FOURTH DIVISION
March 7, 2013

Nos. 1-08-3304; 1-09-0165; 1-09-0188 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAUL SANCHEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
RENTAL SERVICE CORPORATION,	)	
	)	
Defendant and	)	No. 08 L 6319
Third Party Plaintiff	)	
	)	
(Paul's Welding Service, Inc.,	)	Honorable
	)	Jennifer Duncan-Brice,
Third-Party Defendant-Appellant).	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Sterba* concurred in the judgment.
Presiding Justice Lavin dissented.

ORDER

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*Pursuant to Justice Gallagher's retirement, Justice Sterba has participated in the reconsideration of this case. He has reviewed all relevant materials, including the original opinion filed on March 10, 2011 and the petition for rehearing, the amended petition for rehearing, the answers to the petitions for rehearing and the reply in support of rehearing.

¶1 HELD: (1) The employers' lien is for the gross amount of the workers' compensation benefit paid to the injured worker and the court had no authority to reduce it in this case. (2) The Illinois Insurance Guarantee Fund is entitled to reimbursement from the settlement with the third party tortfeasor for the amount not only paid by it but also for the amount of funds paid by a liquidated insurance company for workers' compensation under the Insurance Code, Illinois Insurance Guaranty Fund Act and Workers' Compensation Act, as the Fund stands in the place of the liquidated insurance company as the substitute subrogee of the employer if there is a subrogation clause in the insurance policy, the subrogated funds are part of the estate of the liquidated insurance company. (3) The employer's lien is subject to the statutory attorney fees, costs and expenses. (4) An attorney cannot be awarded attorney fees based on a miscalculation related to his premature disbursement of third party settlement from a tort action in workers' compensation case before the time for a motion for rehearing and before the time for filing an appeal. (5) A settlement obtained without providing for the reimbursement of workers' compensation benefits is not valid. (6) The employer or insurer who is owed reimbursement of workers' compensation benefits paid has a remedy against the third-party tortfeasor where a third-party case is settled and the settlement funds are disbursed to the plaintiff employee without reimbursement of a workers' compensation lien. (7) Because the circuit court did not follow the appellate court's instructions on first remand, a second remand was necessary. (8) The owner of an employer which is now out of business cannot personally benefit from the employer's lien absent a showing the business was self-insured and/or that benefits were paid personally by the owner.

¶2 INTRODUCTION

¶3 Plaintiff-Appellee Sanchez seeks a rehearing and has raised questions in his petition and amended petition that require a more robust explanation than our opinion. We are therefore withdrawing that opinion by separate order and entering this order.

¶4 Third-party defendant Paul’s Welding Service (PWS) appeals from an order of the circuit court restricting its recovery on a workers' compensation lien against the proceeds of a settlement obtained by its former employee, plaintiff Raul Sanchez (Sanchez). The order limited recovery to the amount paid by the Illinois Insurance Guarantee Fund (Fund), ordered the money to be paid directly to the Fund and barred recovery of the amount paid by PWS’s workers'

compensation carrier, Legion Insurance Company (Legion) before Legion went into liquidation. On appeal PWS contends the court should have enforced the entire amount of workers' compensation benefits paid to Sanchez as a lien to the employer PWS.

¶5 In his cross appeal Sanchez argues that we do not have jurisdiction because the trial court's October 29, 2008 order was not final and that PWS's filing of an appeal on December 1, 2008 divested the trial court of jurisdiction to enter its December 19, 2008 order; that there was no 304(a) language in the October 29, 2008 order; that the wrong person (PWS) took the appeal because PWS waived its lien by being the beneficiary of the dismissal of a spoilation claim and because there was never a judgment in favor of PWS; that the Fund is not a party to the appeal; that the money paid out by Legion cannot be claimed by either PWS or the Fund; and that the trial court erred when it denied Sanchez credit for attorney fees, expenses and costs; and that the trial court should have held an evidentiary hearing to determine if the Fund was entitled to any lien.

¶6 In order to answer the questions asked we must also ask and answer other questions: Does the Fund stand in the place of Legion as to the benefits paid out by Legion? Is this case moot? Does PWS and/or the Fund have any other remedy, either against Sanchez or his attorneys, or against the third-party tortfeasor, RSC? What if PWS is out of business? Can the owner personally claim the lien? Was there a subrogation clause in the PWS policy with Legion? For the following reasons we reverse and remand a second time for the circuit court to follow our instructions and enter a judgment for the entire amount of the employer's workers' compensation lien and hold a hearing to gather additional facts and apply the law as we instruct

in our order herein.

¶7 FACTUAL BACKGROUND

¶8 Raul Sanchez (Sanchez), a construction worker, was injured in September 2001, on the job while working for Paul's Welding Service (PWS) when a scissor lift rented by PWS from Rental Service Corporation (RSC) malfunctioned. Sanchez was working that day as a "pusher," that is, the man who pushes columns into place as steel joists overhead are also placed. When the scissor lift bumped into one of the joists, the joist went straight down and hit Sanchez. He received head, neck and jaw injuries. Sanchez filed a Workers' Compensation Claim against PWS and was paid benefits pursuant to action of the Illinois Industrial Commission of $102,994.63 for medical expenses plus $42,024.08 for Temporary Total Disability totaling $145,018.71, often rounded in the pleadings to $145,019. This amount was paid on behalf of PWS by its Workers' Compensation Insurance Carrier, Legion Indemnity (Legion).

¶9 In April 2002 Legion went into liquidation, and in the circuit court of Cook County, Illinois, Case No. 02 CH 06695, Orders of Conservation and Liquidation were properly entered along with a finding of insolvency against Legion.

¶10 We take judicial notice of the conservation and liquidation orders. The Order of Conservation, April 3, 2002, named the Director of Insurance of the State of Illinois as the Conservator of Legion and authorized and directed him "to immediately take possession and control of the property books, records, accounts, business and affairs, and all other assets of the Defendant Legion *** and to conserve the same for the benefit of the policyholders and creditors of Legion, and of the public, and further authorizing the Director to take such actions as the

nature of the cause and interests of Legion, its policyholders and creditors and the public may require ***."

¶11 The Order of Liquidation, April 9, 2003, found Legion insolvent, and created an estate "comprising of all the liabilities and assets of Legion" and ordered that the "Director is vested with the right, title and interest in all funds recoverable under any insurance policies."

¶12 The Illinois Insurance Guarantee Fund (Fund) took over the defense of the workers' compensation case and ultimately settled with Sanchez for an additional $120,186, an amount approved by the Illinois Industrial Commission. Altogether Sanchez's worker's compensation benefits equaled $265,204.71, often rounded in the pleadings to $265,205.

¶13 On May 3, 2002 Sanchez filed a Personal Injury Action against PWS, RSC and Skyjack (the equipment manufacturer) in case 2002 L 5613. The case involved claims and counterclaims, PWS joined the lawsuit to protect its Employer's Lien. Skyjack was granted summary judgment. The case went on, with vigorous motion practice, until it was settled in August 2006 for $300,000.

¶14 Sanchez filed a Motion to Adjudicate the (Employer's) Lien, taking the position that because PWS had participated in the settlement negotiations, PWS had waived its Employer's Lien for the entire workers' compensation it had paid out through Legion and later through the Fund.

¶15 The trial court agreed, relying on *Borrowman v. Prastein*, 356 Ill. App. 3d 546 (2005), in an order entered August 14, 2006. The settlement agreement is not a part of this record. The record does not indicate any trial court order protecting the lien or the settlement fund pending

any post trial motions or appeals.

¶16 The case was then dismissed. PWS filed a Motion to Strike or Vacate the Order which was denied on September 11, 2006. PWS appealed.

¶17 On May 19, 2009 this Court reversed and remanded, holding that *Gallagher v. Lennart*, 367 Ill. App. 3d 293 (2006), *affd.* 226 Ill. 2d. 208 (2007), not *Borrowman*, controlled and that the employer's lien was not waived unless the waiver was specific.

¶18 On June 10, 2008 the case was remanded to the trial court, and renumbered as 08 L 6319.

¶19 On remand, in an order entered October 29, 2008, the trial court enforced only that part of the lien ($120,186) paid by the Fund because the employer's original insurer, Legion had been liquidated. The trial court ordered the $120,186 to be paid directly to the Fund, and reserved a decision about any attorney fees, costs or expenses.

¶20 PWS filed its first notice of appeal in the second round on December 1, 2008. The trial court entered an order denying attorney fees, expenses and costs and ordered the case disposed on December 19, 2008. Sanchez cross appealed. This court entered an order, dated November 29, 2010, which was later withdrawn for procedural reasons. PWS appealed the trial court's December 19, 2008 order and the underlying October 29, 2008 order.

¶21 That left the second (consolidated) appeal of PWS and the cross appeal of Sanchez ready for review by this court, which entered an opinion on March 10, 2011 reversing and remanding again, directing the trial court that "PWS has the right to recover on the entirety of its workers' compensation lien," stating "we reverse the order of October 29, 2008 to the extent it denied recovery of the 'lien on (sic) [to] the amount paid by the Fund,' and we reverse the order of

December 19, 2008 to the extent it denied recovery of attorney's fees and costs."

¶22 Sanchez filed a petition and an amended petition for rehearing. We deny the petition and amended petition for rehearing with this order.

¶23 To complicate matters, Sanchez alleges, and PWS does not contradict, that PWS is no longer in business; it is uncontradicted that the money from the settlement in the tort lawsuit was disbursed by the attorney for Sanchez while PWS had a timely motion for rehearing and then a timely notice of appeal [1st appeal] on record; and the Fund is not a party to the underlying case or this appeal.

¶24 The basic issue is whether the employer, PWS, can recover out of the third party settlement the entire amount of workers' compensation benefits paid to Sanchez as its employer's lien of $265,204.71, including the $145,018.71 paid to Sanchez by Legion and the $120,186 ordered by the trial court to be paid directly to the Fund and not to PWS.

¶25 For the reasons that follow we hold that: (1) The employers' lien is for the gross amount of the workers' compensation benefit paid to the injured worker and the court had no authority to reduce it in this case. (2) The Illinois Insurance Guarantee Fund as the substitute subrogee of PWS is entitled to reimbursement from the settlement for the amount not only paid by it but also for the amount of funds paid by Legion under the Insurance Code, Illinois Insurance Guaranty Fund Act and Workers' Compensation Act, as the Fund stands in the place of Legion as the substitute subrogee of the employer if there is a subrogation clause in the insurance policy. The subrogated funds are part of the estate of the liquidated insurance company. (3) The employer's lien is subject to the statutory attorney fees, costs and expenses. (4) An attorney cannot be

awarded attorney fees based on a miscalculation related to his premature disbursement of a third party settlement from a tort action in a workers' compensation case before the time for motion for rehearing and before the time for filing an appeal has passed. (5) A settlement obtained without providing for the reimbursement of workers' compensation benefits is void. (6) The employer or insurer who is owed reimbursement of workers' compensation benefits paid has a remedy against the third-party tortfeasor where a third-party case is settled and the settlement funds are disbursed to the plaintiff employee without reimbursement of a workers' compensation lien. (7) Because the circuit court did not follow the appellate court's instructions on first remand a second remand is necessary. (8) If the employer is now out of business, the owner cannot personally benefit from the lien because he did not self-insure but, rather, was insured, absent some other extraordinary circumstance.

¶26 ANALYSIS

¶27 STANDARD OF REVIEW

¶28 This matter requires the interpretation of several statutes, the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2000)), the Illinois Insurance Guarantee Fund Act (215 ILCS 5/532-553 (West 2000)) , and various sections of the Illinois Insurance Code (215 ILCS 5/1 *et seq*. (West 2000)). The construction of a statute is a question of law which we review *de novo*. *Overlin v. Windmere Cove Partners, Inc*., 325 Ill. App. 3d 75, 77 (2001).

¶29 JURISDICTION

¶30 Sanchez argues that this court is without jurisdiction to hear an appeal of the trial court's order entered December 19, 2008, and its underlying October 29, 2008 order, because PWS's

December 1, 2008 appeal from the trial court's non-final October 29, 2008 order divested the trial court of its jurisdiction to enter its final order on December 19, 2008.

¶31 In order to clarify our decision on the jurisdiction issue it is necessary to briefly recap the chronology of this case. On September 14, 2006, the trial court, relying on *Borrowman,* entered an order holding that PWS had waived its entire employers' lien.

¶32 On March 28, 2008 this court reversed and remanded, (1st Appeal, Case No. 1-06-2915), holding that the trial court should have relied on *Gallagher*, not *Borrowman*, and that the employer's lien is statutory and cannot be waived unless the waiver is specific. Our order reiterated that the lien is for the entire amount.

¶33 On October 29, 2008 the trial court entered an order that enforced only the part of the employer's lien that the Illinois Insurance Guarantee Fund ("Fund") paid out ($120,186) and denied the employer's lien on that part of the workers' compensation benefits paid out by Legion Insurance which had been liquidated, and ordered that the $120,186.00 be paid directly to the Fund, not to the employer, PWS, or even to PWS and the Fund jointly. The court reserved the issue of "*pro rata* fees, costs and expenses" for another date. Because under the Workers' Compensation Act attorney fees are statutorily set at 25% of any reimbursement made to the employer by the employee out of any fund that results from the employee's suit or settlement with a third party tortfeasor, we take the October 29, 2008 order to mean that the court was reserving attorney fees and the *pro rata* costs and expenses, also covered in the Act.

