperscript{23}

A small percentage of injuries result in “permanent and total” disability, that is, disability resulting in a complete loss of wage earning capacity for life. The benefits, rates and weekly maximums are generally the same as those set for temporary and total disability.\textsuperscript{24} Recent amendments in New York, however, limit benefits to 70 dollars a week.\textsuperscript{25} A further difference exists in the duration of payments. Approximately two-thirds of the jurisdictions pay benefits for the duration of disability, while the remainder limit the length of the compensable period.\textsuperscript{26} New York provides that benefits be paid for the duration of the disability.\textsuperscript{27}

“Permanent and partial” disability benefits are paid when an employee suffers a lifelong functional or anatomical loss which does not result in total loss of earning capacity. These compensable injuries fall into two general categories: schedule or non-schedule. Scheduled disabilities result from the loss of a member of the body, such as an arm or leg. The schedule provides for a stated number of weeks of compensation for a given injury without proof of loss of earning capacity. The range of scheduled benefits varies greatly among various jurisdictions, and little consistency exists.\textsuperscript{28} In New York, the schedule provides, for instance, for 312 weeks of compensation for the loss of an arm. Again, benefits are two-thirds of the average weekly wage and a weekly maximum of 70 dollars is imposed.\textsuperscript{29} Non-scheduled injuries are compensated at two-thirds of the difference between the average weekly wage before injury and the employee’s wage earning capacity thereafter.\textsuperscript{30}

The above sketch demonstrates that not only do benefits represent only a fraction of the actual loss of earning capacity, but they are hardly adequate under any standard. Furthermore, loss of earning capacity is only one of the elements of damage which would be compensable under a common law negligence action.

To make such benefits the worker’s sole remedy when another responsi-
ble party may be available to bear some of the burden would defeat the objec-
tive of protecting the worker and his family against destitution and want. Indeed, to deny the remedy may go further and increase the burden upon the public as a whole where the compensation benefits are in fact inadequate to care for the worker and his family. In this situation, the employee and his family might become dependent upon public assistance.

Thus, the practicalities of workmen's compensation statutes call for the retention of common law rights against negligent third parties. As the law of every state attests, the limitation of statutory benefits calls for third party actions despite objections stemming from enterprise theories.

More important for purposes of this study, the above catalog of benefits demonstrates that the cost of industrial injuries is shared by the employee and industry. The employee absorbs a substantial portion of his loss. This sharing of the burden, although rarely referred to, is as old as workmen's compensation laws in the United States. It is sometimes justified as being consistent with the Puritan Ethic: the statutory benefits should encourage employees to go back to work and thereby discourage malingering. Without challenging this concept, it should be clear that it does not explain the limitations on "permanent and total" disability, or even "permanent and partial" disability. Schedule losses are limited to a maximum number of weeks despite the great possibility that the worker's earning capacity may have been reduced for life. A reply would no doubt concern costs and the burden on industry and the fear of the states that generous benefits will place them in a disadvantaged competitive position.

Although benefits may be justifiably restricted, it is important to note, again, that these limitations argue for third party actions, and, indeed, encourage workers to pursue their common law remedy. Although the cost of industrial accidents is borne by the employee and the employer, they do not share in the expenses of a third party action. If the employee sues, he pays the entire cost of attorney's fees and, indeed, the employer recoups his statutory expenses from the recovery ahead of the employee.

THE MECHANICS OF THIRD PARTY ACTIONS: AN OVERVIEW

In most jurisdictions the employee may sue under the common law and also pursue his compensation claim, subject to the condition that he may not retain both recoveries. Normally, the employee's right to sue will be assigned to the insurer if the employee fails to sue within a specific period of time. Thus, most states have decided that the common law action against the third party is not an inconsistent remedy.

In some states, for example, Massachusetts and Maryland, the acceptance of compensation gives the insurer a prior right to sue. If an employee in Mas-

31. See Larson, § 73, at 190.
sachusetts claims or receives compensation within one year of the injury, and the insurer does not begin a third party action within fifteen months after the injury, the employee may sue. Therefore, in the event that the employer does not bring an action, the employee may in fact bring an action at law and file for workmen's compensation claims. However, an initial action at law forecloses a claim under the workmen's compensation act. The act, then, encourages the employee to seek statutory benefits under the workmen's compensation act first. The insurer, on the other hand, has a great incentive to pursue his assigned cause of action against the third party. The insurer has the initial right to bring the action, and, if he does, only four-fifths of any excess is paid to the employee. On the other hand, if the employee brings the action he retains the entire excess. Thus, as in New York, the insurer is encouraged to bring an action and settle for more than the amount of its lien since it may keep a portion of the excess.

In a small number of states, however, an employee is required to elect whether he will pursue his negligence claim or request statutory benefits. Normally, the election doctrine works both ways: recourse to either avenue of relief bars recourse to the other. In Texas, although a third party action bars a compensation claim, a prior compensation claim will not necessarily bar a later third party suit. If compensation is claimed under workmen's compensation, then the insurer may bring an action against a third party. There is no provision for the cause of action to return to the employee after a certain amount of time. The right of the employee to sue, however, has apparently been read into the act by the courts. On the other hand, when the employee first starts an action at law, he forecloses any right to bring a claim under workmen's compensation.

A number of states require an election, providing that an election to take compensation assigns the cause of action to the insurer. Harshness is reduced by permitting the employee to recover from the insurer any amount by which his third party recovery is less than the statutory benefits.

33. The statute is designed to protect the insurer's interest if the employee should choose to seek statutory compensation. Furlong v. Cronan, 305 Mass. 464, 26 N.E.2d 382 (1940). See also, Reidy v. Old Colony Gas Co., 315 Mass. 631, 53 N.E.2d 707 (1944). This kind of provision raises all the typical common law questions which arise whenever an election of remedies rule is applied, such as, what indeed constitutes an election, who may make an election, the effect of discontinuing an action by an employee, and so on. Mass. Gen. Laws Ann. ch. 152, § 15 (1958), annot. 3-5, pp. 448-51.

36. Hart v. Traders and General Ins. Co., 185 S.W.2d 605 (Tex. Civ. App. 1945), aff'd., 144 Tex. 146, 189 S.W.2d 493 (1945). Oddly, however, the employer's right of recovery against the third party is limited to damages in excess of the workmen's compensation benefits received by the employee. Dallas Ry. and Terminal Co. v. Hendrix, 261 S.W.2d 610 (Tex. Civ. App. 1953); Hartford Accident and Indem. Co. v. Weeks Drug Store, 161 S.W.2d 153 (Tex. Civ. App. 1942). This means that the third party does not pay the total amount of damages stemming from his negligence.

The risks involved in the application of strict election doctrines is out of place in modern social welfare legislation, and the doctrine has been vigorously criticized. There is no danger of double recovery because the employer or insurer is reimbursed out of the proceeds of the third party recovery. Furthermore, the employee cannot be said to be asserting two inconsistent rights, alleging contrary facts, or seeking inconsistent remedies.

With the exception of the few “election of remedy” states, then, the injured employee may generally file his compensation claim and also pursue his common law tort claim. The employer is generally given the right to share in the worker’s cause of action against the third person. Most states permit a lien on the proceeds of the third party action or actually assign the employee’s cause of action to the employer. Most states provide that the employer shall have a lien on any recovery which the worker may obtain in the amount of the compensation benefits paid to or for the worker.

Three objectives are thought to be achieved by a statutory subrogation procedure. First, there is an oft-expressed feeling that the employee should not retain both damages and compensation for the same injury. Such an approach necessarily rejects the analogy of benefits to payments under accident insurance policies. This analogy is employed, however, by the few states which permit the retention of benefits and full damages from the third party.

