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Attorney's Fees in Third Party Actions

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ATTORNEY'S FEES IN THIRD PARTY ACTIONS

In many cases where workmen's compensation benefits are claimed and paid, the accident giving rise to the claim involves a third party other than the employee and his employer. A simple example is a truck driver who, while in the course and scope of his employment, is negligently hit by another vehicle. This gives rise to a third party negligence action in which all the traditional elements of damages can be claimed.[1]

To avoid a double recovery by the employee, however, the legislature has enacted a lien system[2] whereby the employer or his insurance carrier[3] may impose a lien upon the judgment or settlement obtained by the employee, for the benefits paid by the employer under the workmen's compensation laws.[4] The employer can also join with the employee in bringing suit, intervene when suit is brought by the employee,[5] or seek reimbursement through subrogation directly against the third party where the employee fails to sue.[6] Labor Code section 3861 also allows the employer a credit, for the amount of the employee's net recovery, against any future compensation payments for which the employer may become liable because of further temporary disability, or permanent disability arising from the same accident.[7]

Labor Code sections 3856 and 3860 give priority to the employer's lien in the situation discussed above. Furthermore, they give the trial court the authority to grant attorney's fees and litigation expenses out of the judgment or settlement. This Note is concerned primarily with attorney's fees and costs.

In a third party action, the employee's attorney is generally retained on a contingent fee basis whereby a certain percentage of the recovery constitutes his legal fee. The employer's attorney is normally retained by the workmen's compensation insurance carrier on a permanent basis and receives a fixed fee as opposed to the contingent fee arrangement entered into by the employee and his attorney.

The code sections herein discussed were not meant to take the

1. CAL. LABOR CODE § 3852.

2. *Id.* §§ 3856, 3860.

3. Hereinafter both the workmen's compensation insurance carrier and the employer will be identified by the single word "employer."

4. These benefits are paid by the employer when there is an injury to an employee while working in the course and scope of his employment. The benefits include such things as lost wages and medical expenses. *See* CAL. LABOR CODE § 3600.

5. CAL. LABOR CODE § 3853.

6. *Id.* § 3852.

7. *Id.* § 3861.

place of such agreements, but were intended to provide for a reasonable recovery of expenses and fees in all cases where, through the prosecuting attorney's efforts, there was a recovery for the unrepresented party, whether that party was the employee or employer.[8] Despite this laudable goal, the legislature and the courts have found it difficult to achieve fairness and equality in the application of these statutes.

History of Sections 3856 and 3860 of the Labor Code

To appreciate the present meaning of sections 3856 and 3860, it is helpful to understand some of their history. The language of these sections began to take their present form under statutory enactments in 1937. Section 3856 originally read as follows:

> The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on application [by the employer] shall allow, as a *first lien* against the entire amount of any judgment for damages recovered by the employee, the amount of the employer's expenditure for compensation.[9]

This section failed to provide a procedure by which the employee's attorney could be compensated for any service which he performed for the nonparticipating employer. Consequently, the employer could wait until the employee had, through the efforts of his attorney, either negotiated a settlement or received a judgment against the third party tortfeasor, and then claim a first lien against the proceeds without having to pay any attorney's fees. This "free ride" was even worse from the standpoint of the employee's attorney under a contingent fee contract, since his fee was a percentage of the amount actually paid to the employee.

The problem was first dealt with by the California Supreme Court in *Dodds v. Stellar*.[10] The employee's attorney had sought reimbursement for his efforts in obtaining a recovery for the employer after the employer had exercised his lien rights under section 3856. The court strictly construed the statute, stating that there was no statutory authority for allowing fees or costs to be deducted from an employer's lien. Consequently, it had no alternative but to deduct the full amount of the lien from the entire judgment.[11] The court stated that the legislative

8. *See* Eldridge v. Truck Ins. Exch., 253 Cal. App. 2d 365, 61 Cal. Rptr. 347 (1967); Branscum v. State Comp. Ins. Fund, 232 Cal. App. 2d 352, 42 Cal. Rptr. 682 (1965).