¶34 On December 1, 2008, PWS filed another appeal (2nd Appeal, Case No. 1-08-3304) "out of an abundance of caution" however, this appeal was not timely, as it was more than 30 days

from the October 29, 2008 trial court order and it was not based on a final and appealable order, nor did that order include the Supreme Court Rule 304(a) (Ill. S. Ct. Rule 304(a) (eff. Jan. 1, 2006) language that would have made the appeal ripe as to the issues presented. Further, there was no postjudgment motion filed in the trial court nor were the attorney fees, costs and expenses separate claims to be brought under the mantra of Illinois Supreme Court Rule 303 (a)(2) (Ill. S. Ct. Rule 303(a)(2) (eff. June 4, 2008)) which would have saved that appeal. PWS's December 1, 2008 appeal specifically challenged the October 29, 2008 trial court order that limited reimbursement of the employers' lien to the amount paid by the Fund, ordered it paid to the Fund, and denied the employer's lien on the part of the benefits paid to Sanchez by Legion. However, since the December 1, 2008 appeal was ineffective, the trial court's jurisdiction, reserved by itself specifically, was not disturbed and the trial court was then free to enter follow up orders, which it did.

¶35 On December 3, 2008, the trial court set December 19, 2008 as the date for hearing on the bill of costs and expenses, although that court order omits any mention of attorney fees.

¶36 On December 19, 2008, the trial court entered two separate orders. The first ruled that the Fund amount was not entitled to a set-off for attorney fees or *pro rata* costs or expense set-offs since the IIGF Act does not provide for them, and reiterated that the Fund was entitled to $120,186.00. The second ruled that the case was final and off call.

¶37 On January 16, 2009, PWS filed a timely appeal (2nd Appeal, 2nd case, Case No. 1-09-0165) from the substantive December 19, 2008 trial court order and its underlying October 29, 2008 order.

¶38 On January 20, 2009 PWS filed another appeal, (2nd Appeal, 3rd case, Case No. 1-09-0188), one to "preserve the appearance of Co-Counsel."

¶39 We consolidated appeal case numbers1-08-3304, 1-09-0165 and 1-09-0188, which we will refer to collectively as the "2nd Appeal."

¶40 PWS acknowledges that the circuit court's order of October 29, 2008 did not dispose of the entire case but left the issue of attorney fees outstanding. We find that the trial court specifically retained jurisdiction of this matter until the "*pro rata* fees, costs and expenses" were decided. Thus, the entire case was not disposed of by the circuit court at that time. Since the trial court order of October 29, 2008 was not a final order, the decisions contained therein were part of the continuum of orders entered to finalize this matter and when added to the trial court orders entered on December 19, 2008 give both sides the complete and final orders in this matter. The circuit court's order of December 19, 2008, disposed of the attorney fees, costs and expenses, which was the last remaining pending matter.

¶41 Illinois Supreme Court Rule 301 states: "Every final judgment of a circuit court in a civil case is appealable as of right." Ill. S. Ct. Rule 301 (eff. Feb. 1, 1994). The notice of appeal filed before entry of the final disposition becomes effective when the order disposing of the final issue is entered. *F. H. Prince & Co., Inc. v. Towers Financial Corp.*, 266 Ill. App. 3d 977, 983 (1994). In this case the appeal was premature and ineffective until the final order was entered. Therefore, it did not divest the circuit court of its own, retained and statutory jurisdiction to decide the issues of attorney fees, and *pro rata* costs and expenses. It is the final judgment, the trial court order of December 19, 2008 and its underlying October 29, 2008 order, that was appealable as of right

and the premature notice of appeal became effective at that time. Up until then, the trial court retained jurisdiction.

¶42 Sanchez attempts to cloud the issue by arguing that PWS divested the trial court of its own jurisdiction by filing a premature appeal and raising Illinois Supreme Court Rule 303(a)(2), but that subsection of the Supreme Court Rule does not apply since in this case there was no postjudgment motion by either side, and the issue of attorney fees and the matter of *pro rata* costs and expenses is not a separate claim, but a statutory matter that was under the jurisdiction of the court from the moment the first complaint was filed to the moment the final order was entered. See Illinois Supreme Court Rule 303(a)(2) (eff. May 30, 2008) ("When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered").

¶43 It is true that PWS's appeal of the October 29, 2008 order could have been possible standing alone if the court had added the language required by Illinois Supreme Court Rule 304, but the court did not, and in any event that notice of appeal was filed too late. It is clear that the trial court had continuing jurisdiction.

¶44 PWS's first notice of appeal challenged the circuit court's award of only part of its workers' compensation lien, directed against an order that was not final and appealable and did not include the alternate 304(a) language. PWS's first notice of appeal did not divest the circuit court of jurisdiction to proceed with the matter, however, because PWS filed that notice of

appeal outside the 30 day limit and because the circuit court specifically reserved for itself the remaining issues of fees, costs and expenses. Once the circuit court entered its two final orders, one finding the case disposed, and one denying attorney fees, costs and expenses as a set off against the amount it had previously awarded as reimbursement for workers' compensation, PWS filed a timely appeal and in its notice brought both the partial award of workers compensation and the denial of the set off for fees, costs and expenses before the appellate court. We therefore have jurisdiction to consider all matters.

¶45 LAW OF THE CASE

¶46 In the first appeal in this matter, entered May 19, 2009, in Case No. 1-06-2915, the question was whether PWS waived its statutory lien during in the settlement stage of the worker's compensation case. We held that the circuit court erred in finding PWS' workers' compensation lien waived and reversed and remanded. In light of the explicit waiver rule adopted in *Gallagher*, we reversed the circuit court's determination that PWS waived its statutory lien when it initially settled Sanchez's workers' compensation claim. We also rejected the alternative argument that PWS subsequently waived its lien during the pretrial conference leading to the settlement and dismissal of the instant litigation. Specifically, we held that:

> "*The Act [Workers' Compensation Act] provides that an employee who has received workers' compensation benefits must reimburse his employer up to the amount of those benefits received from a third-party legally* responsible for the employee's injuries ***. The Act further provides that if an employee agrees to a worker's compensation settlement, the employer may claim a lien upon any award or judgment that the employee

> ultimately receives from a third party. (Emphasis added.) 820 ILCS 305/5(b) (West 2006). 'Our supreme court has recognized that the workers' compensation lien provided for in section 5(b) prevents the employee from obtaining a double recovery and is crucial to the Act's overall scheme.' *Gallagher* [*Gallagher v. Lenart*, 226 Ill. 2d 208 (2007)], 226 Ill. 2d at 238-39, quoting *In re Estate of Dierkes*, 191 Ill. 2d 326, 331-33 (2000). 'It is therefore of the utmost importance that the circuit court protect the employer's workers compensation lien.' *Gallagher*, 226 Ill. 2d at 239, quoting *Dierkes*, 191 Ill. 2d at 333."

¶47 When that order was entered by this court PWS did not have to do anything further, since the order was in its favor. Sanchez did nothing. Thus, our holding became the law of the case. "The failure of a party to challenge a legal decision when it has the opportunity to do so renders that decision 'the law of the case for future stages of the same litigation, and [that party is] deemed to have waived the right to challenge that decision at a later time.' " *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540, 546 (1997) (quoting *Aardvark Art, Inc. v. Lehigh/Steck-Warlick*, 284 Ill. App. 3d 627, 632 (1996)).

¶48 We have already held that the employer has a lien for the entire amount, but this is now again the subject of an appeal. This is vexing because: (1) we have already held that the lien exists in favor of the employer and the employer did not waive it; (2) we have also already held that consistent with *Gallagher* and *Dierkes*, the employer's lien is for the entire amount of the workers' compensation benefit received by the worker and the entire amount of the lien is $265,204.71; (3) the funds from the tort settlement ($300,000) were prematurely disbursed by Sanchez's attorney before the first appeal while there was still a timely motion for rehearing and

then a timely notice of appeal; and (4) the circuit court itself failed to conform to the direction of this court, and clear precedent, by failing to protect the entire employer's lien or at the very least failing to protect the settlement fund, perhaps in trust or escrow, until the litigation was fully complete.

¶49 Despite our holding and instruction on remand, the circuit court ordered that the Fund be reimbursed only to the extent it, the Fund, had paid Sanchez, for a total of $120,186. However, when the circuit court entered its order of October 29, 2008, it clearly stated that: "this Court finds that while plaintiff's counsel was taking a risk by dispersing [sic] the funds [from the tort lawsuit settlement] before the deadline for an appeal had passed, this does not extinguish the Fund's right to be reimbursed ***."

¶50 Given our clear instruction, we find it necessary to reiterate that the workers' compensation employer's lien has been a consistent part of Illinois' workers' compensation law and the employer's lien must be protected. We also review the statutory provisions which establish that the Fund is entitled to reimbursement for the full amount of the lien as the subrogee of the employer.

¶51 THE EMPLOYER HAS A STATUTORY RIGHT TO REIMBURSEMENT WHICH HAS BEEN CONSISTENTLY UPHELD

¶52 The employer has a statutory right to reimbursement. Section 5(b) of the Workers' Compensation Act provides:

> "(b) Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some

> person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act [820 ILCS 305/8]." 820 ILCS 305/5(b) (West 2012).

¶53 Section 5(b) contained the exact same language in 2001, when the accident in this case occurred. See 820 ILCS 305/5(b) (West 2000).

¶54 This statutory right to reimbursement has been consistently upheld. See *Employers Mutual Casualty Company, Subrogee of Clark-Maple Chevrolet Company v. Trimon Elevator Company and Richard Moore*, 71 Ill. App. 2d 124, 133 (1966) ("The Workmen's Compensation Act provides in relevant part: first, if any compensation is received by the employee from his employer the employer may have a lien on any award judgment or fund out of which the employee might be compensated from such third party"); *Hartford Accident & Indemn. Co. v. D.F. Bast, Inc.*, 56 Ill App. 3d 960, 964 (1977) ("An employer has a lien right against any monies paid by a third party tortfeasor as a result of the injury or death of the employee"); *Pederson v. Mi-Jack Products*, 389 Ill. App. 3d 33, 39 (2009) ("[S]ection 5(b) provides *** a

lien [to an employer] against compensation that an employee recovers from a third party for any workers compensation benefits the employer pays"); *Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill App. 3d 5, 7 (2007) ("[Section 5(b) of the Act] grants an employer *** a statutory lien on any recovery the employee receives from a liable third party equal to the amount of the worker's compensation benefits paid or owed to the employee" (quoting *Dierkes*, 191 Ill. 2d at 328)).

¶55 This policy has remained unchanged in our state since 1911. In Illinois by 1911 legislation provided that employers in construction work were covered by the Employment Act, had a responsibility to pay for enough insurance to pay injury and/or death benefits to their employees, that when the injury was caused by a third party the employee or the employer could bring an action, that if the third party action was successful the employee's amount of benefits from the employer would be reduced according to the Act.[1]

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[1]See Laws of Illinois, Forty Seventh General Assembly, 1911, Employment, Compensation for Accidental Injuries or Death. ("*Section 1.* That any employer covered by the provisions of this Act in this State may elect to provide and pay compensation for injuries sustained by an employee arising out of and in the course of the employment according to the provision of this Act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided. *Section 2.* The provisions of this Act shall apply to every employer in the State engaged in ... any construction ...work. *** *Section 15.* This Act shall not affect or disturb the continuance of any existing insurance...maintained by the employer ***. *Provided* the employer contributes to such *** an amount sufficient to insure the employee *** the full compensation herein provided. *** *Section 17* Where the injury for which compensation is

¶56 "An employer's reimbursement of workers' compensation payments from an [employee's] third party recovery is crucial to the workers' compensation scheme." *Gallagher*, 367 Ill. App. 3d at 299 (quoting *Dierkes*, 191 Ill. 2d at 331). "The worker's compensation system is based on the public policy that the employer, while himself not actually negligent, [***][2] should compensate the employee for injury incurred on the job if no other recovery is available. However, when recovery is obtained from the party actually responsible for the employee's injury, fairness and justice require that the employer be reimbursed for the workers' compensation benefits he has paid or will pay." *Denius v. Robertson*, 98 Ill. App. 3d 83, 87

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payable under this Act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof: a. The employee *** may take proceedings both against that person to recover damages and against the employer for compensation but the amount of the compensation which he is entitled to under this Act shall be reduced by the amount of damages recovered. b. If the employee *** has recovered compensation under this Act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under Sections 4 and 5 of this Act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor.")

[2] Employer negligence became a non-issue in payment of workers' compensation benefits with an amendment to the Workers' Compensation Act in 1957. See Ill. Rev. Stat., Ch. 48, para. 138.5; Laws 1957, p. 2610, § 1, eff. July 11, 1957.

(1981).