Second, the employer who has satisfied his statutory obligation should be entitled to reimbursement from the negligent third party for the loss he has been obliged to suffer. This objective, however, is far from persuasive. Such indemnity, it should be noted, permits the enterprise to shift the accident cost to the third party. Ironically, many third party actions are brought against a third party responsible only under the doctrine of respondeat superior. Thus, two no-fault principles collide. Finally, the employer may have negligently contributed to the employee’s injury. Although courts are in sharp disagree-
ment, most have held that even a negligent employer may be entitled to reim-
bursement from the third party.46

Third parties have had little success in securing contribution from negli-
gent employers. Contribution is normally denied on the theory that the employer
cannot be jointly liable in tort because of the operation of the exclusive remedy
clause in workmen's compensation statutes.46 Third parties may recover over
against the employer, however, if the employer could be said to have breached
an independent duty owed to the third party.47

Third, it is often argued that the third party's liability should not be
affected simply because the injured employee is entitled to statutory benefits.
In other words, he is subject to a tort action despite the fact that the plaintiff
may also have recovered statutory benefits for the same injury.

In most states provisions for statutory subrogation seek to meet the objec-
tives raised above.46 The precise framework, however, varies widely from state
to state.49 The most common procedure permits the employee to recover full
damages from the third party, providing that the insurer shall have a lien on
the proceeds to the extent of his statutory liability. Many states provide for a
delayed right of action in the insurer should the employee not bring an action
during a prescribed period of time.60

A number of states give the cause of action to the insurer in the first
instance, although some61 give a delayed right of action to the employee should
the insurer fail to sue. In some states the insurer and employer may have joint
rights to sue, the statutes typically providing for joinder.62

494 (3d Dep't Mem. 1961), where the court rejected the third party's defense that the
employee, through his employer, was negligent. The court held that the allegations did not
constitute a defense if the third party was also negligent.

46. See Larson § 76.

47. See W. Malone and M. Plant, supra note 40, at 511-13; Larson, §§ 76.30-76.53.

48. Ohio and West Virginia do not provide for the protection of insurers by permit-
ting subrogation. Since subrogation is considered a statutory creation rather than an equit-
able device, the employee may recover and retain full damages from the third party. See
Fischer Constr. Co. v. Stroud, 175 Ohio St. 31, 191 N.E.2d 164 (1963); Mercer v. Ott, 78
W. Va. 629, 89 S.E. 952 (1916).

49. See generally Larson, § 74.

50. A relatively clear statement of this approach is found in the Longshoremen's and

§ 933. Compensation for injuries where third persons are liable.
(a) If on account of a disability or death for which compensation is payable
under this chapter the person entitled to such compensation determines that some
person other than the employer or a person or persons in his employ is liable in
damages, he need not elect whether to receive such compensation or to recover
damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order
filed by the deputy commissioner shall operate as an assignment to the employer
of all right of the person entitled to compensation to recover damages against
such third person unless such person shall commence an action against such third
person within six months after such award.


51. In Michigan, for instance, the employee's cause of action is assigned unconditionally

Commonly, one of the parties is given the right to sue, with the condition that failure to bring an action transfers the cause of action to the other. In New York, for instance, the employee must sue within six months after the awarding of compensation, or at most within one year from the date the action accrues. Failure to sue operates as an assignment of the action to the insurer. In Illinois the right to sue is transferred to the employer three months before the expiration of the statute of limitations. A similar provision exists in Michigan, except that the employee may sue even after the one-year period has expired if the insurer has not yet begun an action.

In New York various protections are provided so that the employee is warned that his cause of action might be statutorily assigned to the insurer. The failure to commence an action within the appropriate time is not an assignment unless the carrier has notified the claimant by personal service or registered mail, at least 30 days prior to the expiration of the time limited for the commencement of such action, that the failure to commence action operates as an assignment of the cause of action. If the carrier fails to send a notice, the time for the commencement of an action is extended until 30 days after the carrier does notify the claimant in writing.

Although the assignment occurs after an employee has “taken compensation under this chapter,” payment of compensation without an award affects the assignment. In American Mutual Liability Ins. Co. v. Niagara Mohawk Power Corp., claimant had not yet received death benefits, but notified the carrier that she intended to proceed under the compensation act rather than against a third party. The court held that this amounted to an assignment of 

In Wisconsin the insurer can recover the full amount of the employee's damages, for the benefit of the employee and himself, but only if the employee has received notice of the suit and an opportunity to join in the action. California, on the other hand, will permit the insurer to recover total damages only if the employee actually joins in the action.

53. N.Y. Workmen's Comp. Law § 29(1)(a) (McKinney 1965).
55. Harrison v. Ford Motor Co. 370 Mich. 683, 122 N.E.2d 680 (1963). See Ore. Rev. Stat. § 656.566 (1967). The paying agency may require the workman to exercise his right to sue the third party. Unless such election is made within 60 days from the receipt or service of such demand, the employee will be deemed to have assigned his cause of action to the paying agency. If the employee elects to pursue his common law action, he has 90 days to institute such action.
56. N.Y. Workmen's Comp. Law § 29(2) (McKinney 1965); see Bedsole v. Consolidated Edison Co. of N.Y., Inc., 203 Misc. 194, 118 N.Y.S.2d 192 (Sup. Ct. 1952). In one case the employer was not insured, did not pay any compensation, and was insolvent. The claimant commenced his third party suit after the six month limitation period had run. This could have meant that his rights were assigned to the employer if the statute had been construed literally, since the operative fact is the award of compensation rather than its payment. The court held that the legislature could not have intended such a harsh and illogical result. It held that automatic assignment does not take place where there has been no payment of compensation. The suit was held timely, since it was within the overall three year statute of personal injury actions. See Juba v. General Builders Supply Corp., 7 N.Y.2d 48, 165 N.E.2d 328, 194 N.Y.S.2d 303 (1959).
58. 51 Misc. 2d 940, 274 N.Y.S.2d 198 (Sup. Ct. 1966).
the cause of action, even though the statute referred to a situation where a dependent had "taken compensation."

In Massachusetts, unlike New York, the subrogee receives the first opportunity to sue. If the employee has claimed or received compensation within six months of the injury, and if the insurer fails to institute the third party proceeding within nine months after the injury, the employee may begin the action.60

A similar result is achieved in states which provide for an election of remedies. In Colorado, for instance, the "awarding of compensation" operates as an assignment of the cause of action to the insurer.60 The insurer may sue, but, oddly, may only recover the amount of its statutory liability. Thus, the third party's liability is reduced if the employee elects to take compensation rather than sue. In Minnesota, an election to take compensation also serves to assign the cause of action to the insurer. The insurer, however, can recover the employee's total damages, the excess going to the employee.61

Although the mechanics differ widely, the ultimate result of following the statutory procedure is approximately the same when the tort recovery exceeds statutory benefits: the insurer receives the amount of benefits it has paid with most or all of the excess going to the employee. If the tort recovery does not exceed the statutory benefits, most states permit the employee to recover a deficiency judgment. Strict election states, of course, would not permit deficiency judgments.

Questions have arisen regarding the elements of the employer's lien and the part of the recovery to which it applies. In regard to the size of the lien, the compensation expenditure for which the insurer is entitled to reimbursement includes not only wage benefits but hospital and medical payments as well as funeral expenses.62 The lien normally includes only sums the employer has been obliged to pay prior to the third party recovery. Normally, the excess received by the employee becomes a credit against future liability. That is, the insurer is relieved of his obligation to pay further compensation up to the amount of the balance, or excess, of the recovery.63 A variation of this procedure is to determine the present value of estimated future compensation benefits and permit the insurer to retain this sum in trust. As compensation thereafter becomes due, payment is made from this trust fund. Any remainder which may exist after compensation liability ceases is then paid to the injured employee or his representatives.64

62. See Larson § 74.34.
Usually, attorney's fees and expenses are deducted from the gross recovery prior to the employer's lien and the employee's excess recovery. If the sum recovered by the employee is more than enough to pay attorney's fees and reimburse the carrier, the carrier is reimbursed in full, and is not required to share the legal expenses involved in obtaining the recovery. In other words, the legal expenses diminish the overall sum to which the insurer's claim attaches.

Granting the insurer a right to recover based on its compensation obligation suggests that the lien should not attach to those items of recovery which are not recoverable under workmen's compensation acts, such as pain and suffering. The question does not often arise since the amount recovered against the third party for loss of earnings and medical expenses usually exceeds the amount of the insurer's obligation for these items. As stated above, benefits are usually based on a percentage of loss and often are limited by statutory maximums. Moreover, jury verdicts rarely segregate damages for items such as pain and suffering. In any event, it is common to provide that the employer's claim of priority attaches to the entire judgment. One alternative might be to require juries to itemize damages in these situations.