9. Cal. Stats. 1937, ch. 90, § 3856, at 274 (emphasis added).

10. 30 Cal. 2d 496, 183 P.2d 658 (1947).

11. *Id.* at 506, 183 P.2d at 664.

intent was further manifested by the fact that when the *employer* brings suit, attorney's fees were expressly provided for under section 3854.[12] Since there was no similar provision in section 3856, the court concluded that the legislature intended that no attorney's fees be deducted from the employer's lien.[13]

Justice Carter dissented, stating that the interpretation offered by the court made the law unconstitutional;[14] if the statute was unconstitutional, then the plaintiff's attorney should be awarded fees under the equitable theory of representative suit or common fund.[15]

The legislative response to the *Dodds* decision was relatively swift. A proviso was added to section 3856 in 1949:

> [W]here the employer has failed to join in said action and to be represented therein by his own attorney, or where the employer has not made arrangements with the employee's attorney to represent him in the said action, the court shall fix a reasonable attorney's fee, *which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of the service rendered by him in affecting recovery for the benefit of the employer, which said fee shall be deducted from any amounts due the employer.*[16]

This addition allowed the employee's attorney to be reimbursed by the employer for the services performed for the employer. It left no doubt that such fees would be subtracted from the part of the lien actually received by the employer. At this stage in the historical development of the statute, at least, some degree of equality was achieved between the employer and employee and their attorneys with regard to the payment of fees.

However, the California Supreme Court was reluctant to extend the policy expressed in section 3856 (referring to judgments) to a similar situation involving settlements under section 3860.[17] In *R.E. Spriggs, Inc. v. Industrial Accident Commission*,[18] the employee reached a settlement with the third party tortfeasor and the commission awarded attorney's fees to the employee's attorney out of the settlement. The employer then sought a credit against any further awards for compensa-

12. *Id.* at 504, 183 P.2d at 664.
13. *Id.*
14. *Id.* at 507, 183 P.2d at 665.
15. *Id.* at 510, 183 P.2d at 667.
16. Cal. Stats. 1949, ch. 120, § 2, at 355 (emphasis added).
17. Section 3860 read as follows: "No release or settlement of any claim under this chapter is valid and binding without notice to both employer and employee and opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay. The entire amount of such settlement, or any settlement without suit, is subject to the employer's full claim for reimbursement for his compensation expenditures and liability." Cal. Stats. 1937, ch. 90, § 3860, at 274.
18. 42 Cal. 2d 785, 269 P.2d 876 (1954).

tion for the full amount of the employee's recovery, without any deduction for attorney's fees. While this credit was requested pursuant to section 3861 of the Labor Code,[19] any allowance for attorney's fees was governed by section 3856 or 3860 depending on the nature of the recovery. Under section 3856, there would have been no question that attorney's fees could have been deducted from the amount of the credit, but the supreme court decided that since the legislature had not put the same language into section 3860, the court would not put it there by implication.[20] It held that the Industrial Accident Commission had committed reversible error by not allowing the employer credit for the full amount of the employee's recovery against any future compensation payments that the employer might be required to make for the same injury.

As with the *Dodds* case, the legislature was quick to respond; in 1957, a clause very similar to that added to section 3856 was added to section 3860.[21] On the basis of these sections, the employee's attorney could now have the court award him fees from the employer's share of the settlement or judgment where the employer failed to join in the employee's suit or make arrangements with the employee's attorney to have his interests represented.[22] Likewise, under the language of section 3854 at that time,[23] the employer's attorney had similar rights for any recovery obtained for the employee through action by the employer.

Present Sections

In 1959, the last important legislative changes to sections 3856 and

19. At the time of the *Spriggs* case, section 3861 read as follows: "The commission is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to reimburse the employer, or has not been applied to the payment of an attorney's fee to the employee's attorney, pursuant to the provisions of Section 3856 of this code." Cal. Stats. 1937, ch. 90, § 3861, at 274, *as amended*, Cal. Stats. 1949, ch. 120, § 3, at 356.