¶57 Precedent in our state has continuously applied this unchanged foundation of workers' compensation law. See *Taylor v. Pekin Ins. Co*. 231 Ill. 2d 390, 391 (2008) ("[S]ection 5(b) [820 ILCS 305/5(b) West 2006] of the Illinois Workers' Compensation Act, grants an employer a lien on an employee's recovery against a third party tortfeasor up to the amount of the workers' compensation benefits paid to the employee"); *Harder v. Kelly*, 369 Ill. App. 3d 937, 942 (2007) "An employer's reimbursement of workers' compensation payments from an employee's third party recovery is crucial to the workers' compensation scheme" (quoting *Gallagher*, 226 Ill. 2d at 299, citing *Dierkes*, 191 Ill. 2d 331); *Fret v. Tepper*, 248 Ill. App. 3d 320, 326 (1993) ("Pursuant to Section 5(b) to the extent that a recovery is had from a third party, an employer is entitled to be reimbursed for the compensation benefits it paid"); *Higgenbottom v. Pillsbury Corp*., 323 Ill. App. 3d 240, 248 (1992) ("An employer, whether negligent or not has a right to recover compensation payments paid to an injured employee under section 5(b) of the Workers' Compensation Act [Ill. Rev. Stat. 1989, ch.48, par. 138.5(b)] This so called right of recoupment allows the employer to assert a lien upon any award, judgment or fund out of which such employee might be compensated from any such third party"); *Bart v. Union Oil Co.*, 236 Ill. App. 3d 964, 966 (1992) ("Section 5(b) of the Act grants a right of reimbursement to the payor of workers' compensation benefits out of the amount received by an employee in any action brought by that employee or his personal representative equal to the amount of the workers' compensation benefits previously paid to the employee ***"); *Porro v. M.W. Powell Co.*, 224 Ill. App. 3d 175, 177 (1991) ("An employer has a right to reimbursement for compensation paid when an

employee sustains an injury due to a third party's fault and recovers from that party" (citing *Freer*, 108 Ill. 2d 421, 426 (1985)); *Zuber v. Illinois Power Co.*, 135 Ill. 2d 407, 415 (1990) ("The first paragraph of section 5(b) [Workers' Compensation Act, Ill. Rev. Stat. ch. 48, par. 138.5(b) (1987)] provides that a compensation beneficiary who succeeds in a related damages action against a third party must pay to the employer, from the proceeds of that recovery, the amount of compensation paid or to be paid by the employer to such beneficiary"); *Corley v. James McHugh Construction Co.,* 266 Ill. App. 3d 618, 619 (1994) ("A workers' compensation lien is statutorily imposed by section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 1992) (section 5(b)). It requires an employee who had received workers' compensation benefits to reimburse the employer for the full amount of benefits from any recovery the employee obtains from a third party legally liable for the employee's injuries." (quoting *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 311 (1989)); *Langley v. J. L. Simmons Contracting Company*, 152 Ill. App. 3d 899, 905 (l987) ("Section 5(b)) of the Worker's Compensation Act (Ill. Rev. Stat. 1985, ch. 48, par. 138.5(b) allows an employer to recoup the amount of compensation paid by him to his injured employee from the proceeds of any judgment or settlement obtained by the employee from a third party"); *Kochan v. Arcade Electric Company*, 160 Ill. App. 3d, 1, 4 (1987) ("We conclude that section 5(b) of the Worker's Compensation Act is clear, unambiguous and susceptible to only one logical interpretation. The provision allows the employer to recoup the total amount of compensation that he paid to the employee"); *Kleeman v. Fragman Const. Co.*, 91 Ill. App. 3d 455, 458 (1980) ("In Illinois, an employer has a right to recover reimbursement of compensation payments from the proceeds of an action filed

by the employee against a third party under the Workmen's Compensation Act (the Act)"); *Kimpling v. Canty*, 13 Ill. App. 3d 919, 921 (1973) ("The Workmen's Compensation Act [Ill. Rev. Stat. ch. 48, para 138.5(b)] provides that an employee who has received compensation under the Act is required to reimburse an employer from any recovery the employee receives from a third party legally responsible for the employees' injuries ***. A lien upon a recovery by an employee for the amount of benefits is provided for the employer"); *Dierkes*, 191 Ill. 2d at 332 ("The employee is entitled to retain only that portion of a recovery from the tort-feasor which exceeds the benefits received under the Act from the employer" (quoting *Ullman v. Wolverine Ins. Co.*, 48 Ill. 2d 1, 7 (1970)); *Continental Casualty Co. v. Sweda*, 113 Ill. App. 2d 423, 428 (1969) ("[I]t is clear that the law contemplated that the employer should be reimbursed out of this recovery, since the employer had not caused the injury").

¶58 Our supreme court has reiterated our state's unwavering application of the statute. In *LeFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998), our supreme court was asked to decide a number of issues revolving around the employer's waiver of his lien. The court found that the employer could waive his lien at any time, that if the employer did recover any reimbursement from a third party action by the employee that based on the actual – not possible – recovery, the employer must pay his 25% of the attorney fees and *pro rata* share of costs and expenses, and went on to outline several hypotheticals that could change the formula for when and under what circumstances the employer could waive his lien and what the result would be: the main point, however, was the court's very clear statement: "We believe that these hypotheticals illustrate why we should be reluctant to depart from the text of section 5(b) and why we should interpret

the statute according to its clearly stated terms." *Lefever*, 185 Ill. 2d at 405. Thus, the statute continues to be upheld in its plain meaning.

¶59 THE EMPLOYER'S LIEN IS FOR THE ENTIRE AMOUNT OF WORKERS' COMPENSATION BENEFITS TO THE EMPLOYEE AND THE EMPLOYER MUST BE REIMBURSED FOR THE FULL AMOUNT

¶60 "The Act obligates the employee to reimburse the employer for the full amount of benefits paid or payable by him and that the Act creates a lien in favor of the employer upon any recovery by the employee for the amount of the benefits. The employee must reimburse the employer's lien from any recovery that the employee received from a third party." *Ullman v. Wolverine Insurance Co.*, 48 Ill. 2d 1, 7 (1970).

¶61 " '*There can be little question that what is protected is the employer's right to be reimbursed for the amount of compensation paid or to be paid by him to such employee* ***.' " (Emphasis in original.) *William Blagg v. Illinois F. W. D. Truck and Equipment Company*, 143 Ill. 2d 188, 194 (1991) (quoting *Freer v. Hysan Corp.*, 108 Ill. 2d 421, 426 (1985)). As stated in *Borden v. Servicemaster Management Services*, 278 Ill. App. 3d 924 (1996):

> "There is nothing in 820 Ill. Comp. Stat. Ann. 305/5(b) (1992) of the Workers' Compensation Act, 820 Ill. Comp. Stat. Ann. 305/1 *et seq*. (1992) that suggests a limitation on the employee's obligation of reimbursement from the third party recovery. On the contrary, the plain language of the statute grants the employer a right of reimbursement out of any recovery without regard to the type of damages the employee received payment for in the third party action." *Borden*, 278 Ill. App. 3d at 931 (quoting

Page v. Hibbard, 119 Ill. 2d 41, 47 (1987)).

¶62 We continue to uphold the workers' compensation statute's required protection of the employer's lien in the full amount. We join our colleagues in the First District in their analysis of this matter. " 'If an employer has made workers' compensation payments the obligation of reimbursement exists regardless of the amount that the employee recovers *** the employer is entitled to the entire recovery. ' " *Johnson v. Tikuye*, 409 Ill. App. 3d 37, 41 (2011) (quoting *Dierkes*, 191 Ill. 2d at 332-33). In that case the trial court conducted a hearing to determine the amount of the employer's workers compensation lien based on the evidence of proximate cause, and reduced the employer's lien, awarding the employer limited recovery. The payment to the employee from the third party was less than the workers' compensation paid out by the employer. Our colleagues determined that under Section 5(b) (820 ILCS 305/5(b) (West 2004)) the statute " 'grants the employer a lien on the recovery equal to the amount of workers compensation benefits paid or owed' " (*Johnson*, 409 Ill. App. 3d at 42 (quoting *Dierkes*, 191 Ill. 2d at 331-32)) and " 'there is nothing in the statute that suggests a limitation on the employee's obligation of reimbursement from the third party recovery. ' " *Id*. at 42 (quoting *Dierkes*, 191 Ill. 2d at 328).

¶63 Even in cases where the employer has been found to contribute to the injury, the courts have protected the employer's right to the full amount of the lien. As the court in *Langley v. J. L. Simmons Contracting Co.*, 152 Ill. App. 3d 899 (1987), explained:

> "An employer, whether negligent or not, has a right to recover compensation payments paid to an injured employee under section 5(b) of the Workers' Compensation Act (Ill. Rev. Stat. 1985, ch. 48, par 138.5 (b)). The trial court's reduction of the amount of the

> lien impermissibly interjects the concept of fault into the compensation award contrary to the intent of the statute to provide compensation to injured employees regardless of fault. We conclude that the trial court erred in reducing the amount of [the] workers' compensation lien." *Langley*, 152 Ill. App. 3d at 906.

¶64 "The Workers' Compensation Act (Ill. Rev. Stat. 1987, ch. 48, par 138.1 *et seq*.) does not place any limitations or qualifications on the recovery of the workers compensation lien on the employer." *Camp v. Star Erection Serv. Inc.*, 186 Ill. App. 3d 481,483 (1989). An employer who pays compensation to an injured employee under the Act is entitled to be reimbursed from the entire third party recovery by the employee and is not subject to adjustment to reflect relative proportion of fault assessed by jury between employer and third party. *Id*.

¶65 Even a setoff for medical expenses has been found to be error because the Act does not provide for such setoffs. See *Foster v. Devilbiss Co.*, 174 Ill. App. 3d 359, 367 (1988).

¶66 And, where the trial court reduced the employer's lien after holding an evidentiary hearing to adjudicate the lien and reduced it based on its findings of eligible work-related costs our colleagues reversed, finding that the lien should have been enforced without reduction:

> "The statute does not provide for the arbitrary lien reduction imposed by the trial court here. The legislature removed impediments to the employer's full reimbursement and specified setoffs thereto only for costs, expenses, and attorney fees. Had the legislature intended the employers reimbursement to be subject to additional setoffs, the legislature would have supplied them." *Johnson*, 409 Ill. App. 3d at 42 (quoting *Dierkes*, 191 Ill. 2d at 334).

¶67 The employer's lien is for the full amount even if the tort recovery is less than the employer's lien. "Our workmen's compensation statute does not make an employee's obligation to reimburse his employer dependent on the employee's recovering his full measure of damages from the tortfeasor. To the extent that workmen's compensation benefits have been received the obligation of reimbursement exists regardless of the amount recovered or the total damages sustained by the injured employee." *State Farm Mutual Automobile Ins. Co. v. Coe*, 367 Ill. App. 3d 604, 609 (2006) (quoting *Ullman*, 48 Ill. 2d at 8).

¶68 In *Gallagher* the employee claimed he settled the third party case for less than he otherwise would have in reliance on what he believed to be the employer's waiver of its lien when he turned in his resignation. The court found that since the "waiver" was not specific it did not operate as a waiver, and the court declined to "conduct a general inquiry into the fairness of the contract." See *Gallagher*, 226 Ill. 2d at 242.

¶69 "There is nothing in the statute that suggests a limitation on the employee's obligation of reimbursement from the third-party recovery. If an employer has made workers' compensation payments, the obligation of reimbursement exists regardless of the amount that the employee recovers." *Dierkes*, 191 Ill. 2d at 333 (quoting *Page v. Hibbard*, 119 Ill. 2d 41, 47 (1987)).

¶70 THE ACT PREVENTS DOUBLE RECOVERY

¶71 The statutory scheme means that employees still get the amount they are entitled to under worker's compensation, plus any additional funds in excess of the lien. However, no double recovery is allowed. "An employee is entitled to retain only that portion of a recovery from the third party which exceeds the benefits received under this Act from the employer." *Insurance*

Company of North America v. Andrew, 206 Ill. App. 3d 515, 519 (1991) (quoting *Ullman*, 48 Ill. 2d at 7). "Pursuant to section 5(b), to the extent that a recovery is had from a third party, an employer is entitled to be reimbursed for the compensation benefits it paid. To hold otherwise would be to permit the employee to receive a double recovery one from the third party and the other from his own employer." *Fret v. Tepper*, 248 Ill. App. 3d 320, 326 (1993) (citing *Sweda*, 113 Ill. App. 2d at 427-28).

¶72 "[T]he plain language of section 5(b) shows that an employer's reimbursement of workers' compensation payments from an employee's third party recovery is crucial to the workers' compensation scheme." *Gallagher*, 226 Ill. 2d at 238 (quoting *Dierkes*, 191 Ill. 2d at 331). "As this court explained in *Dierkes*, because an employer may be required to pay compensation to an injured employee under the Act even though the employer was without fault, section 5(b) serves the important purpose of allowing 'both the employer and the employee an opportunity to reach the true offender while preventing the employee from obtaining a double recovery.' " *Gallagher*, 226 Ill. 2d at 239 (quoting *Dierkes*, 191 Ill. 2d at 331-32). See also *Langley v. J. L. Simmons Contracting C*., 152 Ill. App. 3d 899, 905 (1987) ("This section [5(b)] allows both the employer and the employee to reach the true offender while preventing the employee from obtaining a double recovery"). " 'It is [] elementary that the claimant should not be allowed to keep the entire amount both of his compensation award and of his common law damage recovery' " *Dierkes*, 191 Ill. 2d at 332 (quoting 6 A. Larson & L. Larson, Larson's Workers Compensation Law Section 71.20 at 14-5 (1998)).

¶73 Here without full reimbursement of the employer's lien Sanchez would have a double

recovery – the $300,000 he settled for in his tort action against the third party defendant, and the $265,204.71 he got from his employer through workers compensation for a gross total of $565,204.71.

