

# Multiple Accidents and Section 5(b): What Does the Employer Have to Prove to Recover?

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In *Hunt v. Herrod*, 2019 IL App (3d) 170808, the third district appellate court found that an employer is not entitled to a lien pursuant to Section 5(b) of the Workers' Compensation Act merely because it paid workers' compensation benefits. Instead, to recover a lien the employer must establish that the payments it made were connected to the injury for which the employee recovered from a third party. The court also held that evidence depositions of treating and examining physicians are admissible at a lien adjudication hearing whether or not the physicians are available.

On September 27, 2009, Hunt was employed by the city of Peoria as a police officer. While on duty, Hunt's vehicle was rear ended by Herrod. As a result of the accident, Hunt sustained low back injuries. He was evaluated by the police department doctor, participated in physical therapy, and underwent an MRI. Based on the MRI, no surgery was recommended. He missed three days of work and was on light duty for two weeks. Hunt had a history of low back pain, injuries, and aggravations prior to the collision. He rated his usual back pain as a 1 or 2 and occasionally a 3 out of 10. Although Hunt's pain increased after the collision, he had reached his baseline discomfort level when he returned to full duty work in December 2009.

On January 25, 2010, Hunt participated in a training exercise. He advised the training officers before the exercise that his back pain was at a level of 1 or 2. He did not report an injury during the training session. When he returned home that evening, he was in severe pain in his low back, which he rated at a 6-8/10. He was numb below his waist in his saddle area and unable to properly use

his right leg. He testified that his symptoms were not like any he previously experienced. He sought medical attention, underwent an MRI, and had emergency surgery on January 29, 2010. Unfortunately, the surgery did not yield a positive outcome.

Hunt filed a workers' compensation claim for the training incident but did not initially file a workers' compensation claim for the vehicular accident. He also filed for a line-of-duty pension with the police pension board, alleging inability to work secondary to the September 2009 and January 2010 incidents. The board determined that Hunt could not return to full-duty police work and was entitled to a disability pension. It denied his request for a line-of-duty pension finding that he failed to prove that his low back condition was caused, aggravated, or accelerated by either the September 2009 or January 2010 incidents.

Hunt filed a personal injury action against Herrod for the vehicular accident which settled for \$75,000. The City of Peoria intervened and asserted a lien under Section 5(b) of the Act in the amount of \$125,899.50. Hunt filed a motion to adjudicate Peoria's lien, seeking a reduction of the lien to zero based on Peoria's refusal to respond to his discovery requests and Peoria's lack of evidence linking the lien to the car accident.

The motion to adjudicate was heard on January 21, 2016. Peoria argued the Workers' Compensation Act did not require it to prove any causation and the only proof necessary was that compensation was paid. It produced payment logs from its third-party administrator which allocated payments of \$5,325.36 to the September 2009 accident and \$119,880.13 to the January 25, 2010 incident.

Peoria's senior human resource specialist testified that he accepted Hunt's claim for the September 2009 accident, but he did not authorize any workers' compensation payments for the January 2010 injury. He prepared a document in preparation for trial showing that Peoria paid \$125,899.50 in medical bills. He testified that the third-party administrator's payment logs indicated two different claims for Hunt's injuries and a payout of \$5,325.36 for the 2009 vehicular accident and \$119,880.13 for the 2010 training injury.

On August 10, 2016, the trial court entered an order finding that Peoria had a \$125,899.50 lien and that a "portion of expense should be allocated to the accident as an aggravating factor to what is a chronic, pre-existing back injury." The court determined that Peoria was entitled to 10 percent of its lien amount (\$12,589.95). The court also found that the evidence depositions of Hunt's medical expert, Dr. Kube, and Peoria's independent medical examination physician, Dr. Singh, were inadmissible because the doctors were not unavailable to testify.

Peoria filed a Motion to Reconsider claiming that there were no facts to support the trial court's allocation of funds based on an aggravation of pre-existing condition. In response, Hunt argued that the trial court should reduce the lien to \$5,325.36, the amount documented in the third-party administrator's payout log for the September 2009 injury. On October 26, 2017, the trial court entered an order finding that because Peoria continued to pay workers' compensation benefits after Hunt returned to work in December 2009, it was entitled to the entire \$75,000 settlement to satisfy its

lien. Hunt appealed.

The third district began its analysis by pointing out that Section 5(b) of the Workers' Compensation Act provides that an employer is entitled to amounts paid to the employee under the Act when: (1) some person other than the employer caused the injury, (2) the other person is legally liable for damages, and (3) the employee reaches a settlement with that third-party. The employer is also entitled to a lien on the employee's recovery equal to the amount of workers' compensation benefits paid or owed. The court noted that under Section 5(b) an employer is not required to bring an action to protect its lien, and the lien is preserved regardless of whether it has been asserted.

The court explained that the trial court may hold an evidentiary hearing to adjudicate a lien to determine the amount of the workers' compensation lien where there are multiple claims that could be attributable to the injured employee's condition. At the hearing, the trial court should determine the settlement amount attributable to each of the incidents. Where the employer has paid more compensation than the employee recovered from the third-party, the employer is entitled to the entire recovery, less fees and costs.

The third district found that the trial court's decision that Peoria's lien "should be allocated to the accident as an aggravating factor to what is a chronic, pre-existing back injury", and its award of 10 percent of the lien (\$12,589.95) was in error. The court rejected Peoria's argument that it was not required to prove that the workers' compensation payments were related to either the 2009 car accident or the 2010 training injury, and as a result, reversed the trial court's revised order awarding Peoria the entire lien.

The court found it significant that Peoria presented no expert medical evidence connecting its workers' compensation payments to the vehicular accident. It noted that the only evidence of Hunt's medical condition was his testimony regarding the chronic nature of his back pain, that he had returned to baseline when he returned to work in December 2009, and that the training injury caused him levels of pain he

had not previously experienced.

The court stated that Peoria was not entitled to a lien merely because it paid workers' compensation benefits but was required to establish that the payments it made were connected to the injury for which Hunt recovered from the third party. The court found that Peoria had not presented any medical evidence connecting the payments made for the training injury to the vehicular accident settlement. As such, the court held that the trial court erred in determining that Peoria was entitled to the entire settlement amount without first establishing a nexus between the payments and the settlement injury.

The court remanded the case back to the trial court with directions that on rehearing, Peoria should be allowed to show what it paid for the vehicular accident. It held that the payments related to the car accident ended when Hunt was medically released to return to full duty in December 2009 and that Peoria could not argue that it was entitled to the settlement proceeds for payments it made for the training injury.

The court also addressed the trial court's rejection of the evidence depositions of Drs. Kube and Singh, both of whom were deposed for the pension board hearing. The court found that the trial court's decision that Kube's deposition was inadmissible because he was not available to testify at trial was in error. The court pointed out that Supreme Court Rule 212(b) allows an evidence deposition of a physician or surgeon to be introduced at trial on the motion of either party regardless of the deponent's availability and that the need for an affidavit to establish the unavailability of a deponent under Supreme Court Rule 222(f)(3) is not necessary when the deponent is a physician or surgeon. Accordingly, Dr. Kube's availability was immaterial to the admissibility of his evidence deposition, and the deposition should have been admitted. The court held that on remand, the depositions of Dr. Kube and Dr. Singh should be admitted. ■