20. 42 Cal. 2d at 789, 269 P.2d at 878.

21. Cal. Stats. 1957, ch. 615, § 1, at 1825: "[W]here the employer has not prosecuted any claim or action in his own behalf or has failed to join and participate in the prosecution of any action presented by the employee's attorney to represent him in the prosecution of said action or claim, the commission shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of services rendered by him in effecting a recovery for the benefit of the employer, which said fee shall be deducted from any amounts due to the employer."

22. These requirements are discussed in Bosch v. Standard Oil Co., 193 Cal. App. 2d 426, 14 Cal. Rptr. 247 (1961).

23. Cal. Stats. 1937, ch. 90, § 3854, at 273, *as amended*, Cal. Stats. 1949, ch. 120, § 1, at 355, *repealed*, Cal. Stats. 1959, ch. 1255, § 10, at 3390.

3860 were made. The provision in section 3854 for attorney's fees when the employer prosecuted the third party action was repealed,[24] and sections 3856 and 3860 were completely revised. The provisions pertaining to attorney's fees discussed previously were discarded and new methods for determining attorney's fees and expenses were set out, along with the priority of their payment in relation to the employer's lien.[25]

Since the two sections in their present form are very similar, it is possible to combine the discussion of the various provisions. Section 3856(a)[26] and section 3860(b)[27] now provide that if recovery is ob-

24. In addition to repealing section 3854, the legislature repealed all sections necessary to avoid any inconsistencies. Cal. Stats. 1959, ch. 1255, § 10, at 3390.

25. Cal. Stats. 1959, ch. 1255, §§ 3, 7, at 3387, 3389.

26. CAL. LABOR CODE § 3856 reads as follows: "In the event of suit against such third party: (a) If the action is prosecuted by the employer alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employer's attorney in effecting recovery both for the benefit of the employer and the employee. After the payment of such expenses and attorney's fees, the court shall apply out of the amount of such judgment an amount sufficient to reimburse the employer for the amount of his expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852 and shall order any excess paid to the injured employee or other person entitled thereto.

"(b) If the action is prosecuted by the employee alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of such expenses and attorney's fee the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852.

"(c) If the action is prosecuted both by the employee and the employer, in a single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, the court shall first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in preparation and prosecution of such action or actions, together with reasonable attorneys' fees based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. After the payment of such expenses and attorneys' fees the court shall apply out of the amount of such judgment for damages an amount sufficient to reimburse the employer for the amount of his expenditures for compensation together with any other amounts to which he may be entitled as special damages under Section 3852.

"(d) The amount of reasonable litigation expenses and the amount of attorneys' fees under subdivisions (a), (b), and (c) of this section shall be fixed by the court. Where the employer and employee are represented by separate attorneys they may propose to the court, for its consideration and determination, the amount and division of such expenses and fees."

27. CAL. LABOR CODE § 3860 reads as follows:

tained solely through the efforts of the employer's attorney, then reasonable expenses in effecting such recovery shall be deducted from the employee's judgment or settlement along with reasonable attorney's fees. Such an award is based upon the services rendered by the attorney in procuring recovery for both the employer and the employee. From the remaining sum, the full amount of the employer's lien is deducted and the excess goes to the employee. This section substantially takes the place of the repealed section 3854.[28]

"(a) No release or settlement under this chapter, with or without suit, is valid or binding as to any party thereto without notice to both the employer and the employee, with opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, and opportunity to the employee to recover all damages he has suffered and with provision for determination of expenses and attorney's fees as herein provided.

"(b) The entire amount of such settlement, with or without suit, is subject to the employer's full claim for reimbursement for compensation he has paid or become obligated to pay and any special damages to which he may be entitled under Section 3852, together with expenses and attorney fees, if any, subject to the limitations in this section set forth.