¶74 EMPLOYERS DO NOT HAVE TO DO ANYTHING TO PROTECT THEIR LIEN; EVEN CONSTRUCTIVE NOTICE OF THE LIEN IS SUFFICIENT

¶75 An employer's lien is a protected right even if the employer takes no action. "Section 5(b) of the Worker's Compensation Act provides that an 'employer may have or claim a lien upon any award, judgment or fund' out of which an employee might be compensated from a third party for injuries ***" *Brile v. Estate of Brile*, 296 Ill. App. 3d 661, 669 (1998). To protect its lien, an employer may file an action but is not required to. As the court explained in *Hartford*:

> "[S]ection 5(b), in providing this right to sue, states as follows: 'Prior to three months before such action would be barred the employer *may* in his own name or in the name of the employee or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee ***.' Ill. Rev. Stat. 1975, ch. 48, par 138.5. An employer is not required to institute an action in order to protect the lien. By use of the italicized work 'may' we believe the legislature has made it clear that an employer is not required to institute an action in order to protect the lien granted by section 5 (b)." (Emphasis in original.) *Hartford,* 56 Ill. App. 3d at 963.

¶76 Our courts have held that even constructive notice of an employer's lien is sufficient to enforce the lien. See *Chubb v. Carri Zolez*, 375 Ill. App. 3d 537 ("Based on the protections

afforded the employer in the statutory provision of section 5(b), the *Villapeano* court noted that the defendants had, at a minimum, constructive notice of the employer's interest.") *Chubb*, 375 Ill. App. 3d 543 (2007).

¶77 Here, however, Sanchez, his attorney and RCS all had actual notice of PWS's lien because PWS joined the case. Thus, there is no question the parties knew of the lien. Nothing else had to be done to protect the lien.

¶78 COURTS TREAT THE EMPLOYER AND INSURER AS INTERCHANGEABLE FOR PURPOSES OF PROTECTING THE LIEN

¶79 Unless the employer is self-insured, the law requires employers to have workers' compensation insurance. The law also requires employers to pay workers' compensation benefits. The law further requires that employees who are successful in third-party actions must reimburse their employers to the full extent of the benefits paid. The statute itself uses only the term "employer," but the courts have interpreted that to mean the employer or the insurance carrier, since in the real world it is impossible to conceive a workers' compensation policy without a subrogation clause.

¶80 The operative section of the Act which specifically mentions insurance carriers is section 305/4(g), which provides:

> "In the event the employer does not pay the compensation for which he or she is liable, then an insurance company *** which may have insured such employer against such liability shall become primarily liable to pay to the employee *** the compensation required by the provisions of this Act to be paid by such employer. The insurance carrier

may be made a party to the proceedings in which the employer is a party and an award may be entered jointly against the employer and the insurance carrier." 820 ILCS 305/4(g) (West 2000).

¶81 However, courts have consistently treated the employer and his insurance carrier as interchangeable for purposes of protecting the lien even though that is not specifically stated in the statute. In *Brandt v. John S. Tilley Ladders Co.*, 145 Ill. App. 3d 304 (1986), the insurance company intervened after the employer moved to dismiss the case. The court held that the insurance carrier had a right to intervene to protect its lien, even though the language of the statute at the time used only the word "employer." Pursuant to *Brandt*, this court has held:

"Under Illinois law, a workers' compensation insurance carrier may intervene to protect its right to a lien against the proceeds from an employee's settlement with a third party tortfeasor. Section 5 of the Illinois Workers Compensation Act provides:

'if the injured employee or his personal representative agrees to receive compensation from the employer *** the employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from [a] third party [tortfeasor] (Ill. Rev. Stat., 1985, ch. 48, par 138.5 (b) now 820 ILCS 305/5(b) (West 1992).'

Under this statute, Illinois courts have held that either an employer or a workers compensation insurer may intervene in an employee's suit against a third party tortfeasor in order to protect its lien interest in the employee's recovery." *Malatesta v. Mitsubishi Aircraft International, Inc*., 275 Ill. App. 3d 370, 374 (1995) (citing *Brandt*, 145 Ill. App.

3d 304).

¶82 "The purpose of such intervention is to allow the employer *or insurer* to protect its lien interest in any recovery of the employee to the extent that the employer or insurer initially was required to pay the employee under the Act." (Emphasis added.) *Brandt*, 145 Ill. App. 3d at 308.

¶83 In *Harder v. Kelly*, 369 Ill. App. 3d 937 (2007), the employer's insurance carrier was permitted to intervene where it had paid workers' compensation benefits to an injured employee. The employee then filed and settled a third-party lawsuit. The insurance company argued that it was subrogated to the employer's right to the workers' compensation lien. The trial court ruled, however, that the employer had forfeited its lien. The appellate court reversed and remanded, following the logic of *Gallagher* that the insurance carrier was as the subrogee of the employer and that the employer had not waived or forfeited its lien under section 5(b) because: (1) reimbursement of those payments was crucial to the workers' compensation scheme, in accordance with the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer; (2) preservation of the lien advances the purpose of the Workers' Compensation Act of preventing an employee's double recovery; and (3) finding a waiver would improperly rewrite the parties' settlement agreement, in which they chose not to address the employer's lien. *Harder*, 369 Ill. App. 3d at 941-42. Thus, under the Act, when an insurance company pays the workers' compensation benefits, it is subrogated to the right of the employer to the lien.

¶84 The court in *Denius* held that "when recovery is obtained from the party actually responsible for the employee's injury, fairness and justice require that the employer be reimbursed for the workers compensation benefits he has paid or will pay." *Denius*, 98 Ill. App.

3d at 87. In *Denius*, the insurance carrier paid the workers' compensation benefits, and the *Denius* court held that the carrier was thus entitled to reimbursement for the lien. The *Denius* court found that "[f]rom this statutory scheme, it is clear that Home, as carrier, for Haas's workmen's compensation insurance is entitled to reimbursement for its payment out of any settlement reached between the plaintiff's estate and the third party tortfeasor. The employer has a lien on any judgment in the amount he had paid or is to pay under workmen's compensation." *Denius*, 98 Ill. App. 3d at 86.

¶85 The employer, then, is the statutory recipient of the reimbursement, but the carrier actually gets the money since it is the insurance company that paid the benefits. The law protects the employer; case law protects the insurance company.

¶86 It is clear that the legislature saw the whole cloth: the employer has employees; a construction employer is automatically within the provisions of the Act; the employer may either self-insure or buy insurance; if the employee is injured he is entitled to compensation; if the employer is not insured or self-insured then the employer directly pays and is entitled to reimbursement; and if the employer is insured the insurance company pays and is entitled to reimbursement.

¶87 PWS was insured and its insurer, Legion, paid workers' compensation benefits before it was liquidated, and the Fund paid the remainder of the workers' compensation given to Sanchez. Thus, the amount Legion paid is owed to it. However, Legion is now defunct and has been liquidated. The question remaining is the proper allocation of funds paid by Legion. The circuit court felt that nothing should be done or can be done regarding the amount Legion paid since it

has been liquidated. However, we turn to statutory provisions regarding the liquidation of an insurer in explaining how and why the Fund is entitled not only to the amount it paid, but also to the amount paid by Legion.

¶88 THE ILLINOIS INSURANCE GUARANTEE FUND

¶89 In *Virginia Surety Co. v. Adjustable Forms*, 382 Ill. App. 3d 663 (2008), our court provided general background on the Fund. "The Illinois Insurance Code established the Illinois Insurance Guarantee Fund 'to protect policyholders of insolvent insurers and third parties who make claims under policies issued by insurers that become insolvent.' " *Virginia Surety Co.*, 382 Ill. App. 3d at 670 (quoting *Roth v. Illinois Insurance Guaranty Fund*, 366 Ill. App. 3d 787, 794 (2006)). "The Fund is entitled to set off the full limits of a policy's coverage of an insolvent insurer even though said limits were not recovered in a judicial proceeding, but rather through a settlement." *Roth*, 366 Ill. App. 3d at 795 (citing *Hasemann v. White*, 177 Ill. 2d 414, 420-21 (1997)).

¶90 "The Guaranty Fund's obligations are limited to those claims falling within the statutory definition of a 'covered claim.' " 212 ILCS 5/534.3 (West 2000); *Pierre v. Davis*, 165 Ill. App. 3d 759, 760 (1987).

¶91 The Illinois Insurance Guarantee Act defines a "covered claim" in pertinent part, as follows:

> "(a) 'Covered Claim' means an unpaid claim for loss arising out of and within the coverage of an insurance policy to which this Article applies and which is in force at the time of the occurrence giving rise to the unpaid claim including claims presented during

> any extended discovery period which was purchased from the company before the entry of a liquidation order or which is purchased or obtained from the liquidator after the entry of a liquidation order made by a person insured under such policy or by a person suffering injury of damage for which a person insured under such policy is legally liable, and for unearned premium, if: (I) The company issuing he policy becomes an insolvent company as defined in Section 534.4 after the effective date of this Article ***." 215 ILCS 5/534.3(a) (West 2000).

See also *Barbee v. Illinois Insurance Guaranty Fund*, 395 Ill. App. 3d 211, 213 (2009) (citing 215 ILCS 5/534.3(a) (West 2006)). Here, the workers' compensation benefit to Sanchez was a covered claim against Legion, that is, the settlement portion, $120,186 was unpaid by Legion but was paid by the Fund. That takes care of the $120,186.

¶92 THE ILLINOIS INSURANCE CODE AND INSURANCE GUARANTEE FUND ACT'S PROVISIONS REGARDING LIQUIDATED INSURANCE COMPANIES

¶93 The $145,018.71 paid out by Legion before its liquidation requires a different analysis.

¶94 The application of the Illinois Insurance Code and Illinois Insurance Guarantee Fund Act are both interwoven in Legion's liquidation. See Illinois Insurance Code, 215 ILCS 5/187 - 5/221, Article XIII. Rehabilitation, Liquidation, Conservation and Dissolution of Companies and Illinois Insurance Guarantee Fund Act, 215 ILCS 5/532 to 5/553, Article XXXIV, Illinois Insurance Guarantee Fund.

¶95 Taken together these Acts, along with the liquidation and conservation orders, require the repayment of the $145,018.71 originally paid by Legion before it was liquidated to the Illinois

Insurance Guarantee Fund as the successor subrogee of PWS but only if the Legion policy included a subrogation clause.

¶96 Under section 188 of the Insurance Code, an insurance company may be liquidated when it is insolvent. 215 ILCS 5/188 (West 2000).

¶97 The Director of the State Department of Insurance is, by operation of law, the liquidator of any liquidated insurance company and among his duties is the following:

> "(1) upon the entry of an order directing liquidation [the Director] shall immediately proceed to liquidate the property, business, and affairs of the company *** (2) *** may sell or compromise all debts or claims owing to the company *** and (3) *** may bring any action, claim, suit or proceeding *** against [any other] person with respect to that person's dealings with the company, including but not limited to prosecuting any action, claim, suit or proceeding on behalf of the creditors, members, policyholders or shareholders of the company ***." 215 ILCS 5/193(1-3) (West 2000).

¶98 Once the Director of Insurance determines that an insurance company is subject to liquidation, he must get court orders of liquidation and conservation. "[T]he Director as receiver [is to] assume control of the assets and operation of the company." 215 ILCS 5/188.15 (West 2000). "[T]he court may issue any other injunctions or enter any other orders as may be deemed necessary to prevent waste of assets or the obtaining, asserting, or enforcing of preferences, judgments, attachments, or other like liens *** or the making of any levy against such company or its property and assets while in the possession and control of the Director." 215 ILCS 5/189 (West 2000).

¶99 Section 537.2 of the Illinois Insurance Guaranty Fund Act provides that:

"The Fund shall be obligated to the extent of the covered claims existing prior to the entry of an Order of Liquidation against an insolvent company ***. "

215 ILCS 5/537.2 (West 2000).

¶100 Section 5/191of the Illinois Insurance Code further provides:

"The Director *** shall be vested by operation of law with the title to all property, contracts and rights of action of the company as of the date of the order directing *** liquidation. *** The entry of an order of *** liquidation creates an estate that comprises all of the liabilities *and assets of* the company." (Emphasis added.) 215 ILCS 5/191 (West 2000).

¶101 At section 537.4 the Illinois Insurance Guarantee Fund Act provides:

"Fund assumes obligations of insolvent companies. The Fund shall be deemed the insolvent company to the extent of the Fund's obligation for covered claims and to such extent shall have all rights, duties, and obligations of the insolvent company, *subject to the limitations provided in this Article*, as if the company had not become insolvent, with the exception that the liquidator shall retain the sole right to recover any reinsurance proceeds. *The Fund's rights under this Section* include, but are not limited to, the right to pursue and retain salvage and subrogation recoveries on paid covered claim obligations *to* the extent paid by the Fund." (Emphasis added.) 215 ILCS 5/537.4 (West 2000).

¶102 The highlighted language appears to limit the Fund's ability to recoup from any salvage or subrogation to the extent it, the Fund, has paid out. However, the additional highlighted

language: "subject to the limitations provided in this *Article*" brings in the rest of the Illinois Insurance Guarantee Fund Act, not just this section.

¶103 Section 538.8 of the Illinois Insurance Guarantee Fund Act states: "If, at any time, *the Fund receives monies as reimbursement from the estate of an insolvent company*, the Fund shall distribute those monies in accordance with the procedures established in the plan of operation." (Emphasis added.) 215 ILCS 5/538.8(b) (West 2000).

¶104 Section 545 of the Illinois Insurance Guarantee Fund Act adds more:

> "Effect of paid claims. (a) *** The Fund shall have all the rights, duties and obligations under the policy to the extent of the covered claim payment provided the Fund shall have no cause of action against the insured of the insolvent company for any sums it has paid out except such causes of action as the insolvent company would have had if such sums had been paid by the insolvent company *** " 215 ILCS 5/545 (West 2000).