Thus far, the discussion has assumed the normal pattern by which the subrogee receives his total lien before the employee is entitled to any excess. A number of states have begun to vary this formula. In Massachusetts, for example, the insurer-plaintiff may retain one-fifth of the excess, presumably to encourage the insurer to seek more than the amount necessary to satisfy his compensation obligation. In New York, the employee is granted the first opportunity to sue, and he may retain the entire excess. Should the cause of action pass to the insurer, however, the insurer may retain one-third of the excess. Again, as in Massachusetts, this is probably designed to encourage the insurer to press for more than the amount of his lien, rather than making it tempting to settle for no more than out-of-pocket costs. It is important to note, that the statutory scheme in New York encourages the employee to press his negligence claim, since, should the insurer receive the right to sue, the employee would lose one-third of the excess above the amount of the lien. True, the employee would be encouraged to bring suit simply because he can best represent and protect his interests; the insurer is primarily motivated to recoup

65. See Larson § 74.32.
68. N.Y. Workmen's Comp. Law § 29 (McKinney 1965).
69. In death cases, this % is distributed, not as unbequeathed assets under the Decedent Estate Law, but, rather, as compensation according to the ratios for dependents in the compensation law. See Skakandy v. Wreckers and Excavators, Inc., 298 N.Y. 886, 84 N.E.2d 805 (1949).
its workmen's compensation liability. The loss of a substantial portion of the excess to the insurer, however, adds a powerful incentive to the employee's interest in prosecuting his claim. This incentive is relevant to the question of apportioning the employee-plaintiff's attorney's fees. We shall return to this matter at a later point.

More radical variations are made in many states, and details are provided in the next section. In brief, however, some states guarantee the employee a percentage of the recovery less expenses, unaffected by the insurer’s lien.70 There are three possible reasons for such a guarantee. First, many perceive an inequity in those cases in which nothing is left for the employee-plaintiff after the lien is subtracted. The cause of this alleged inequity, however, is unclear. The employee has at least received his statutory compensation. The insurer has been reimbursed out of the third party recovery, and the employee receives nothing for his efforts in bringing his tort action. We might sympathize with the employee, but nothing assures him a recovery in excess of statutory benefits. Alternatively, the guarantee could be thought of as a rough apportionment of attorney's fees. Normally, attorney's fees are a prior lien on the third party recovery and the lien applies to the remainder. In effect, then, the employee pays the attorney's fees, even though he may receive no damages,71 and the insurer recovers his lien without payment of attorney's fees. It is also possible that the one-third guarantee is thought to compensate the employee for items such as pain and suffering, which are not compensable under workmen's compensation statutes. Such an apportionment is arbitrary, of course, and recoveries even for items compensable under compensation statutes normally exceed compensation benefits.

If the purpose of the guarantee is to compensate the employee for at least a portion of his attorney's fees, less crude devices are available. Attorney's fees may exceed one-third of the recovery, and statutes could specifically provide for apportionment of fees. Indeed, as hereinafter detailed, a growing number of states do apportion attorney's fees, either based upon an equitable division by the trial court judge or upon a statutory formula.72 This development has surprisingly been overlooked in texts and law reviews. Indeed, a few states, such as Missouri and Florida, have made even more radical breaks with tradition. In these states the trial court is permitted to reduce the employer's lien as well as the employee's attorney's fees.

**Apportionment of Attorney's Fees and Reduction of Liens: Statutory Experimentation**

A detailed look at experiments in various states follows. No attempt was made to canvass the statutes of all states, but an investigation was made in all

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71. See Strachan Shipping Corp. v. Melvin, 327 F.2d 83, 86 (5th Cir. 1963) (Brown, J., dissenting).
heavily-industrialized states as well as those states which have shown a penchant for innovation and experimentation. The statutory description involves simple mathematical calculations, but such irritations are necessary for an understanding of the operational significance of the various statutory schemes.

**Apportioning Attorney’s Fees and Reducing the Insurer’s Lien**

Missouri and Florida provide for apportionment of attorney’s fees as well as equitable division of the insurer’s lien. In Missouri, if the employee sues, the employer pays “from his share of the recovery a proportionate share of the cost of the recovery, including a reasonable attorney’s fee.” After that, the balance is apportioned “in the same ratio that the amount due the employer bears to the total amount recovered, or the balance of the recovery may be divided between the employer and the employee or his dependents as they may agree.”

Thus, if an employee recovers $30,000, and the lien is for $15,000, the court would first subtract attorney’s fees and other expenses from the total recovery. Assuming fees and expenses of $10,000, the net recovery would be $20,000. The remainder exceeds the lien, but the court will apportion the net recovery 50-50, since the lien is one-half the total recovery. Thus, each will receive $10,000. One court has achieved the same result by reducing the lien, $15,000, by the ratio of the net recovery to the total recovery: since $20,000 is 2/3 of $30,000, the employer will recover only 2/3 of his lien, or $10,000. The result is thus the same under either approach.

Based upon limited case authority (most apportionments will not be reported) the Missouri courts seem to be apportioning only attorney’s fees, rather than dividing fees and reducing liens. In states that apportion fees, such as Maryland, for instance, the insurer pays that part of the fees which his lien bears to the recovery. Thus, the result will be exactly like the result in the Missouri example above which is based on an actual case. Whether Missouri courts actually reduce the lien as well as the employee’s attorneys fees is unclear.

The actual operation of Florida’s provision is also cloudy, but apportionment is left to the discretion of the trial judge rather than being set by a statutory formula.

Sub-section 3(a) of the Florida statute states that if the employee files suit the carrier shall file a notice of lien which shall be recorded and shall be a lien upon any judgment recovered to the extent that the court may determine to be their pro rata share for compensation benefits paid or to be paid under the provisions of this law, based upon such equitable distribution of the amount

74. This apportionment only applies when the employee sues. See Mo. Ann. Stat. 287.150(1) (1965) which provides that the employer may get the entire lien if he sues. Maryland Cas. Co. v. Gen. Elec., 418 S.W.2d 115 (Mo. 1967).
75. See Knox v. Land Constr. Co., 345 S.W.2d 244 (Mo. 1961).
recovered as the court may determine, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney’s fees for plaintiff’s attorney, such pro ration of court costs and attorney’s fees to be made by the judge of the trial court upon application therefor and notice to the adverse party.

Sub-section 4(a) states that the injured employee or his dependents have one year after the cause of action accrues to bring an action. If they fail to, the insurance carrier may institute an action against a third party. The insurer may recover all amounts paid as compensation and medical benefits under the provisions of this law and also the present value of all future compensation benefits payable (to be reduced to its present value and to be retained as a trust fund from which future payments of compensation are to be made), together with all court costs, including attorney’s fees expended in the prosecution of such suit, to be pro rated as provided by sub-section (3) of this section. The remainder is to be paid to the employee.

Under the Florida statute, when the employee sues, the carrier is entitled to receive on its subrogation claim only its “pro rata share” based upon an equitable distribution. The scope and discretion of the individual judge is quite broad. Thus the failure to award anything to the insurance carrier in determining equitable distribution was not an abuse of discretion in view of amount of the judgment and the cost of expenses and attorney’s fees incurred by the employee. The discretionary power of the trial judge in making equitable distribution is not affected by the fact that damages were determined by a jury.

In one case a widow settled her wrongful death action for $40,000, but the trial judge determined that her “full compensable loss” was $79,000. He first deducted from the settlement $5,000 for loss of consortium together with attorney’s fees and costs. The court then determined that from the balance the carrier was entitled to that percentage of his lien which the balance bore to the total compensable loss. In other words, the court began with the settlement figure, $40,000, and from that figure subtracted attorney’s fees. The remainder represented 27 percent of plaintiff’s “compensable loss.” The carrier’s reimbursement was thus limited to 27 percent of its lien. Since the plaintiff only recovered 27 percent of her compensable loss, the carrier only received 27 percent of its claim.