"(c) Where settlement is effected, with or without suit, solely through the efforts of the employee's attorney, then prior to the reimbursement of the employer, as provided in subdivision (b) hereof, there shall be deducted from the amount of the settlement the reasonable expenses incurred in effecting such settlement, including costs of suit, if any, together with a reasonable attorney's fee to be paid to the employee's attorney, for his services in securing and effecting settlement for the benefit of both the employer and the employee.

"(d) Where settlement is effected, with or without suit, solely through the efforts of the employer's attorney, then, prior to the reimbursement of the employer as provided in subdivision (b) hereof, there shall be deducted from the amount of the settlement the reasonable expenses incurred in effecting such settlement, including costs of suit, if any, together with a reasonable attorney's fee to be paid to the employer's attorney, for his services in securing and effecting settlement for the benefit of both the employer and the employee.

"(e) Where both the employer and the employee are represented by the same agreed attorney or by separate attorneys in effecting a settlement, with or without suit, prior to reimbursement of the employer as provided in subdivision (b) hereof, there shall be deducted from the amount of the settlement the reasonable expenses incurred by both the employer and the employee or on behalf of either, including costs of suit, if any, together with reasonable attorneys' fees to be paid to the respective attorneys for the employer and the employee, based upon the respective services rendered in securing and effecting settlement for the benefit of the party represented. In the event both parties are represented by the same attorney, by agreement, the attorney's fee shall be based on the services rendered for the benefit of both.

"(f) The amount of expenses and attorneys' fees referred to in this section shall, on settlement of suit, or on any settlement requiring court approval, be set by the court. In all other cases these amounts shall be set by the appeals board. Where the employer and the employee are represented by separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount and division of such expenses and fees."

28. Cal. Stats. 1937, ch. 90, § 3854, at 273, *as amended*, Cal. Stats. 1949, ch.

Section 3856(b)[29] and section 3860(c)[30] contain like provisions when the recovery is obtained solely through the efforts of the employee's attorney. He may likewise be compensated on the basis of the recovery obtained for both the employer and employee, with the employer's lien subsequently taken out in full and the remainder going to the employee.

Section 3856(c)[31] and section 3860(e)[32] contain provisions for the situation in which the recovery, either by settlement or judgment, is obtained through the efforts of both the employer and employee when represented by either the same attorney or separate attorneys. Fees and expenses will be awarded on the basis of the recovery to both parties if they are represented by one attorney, or solely on the basis of the recovery obtained by the party represented, if they are represented by separate attorneys. Again, the excess over the employer's lien goes to the employee.

Superficially, it may seem that the rights of the attorney are augmented by the new code sections. In actuality, there is very little distinction between the rights of the attorney to his fees before and after the 1959 amendments. Attorney's fees and expenses are now deducted from the recovery before, rather than after,[33] the employer's lien, thereby apparently giving the attorney some increased assurance of recovering his fees.

Unfortunately, any added security the attorney achieves under the new language is far outweighed by the statute's unequal and unfair treatment of the employee. This treatment not only raises serious constitutional questions, but creates serious practical problems for the employee's attorney as well.

Hardship to the Employee under the Present Code

By far the most inequitable result of the present code sections is the discordant effect on the employee's recovery. The problem can be best illustrated by a hypothetical case. Employee *A*, while in the course and scope of his employment with *B*, is injured as a result of the negligence of *C*. *B* pays compensation benefits to *A* totaling $10,000. In the meantime, *A* has filed a third party action against *C* and recovers $20,000.[34] *A*'s attorney prosecutes the suit alone, and *B* merely

120, § 1, at 355.

29. See note 26 *supra.*

30. See note 27 *supra.*

31. See note 26 *supra.*

32. See note 27 *supra.*

33. See notes 16 & 21 *supra.*

34. If the recovery is less than the lien, the attorney for the employee will be compensated only for the recovery which he effected for the employer.

files for a lien for the benefits paid. Assuming that *A*'s attorney has a 30 percent contingent fee arrangement, he is entitled to a fee of $3000 from *A*. In addition, if the 30 percent is a reasonable fee in such actions, the same could be demanded by *A*'s attorney under section 3856 for the $10,000 recovered for the employer. According to the new statute, however, the court must award all reasonable fees and expenses, and then deduct the *full* amount of the lien.[35] Therefore, it becomes obvious that the fee attributable to the employer's share of the recovery is being taken out of the employee's share.[36] Thus, the final amounts received would be approximately as follows: employer, $10,000; attorney for *A*, $6000; employee, $4000.