¶105 Here the employer's insurance company paid benefits and then was liquidated pursuant to orders of liquidation and conservation by the chancery court. Those orders create an estate of the assets of the insurance company and transfer that estate to the Fund.

¶106 The Order of Conservation, entered April 2, 2003 states specifically that the Director of Insurance "is authorized and directed to immediately take possession and control of the property, books, records, accounts, business and affairs, and all other assets of *** Legion" and that "*** all other persons are hereby ordered to give immediate possession and control to the Conservator of all *** other assets of *** Legion *** " and " *** that any *** persons or entities having

knowledge of the order *** herein, having in their possession accounts and any other assets which are, or may be the property of Legion are hereby restrained and enjoined from disbursing or disposing of said…assets without the express written consent of the Conservator ***." People of the State of Illinois, *ex rel*. v. Legion Indemnity Company (No. 02 CH 06695).

¶107 The Order of Liquidation With Finding of Insolvency, (02 CH 06695) entered April 9, 2003, states specifically that the Director of Insurance:

> "is affirmed as the statutory Liquidator of Legion, *** with all the powers appurtenant thereto, including but not limited to: *** title to all *** contracts and rights of action of Legion *** entitled to immediate possession of and control of all property, contracts and rights of action of Legion *** is authorized to deal with the property, business and affairs of Legion" *** and "*** the Liquidator shall proceed to take immediate possession and control of the property, books, records, accounts, business and affairs and all other assets of Legion *** "and " *** *the Director is vested with the right, title and interest in all funds recoverable under any insurance policies* *** *heretofore entered into by or on behalf of Legion* ***." (Emphasis added.)

¶108 The order (02 CH 06695) further states that:

> "Any and all *** companies, persons or entities having knowledge of this Order having in their possession accounts and any other assets which are, or may be the property of Legion *** are restrained from disbursing or disposing of said accounts and assets *** and further, that each such person or entity is

ordered to immediately deliver any and all such assets and/or records to the Liquidator ***" Order of April 9, 2003, Sanchez v. Rental Service Corporation (No. 02 CH 06695).

¶109 Thus the assets of the estate, by operation of law and court order, became the assets of the Liquidator, Director of Insurance. The Fund is not a party to this action and it does not need to be. While Legion's policy with PWS is not in the record it seems unlikely that a workers' compensation carrier would write a policy without a subrogation clause. If the insurance company was the employer's subrogee, then by operation of the liquidation and conservation orders, the Director of Insurance, both as Conservator and Liquidator, is entitled to possession of all of Legion's assets, and since the subrogation of the employer's lien is an asset, the Fund, through the Director of Insurance is the employer's substitute subrogee and did not need to be a party to the action. To clear up any loose ends, we direct the court on second remand to confirm there is a subrogation clause in Legion's policy with PWS because in the unlikely event there is none, the court will have to determine the full extent of the Fund's rights under that policy in conformance with the Orders of Conservation and Liquidation.

¶110 This court has not found, nor has either party provided, any case law that reconciles the notion that the Fund can, through subrogation, recover only what it has paid out with the language that permits the Fund to receive monies it receives as reimbursement from the estate of an insolvent company.

¶111 THE LAW REQUIRES EMPLOYERS SELF-INSURE OR HAVE INSURANCE AND PAY FOR IT

¶112 The Illinois Workers' Compensation Act requires employers to meet the standards of self insurers, or to "furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act," or to "insure his entire liability to pay such compensation" according to the rules set out in the Act. The Act also provides the imposition of penalties up to $1,000 per day for each day "of work for which the employer failed to make payments on the insurance" required. 820 ILCS 305/4(a)(1), (2), (3), 5(B)(ii) (West 2000).

¶113 THE LAW MUST BE READ AS A WHOLE BOTH IN SITUATIONS WHERE DIFFERENT STATUTES ARE CONCERNED AND WHERE DIFFERENT SECTIONS OF THE SAME STATUTE ARE CONCERNED

¶114 "In construing a statute, we must give effect to the intention of the legislature so that each word, clause or sentence is given reasonable meaning and not deemed superfluous or void." *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill. 2d 498, 508 (2004).

¶115 "It is a basic rule of statutory construction that 'whenever possible court must construe statutes so that no part is rendered a nullity.' " *Eads v. Heritage Enterprises, Inc*., 204 Ill. 2d 92, 105 (2003) (quoting *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 397 (1994)).

¶116 "We seek the legislative intent primarily from the language used in [the Act]. We evaluate the Act as a whole; we construe each provision in connection with every other section. If we can ascertain the legislative intent from the plain language of the Act itself, that intent must prevail and we will give it effect without resorting to other interpretive aide. We must not depart from the plain language of the Act by reading into it exceptions, limitations or conditions that conflict with the express legislative intent." *Barnett v. Zion Park District*, 171 Ill. 2d 378, 389

(1996).

¶117 "The fundamental rule of statutory construction requires courts to ascertain and give effect to the legislature's intent ***. In interpreting a statutory provision, courts evaluate the statute as a whole 'with each provision construed in connection with every other section.' " *Skokie Castings, Inc. v. Illinois Insurance Guarantee Fund*, 2012 IL App (1st) 11533, ¶ 10 (quoting *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 180 (2011)).

¶118 The Workers' Compensation Act provides that "the provisions of this Act *** shall apply automatically and without election to *** businesses [engaged in] construction." 820 ILCS 305/3.2 (West 2000). And the Act then continues to provide that those businesses that are under the Act either by election or automatic operation may self-insure or "by insuring [his] liability to pay compensation under this Act in some insurance carrier authorized, licensed or permitted to do such insurance business in this state." 820 ILCS 305/2(a) (West 2000). The Act continues with the requirements for self insurance, for purchased insurance, for the amount of compensation for death and various injuries, and for the operation of the Industrial Commission. 820 ILCS 305/1 *et seq*. (West 2000). The Act includes penalties for violations of the insurance provisions, including "$1,000.00 for each day of work for which the employer failed to make payments upon the premiums." 820 ILCS 305/4(a-1)(A)(ii) (West 2000). The Act also provides that the Attorney General is authorized to prosecute violations of provisions of the Act. 820 ILCS 305/4(d) (West 2000).

¶119 Since the law must be read as a whole, it makes no sense to require a choice of self insurance or bought insurance and not expect the employer who chose to buy insurance to turn to

his insurance company to pay the compensation when the need arises.

¶120 RECONCILING THE WORKERS' COMPENSATION ACT, THE ILLINOIS INSURANCE GUARANTEE FUND ACT, AND THE INSURANCE CODE

¶121 In determining who is entitled to the payment made by now-liquidated Legion, we are required to reconcile the plain language of the Workers' Compensation Act, the Illinois Insurance Guarantee Fund Act and the Insurance Code with the specific liquidation order entered against Legion Insurance, which we accomplish pursuant to the doctrine of *in pari materia*. In *Land v. Board of Education*, 202 Ill. 2d 414 (2002), our supreme court explained the doctrine of *in pari materia*:

> "Under this doctrine of construction, two legislative acts that address the same subject are considered with reference to one another, so that they may be given harmonious effect. See *United Citizens of Chicago & Illinois v. Coalition to Let the People Decide in 1989*, 125 Ill. 2d 332, 339, 531 N.E.2d 802 (1988). This court has previously held that sections of the same statute should also be considered *in pari materia*, and that each section should be construed with every other part or section of the statute to produce a harmonious whole. *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555, 169 Ill. Dec. 254, 591 N.E.2d 427 (1992). The doctrine is consistent with our acknowledgment that one of the fundamental principles of statutory construction is to view all of the provisions of a statute as a whole. *Michigan Avenue National Bank*, 191 Ill. 2d at 504. Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute so that, if possible, no term is rendered superfluous or

meaningless. *Michigan Avenue National Bank*, 191 Ill. 2d at 504; *In re Marriage of Kates*, 198 Ill. 2d 156, 163, 260 Ill. Dec. 309, 761 N.E.2d 153 (2001). Further, we presume that the legislature, when it enacted the statute, did not intend absurdity, inconvenience, or injustice. *Michigan Avenue National Bank*, 191 Ill. 2d at 504." *Land*, 202 Ill. 2d at 422.

¶122 "When the plain language of two statutes conflicts a reviewing court will attempt to construe them together *in pari materia* if such an interpretation is reasonable. Legislative intent remains the foremost consideration, however. In determining that intent, reviewing courts may consider the statutes in their entirety, their purposes, the problems they target and the goals they seek to achieve. Words and phrases should not be interpreted in isolation but must be construed in light of other relevant provisions of the statute." *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324 (2008).

¶123 Here, it is apparent that under the statutes the creation of the Fund to pay out for covered claims not paid by insolvent insurance companies flows into the right of the Fund to be reimbursed for the monies *it has* paid out. The right of the Director of Insurance to act as the liquidator of the insolvent insurance company and the holder of its estate's assets permits the Director of Insurance to recover any funds which were *owed* to the liquidated insurance company under its policies and contracts. The Fund, by operation of law and contract becomes the subrogee of the employer for any funds it has paid; the Director of Insurance, as Liquidator, by operation of law and court order is the substitute subrogee of the employer for any funds the insolvent insurance company paid out before it was liquidated.

¶124 To hold otherwise would be to ignore the duties and obligations of the Director of Insurance, the estate and assets of the liquidated insurance company, the obligation of the employee to reimburse the employer for his entire workers' compensation payout thereby ignoring the employer's statutory lien. The fact that the actual money in that employer's statutory lien is subject itself to subrogation is, in the case of the Fund, a result of the operation of law, and as to the money paid out by Legion, a matter of the policy or contract between PWS and Legion which is not a part of this record and therefore cannot be confirmed by this court. In the most likely event, the policy included a subrogation clause – since it is hardly likely that any insurance company wrote its own policy to give away money and not get it back –in which case the terms of the Order of Liquidation and Conservation would direct those funds to the Director of Insurance, as Liquidator. If by some extremely remote chance the Legion policy with PWS did not include a subrogation clause, and does not include some other debt to Legion, then to that extent, PWS, if it exists, would benefit. If, in fact PWS is out of business, it remains to be seen if the former owner is personally able to claim any or all of the Legion payout, depending on whether he is entitled to any of the money personally – for example in the form of a large deductible made by PWS but now owing to the former owner personally based on some contract he had with PWS and/or Legion which is also not of record and cannot be determined by this court.

¶125 In sum, pursuant to the Insurance Code, the Illinois Insurance Guaranty Fund Act, and the Workers' Compensation Act, the entire amount paid by the Fund and Legion constitutes the employer's lien, regardless of the fact that Legion has been liquidated. Thus, the law protects the

employer; case law protects the insurance company; and the law protects the Fund, in liquidation cases, as the substitute subrogee of the employer because of the Orders of Liquidation and Conservation and the statutory duties of the Director of Insurance. The money goes from the third party tortfeasor to the employee, from the employee to the employer on behalf of the carrier, in this case the Fund, as the replacement carrier.

¶126 Verification that there was indeed a subrogation clause in the policy is important because that will determine the exact nature of the Fund's claim on the employer's lien. This is one of the questions we direct the circuit court to answer on remand upon hearing and discovery of the policy itself, since it is not in the record.

¶127 THE COURT MUST PROTECT THE EMPLOYER'S LIEN

AND WITHOUT SUCH PROTECTION A SETTLEMENT IS VOID

¶128 Having explained that the entire amount paid to Sanchez by both the Fund and Legion constitutes the amount of the employer's lien owed to the Fund as the subrogee of PWS, and that there is no basis for a reduction of this amount, we reiterate that it is the court's duty to protect the entirety of the employer's lien. "The plain meaning of section 5(b) imposes the duty of protecting the employer's lien upon the court." *Freer*, 108 Ill. 2d at 426. "It is of the utmost importance that the trial court protect an employer's lien." *Blagg v. Illinois F.W.D. Truck & Equipment Co.*, 143 Ill. 2d 188, 195 (1991). See also *Gallagher*, 226 Ill. 2d at 239 (quoting *Dierkes*, 191 Ill. 2d at 333, quoting *Blagg*, 143 Ill. 2d at 195). "The plain meaning of section 5(b) imposes the duty of protecting the employer's lien upon the court. The statute provides that the very point of the employer's intervention in the third party legal proceedings is 'so that all orders

of *court* after hearing and judgment shall be made for his [the employer's] protection.' " (Emphasis in original.) *Blagg*, 143 Ill. 2d at 194 (quoting *Freer*, 108 Ill. 2d at 426). "The Supreme Court has succinctly stated: 'There is nothing in the statute that suggests a limitation on the employee's obligation of reimbursement from the third-party recovery. If an employer has made workers' compensation payments, the obligation of reimbursement exists regardless of the amount that the employee recovers. [Citation.] *** Clearly, '[i]t is of utmost importance that the trial court protect an employer's [workers' compensation] lien.' " *Johnson*, 409 Ill. App. 3d at 42 (2011) (quoting *Dierkes*, 191 Ill. 2d at 332-34).

¶129 The employer must consent to a settlement or the court must protect the employer's lien; without one of those two things the settlement is void. Section 305/5(b) (2004) provides that a release or settlement entered into without the employer's consent or without an order of the court protecting the employer is void. " 'The plain, unambiguous statutory language provides that a release or settlement entered into without the employer's consent or without an order of the court protecting the employer is not valid.' " *Chubb*, 375 Ill. App. 3d at 542 (quoting *Andrew*, 206 Ill. App. 3d at 521). Here, the court did not protect the employer's lien, and clearly PWS did not agree to waive it in the settlement since that was the subject of the first appeal.