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78. Id.
79. See Security Mut. Cas. Co. v. Grice, 172 So. 2d 834 (Fla. 1965). The words “pro rata” must be “construed in their broadest aspect and mathematical calculations cannot be applied to determine pro rata share.” See also Southern Farm Bureau Cas. Ins. Co. v. Bennett, 131 So. 2d 499 (Fla. 1961); Arex Indem. Co. v. Radin, 72 So. 2d 393 (Fla. 1954).
80. See U.S. Fidelity & Guar. Co. v. Harb, 170 So. 2d 54 (Fla. 1965). See also Luby Chev. Inc. v. Foster, 177 So. 2d 510 (Fla. 1965).
82. Hartford Acc. & Indem. Co. v. McNair, 152 So. 2d 805 (Fla. 1965).
83. When the employer sues, attorney’s fees are pro rated, but the employer may keep the full amount of its lien. See General Guar. Ins. Co. v. Moore, 143 So. 2d 541 (Fla. 1962).
In summary, then, the few reported Missouri cases show a reluctance to go beyond the apportionment of attorney’s fees despite broad statutory provisions. Florida courts have been less restrained, and, as the above example demonstrates, courts have apportioned the entire third party recovery.

Guaranteeing the Employee a Percentage of the Recovery

Four states guarantee the employee a flat percentage of the recovery after deduction of attorney’s fees: Wisconsin, Arkansas, Oregon, and Minnesota.

In Wisconsin, the employee may proceed under the statute and may also bring an action against the third party. Unlike the laws of other states, the act does not initially give the cause of action to one party. Either party may sue giving notice to the other, or they both may decide to sue at the same time. Each party has an equal voice in the prosecution of such claim, and disputes are passed upon by the court before whom the case is pending, and if no action is pending, then by a court of record or the industrial commission. After deducting the reasonable costs of collection, which include attorney’s fees, one-third of the remainder of the recovery is paid to the injured employee. Out of the balance, the insurance carrier is reimbursed for all payments made by it or which it may be obligated to pay in the future. Any excess is paid to the employee.

If both the employee and the employer join in pressing the claim and are represented by counsel, the attorney’s fees allowed as a part of the cost of collection are, unless otherwise agreed upon, divided between such attorneys as directed by the court or by the industrial commission.

Arkansas provides for a similar distribution. As in Wisconsin, reasonable costs of collection are deducted from the third party recovery first. One-third of the remainder belongs to the employee or his dependents in every case. The remainder is applied against the lien, and any excess belongs to the employee. As in Wisconsin, the employee is guaranteed one-third of the recovery, excluding expenses and attorney’s fees, no matter who sues. Minnesota follows the same formula.

In Oregon, under the newest American workmen’s compensation statute, the employee is guaranteed one-quarter of the third party recovery excluding expenses and attorney’s fees. If the employee sues he must notify the carrier. The paying agency has a lien on the recovery but the total proceeds are distributed as follows: The cost and attorney’s fees incurred by the employee are first subtracted, and then the employee receives at least 25 percent of the balance of such recovery. The paying agency is paid and retains that part of

85. In referring to the case in which the employee and the insurer both sue, the act refers to “the attorney’s fees allowed as a part of the costs of collection . . . .” The cost of collection, therefore, includes attorney’s fees.
the balance which compensates it for its expenditures. The balance of the recovery is then paid to the employee.

Unlike the other two states, however, the one-quarter is not guaranteed when the employer sues. Under section 656.591 the employer may recover the expenses incurred in making the recovery and also the amount expended for compensation and medical benefits. Thus, the employee is encouraged to sue, for otherwise he will not be guaranteed one-quarter of the recovery.\(^89\)

As stated earlier, the function of these provisions is not clear. Why should the insurer's lien be reduced by an arbitrary amount? Perhaps to encourage employees to sue. Yet, in two states, a guarantee exists even though the insurer brings the action. Perhaps, then, the guarantee is a disguised sharing of attorney's fees. Oregon's provision is consistent with this thought, since the guarantee exists only when the employee sues. Yet, in Wisconsin and Arkansas, the employee is guaranteed one-third even when he does not incur attorney's fees.

Another possibility is that it is simply thought equitable to guarantee the employee a portion of the damages a jury awards to him. Whoever brings the action, the measure of damages is still the same. Since a portion of those damages are based upon non-compensable items under compensation law, the guarantee perhaps makes a rough division. Alternatively, the guarantee may be intended to require the employer to share in the cost of securing the tort recovery.\(^90\)

Not only is the justification for a percentage guaranty unclear, but its role is also cloudy. There is no problem when the recovery is sufficiently large to cover attorney's fees, insurer's lien, and at least the employee's statutory share. The problem cases, of course, arise when the recovery is insufficient to protect all these interests. No figures exist to determine the frequency or magnitude of the problem, although the number of states with apportionment schemes could indicate that the problem is not insignificant.

When the tort recovery is insufficient, the guarantee operates to reduce the lien by the employee's prior right to take one-fourth or one-third of the net recovery. It is possible that attorney's fees could consume the entire recovery leaving nothing for the employee and insurer. Thus, the employee's guarantee is operative only when the recovery exceeds attorney's fees but is insufficient to pay the three statutory liens. In this case, the guarantee makes certain that the employee receives at least some of the recovery. In cases in which there is an excess, the statutory guarantee may enlarge the employee's recovery. Assume a recovery of $30,000, attorney's fees of $10,000, and a lien of $15,000. In New York, the employee would receive $5,000, the excess remaining after deduction of fees and insurer's lien. Using the same figures, an employee in Wisconsin would receive one-third of the net recovery \((1/3 \times (30,000-10,000))\), or

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89. Cf. Model Work. Comp. Act. § 43 (U.S. Dep't of Labor) which guarantees the employee one-third of the net proceeds, but only when the employee sues. The employer as plaintiff may recover his total lien plus one-fifth of the proceeds. The act combines, then, elements of the Wisconsin and New York approach.

90. Memorandum submitted to Minnesota legislature, House file #397.
$6666.66. Since there was some excess, however, it is hard to explain the role of the guarantee.

**Apportioning Attorney’s Fees**

A growing number of states make provision for the apportioning of attorney’s fees when the employee’s attorney secures a recovery for the insurer.\(^1\)

Although not all states were investigated, the nine states discussed below with the inclusion of New York and Ohio, include all the highly industrial states. Ohio, as mentioned before, has no subrogation mechanism, and New York does not provide for apportionment of attorney’s fees.\(^2\)

There exists considerable variation in approach and method of apportionment among the nine states which do provide for apportionment of fees. In three of the states investigated, California, Michigan and Kansas, apportionment is left to the trial court, without a specific statutory formula. The Michigan statute, for instance, provides that attorney’s fees “shall be apportioned by the court between the parties as their interests appear at the time of said recovery.”\(^3\)

The employee has one year to sue before the cause of action is automatically assigned to the employer. Like other states, costs are initially deducted, then the lien, and the employee receives the excess which becomes a credit against future compensation liability. The difference here is that attorney’s fees are apportioned, although the exact formula to be used is not spelled out.\(^4\)

Although no formula is expressly set forth in the statutes mentioned above, the results will probably not differ markedly from a second group of states which, as in Minnesota, expressly require the employer to bear that proportion of the reasonable attorney’s fees and costs, incurred in making collection from and enforcing liability against the party other than the employer which the amount claimed by the employer for


\(^2\) Utah has overruled precedent and held that the plaintiff in his third party action was entitled to deduct reasonable attorney’s fees from the carrier’s share of the recovery. See Worthen v. Shurtleff & Andrews, Inc., 46 P.2d 233 (Utah 1967).