If the employer exercises his right to sue independently of the employee,[37] rather than simply file for benefits paid, the results under sections 3856 and 3860 are just as unfair. The employer can have his attorney's fees deducted from the amount recovered in excess of the lien.[38] The employee in this situation may have to pay a reasonable fee for services the attorney rendered both to the employer and to him, even though he did not bring the suit.

Perhaps the most unjust result is encountered when both parties are represented by separate attorneys. In this case, under sections 3856 and 3860, the fees for both attorneys can be deducted from the employee's portion of the recovery and the employer then can have his lien deducted in full, with the remaining sum going to the employee.

Constitutionality of Paying Employer's Attorney's Fees Out of Employee's Recovery

At least one court has refused to follow the statutory method of deducting attorney's fees on the grounds that the statute is unconstitutional. In *Gurzi v. U.S. Rubber Co.*,[39] Judge McCarthy of the Los Angeles Superior Court denied the employer's motion to have his attorney's fees deducted from the employee's portion of the third party judgment. He ruled that such a deduction would deprive the employee of his property without due process of law and would deny him the equal protection of the laws.

The earliest case in which the constitutional aspect of the statute was considered was *Dodds v. Stellar.*[40] Although the majority avoided

35. *See* CAL. LABOR CODE §§ 3856(c), 3860(b)-(e); see notes 26 and 27 *supra.*

36. *See* Moreno v. Venturini, 1 Cal. App. 3d 286, 81 Cal. Rptr. 551 (1969); Johnson v. L.D.S. Trucking, 254 Cal. App. 2d 496, 62 Cal. Rptr. 501 (1967); Green v. Industrial Acc. Comm'n, 27 Cal. Comp. Cases 278 (1962); Soffish v. Industrial Acc. Comm'n, 27 Cal. Comp. Cases 286 (1962).

37. CAL. LABOR CODE § 3852.

38. *Id.* §§ 3856(a), 3860(b).

39. 31 Cal. Comp. Cases 343 (Super. Ct. 1966).

40. 30 Cal. 2d 496, 183 P.2d 658 (1947).

the issue completely, Justice Carter in dissent vigorously attacked the statute on constitutional grounds.[41] Although the case was decided under the 1937 version of the statute, it is still relevant since the effect of of the statute was somewhat similar to the present one. In his dissent, Justice Carter found that the statute violated both the privileges and immunities and the equal protection clause of the 14th amendment.

> At the outset it should be noted that the majority opinion holds . . . that the workmen's compensation law, properly interpreted, provides that the *employer* may have his attorney's fees paid from the judgment against the tort feasor when he [the employer] brings the action, but the *employee* may not when he [the employee] brings the action, and that means . . . that such fees come out of the portion of the surplus that would be payable to the employee after the employer is reimbursed; that is, the employer would be entitled to have *all of the fees paid out of the employee's share of the judgment.* There is not even a sharing of those fees between the employer and the employee. On the other hand when the employee sues he is not entitled to subject the recovery on behalf of the employer to the payment of any portion of such fees. He must pay them all. Suppose the compensation paid to the employee was $4,000, the attorney's fee a 25 per cent contingency, and the recovery from the tort feasor was $4,000. The employer would be made whole and the employee would suffer a total loss of $1,000 or his attorney would receive no fee. *If the provisions of the Workmen's Compensation Act are so construed they are clearly discriminatory and violate the privilege and immunities and equal protection provisions of the 14th Amendment to the Constitution of the United States.*[42]