¶130 THE COURT DID NOT PROTECT THE EMPLOYER'S LIEN

¶131 "Section 5(b) of the Workers' Compensation Act *** provides that if an employee or the employee's representative obtains a judgment or settlement from a third party then *from the amount received shall be paid to the employer* the amount of compensation paid or to be paid by him to such employee or personal representative." (Emphasis added.) *Scott v. The Industrial*

Commission, 184 Ill. 2d 202, 215-16 (1998). Here, however, the court did not protect the employer's lien, the settlement is void, and the funds have already been disbursed to Sanchez. The question then becomes how the employer, or, since its insurer actually paid the benefits, its subrogee, will get reimbursed.

¶132 In a case where future payments are part of the order, it is possible to craft an efficient remedy. In *Scott*, one of several issues was how the lien, claimed by the insurer, could be satisfied after the settlement was already paid out by the third party tortfeasors, without any court order protecting the lien and without any agreement by the employer or the insurer. The Supreme Court found the answer in credits against future payments. "We find no reason to afford an employer's insurer fewer protections under section 5(b) than those granted the employer on whose behalf compensation is paid under the Act." *Scott*, 184 Ill. 2d at 217. See also *Freer*, 126 Ill. App. 3d at 61 ("Since the trial court did not properly protect, as required by subsection (b) of this section, the reimbursement right of the intervenor as to the future benefits it should have paid, the application of the credit formula was an appropriate method of protecting its reimbursement right").

¶133 The future benefits set off, however, is not an option in this case because there are no future benefits. Sanchez's attorney disbursed the funds while the motion for rehearing in the trial court and then the notice of appeal were pending for the first appeal. Compare this situation to *Freer*. Here the disbursement of settlement funds was by Sanchez's attorney, not a court order. "There [i]s nothing in subsection (b) of this section authorizing the impression of a lien on the recovery funds in plaintiff's possession and a lien may not be created by the court." *Freer*, 126

Ill. App. 3d at 61.

¶134 The court in *Freer* explained:

> "The trial court was not empowered to impress a lien upon the recovery funds after ordering that they be paid to a plaintiff ***. The lien here thus ceased to exist as to the recovery fund when it was paid to plaintiff, as there was then no longer a fund out of which plaintiff might be compensated. *** [I]t is clear that the trial court did not properly protect, as required by section 5(b), the reimbursement right of the village as to future benefits it must pay. We are of the belief, under the particular circumstances here, that the application of the credit formula is now an appropriate method of protecting its reimbursement right." *Freer*, 126 Ill. App. 3d at 60-61. (Emphasis added.)

¶135 However, in *Freer* and similar cases where the court did not protect the lien there was a court order that disbursed the funds. In this case, the situation is completely different. There is no court order approving or ordering the disbursement of funds in the record. Further, the trial court here specifically found the Fund still had a right to be reimbursed. As the trial court noted in its October 29, 2008 order: "This Court finds that while plaintiff's counsel was taking a risk by dispersing (sic) the funds before the deadline for an appeal had passed, this does not extinguish the Funds (sic) right to be reimbursed."

¶136 IT WOULD BE BAD PUBLIC POLICY TO IGNORE THE LIEN

¶137 It is clearly established that the employee cannot keep a double recovery and the employer is entitled to the full amount of the lien, regardless of whether it or its insurer pays, the employer does not have to do anything to protect the lien, the court must protect the lien, and any

settlement where the lien is not protected is void. Yet, here Sanchez's attorney disbursed the funds prior to the time for rehearing and appeal and completely ignored the employer's lien. It would be bad public policy to allow a race to disburse tort settlement funds to interfere with the employer's lien.

¶138 EMPLOYER'S REMEDIES

¶139 The court in *Chubb* summarized an employer's remedies under section 5(b) of the Worker's Compensation Act:

> "[A]s to the remedies provided to employers to recoup compensation paid to employees for injuries caused by third party tortfeasors, section 5(b) specifically provides: (1) a lien against any compensation the employee receives from a third party with or without suit for any worker's compensation benefits paid by the employer; (2) the right to intervene in any suit filed by the employee against the tortfeasor at any stage prior to satisfaction of judgment so that all orders are made for the employer's protection; (3) the invalidity of a release or settlement of claim for damages entered between the employee and the tortfeasor, without written consent of the employer unless the employer has been fully indemnified or is protected by court order; and (4) the right to bring a suit during the three months prior to the expiration of the statute of limitations if the employee has not filed suit." *Chubb*, 375 Ill. App. 3d at 539-40 (quoting *Insurance Co. of North America v. Andrew*, 206 Ill. App. 3d 515, 518-19 (1990)).

¶140 Here the settlement funds were disbursed to Sanchez without any agreement by the employer and without any protection of the court, thus rendering the settlement invalid under the

third remedy set forth in *Chubb*. However, the settlement funds have already been disbursed to Sanchez. The question now is how these funds can be recovered to reimburse the Fund for its lien.

¶141 A lien is not an employer's exclusive remedy. Where the employer (or, interchangeably, its insurer) pays workers' compensation benefits but its right to reimbursement is not protected in a settlement and the settlement funds have already been paid to the employee, the employer or its insurer may pursue a separate action to recover its proper reimbursement amount. See *Villapiano*, 26 Ill. App. 3d at 517.

¶142 In *Villapiano*, the employer was not notified or part of the settlement. The employer sued the third party tortfeasor as a defendant to recover the amount paid out in workers compensation benefits to the injured employee. The court held that the employer was entitled to sue for reimbursement of workers' compensation after a settlement that did not include repayment of its lien because the third party tortfeasors knew or should have known about the lien by operation of section 5(b) and by the employer's notice of its lien. The court specifically said: "Our decision should not, as the defendants fear, undermine the speedy settlement of claims within the bounds of judiciousness. To hold otherwise would convert post-accident negotiations *into an unseemly race*, the only result of which, if not the goal, would be inequity." (Emphasis added.) *Villapiano*, 26 Ill. App. 3d at 517.

¶143 The *Villapiano* court relied on *Employers Mutual Casualty Company v. Trimon Elevator*, 71 Ill. App. 2d 124 (1966), in which the court was faced with a settlement that had been paid to the employee more than a year before the employer took action to protect its workers'

compensation benefit. The court discussed *Trimon*'s holding that the employer has a remedy against the third-party tortfeasor in such a circumstance:

> "The court permitted an employer to pursue a separate action to recover his compensation liability since he had not been protected in the settlement of the employee's action against the third party. That the amount of the settlement in *Trimon* had been paid to the employee more than a year prior to the employer's action, that as a practical matter there remained no *res* or particular fund upon which to impress a lien, that the settlement had exceeded substantially the amount of indemnification sought, were not deemed to foreclose the employer's right to sue for indemnity and to name the third party tortfeasor as a defendant. This liberal interpretation of section 5(b) reinforces our view that the right granted employers by that section is paramount to the alternative remedies available for enforcement." *Villapiano*, 26 Ill. App. 3d at 517.

¶144 Similarly here, the payment of the settlement funds to Sanchez does not foreclose PWS and/or the Fund's "right to sue for indemnity and to name the third-party tort-feasor [here, RSC] as a defendant" (*Villapiano*, 26 Ill. App. 3d at 517).

¶145 We also note that counsel for all parties were aware there was a workers' compensation lien, and no one insisted on waiting to disburse until all litigation and appeals were final and after the first appeal no one deducted the reimbursement of the lien from the settlement to hold in safekeeping until all remaining appeals were final. In fact, the funds were disbursed to Sanchez (and, presumably, his attorney), prior to the time allowed for any motions for rehearing and time for appeal, in a seeming race to obtain the full amount of the settlement and not pay anything for

the workers' compensation lien. This premature disbursement may now necessitate further action by PWS and/or the Fund and/or Sanchez to obtain the employer's lien reimbursement from RSC, when the proper amount should have been originally deducted from the settlement amount it already paid.

¶146 *Villapiano* and *Trimon* do not speak to the issue of whether the third-party tortfeasor could seek to recover the lien amount from the employee plaintiff who received the settlement funds. However, we have already put Sanchez on notice in our order after the first appeal that the employer is entitled to the entire amount of benefits as its lien, and neither Sanchez, his attorney or RCS is in any position to claim lack of understanding on this issue.

¶147 THIS MATTER IS NOT MOOT

¶148 Sanchez attempts to characterize this matter as moot because the money from the settlement fund was disbursed by his attorney prematurely. As stated above, we have already ordered that the employer be reimbursed for the full amount of benefits as the statutory lien; in addition, as discussed above, the circuit court itself noted that Sanchez's attorney was taking a risk by his early disbursement of the funds, and finally, at the very least Sanchez was ordered by the circuit court to reimburse the Fund (in the place of his employer) for $120,186 paid by the Fund. Sanchez, his attorney and RCS have had plenty of notice that this matter is not moot.

¶149 A case is "normally considered moot 'where the issues raised below no longer exist because events subsequent to the filing of the appeal make it impossible for the reviewing court to grant the complaining party of effectual relief.' " *Goodman v. Ward*, 241 Ill. 2d 398, 404 (2011) quoting *Hassfeld v. Illinois State Board of Elections*, 238 Ill. 2d 418, 423-24 (2010).

Here, Sanchez was on notice that the money was still an issue, he was ordered to pay at least part of it to the Fund, his attorney may have miscalculated his fees, and RCS may have been a party to a rush to disburse in the face of what it knew to be the employer's statutory lien. There are still remedies available to the employer on behalf of his substitute carrier.

¶150 EVEN IF IT WERE MOOT IT WOULD STILL BE CONSIDERED AS A PUBLIC INTEREST EXCEPTION TO THE MOOTNESS DOCTRINE

¶151 Even if this specific case were found to be partially moot, the matter is still significant enough under the public interest exception for this Court to consider because of the great number of workers' compensation cases in Illinois, and because third party actions are common. This Court must make it perfectly clear that: 1) the trial court must protect the employer's lien in every possible way; 2) the employer's lien is for the entire amount; 3) attorneys who race to disburse third party settlements in the face of an employer's lien do so at their own risk.

¶152 "The public interest exception permits a court to reach the merits of a case which would otherwise be moot if the question presented is of a public nature, an authoritative resolution of the question is desirable for the purpose of guiding public officers and the question is likely to recur." *Goodman*, 404, quoting *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 395 (1994). All three of those requirements are present in this case: workers' compensation is clearly a question of a public nature; an authoritative resolution of the questions (what to do if the settlement fund is prematurely disbursed, what to do if the court fails to properly protect the employer's lien, what is the attorney's responsibility in this situation?) is needed; and the questions are likely to recur because third party actions are common. In addition the race to

disburse the settlement funds may result in either an overpayment to the attorney and/or an underpayment of the employer's lien which would significantly undermine the entire structure, reason and effect of our workers' compensation legislation.

¶153 THE EMPLOYER IS RESPONSIBLE FOR 25% OF ATTORNEY FEES

¶154 In *Silva v. Electrical Systems, Inc.*, 183 Ill. 2d 356 (1998), the supreme court considered how the "attorney's 25% of the gross amount of such reimbursement" language in section 5(b) of the Act is to be computed where the third party has brought a successful action against the employer under the Joint Tortfeasor Contribution Act. The employer sought to reduce its attorney fee responsibility by deducting its contribution liability from the reimbursement amount and pay attorney fees only on the difference. The court held:

> "Section 5(b) is premised on the assumption that an employer should share in the fees and costs associated with the employee's lawsuit because the litigation benefits the employer by providing a fund from which the employer can obtain reimbursement of its workers' compensation payments." *Silva*, 183 Ill. 2d at 356.

¶155 The court held that "the principle behind the fee provision in section 5(b) is that employers should pay their fair share of the cost of their employees' tort recoveries." *Silva*, 183 Ill. 2d at 364. The court further held that "[t]he benefits received by [the employer] were due to the efforts of [the employee's] attorneys. Those attorneys are entitled to be fully compensated for their efforts in accordance with section 5(b)." *Silva*, 183 Ill. 2d at 365.

¶156 ATTORNEY FEES

¶157 Because the circuit court did not protect the full amount of the employer's lien, the

calculation of attorney fees ordered may also be incorrect. The employer is required under section 5(b) under the Act to pay the attorney 25% of the gross amount reimbursed. The second paragraph of section 5(b) provides that:

> "where the services of an attorney at law of the employee *** have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, the employer shall pay such attorney 25% of the gross amount of such reimbursement. *** The provision is 'premised on the assumption that an employer should share in the fees and costs associated with the employee's lawsuit because the litigation benefits the employer by providing a fund from which the employer can obtain reimbursement of its workers compensation payments and operates to prevent an unjust enrichment on the part of the employer.' " *Taylor v. Pekin Ins. Co.*, 231 Ill. 2d 390, 396-97 (2008) (quoting *Silva v. Electrical Systems, Inc.*, 183 Ill. 2d 356, 361 (1998)).

¶158 "[S]ection 5(b) of the Act requires the employer to pay as the employee's attorney fees 25% of the gross amount of the reimbursement. 'If this does not satisfy the amount owed the attorney under [an] attorney-client agreement, then the attorney must seek any additional amounts from the client. The employer cannot be expected to pay more than the statutorily required amount ' " *Dierkes*, 191 Ill. 2d at 335 (quoting *Mounce*, 150 Ill. App. 3d 806, 811 (1986)).