\(^4\) The California act was amended in 1949 to provide for the fixing of reasonable attorney’s fees and litigation expenses by the court in any case. Cal. Labor Code Ann. § 3856(d) (West 1955). See Bosch v. Standard Oil Co., 193 Cal. App. 2d 426, 14 Cal. Rptr. 427 (1961). See also Spriggs, Inc. v. Industrial Accident Comm., 42 Cal. 2d 785, 269 P.2d 876 (1954); Record v. Indemnity Ins. Co., 103 Cal. App. 2d 434, 229 P.2d 851 (1951). Similarly, the employee has one year from the date of the injury to bring action under the Kansas provision. Kan. Gen. Stat. Ann. § 44-504 (Supp. 1967). “The Court shall fix attorney’s fees which shall be paid proportionately by the employer and the employee in amounts determined by the court.” U.S. Fiduciary & Guar. Co. v. Allied Mut. Cas. Co., 190 Kan. 383, 375 P.2d 619 (1962). The provision for fixing attorney’s fees is located in a paragraph dealing with a situation in which the cause of action is assigned to the employer. This gives the impression that attorney’s fees are apportioned only when the employer sues. It would seem, however, that this type of section as in other states would only apply when the claimant sues, or, perhaps, when either party sues.
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deduction from, or to be retained against, compensation payable bears
to the whole amount recovered from such other party.95

The approach taken by Pennsylvania96 and Maryland97 is similar. The em-
ployer in Pennsylvania is subrogated to the rights of the employee against the
third party to the extent of the compensation payable under the act; “reasonable
attorney's fees and other proper disbursements incurred in obtaining a recovery
or in effecting a compromise settlement shall be prorated between the employer
and employee. ... The employer shall pay that proportion of the attorney's
fees and other proper disbursements that the amount of compensation paid or
payable at the time of recovery or settlement bears to the total recovery or
settlement.” Any recovery in excess of the compensation paid by the employer
goes to the employee and is treated as an advance payment by the employer on
account of any future installments of compensation.98 Thus, the amount of the
pro rata share includes benefits paid, accrued, and to be paid in the future, i.e.,
the total amount of the compensation award, and not merely the amount to be
reimbursed.99

Note that the employer's share is not based simply on amounts paid to the
time of recovery, but also includes the future value of estimated future com-
pensation liability. The result is to make the employer's share larger, thus
making him liable for a larger share of the attorney's fees. After bearing his
share of the fees, however, he actually recovers only the amount actually paid
to the employee. The excess is paid to the employee, but it is treated as a
credit against future compensation installments. The employee, then, receives
the present value of his future benefits at no actual loss to the insurer (except
for the loss of interest which might have been earned in the future). Since the
excess received by the employee actually reduces the employer's liability, it
seems equitable for the employer to bear part of the cost of securing this benefit.

Maryland’s100 approach is similar, although the act is less clear. The insurer
has the first opportunity to sue the third party. If the employer or insurer does
not within two months after the granting of the award start a proceeding against
the third party, the injured employee may sue. Like the law in other states, at-
torney's fees are subtracted first, and then the insurer subtracts his lien from

See also Note, Workmen's Compensation Subrogation Suits: Allocation of Counsel Fees,
28 U. Pitt. L. Rev. 503 (1967). Thus, if the entire liability is $15,000 and there is a third
person recovery of $30,000 and a contingent fee of $5,000: the ratio of compensation
to the total recovery of $30,000 is 1:2 ($15,000/$30,000). The attorney's fees are divided in
half, and $5,000 is then subtracted from the lien of $15,000, leaving the employer with
$10,000. Another way to compute this is to divide the recovery in half giving the employer
and claimant each $15,000. Half of the attorney's fees are subtracted from each amount
leaving claimant and employer each with $10,000.
the total recovery. However, court costs and attorney fees are paid by the employee and the employer “in the proportion that the amount received by each shall bear to the whole amount paid in settlement of any claim or satisfaction of any judgment obtained in the case.” Since the employer may sue the third party first, an incentive to do so is created since the employer may then retain the entire amount of his lien.

In three states, Indiana, New Jersey, and Illinois, specific percentages of attorney’s fees are allocable to the employer. In Indiana, for instance, the employer must pay a prorated share of all costs and necessary expenses incurred in the third party action as well as a percentage of the attorney’s fees incurred. Specifically, the employer pays one-quarter if a settlement is reached, or one-third if the recovery is secured after a trial. Although legal fees would be greater in the latter situation, the reason for the varying percentage is unclear. Moreover, it is unclear if the employer pays a percentage of the reasonable attorney’s fees, or a percentage of his reimbursement. The statutory language indicates the latter, although the act obliges the insurer to pay this amount to the employee’s attorney. Perhaps it is assumed that the attorney’s fees will always exceed a percentage of the insurer’s reimbursement. The result then is similar to that reached in those states which guarantee the employee a percentage of the net recovery. Here, though, the percentage is based on the amount payable to the employer, rather than the normally larger net recovery.

The aforementioned interpretation of Indiana’s scheme is strengthened by similar interpretations of statutes in New Jersey and Illinois. In New Jersey, for instance, the plaintiff-employee’s attorney receives one-third of the employer’s recovery. Thus, in a case in which the tort action resulted in a $60,000 verdict and attorney’s fees were $10,000, or 1/6 of the recovery, and the employer was held entitled to reimbursement in the amount of $17,304.50 for its compensation liability, the employer could be assessed up to 1/3 of the $17,304.50 for attorney’s fees. The section is read as making the employer liable for the employer’s proportionate share of the employee’s attorney’s fees, but not in excess of 1/3 of the proportion of the recovery which inures to the employer. This relates to the total compensation liability of the employer, even though much of the obligation remains unfilled at the time of the third party recovery. Apparently, the court can assess up to one-third of the lien to the employer, thus reducing the employee’s liability to his attorney.

104. The assessment was not required to be limited to 1/6 merely because the employee paid his attorney only 1/6 of the amount of the recovery. Dante v. William T. Gotelli, Inc., 17 N.J. 254, 111 A.2d 267 (1955); Caputo v. Best Foods, 17 N.J. 259, 111 A.2d 261 (1955).
A similar result is reached under Illinois' statute. Out of any reimbursement received by the employer, he must pay his pro rata share of all costs and reasonably necessary expenses in connection with such third party claim. Where the services of an attorney of the employee has resulted in or substantially contributed to the procurement of the settlement or proceeds, in the absence of other agreements, the employer must pay such attorney 25 percent of the gross amount of such reimbursement. Unlike New Jersey where a maximum of one-third is fixed the actual apportionment to be made by the court, the Illinois act flatly states that the employer shall pay one-fourth of the amount of its reimbursement to the employee's attorney. Again, although it is not clear, it is suspected this is not an amount in addition to his attorney's fees, but a way of reducing the employee's liability to his attorney. This arbitrary figure may be designed to induce private agreements. Again, if the employer sues, he deducts all his attorney's fees, keeps his lien and pays the excess to the employee.

In summary, then, most of these states apportion attorney's fees on a prorated basis, normally using the ratio of lien to the recovery minus expenses. A number require the employer to pay a flat percentage out of the lien he receives to the client's attorney. The prorated share would seem to be fair and a more equitable device than a flat sum. A combination of these devices is apparently used in New Jersey, which requires the employer to pay a proportionate share out of his reimbursements up to a certain percentage of his reimbursement. Impliedly, the court will apportion, but an upper limit is placed on the employer's share.

**No Apportioning of Attorney's Fees: New York**

The leading state having no provision for apportionment of attorney's fees is New York. Since New York is the focus of this study, New York practice will be set out in some detail.

The injured employee and his dependents need not elect whether to take compensation and medical benefits under the act or pursue the remedy against a third person, but may take compensation and medical benefits and at the same time sue the negligent third party. The right in section 29 is limited to any

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108. If the employee does not bring a proceeding against such third party at any time prior to three months before such action would be barred at law, the employer may then sue in his name or the name of the employee. See Reno v. Md. Cas. Co., 27 Ill. 2d 245, 188 N.E.2d 657 (1963).
109. In Massachusetts, there is also no provision for apportionment of attorney's fees, although the act states that the employee and the insurer may agree to share the attorney's fees, with the provision that any agreement will be invalid if the employee is required to bear a greater apportionment of such expenses than the proportion of that part of the excess received by him bears to the total sum recovered by him and the insurer, exclusive of interest and cost. Mass. Gen. Laws Ann. ch. 152, § 15 (1958).
110. Since 1937 the employee has no longer been obligated to make a binding election, and has been entitled under the act to collect compensation and still maintain an action at
third party who is not "in the same employ." The employee may sue any time prior to taking compensation and medical benefits or within six months after the awarding of compensation or nine months after the enactment of a law or laws creating, establishing, or affording a new or additional remedy or remedies. In any event, the third party action must be begun before the expiration of one year from the date such action accrues. If the employee pursues his action against the third party, the state insurance fund or other carrier has a lien on the proceeds of any recovery, whether by judgment or settlement, after the deduction of reasonable necessary expenditures including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded or estimated and the expenses for medical treatment. Such recovery shall be deemed for the benefit of such funds or carrier. Finally, if such action is begun, notice shall be given within 30 days thereafter to the chairman, the employer, and the insurance carrier upon a form described by the chairman.