Justice Carter went on to discuss *Builders' Supply Depot v. O'Conner*,[43] a case involving the mechanic's lien laws.[44] In this particular statute, there was a provision for attorney's fees for the lien claimant bringing the action, but there was no similar right for the defendant. The supreme court held this aspect of the law to be unconstitutional by both federal (as a denial of equal protection of the laws) and state standards. The court referred to the law as one which "gives an attorney's fee to one party in an action and denies it to the other, and allows such a fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences . . . ."[45]

Justice Carter also relied upon the case of *Gulf, Colorado & Santa Fe Railway v. Ellis*,[46] in which the United States Supreme Court declared unconstitutional a Texas statute that allowed attorney's fees to a

41. *Id.* at 506, 183 P.2d at 665.
42. *Id.* at 507, 183 P.2d at 665.
43. 150 Cal. 265, 88 P. 982 (1907).
44. Cal. Stats. 1885, ch. 152, 1195, at 146.
45. 150 Cal. at 268, 88 P. at 983.
46. 165 U.S. 150 (1897).

prevailing plaintiff but not to a prevailing defendant.

These same cases were relied upon by Judge McCarthy in his opinion in *Gurzi v. U. S. Rubber Co.*[47] In addition to the equal protection argument, Judge McCarthy also found a taking of property without due process of law:

> The net effect of this is to force the injured employee to pay his employer's attorney's fees even though he did not employ such attorneys, gained no benefit from their services, and probably would have welcomed their absence.
>
> The judgment for damages so obtained by the injured employee is a form of property. The award may include not only the recovery of medical expenses and compensation payments for which the employer has a lien, but also the pain and suffering, loss of earning capacity and other items as to which the employer has no interest whatever. Under the statute the employer (or his insurance carrier) is made whole for the full amount of medical payments and compensation paid under the workmen's compensation law. If the employee must pay the employer's attorney's fees it can come only from property of the employee, being that portion of the judgment owned solely by him.
>
> It must be remembered that in this situation the employee has not invaded the rights of anyone. . . . To require an employee to pay his employer's attorney's fees when the employee has not violated the rights of another and has himself been damaged, is clearly a taking of his property without due process of law.[48]

Unfortunately, this opinion was rendered by a superior court in ruling on a motion before it, and therefore has little, if any, binding effect on other courts.

The court of appeal was faced with a similar constitutional attack upon the statute in *Johnson v. L.D.S. Trucking Co.*,[49] but was able to avoid the issue by holding that the employee's attorney did not qualify for reimbursement under section 3860(c). The court did indicate, in a dictum, that if the section had applied, the attorney's fees would have been deducted from the employee's share, not from the employer's lien. On the issue of constitutionality, however, the court refused to offer its opinion.[50]

The brief of the employee, on the other hand, was devoted almost entirely to constitutional arguments and in so doing developed a different basis upon which a court may find a denial of equal protec-

47. 31 Cal. Comp. Cases 343 (Super. Ct. 1966).

48. *Id.* at 345.

49. 254 Cal. App. 2d 496, 62 Cal. Rptr. 501 (1967).

50. In the recent case of Moreno v. Venturini, 1 Cal. App. 3d 286, 81 Cal. Rptr. 551 (1969), the court, by footnote, seemed to be inviting a constitutional challenge.

tion.[51] It will be remembered that in the *Builders' Supply* case,[52] the court had found alternative methods for a denial of equal protection of the laws.[53] This protection could be denied by discrimination (1) between parties to the same action, and/or (2) between different actions of the same type.[54] With regard to this second basis for denial of equal protection of the laws, the employee's brief in the *Johnson* case cited two situations analogous to the workmen's compensation problem. The first situation mentioned was an action for indemnity by the owner of an automobile against the driver for any sums which the owner has paid to an injured third party as a result of the negligence of the driver. The second situation analogized was an action by the general contractor or owner of property for indemnity against a negligent subcontractor for injuries sustained by employees as a result of a failure to maintain a safe place to work or a violation of applicable safety orders. In neither of the above instances has the legislature provided attorney's fees. From this line of reasoning, the employee in *Johnson* concluded that any provision for attorney's fees in the analogous third party actions involving workmen's compensation would be a violation of the equal protection clause of the Constitution.