¶159 "The Workers' Compensation Act does not define what constitutes 'the gross amount' of reimbursement for purposes of section 5(b) [820 ILCS 305/5(b) (West 1992)], so the phrase must

be given its ordinary and popularly understood meaning. *** When describing an amount, the term "gross" is generally understood to mean the overall total prior to any deductions or adjustments." *Silva*, 183 Ill. 2d at 363.

¶160 Any fee arrangement with a client does not change the employer's reimbursement rights under the Act. In *Swets v. Village of Lansing*, 284 Ill. App. 3d 1003 (1996), the court held that under the Act, the employer was entitled to be reimbursed from the gross amount of the employee's recovery, reduced only by the 25% attorney fee provided by the Act, regardless of the actual contingent fee agreement between the employee and her attorney. The court held:

> "Our Supreme Court has determined that the plain meaning of the Act [820 Ill. Comp. Stat. Sec. 305/5(b) (1994)] dictates 'an employer who had paid compensation to an injured employee under the Act is entitled to be reimbursed from the entire third party recovery by the employee.' " *Swets*, 284 Ill. App. 3d at 1007 (quoting *Page v. Hibbard*, 119 Ill. 2d 41 (1987)).

¶161 Unless the employer and employee have some other agreement, the Act requires only the payment of the statutorily required amount in attorney fees. Where the issue was excessive attorney fees, our colleagues in the Third District held:

> "Section 5(b) specifically states that 'in the absence of [some] other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement' (Ill. Rev. Stat. 1985, ch. 48, par 138.5(b). This statutory directive is totally separate and distinct from any fee arrangement entered into between the plaintiffs and the plaintiff's attorney. The statutory language 'in the absence of other agreement' refers to any

> agreement between the employer and the employee or his attorney. Absent such an agreement the statute requires that the employer pay 25% of the gross amount of the reimbursement. In this case there was no such agreement, ***therefore the only basis upon which [the plaintiffs' attorney] can recover attorney fees is section 5(b) of the Worker's Compensation Act. *** If this does not satisfy the amount owed the attorney under the attorney-client agreement, then the attorney must seek any additional amounts from the client. The employer cannot be expected to pay more than the statutorily required amount." (Emphasis added.) *Mounce v. Tri-State Motor Transit Co.*, 150 Ill. App. 3d 806, 811 (1986).

¶162 "[A]n employer's workers' compensation lien cannot be reduced or prejudiced by the fact that the employee entered into a contingent fee contract with his or her attorney requiring a fee in excess of the 25% allowed under the act.' " *Swets,* 284 Ill. App. 3d at 1007 (quoting *Mounce*, 150 Ill. App. 3d 806). Thus, whatever Sanchez's agreement was with his attorneys, it cannot reduce the amount his employer is owed.

¶163 "The most logical reading of the statute, then, is that the legislature intended that 25% of the employer's total reimbursement for its workers' compensation lien be taken off the top as fees to plaintiff's attorneys. The remaining amount is then compared to the total recovery from the third party to determine the employer's *pro rata* share of costs and necessary litigation expenses." *Overlin*, 325 Ill. App. 3d at 75, 78.

¶164 In this case, the employees' attorney fees of 25% of the gross amount of the reimbursement would be 25% of the 265,204.71 or $66,301.17 from PWS.

¶165 SUMMARY

¶166 The total worker's compensation benefit paid to Sanchez was a covered claim against Legion, and after Legion's liquidation the Fund took over and settled for the remaining $120,186 by operation of law. A total of $265,204.71 was in fact paid out by Legion and the Fund. Together with the third party settlement both sums paid to Sanchez come to $565,204.71 – not a small amount certainly to Sanchez, but an amount that is clearly over-litigated in this case in which there have been two appeals, and more than 50 motioned hearings. It is very unfortunate that Sanchez was injured. The law, however, is very clear. Sanchez is required to reimburse his employer for the full amount of its workers' compensation benefit paid to him, by PWS's insurance carrier, Legion, and the Fund on behalf of PWS and Legion, or $265,204.71, out of the proceeds of his tort settlement with RCS. Sanchez is not entitled to keep the $265,204.71 plus the $300,000 because that would be a double recovery. However, the $300,000, less presumably any attorney fees Sanchez contracted with his attorney, has already been disbursed by that attorney.

¶167 That creates an interesting dilemma for the court. The court cannot impose a lien on funds that it already disbursed *by the court* (see *Freer*), but in this case those funds appear to have been prematurely disbursed *by the attorney*. If the funds had not been disbursed, the employer would have received its statutory lien of $265,204.71 out of the $300,000 tort settlement, less the 25% it would have paid in statutory attorney fees and any costs or fees calculated in this matter. Sanchez would get to keep $265,204.71 from the workers' compensation benefits plus $34,795.29 (the $300,000 RCS settlement minus the lien of

$265,204.71) so Sanchez could have expected to keep roughly $300,000 less any remaining attorney fees and pro rated costs. His attorney would have been entitled to 25% of $265,204.71, or $66,301.17, plus whatever amount in addition that Sanchez contracted for in his retainer agreement, which would be taken from the excess remaining settlement funds after the lien was reimbursed. The amount Sanchez is entitled to keep depends on a reading of the retainer agreement and the tort settlement agreement, neither of which are in the record.

¶168 If Sanchez agreed to pay his attorney a lump sum contingency fee on the tort settlement the language of the retainer agreement should help determine if that fee is based on the entire $300,000 or on the $300,000 less the entire employer's statutory lien. If the retainer agreement calls for payment of a percentage of the entire tort settlement it may be that Sanchez signed the tort settlement believing, and or having been told by his attorney, that he was entitled to the entire amount, plus the workers compensation benefits, less his contracted attorney fee. Since this court made it clear that Sanchez was not entitled to keep the entire $300,000 but had to reimburse his employer for its workers compensation lien, then depending on the wording of the retainer agreement, Sanchez would be paying attorney fees on either $300,000 or $34,795.29, and the difference, already presumably paid to his attorney, may in fact be considered a fund from which the employer's lien, or part of it, must be paid.

¶169 While there are no cases that provide a comprehensive calculation for funds in this situation, and giving credit where it is due, although certainly not raising the *ILCE Workers' Compensation* volume to precedent level, we find a workable guide for calcuation there:

Sanchez's Recovery from Workers' Compensation Claim

Settlement in workers compensation claim (from the Fund)		$120,186.00
Payments by insurance carrier (Legion) for Medical expenses[3]	+	$102,994.63
TTD benefits[4]	+	$ 42,024.08
Gross Workers' Compensation Benefits Paid		$ 265,204.71
Net to Sanchez from Workers Compensation claim		$ 241,167.51[5]

Sanchez's Recovery from Third-Party Claim

With Entire Lien

Sanchez Gross Settlement		$ 300,000.00
- Less full employer's lien	-	$ 265,204.71
Net recovery for Sanchez		$ 34,795.29
-Less Sanchez's attorney fees (usually 1/3)	-	$ 11,598.43
[(Calculate Costs claimed (but not proven) by Sanchez)		[($ 6,019.63)]
-Less Sanchez's *pro rata* share of costs[6]	-	$ 698.27
Net to Sanchez from Third-Party claim		$ 22,488.59

[3]No attorney fees are permitted in these amounts.

[4]No attorney fees are permitted in these amounts.

[5]Less normal 20% of $120,186 attorney fees and expenses, $24,037.20

[6]*Pro rata* costs calculated by dividing the Workers' Compensation Lien ($265,204.72) by the Total Third Party Settlement ($300,000) results in *pro rata* share of 11.60% for Sanchez and 88.40% to PWS. See *Glenn v. Johnson*, 198 Ill. 2d 575 (2002).

Amount of Employer's Lien

Gross Recovery, i.e. entire employer's lien		$ 265,204.71
- Less Attorney fees (25%)	-	$ 66,301.17
- Less *Pro rata* expenses	-	$ 5,321.35
Net employer's lien		$ 193,582.19

¶170 The facts in this case are troubling not only because Sanchez was injured but also because the attorney disbursed the funds prematurely; the money that Sanchez got should have first been used to reimburse the Legion part of the workers' compensation benefit. Since it appears that the attorney prematurely disbursed the funds, the court should examine what, if any, remedy, is available, including recovering any improper compensation and any failure of the attorney to recognize the entire lien for what it was: a statutory obligation. This last direction is important, because the rush in this case to disburse the funds may have temporarily defeated the purpose of the Illinois Workers' Compensation Act, and it would be bad public policy to reward an attorney, or ignore bad behavior, in an area as often litigated as workers' compensation. If by disbursing tort settlement funds before a 5(b) lien is fully litigated the attorney and his client could avoid paying the lien at all, such action would wreak havoc on workers' compensation. This cannot be allowed to happen.

¶171 If the attorney for Sanchez took the customary 1/3 off the top of the third party settlement, plus the customary 20% of the workers' compensation case, that would be $100,000 plus

$24,037.20[7], or $124,037.20, which would exceed the above calculation[8] and would also have used the wrong amount to calculate attorney fees from the third party settlement, since it should have been based on the gross settlement minus the workers' compensation lien or $11,598.43 from Sanchez plus $66,301.17 from Insurer/PWS or $77,899.60 (see discussion above).

¶172 Since we do not know if the same attorney handled both the workers' compensation case and the third party litigation, and we do not know the terms of Sanchez's agreement with his attorney on the third party case, we cannot provide a definitive answer on the matter of the calculation of attorney fees. If the attorney over-calculated the fees from the third party settlement at the expense of the employer's lien that cannot be allowed. If the attorney's agreement with Sanchez requires a 1/3 contingency fee on the gross settlement, and if the amount discussed above is less than that, then the attorney must turn to Sanchez to make up the difference, not the employer (see discussion above.)

¶173 It is worth noting that Sanchez, who was the victim in all of this, settled his workers' compensation claim for $265,204.71 and then settled his tort claim for $300,000. He may have been mistaken in his belief that he did not have to reimburse PWS and expected to be able to keep about $565,204.71, gross, but the opinion in the first appeal in this matter clarified that. After that appeal, Sanchez could not possibly have expected to keep more than roughly $300,000 from the gross total of the tort settlement and workers compensation benefits.

¶174 To summarize: The employer, is entitled to its entire workers' compensation benefit paid

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[7]Sanchez's estimated 20% of settlement in workers' compensation case.

[8]Total attorney fees calculated using ICLE worksheet equal $101,936.80.

to Sanchez in the name of PWS by Legion and Fund; since PWS was not self-insured, the Fund is the current subrogee of PWS and is the conservator of Legion and is therefore entitled to whatever funds are available to it under PWS's policy with Legion and/or by operation of law as to the Fund; the court did not have the authority to reduce the amount of the statutory lien; Sanchez is entitled to his entire workers compensation benefit, 265,204.71, gross, plus the excess tort settlement amount, (i.e., $300,000, less the PWS statutory lien reimbursement,) or about $34,795.29, gross. The attorney fees must be reviewed to assure correct calculation.

¶175 Further, based on the liquidation and conservation orders entered after Legion's collapse, the amount paid by Legion to Sanchez was an asset of Legion, and became an asset of the Fund for which any subrogated lien to PWS must be honored.

¶176 THE COURT DID NOT FOLLOW OUR INSTRUCTIONS ON FIRST REMAND AND THUS A SECOND REMAND IS NECESSARY

¶177 "When the circuit court's action upon remand is inconsistent with the reviewing court's mandate, it is subject to reversal on appeal." *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 56 (2005) (citing *Mancuso v. Beach*, 187 Ill. App. 3d 388, 391 (1989)). Here, the circuit court's action was inconsistent with our holding and explicit instruction upon first remand, Instead of finding that PWS was entitled to the full amount of its lien and applying this holding, the circuit court ordered that the Illinois Insurance Guaranty Fund was only entitled to the amount which it paid and not to the payments made by Legion prior to it being placed in liquidation. This requires a second remand. See *Salkeld v. V.R. Business Brokers, Inc.*, 231 Ill. App. 3d 441, 446 (1992) (holding that a second remand was required in suit involving

applicability of Franchise Disclosure Act, due to the failure of the trial court to carry out the appellate court's mandate in first remand; trial court was to determine if there were any facts negating the appellate court's conclusion that claimant had made out *prima facie* case of violation of Act, and trial court had instead made new legal findings as to Act's applicability).

¶178 INSTRUCTIONS ON SECOND REMAND

¶179 We remand and instruct the circuit court to:

1. Determine what amount of the settlement fund was disbursed to Sanchez, and what amount was disbursed to his attorneys;

2. Correct the calculation of attorney fees if necessary;

3. Determine what provision, if any, was made in the settlement agreement, which is not of record, for the employer's lien;

4. Confirm that the premature disbursement of the settlement funds was accomplished by Sanchez's attorney without an order of court;

5. Determine whether the attorney is liable for funds that are part of the employer's lien and which would have been available to the employer's lien but for the premature disbursal of said funds by the attorney for Sanchez;

6. Determine whether, out of the funds disbursed to Sanchez, there remains any protected balance that can be applied to the employer's lien;

7. Determine to what extent RCS and/or its insurance company participated in the premature or irregular disbursement of funds to Sanchez while having actual notice of the employer's lien;

8. Confirm that the policy between Legion and PWS included a subrogation clause; and

9. Determine if the employer, PWS, is out of business.

¶180 CONCLUSION

¶181 We reverse and remand this cause a second time to the circuit court to follow our holding and instructions on the first remand. We further hold that:

1. The employer's lien is for the entire amount of benefits paid to Sanchez, $265,204.71;

2. The Illinois Workers' Compensation Act provisions apply even when a liquidated insurance company is replaced by the Illinois Insurance Guaranty Fund, thus the employer's lien must be reduced by the statutory 25% attorney fees along with statutory costs and expenses, yet to be proved;

3. The Fund is the substitute subrogee of the employer by operation of law, the Liquidation and Conservation Orders;

4. The Fund is entitled to reimbursement of all benefits paid by it;

5. The policy subrogee clause between Legion and PWS will determine whether PWS's substitute subrogee is entitled to reimbursement of all benefits paid by the liquidated insurance company, Legion;

6. The owner of an insured business cannot personally benefit from the employer's lien absent some extraordinary facts, for example, a unique contract or policy with its insurer;

7. Sanchez is not entitled to keep *both* the workers' compensation benefits and the full third-party settlement less any attorney fees, costs or expenses;

8. An attorney in a workers' compensation case may not benefit from an erroneous calculation of fees that is the result of a premature distribution of a third-party tortfeasor settlement.