Under subsection 2 of section 29 if the employee or his dependents have taken compensation under the chapter, but have failed to commence an action within the time limited by subdivision 1, "such failure shall operate as an assignment of such action against such other to the state for the benefit of the state's insurance fund..." or other carrier. If the insurer then pursues the action, it is permitted to take from a recovery the total amount of compensation awarded to the employee along with medical expenses, together with reasonable and necessary expenses incurred in effecting the recovery. Thus, the carrier is assured full reimbursement before the employee can have the advantage of any excess beyond the statutory limits. A similar approach is followed under section 227 of the Workman's Compensation Law dealing with temporary disability which does not arise out of and in the course of employment.

Thus, the employer receives the full amount of its lien without proportionately sharing the cost of attorney's fees. Subsection 1 of section 29 states that the carrier shall have a lien on the "proceeds of any recovery... after the

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law, the recovery being subject to the carrier's lien for the amounts of compensation paid. N.Y. WORKMEN'S COMP. LAW § 29 (McKinney 1965).


112. See Ocean Steamship Co. v. Lumberman's Mut. Cas. of Ill., 125 F.2d 925 (2d Cir. 1942).

113. One court has said that the primary purpose of the sections dealing with subrogation is to prevent the double recovery to the detriment of one who has already made payment. Amo v. Empsall-Clark Co., 9 A.D.2d 852, 853, 193 N.Y.S.2d 154, 157 (3d Dep't 1959).

114. See, e.g., Great American Ins. Co. v. Government Employees Ins. Co., 30 A.D.2d 743, 291 N.Y.S.2d 291 (3d Dep't Mem. 1968). The court held that outstanding doctors' bills could not be considered "necessary expenditures... incurred in effecting such recovery." Only those expenses which are "legal in nature" or "attributable to legal procedures are deductible."
deduction of reasonable and necessary expenditures, including attorney's fees, included in effecting such recovery, to the extent of the total amount of compensation awarded... and the expenses for medical treatment..." Thus, the employer has a lien on the proceeds only after the deduction of attorney's fees and only to the extent of the total amount of compensation paid. The carrier receives full reimbursement of all compensation paid without any deduction.\textsuperscript{115}

In no case, however, are attorney's fees apportioned between the employee and the insurer.\textsuperscript{116} Where the amount is insufficient for both items the lien suffers, but that is not because the lien is charged with the fee, but because the fee has priority.

If the insurer brings the action, only two-thirds of the excess recovery goes to the employee. Thus, the insurance carrier retains one-third of the excess. Although this appears to be a windfall, this is presumably provided to encourage the insurance company to do more than settle for merely the amount of the lien plus its expenses.

In most cases the full amount of compensation due cannot be finally determined at the time of the action. Section 29(2) provides that in such case the board shall estimate the probable total amount of such future benefits and "such estimates shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery..."\textsuperscript{117}

When the injured employee sues the third party, subsection 4 provides that the carrier is liable only for the deficiency between the amount of recovery actually collected and the compensation under the act. Thus, when the recovery is less than the amount owed the claimant under the Workmen's Compensation Law, the insurance carrier need only pay the difference. The combination of the

\textsuperscript{115} "It was clear intent of the legislature... that a reasonable attorney's fee should be deducted from any recovery as a necessary expense in all instances, and that the expression 'actually collected,' as used in subdivision 4 must now be construed to mean the net amount collected after deduction of all reasonable and necessary expenses including attorney's fees." Hobbs v. Dairymen's League Cooperative Ass'n, 238 A.D. 836, 837, 15 N.Y.S.2d 694, 695 (3d Dep't 1939), \textit{appeal denied}, 282 N.Y. 710, 26 N.E.2d 823, 17 N.Y.S.2d 860 (1940). \textit{See also} Curtin v. City of New York, 287 N.Y. 383, 39 N.E.2d 903, 29 N.Y.S.2d 153 (1942).

\textsuperscript{116} In \textit{Saranca v. Roberts and Grancelli, Inc.}, 41 Misc. 2d 415, 245 N.Y.S.2d 403 (Sup. Ct. 1963), the court stated that where there is enough to pay the compensation lien in full even after making a reasonable allowance for attorney's fees there is no authority to charge any of the fee to the lien. \textit{See also} Kussack v. Ring Constr. Corp., 1 A.D.2d 634, 153 N.Y.S.2d 646 (3d Dep't 1956), \textit{aff'd}, 4 N.Y.2d 1011, 152 N.E.2d 540, 177 N.Y.S.2d 522 (1958). These two cases involved judgment recoveries, but voluntary settlements stand on exactly the same footing under \S\ 29.

\textsuperscript{117} Any excess paid to the employee serves as a credit against any future modification of an award which increases the compensation due under the act. Similarly, if the award is modified by ending or diminishing the compensation previously awarded, or in the event that the future payment shall be less than the amount estimated by the board, the carrier shall pay to the employee any amount of such excess recovery to which the employee is entitled by reason of such deficiency or modification. Thus, if the board overestimated the amount of compensation owed by the carrier, the employee received a correspondingly decreased excess. The employee recovers this sum when the board finds it has overestimated the costs.
recovery and the difference will, of course, amount to the full liability under the Workmen’s Compensation Law.

The deficiency is computed after deduction of attorney’s fees, rather than before. Subtracting attorney’s fees from the recovery in deficiency cases aids the employee, since the result is a smaller net recovery. The employee then receives a larger deficiency judgment against the insurer. To base the deficiency on the difference between the statutory liability and the gross recovery would in effect charge the employee with attorney’s fees, thus reducing his overall recovery under tort and workmen’s compensation. Yet, when the recovery exceeds the compensation amount, the plaintiff-employee is charged with the entire amount of attorney’s fees.

Subsection 5 was amended in 1966 and refers to the payment of an award to the Commissioner of Taxation and Finance in accordance with subdivision 8 and 9 of section 15, which established the special injury fund for previous permanent disability, and section 25(a) for reopened cases. Such payment gives the carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action for the representatives of the deceased. Thus, a new cause of action is created and the carrier has had to pay funds into the special injury fund or the reopened cases funds.

A compromise of any “such cause of action by the employee” at an amount of less than the compensation provided for by the chapter shall be made only with the written approval of the carrier. In the past the failure to get this consent meant that the carrier had no more liability under the act. Under a recent amendment, written approval need not be obtained if the employee obtains an order from the justice of the court in which the third party action is obtained. The form of such petition to such court to compromise is set out in a new subsection 5.

118. See Ocean Steamship Co. v. Lumbermen’s Mut. Cas. Co. of Ill., 125 F.2d 925 (2d Cir. 1942).
120. The purpose of the consent provision was to prevent settlements which might prejudice the rights of the carrier. See Meacham v. N.Y. Cent. R.R., 8 N.Y.2d 293, 169 N.E.2d 913, 206 N.Y.S.2d 569 (1960).
123. Even before the amendment the carrier was held to waive the requirement of written consent by its participation in negotiations for a settlement, its consent to the action, and its acceptance of a reduced recovery. See Timm v. June Rodgers Beauty Salon, 284 A.D. 1, 295 N.Y.S.2d 890 (3d Dep’t 1954). See also Joint Legislative Committee on Industrial and Labor Conditions, 1944-45, Legislative Document #69 (1955), published in 12 N.Y. Legislative Document, 178 Session, at 94 (1956).
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THE SHARING OF ATTORNEY’S FEES: A RESOLUTION

Concern with the apportionment of attorney’s fees has usually stressed the empty-handed, but successful, tort litigant. When the employee sues and recovers from the third party, the deduction for attorney’s fees and the insurer’s lien may leave little, if anything, for the employee. Although many instinctively feel that this result would be unfair, the possibility flows from the creation of a statutory lien in the amount of compensation benefits. Yet, no inherent unfairness seems to be present when the insurer is subrogated to the rights of the employee. The rejection of the insurance analogy is so pervasive that no change in this approach is foreseeable. If one were concerned with the empty-handed employee, the creation of a statutory guarantee would provide a solution.