Undoubtedly, the strongest arguments for unconstitutinality are the denial of due process, and the discrimination between parties to the *same* action resulting in a denial of equal protection of the laws. There is no reason why the employer should be put in the preferential position of having his attorney's fees paid by the employee. Nor has he the right to any amounts recovered by the employee in excess of any compensation payments that the employer may have made. Therefore, when the employer's attorney's fees are taken out of the employee's share, there is a taking of his property that violates the protection afforded by the due process clause of the Constitution. For these reasons, it appears that the courts have adequate grounds for following the lead of Judge McCarthy in the *Gurzi* case and declaring the statute unconstitutional as applied to attorneys' fees.

Effect on the Employee's Attorney

In addition to the hardship on the employee, the rules regarding attorney's fees may also create difficult practical problems for the employee's attorney. This was evident in the case of *Eldridge v. Truck Insurance Exchange*.[55] The employee, Eldridge, had brought an action

51. Brief for Respondent, Johnson v. L.D.S. Trucking Co., No. 23267 (vol. 4084, Records of Court of Appeal), 254 Cal. App. 2d 496, 62 Cal. Rptr. 501 (1967).

52. 150 Cal. 265, 88 P. 982 (1907).

53. See note 48 *supra*.

54. See note 48 *supra*.

55. 253 Cal. App. 2d 365, 61 Cal. Rptr. 347 (1967).

against the third party tortfeasor for injuries sustained in a collision between Eldridge's taxi cab and the defendant's car. The employer intervened in the action. Since liability was apparent and the defendant had very limited funds, a judgment was entered by stipuation of the parties for the insurance policy limit of $10,000. By this time compensation benefits had been paid to Eldridge in the sum of $16,000. The trial court awarded a fee of $3,000 to Eldridge's attorney with the remainder going to the employer to satisfy part of the lien. The court of appeal held that it was error to award the employee's attorney any fees since he had not effected any recovery for his client as required by section 3856(c).

This is an extremely inequitable result since it is the plaintiff's attorney who does the majority of the work in effecting any recovery at all. As was stated in *Bosch v. Standard Oil Co.*,[56] a case decided under the pre-1959 statutes:

> As a practical matter, it is normally not desirable to have two sets of counsel, representing different interests, attempting to try each other's cases. . . . "[I]t is elemental that an intervener who comes into the case . . . does so in subordination to and in recognition of the propriety of plaintiff's case. Necessarily this is so, because it is the plaintiff who has made himself liable to his counsel for legal services . . . and expenses involved in preparing the case for . . . trial . . . . [T]he plaintiff must be permitted . . . to dominate . . . the suit . . . unfettered by the views of the interveners. . . . [W]here there are several counsel some one must be the absolute master of the litigation. . . ."[57]

Thus, it is apparent that since it is the plaintiff's attorney that is the principal figure in the litigation, he should receive some compensation for the portion of the work he did in effecting recovery for the employer. Yet if the attorney is to recover any compensation at all in a case like *Eldridge*, he will have to obtain a worthless judgment in excess of the policy limits rather than pursue the rational solution of a policy limits settlement.

This was in fact done in *Western Union Telegraph Co. v. Mooney*.[58] A judgment of $106,062.48 was obtained, but only $10,000 (the insurance policy limit) was ever likely to be paid. The court of appeal worked out a formula whereby the actual recovery obtained was divided by the amount due each party under the judgment, and attorney's fees for both the employer and employee were determined on the basis of the resulting fraction of the recovery. The court applied this formula because the attorneys for the employee (actually his family

56. 193 Cal. App. 2d 426, 14 Cal. Rptr. 247 (1961).

57. *Id.* at 430, 14 Cal. Rptr. at 250, *quoting* Mann v. Superior Court, 53 Cal. App. 2d 272, 280-81, 127 P.2d 92, 974 (1942).

58. 260 Cal. App. 2d 915, 67 Cal. Rptr. 713 (1968).

in this case since it was a wrongful death action) had secured a judgment of over $100,000 for their clients even though it was not likely to be paid.