Indeed, a number of states have provided for just such a share. As pointed out above, however, the guarantee has no real operative effect when the recovery exceeds the sum of the attorney’s fees, the lien, and the percentage guarantee. Indeed, the one-third guarantee in Wisconsin, for example, is based upon the net recovery, that is, total recovery less attorney’s fees. Thus, the only operative effect of the provision is to reduce the employer’s lien where the net recovery is less than sufficient to give the employee one-third of the recovery and to give the insurer his lien. The critical case, paring further, would seem to be one in which the net recovery is the same as or less than the lien. In this case, under normal principles, the employee would find himself empty-handed despite the successful prosecution of his negligence action.

It seems odd, however, to aid an employee whose third party recovery barely exceeds his total amount of benefits. For, in these cases, the compensation benefits and the jury’s estimation of tort damages prove to be fairly similar. The seemingly narrow application of this guarantee, however, may simply be caused by the obvious fact that the employee who receives a relatively large tort recovery does not really need a statutory guarantee.

Without empirical data, the incidence of empty-handed employees cannot be known. Of course, they have received their statutory benefits even though no excess may be obtained in the third party negligence action. Indeed, given that statutory benefits compensate for only about one-third of the employee’s compensable loss, one might assume that tort awards would normally far exceed statutory benefits.

Irrespective of the size of the third party recovery, however, the failure to provide for apportionment is inequitable. Many states have assumed that it is unfair to employee-plaintiffs to operate under the New York procedure. The objection is probably not so much that the employee may find himself with nothing, but rather that the insurer receives reimbursement without the outlay of attorney’s fees. At the same time, the injured employee, the focus of compensation and tort law, absorbs all of the attorney’s fees. No matter how

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much the employee-plaintiff recovers, he has also recovered an amount for the insurer at the employee’s expense. More serious, of course, is the case where attorney’s fees and the lien consume all of the third party recovery.

The arguments for and against apportionment of attorney’s fees are relatively limited. It must be pointed out, however, that many relevant and critical facts are not available. For instance, how many third party actions are begun each year? By whom? How many actions are settled? In how many cases does the insurer voluntarily reduce his lien? How many employees find themselves with nothing remaining after statutory liens are deducted?124

Without an empirical investigation into these facts, any argument can only be grounded upon speculative bases. The task is made additionally difficult because the apportionment question may ultimately turn on perceived notions of fairness and equity. There are, however, some guide posts from which an objective analysis can be begun.

The workmen’s compensation system, in essence, is based upon strict liability for work-connected injuries. The remedy, as explained above, was partial only, but prompt and partial restoration was deemed superior than the unsatisfactory alternative of litigation. Recovery of benefits is based not on indemnity for injury as such, but rather, on the loss of earning capacity.125

As mentioned earlier, the employee does not only receive less than would be the case under negligence principles, but even loss of earning capacity is restricted by percentages, weekly maximums, total maximums, and limitations on duration. Furthermore, many elements of damages are not compensable under workmen’s compensation statutes. Many states do not reimburse for loss of hearing or for physical or mental pain and suffering unless it in some way interferes with the earning capacity of the injured employee. Some states do not compensate for the loss of child bearing capacity by women or for impotency. Nor is there reimbursement generally for loss of consortium by a husband or wife. There is normally no provision for exemplary damages, no recovery for the loss of a minor’s services, and in many states there is no recovery for a non-disabling injury or partial disability which does not result in the loss of wages.

Furthermore, if the worker employs legal counsel in securing his compensation benefits, his attorney’s fees are made a lien on the recovery.126

124. Correspondence from the California Dept. of Insurance and the New Jersey Division of Workmen’s Compensation indicates that carriers voluntarily reduce liens in the interest of settlement when third party liability is questionable, although data is not available, and little is actually known about the incidence of and recoveries in third party actions.


126. Other states provide that the employer shall pay the attorney’s fees in addition to the amount of the award. In others the employer is liable for payment of the fee only in the event that it is found that the claim has been unreasonably contested. See N.Y. STATE BAR ASS’N REPORT, supra note 121, at 101. The committee points out that in negligence cases the fee comes out of the recovery and there would appear to be no valid reason for creating a different scheme under the workmen’s compensation act. This statement over-
York and a number of other states require, however, that no claim for legal services will be valid or enforceable unless it is fixed and approved by an administrative agency or court. In practically all jurisdictions, some power has been vested in state agencies to control attorneys' fees. Only 29 jurisdictions, however, provide mandatory control. In other states the power to control rests upon the request of either party, a controversy arising, or agency discretion to require the parties to act. The New York Workmen's Compensation Board, acting through referees, fixes the amount of the fee, but it is deemed a lien on the award and it is deducted from the recovery.

As Professor Witte has explained, the compensation system does not place the full cost of industrial accidents on employers. Employers bear part of the cost, irrespective of fault, because we assume they can better bear the cost and, perhaps, can pass on the cost to consumers of their products or services. Thus, when we consider allocation of attorney's fees, traditional subrogation doctrines should not blind us to the actual operation of the system. Since the burden of industrial accidents is shared between employee and employer the question then becomes: should attorney's fees be allocated between the plaintiff-employee and the insurer, and, if so, how should it be done?

Sharing of fees is not inconsistent with compensation principles. Indeed, it would be consistent with the traditional principle of compensating injured employees. As referred to above, this principle, along with the acknowledged inadequacy of compensation benefits, has justified the retention of third-party actions in the first place. One of the sole references to this question in New York literature overlooks this point.

In 1955 Assemblyman Morgan introduced a bill which would have limited the compensation carrier's lien to two-thirds of the net recovery after deduction of expenses including attorney's fees, and authorized approval of a settlement looks the fact that juries might well consider the attorney's fee in rendering an award. Under the workmen's compensation law, however, the effect of maximum amounts and scheduled benefits is that there is very little play in the amount of the benefits received or awarded to the claimant. See discussion of attorney's fees, id. at 100-03.


128. In New York all fees are approved by the board in an amount commensurate with the services rendered, with due regard for the financial status of the claimant, and in no case based solely on the amount of the award. This latter point is significant since in many instances the awards are for a sum which might in any event have been paid in part without contest. The recovery as to which there was a controversy may be for a nominal amount, whereas the face of the award may call for a substantial amount. The full award, therefore, is not a proper measure upon which to base the fee. In addition, in view of the social objectives served by these laws, it could be argued that remuneration for services of attorneys should properly be smaller than in commercial cases or in ordinary negligence actions in the civil courts. See Allen, Fixing of Attorney's Fees by the Industrial Accident Commission, 7 CALIF. STATE BAR J. 234 (1932); In re Fisch, 188 App. Div. 525, 177 N.Y.S. 338 (1st Dep't 1919).

129. Three states, Washington, Oregon, and North Dakota, provide for payment of attorney's fees either by the compensation agency or from the industrial accident fund. Assuming widespread knowledge of such payments, one would expect employees to be motivated to bring negligence actions knowing they will be relieved of the burden of legal costs.
by the court in which the action is pending if voluntary approval of the carrier was refused. The Morgan bill would not have apportioned attorneys' fees, but rather, would have limited the recovery of the lien to two-thirds. This is similar in result to the Wisconsin approach which guarantees the employee one-third of the net recovery. The New York State Bar Committee rejected the idea of reducing the carrier's lien as being

based on a misconception of the purpose of the third party actions. Provision for these actions was included in the act for the purpose of giving the employee an opportunity to collect an amount in excess of the benefits payable under the law. While the provision reducing the carrier's lien was intended to facilitate settlements by giving the injured employee a greater share of the third party recovery, nevertheless there is no logical justification for reducing the carrier's lien. Such a provision would increase the cost of Workmen's Compensation because of the obvious fact that the liability of the compensation carriers is increased in proportion to the decrease in the amount of reimbursements they obtain out of third party settlements.