Yet the same method of apportioning fees used in the *Mooney* case could easily be applied to a case where the attorneys had acted sensibly and had made a settlement where recovery beyond insurance policy limits was not likely. It should not be necessary to go to the expense of obtaining a worthless judgment. Furthermore, the policy motivation in *Mooney* adds weight to this argument:

> Not infrequently the third party causing the death or injury is only partly covered by insurance or is without sufficient assets to satisfy an entire judgment for the wrong done. State policy should make it relatively easy for an injured employee or his family, in case of his death, to engage the services of competent attorneys and in such circumstances the attorneys should have a decent priority in the matter of fees for the work which they do. The legislature saw fit to give them a preference with respect to moneys actually collected on such judgments, even in advance of the moneys payable to the employer for what he has advanced.[59]

Attorney's Fees and Credits

Finally, a discussion of the inequities and pitfalls of the Labor Code's treatment of attorney's fees in third party actions would not be complete unless one further stumbling block was mentioned. Section 3861[60] of the Labor Code provides that an employer may receive a credit for future liability for compensation payments. Thus, if the employee receives an amount above any compensation benefits already paid, that sum may be credited against any future payments by the employer for additional temporary disability or permanent disability arising from the same accident.

The question then arises whether or not the amount credited to the employer includes attorney's fees. An example will illustrate the problem. *A*, the employee, receives a $9000 judgment against the third party tortfeasor; *B*, the employer, applies for a credit since *A* is permanently disabled. *A*'s attorney will probably receive about one-third of the recovery as his fee. Thus, if the entire judgment ($9000) is credited to the employer, the employee is in a worse position than before the judgment since the employer's liability is reduced by $3000 that the employee never really received. Fortunately, section 3861 seems to

59. *Id.* at 919, 67 Cal. Rptr. at 716.

60. The section reads as follows: "The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees pursuant to the provisions of sections 3856, 3858, and 3860 of this code, or had not been applied to reimburse the employer."

indicate that only the amount actually received by the employee can be credited.[61] In *Cummingham v. Industrial Accident Commission*,[62] however, the Industrial Accident Commission held that only the attorney's fees that were *approved* by the court or commission could be deducted from the amount credited. Thus, if the attorney takes his fee pursuant to his agreement with the employee and does not seek court approval, the amount paid to the attorney will be credited against the future liability of the employer as if the employee had actually received it. Consequently, to protect the employee, the attorney must apply to the court or commission for approval of his fees pursuant to sections 3856 and 3860.

Conclusion

Sections 3856 and 3860 create an extremely unfair, if not unconstitutional, burden upon the employee if the employer exercises his rights in regard to attorney's fees. The employee's attorney is also placed in a very uncomfortable position, for if he exercises his right to be reimbursed for his services to the employer, then he reduces his own client's recovery by whatever amount the court awards. Furthermore, he may not receive any fee if he does not obtain a judgment or settlement in excess of the compensation claim.

While the inequities of the statutes could be avoided by entering into an agreement with all the parties for distribution of the cost and expenses,[63] such agreements are not always possible. Indeed, it may be that such an agreement is unethical because the interests of the employee and the employer may be adverse.[64] Ironically, a statutory provision, properly drawn, could play an important part in the equitable distribution of the costs and fees of third party litigation. As presently worded, however, the statutory scheme prevents rather than promotes equality.

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61. See note 60 *supra*.

62. 30 Cal. Comp. Cases 406 (1965).

63. *See* Branscum v. State Comp. Ins. Fund, 232 Cal. App. 2d 352, 42 Cal. Rptr. 682 (1965).

64. Such a possibility could arise under the rule enunciated in Witt v. Jackson, 57 Cal. 2d 57, 17 Cal. Rptr. 369, 366 P.2d 641 (1962). The supreme court in that case imposed the requirement that the employer be free of liability before he can be reimbursed for any benefits he has paid. *Id.* at 72, 17 Cal. Rptr. at 378.