The Committee's objections to a proposal to reduce the lien would probably be applicable to apportionment of attorney's fees. Any reduction in reimbursements by carriers may increase the cost of workmen's compensation. The Committee went further to say that the reduction would increase the insurer's liability. This is not readily apparent, since the liability under compensation acts can only be reduced by the institution of third party actions. It is inaccurate to say that recovery of the lien reduces the carrier's liability; rather, it reimburses the carrier for its satisfaction of its statutory liability. It is true, of course, that allocation of fees reduces the amount of reimbursement and, thereby, reduces the industrial accident fund. Moreover, the carrier's lien is characterized by section 29 as being for the benefit of the fund.

To call this an increase in the carrier's net liability, however, is merely to play with words. A compensation carrier has no inherent right of subrogation, and in two states, carriers have no such right. If the carrier sues in New York, it receives a windfall in that it receives one-third of the recovery. Although created in the hopes that the carrier will seek more than the amount of its lien, and thereby create an "excess" for the employee, the amount is nevertheless a windfall. That is, this amount adds to the accident fund but is not based on any concurrent liability. The "loss" suffered by the apportionment of attorney's fees can be considered as balancing this windfall.

More important, perhaps, is the fact that the insurer receives one-third of the excess as an inducement to settle for more than its statutory liability. This provision demonstrates that pure subrogation doctrine has been modified for certain perceived social goals. The benefit to the insurer, however, is

130. N.Y. Assembly Bill Int. 198, Pr. 198. See recent amendments to N.Y. WORKMEN'S COMP. LAW § 29(5) (1965).
131. N.Y. STATE BAR ASS'N REPORT, supra note 121, at 73-74.
secured at the employee's expense. Thus, traditional subrogation notions alone cannot be used to dismiss a proposal to allocate attorney's fees proportionately. It is also insufficient to argue that apportionment of fees will increase the cost of compensation. First, carriers receive a windfall in the one-third excess recovery which lessens compensation cost. More importantly, the cost argument is misleading for it assumes that the bearing of a proportionate share of attorney's fees is not a proper cost for insurers who recover compensation costs from a third party. Yet this is the very question at issue. When the insurer acts as plaintiff, he deducts attorney's fees and then withdraws his lien from the recovery. Assuming the recovery is sufficient to pay legal fees and reimburse the carrier, the carrier has received his full lien and, in addition, has been reimbursed for his legal expenses. Yet, when the employee sues, the statute requires the employee to bear the entire cost of attorney's fees. This anomaly is inequitable given the strong, statutorily-caused inducement for employees to sue.

The objection often raised, that innovation will increase the cost of doing business in New York and place the state in a disadvantaged competitive position, will be difficult to support. Initially, as pointed out before, nearly all of the heavily industrialized states already provide for some form of apportionment or statutory guarantee. Moreover, benefit rates in New York are not significantly greater than in these states. An unfortunate obstacle to cost determination is the general lack of data about third party actions as well as the difficulty of tracing costs to statutory changes. Since changes in benefits and coverage occur with some regularity, it will be exceedingly difficult to relate the effect of an apportionment scheme to premium rates for compensation insurance.

It is only because the injury is caused by the negligence of the third party that the insurance carrier recoups any of its liability in the first place. Indeed, it is not forced to sue, and therefore the cost the public pays depends on the private decision of an insurance firm. The fact that the claimant recovers more under the Morgan proposal is not astounding, since the very purpose of giving him a third party claim is so that he may recover more than he could under workmen's compensation. Since the number of third party claims might be very small, the added costs to the insurance scheme may well be very small when apportioned over the large number of firms in the state. Its difference to the injured employee, however, may be great. Indeed, the Committee's approach ignores a contrary public policy to compensate injured persons. In the tort action, the employee may be left with nothing after the attorney's fees and

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132. When the insurer's attorneys are employees, this reimbursement should, in effect, further reduce the carrier's liability. The effect may be the same under certain types of retainer agreements.

lien are subtracted, although he has still received his statutory benefits. If this is the case, then the insurance carrier has received a windfall in that it has received funds, albeit a recoupment of prior expenses, without having to incur the normal expenses. In other words, the claimant has paid in order to reimburse the insurance firm. Such a result is not required by any policy under the Workmen's Compensation Law or the law of torts in New York.

Finally, it should be remembered that employees are strongly encouraged to bring actions against third parties before the cause of action is assigned to the insurer. Not only might the employee want to protect his own interests but, should an assignment occur, the carrier receives one-third of the excess. Thus, the act encourages the employee to sue, even though the result is that he bears the collection fees for the insurer's reimbursement. Furthermore, if the settlement figure will merely reimburse the workmen's compensation carrier, the employee may have no real alternative but to prosecute his tort cause of action. Thus, in a real sense, the employee has no real choice. If his case seems meritorious, the very provisions of the act encourage him to prosecute his third party claim. Yet, if the employee receives a settlement or recovery, the insurer is reimbursed without sharing in the necessary legal expenses. Thus, the statute subsidizes carriers by a structure which permits them to recover statutory expenses without incurring legal fees. Since an important motivation to sue is to avoid the statutory windfall to the insurer, it seems highly inequitable to make the employee bear the entire legal expenses involved in securing a recovery.

134. Attorney's fees in the tort action will normally be greater than fees involved in securing compensation. Investigations by plaintiff's attorney will have to be different and more rigorous in nature than in the workmen's compensation proceeding. Entirely new and complex questions are presented, such as proximate causation, contributory negligence, and questions of damages. The case will probably be tried before a jury. Greater attention must be given to the statements of witnesses, medical witnesses, and the background of the client. Formal pleadings are prepared, motions made, congested calendars faced, witnesses examined and cross-examined, exceptions to court rulings are raised, and points of law are argued. Furthermore, in compensation cases before administrative agencies, the notice of injury and claim for compensation forms are simplified and standardized, consultive service with agency officials is readily available, informal procedures often insure against the loss of a case by reason of technical mistakes in presentation, the ordinary rules of evidence are often not binding, the reports of the employer, agents, and agency investigatory staff are made available, findings, awards and decisions are generally drafted by the agencies, and calendars often reduce waiting time for trial to a minimum, thereby enabling attorneys to appear at several hearings in one day. These considerations narrow the scope of the attorney's functions and materially reduce the amount of services performed. See McDonald, Third Party Liability in Workmen's Compensation Cases in Workmen's Compensation Problems, IAIBC PROCEEDINGS, 1962, vol. 254, U.S. Dept. of Labor, 4243.

135. See Separate Report by Jeannette M. Harris, N.Y. STATE BAR Ass'n REPORT, supra note 121, at 116. Miss Harris argues that the claimant-plaintiff must pay out of his share all of the fees and disbursements required to collect the compensation carrier's lien. The Morgan ball was basically an attempt to charge the carrier's lien with the legal fee and this is why the lien was reduced by one-third. It might be pointed out, however, that such is a very arbitrary attempt to allocate legal fees. A better approach would be to leave it to the court to decide an appropriate distribution.

Based on the previous discussion, section 29 of the Workmen's Compensation Law should be amended to provide for the apportionment of attorney's fees incurred by an employee in his third party action.

A precise statutory formula provides the advantage of certainty and narrows the range of a trial judge's discretion. Predictability is of limited value, however, since the attorney's fee will often not be determined until a recovery is obtained or a settlement is reached. Equitable apportionment will often depend upon the ratio of the insurer's lien to the recovery, and this amount will also not be determinable until the action is resolved.

Moreover, it seems wise to permit flexibility in apportioning fees upon equitable considerations. Although most courts would normally apportion fees based on the ratio of the lien to the net recovery, it seems appropriate to provide judicial flexibility in extraordinary cases. A number of variables exist and suggest that a case by case approach is appropriate: the relative cost of attorney's fees, the size of the recovery and its relation to compensation benefits, and the assistance rendered by the insurer in the third party action should all be considered by the court in determining an equitable apportionment. These variables might be listed in the provision itself so that judges could have some guidelines in apportioning fees.

Whether the action is finally determined by jury verdict or settlement, the plaintiff-employee should be permitted to move for judicial apportionment. The motion would then lead to a hearing at which the employee and the insurer would be present.