¶182 Reversed and remanded with instructions.

¶183 PRESIDING JUSTICE LAVIN, dissenting:

¶184 I respectfully dissent from the majority's decision, for two specific reasons. First, PWS paid nothing to Sanchez and it, therefore, is not entitled to reimbursement. Second, the Fund has done absolutely nothing to protect its lien interests and is therefore not entitled to reimbursement. I would, therefore, reverse the judgment and remand for the trial court to enter an order adjudicating the lien of PWS to the amount it actually paid, which is $0.

¶185 The majority opinion in this somewhat straightforward lien resolution matter is Brobdingnagian in its length, principally because it perseverates over issues that are not before this court on appeal. The particulars of the insolvency of Legion are not at issue in this appeal and we certainly should not, *sua sponte*, add to the record on appeal by considering the record of those proceedings. The issue of whether the underlying third-party lawsuit was "prematurely paid out" is not before us. The issue of whether the employer is still in business is not before us. The possible existence of a subrogation clause in the employer's workers' compensation policy is not before us. Simply put, the only matters before us concern whether the trial court properly found the Illinois Guaranty Fund was entitled to any reimbursement of monies paid where it

never took steps to enforce its lien interest and if the answer to that question were to be in the affirmative, whether the recovered amount should be reduced to compensate plaintiff's attorney for recovery of that money for the fund.

¶186 As stated above, there is not a party in this case before us on appeal who has contributed actual monies to settle the workers' compensation case who would therefore have a valid lien that is subject to reimbursement. Absent that necessary party, this court's order should simply state that the trial court should deny the employer's attempt to gain from the contributions of others (the Fund and the defunct Legion) and award nothing to the employer. This court should in no way sanction unjust enrichment to a party by way of reimbursing monies that it never paid and should not sanction payment to an entity (the Fund) which did not properly protect or pursue its interest in recovering any monies that it actually paid. As it stands, the majority's order would effectively "punt" the matter back to the trial court and allow the trial court to conduct hearings on matters that are well outside the ambit of the undeniably narrow mandate of our earlier ruling.

¶187 While coming to these conclusions, I must note that Sanchez has maintained on appeal that the trial court awarded the $120,186 paid by the Fund to the Fund itself, not PWS. Sanchez's position finds ample support in the record. Specifically, the trial court's October 2008 order referred to the Fund's right to reimbursement no less than seven times. The court stated, "[t]his Court holds that the *** Fund is only entitled to the $120,186.00 which it paid pursuant to the Illinois Insurance Guaranty Fund Act," and concluded, "this Court finds that the Fund is entitled to recovery only to the extent paid by the Fund ***. As such, the Fund is entitled to $120,186."

¶188 Nowhere in this order did the court expressly award PWS **any** sum. I do not believe it is

churlish to suggest that a party who seeks reimbursement must prove that it actually paid money in order to allow it to pursue reimbursement, through lien satisfaction, subrogation or another appropriate legal vehicle. PWS indisputably paid **nothing**. In the trial court's December 2008 order, PWS is nowhere identified as the proposed recipient of the court's adjudicatory function. The trial court observed its previous holding that the "Fund is entitled to recover the amount paid by the Fund, $120,186.00," and concluded that "since the Illinois Insurance Guaranty Fund Act does not provide for a means to reduce the amount *owed to the Fund* by attorney's fees or a pro rata share of costs and reasonably necessary expenses, there is no statutory basis for plaintiff's recovery of fees, costs or expenses." (Emphasis added.)

¶189 In a transparent display of shameless hubris in advocacy, PWS posits that "the circuit court's judgment was necessarily in favor of Paul's Welding since the Guaranty Fund was not a party in the circuit court and the workers' compensation lien runs in favor of the employer in any event." In a contradictory fashion, PWS suggests that while the trial court was capable of making errors entitling PWS to relief on appeal, the court could not possibly have erred by entering judgment in favor of an entity which was not a party to the proceedings. I believe the majority erred in accepting the inherent chicanery in this position.

¶190 The majority's murky decision apparently requires the trial court to enter an order providing that PWS' lien includes both the $120,186 paid by the Fund and the $145,018.71 paid by Legion but that PWS must immediately return the former sum to the Fund, pursuant to the Fund's subrogation rights. As to the latter sum, if, on remand, the trial court confirms that the policy between Legion and PWS contained a subrogation clause, PWS must also pay the Fund

the $145,018.71 previously paid by Legion, a notion which, for reasons to be explained, finds no support in the cases cited and is contrary to the orders for the conservation (*People ex rel. Shapo v. Legion Indemnity Company*, 2002 CH 06695 (April 3, 2002)) and liquidation of Legion (*People ex rel. Shapo v. Legion Indemnity Company*, 2002 CH 06695 (April 9, 2002)). If, however, the court determines on remand that no subrogation clause exists, the trial court has much more work to do, partly because the majority has not given the trial court clear guidance with respect to that scenario.

¶191 Under this latter scenario, the majority recognizes that PWS might luck out. Rather than good fortune, PWS' conduct in this case would more appropriately be characterized as the use of sophistry to obtain unjust enrichment. Aside from the prospective windfall for PWS, the majority goes on to state that it remains to be seen whether the owner of PWS can personally benefit from PWS's alleged lien if PWS is out of business. *Supra* ¶124, 181. The majority fails, however, to instruct the trial court how to proceed if PWS's owner cannot personally benefit. This lack of guidance may lead to further unnecessary proceedings.

¶192 The majority also acknowledges that the settlement funds paid by RSC to Sanchez have already been disbursed and suggests as a potential remedy that PWS file a complaint against RSC to recover funds that, as a practical matter, it is unable to recover from Sanchez. *Supra* ¶144. This is seemingly at odds with the majority's overriding concern that Sanchez will receive a double recovery, for under this scenario, not only could PWS possibly obtain a windfall by receiving and keeping a sum that it never paid, but Sanchez would still benefit from sums he received from RSC, Legion and the Fund. In addition, the majority suggests that if RSC is

required to pay PWS, RSC may be entitled to seek reimbursement from Sanchez. *Supra* ¶146. The majority further suggests that Sanchez's attorney may be liable for the premature disbursement of the settlement funds. Thus, this circuitous litigation may very well continue for another decade under the majority's disposition. The question of where this sum will come to rest remains unanswered.

¶193 Section 5(b) of the Workers' Compensation Act provides that where a person other than the employer caused the injury for which compensation was paid under the Act, the employee may institute legal proceedings against that person, notwithstanding the employer's payment of compensation under the Act. 820 ILCS 305/5(b) (West 2008). Section 5(b) also provides as follows:

> "[I]f the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid *by him* to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act." (Emphasis added.) 820 ILCS 305/5(b) (West 2008).

Section 5(b)'s plain language that the employee shall pay the employer the amount of compensation paid "by him" can refer only to compensation paid by the employer himself, as opposed to his insurer or the Fund.

¶194 Section 5(b) further provides:

> "Out of any *reimbursement* received by the employer pursuant to this Section the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is *reimbursed*, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such *reimbursement*." (Emphasis added.) 820 ILCS 305/5(b) (West 2008).

Thus, the payment contemplated under section 5(b) is *not* an arbitrary payment to the employer, but is quintessentially a reimbursement. See *In re Estate of Dierkes*, 191 Ill. 2d 326, 331 (2000) ("The plain language of section 5(b) shows that an employer's reimbursement of workers' compensation payments from an employee's third-party recovery is crucial to the workers' compensation scheme."); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 400 (1998) ("Section 5(b) plainly predicates the employer's obligation to pay costs and fees on actual *reimbursement* of workers' compensation payments ***." (Emphasis in original.)). The fact that our supreme court and this court have interpreted section 5(b) to also permit an employer's *insurer* to be directly reimbursed for its payments demonstrates that the identity of the entity which actually compensated the employee is clearly the critical issue here. See *Scott v. Industrial Comm'n*, 184 Ill. 2d 202, 217 (1998) ("We find no reason to afford an employer's insurer fewer protections

under section 5(b) than those granted the employer on whose behalf compensation is paid under the Act."); *Smith v. Louis Joliet Shoppingtown L.P.*, 377 Ill. App. 3d 5, 7 (2007) (finding that section 5(b) granted the employer's insurance company a statutory lien on any recovery the employee received from a third party equal to the amount of compensation benefits paid to the employee). Simply put, a party cannot be "reimbursed" for a sum which it has not paid. Because PWS has paid no sum to Sanchez, there is no payment for which Sanchez can reimburse PWS.

¶195 I also find it would be improper to adjudicate rights belonging to the Fund because it was not a party in the trial court or on appeal. See *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 274 (2001) (a judgment is the court's determination of the issues presented in the pleadings which determines the final rights *of the parties* to the lawsuit and persons not parties are generally not affected by a judgment so that they are neither bound by it nor entitled to enforce it). PWS does not purport to represent the Fund's interests on appeal but, rather, seeks money paid by the Fund for PWS' own benefit! Because the Fund is not a party to this action, I find no basis for the majority's suggestion that the trial court may grant it relief here.

¶196 By suggesting that the trial court may automatically grant the Fund relief that it has not sought, the majority implies that the Fund holds a "super lien," a term of art in lien argot, commonly used with respect to Medicare's right to recovery. See *Miles v. Sunset Logistics, Inc.*, No. 3:10-CV-0872-G, 2011 WL 1532382, at *6 (N.D. Tex. Apr. 22, 2011) (referring to the payment conditioned on reimbursement pursuant to 42 U.S.C. § 1395y(b)(2)(B)(I) as a "super lien"); 42 U.S.C. § 1395y(b)(2)(B)(I) (2006) ("The Secretary may make payment under this subchapter ***. Any such payment by the Secretary shall be *conditioned on reimbursement* to

the appropriate Trust Fund in accordance with the succeeding provisions of this subsection." (Emphasis added.)); 42 C.F.R. § 411.24(h) (2006) ("If the beneficiary or other party receives a primary payment, the beneficiary or other party must reimburse Medicare within 60 days."); *United States v. Sosnowski*, 822 F. Supp. 570, 573 (W.D. Wis. 1993) (Finding that once the medicare beneficiary and his attorney received settlement proceeds, they had 60 days to reimburse Medicare)*;* see also 42 U.S.C. § 1395y(b)(2)(B)(iv) (2006) ("The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to *any* right under this subsection of an individual or *any* other entity to payment with respect to such item or service under a primary plan." (Emphasis Added.)). I find no statutory support for the proposition that the Fund holds such a "super lien." Unlike the Medicare super lien legislation, no language in the Illinois Insurance Code (the Code) (215 ILCS 5/1 *et seq.* (West 2008)) appears to expressly condition the Fund's payment on a right to reimbursement. In addition, although the majority cites case law for the principle that no steps are required to preserve the lien, the majority erroneously equates preservation with enforcement. Indeed, the majority cites case law where the lien holder did enforce its lien or otherwise protect its interests by filing a complaint. *Hartford Accident & Indemnity Co. v. D.F. Bast, Inc.*, 56 Ill. App. 3d 960, 962-63 (1978); see also *Chubb Group Insurance Companies v. Carrizalez*, 375 Ill. App. 3d 537, 538 (2007).

¶197 As to the $145,018.71 paid by Legion, the majority appears to recognize that the Illinois Guaranty Fund Act itself does not grant the Fund this sum. Specifically, section 537.4 states that "[t]he Fund shall be deemed the insolvent company *to the extent of the Fund's obligation for*

covered claims and to such extent shall have all rights, duties, and obligations of the insolvent company." (Emphasis added.) 215 ILCS 5/537.4 (West 2008). Thus, any rights of the Fund exist only to the extent of its obligation for covered claims. In addition, section 534.3(a) defines "covered claim" as "an *unpaid* claim for a loss arising out of and within the coverage of an insurance policy to which this Article applies." (Emphasis added.) 215 ILCS 5/534.3(a) (West 2008). Because Legion paid Sanchez $145,018.71, that sum was not "unpaid" and thus, does not constitute a "covered claim" under section 534.3(a). Because that sum is not a covered claim for which the Fund was obligated, section 537.4 does not give the Fund any rights with respect to that sum.

¶198 The majority nonetheless contends that the Fund is entitled to the amount paid by Legion and apparently considers the Director of Insurance to be interchangeable with the Fund. *Supra* ¶109 ("the Fund, through the Director of Insurance is the employer's substitute subrogee"). Specifically, the majority cites statutes that allocate rights concerning a defunct insurance company to the Director of Insurance in support of the majority's position that those rights belong to the Fund. Contrary to the majority's analysis, the Fund is operated by the Fund's Board of Directors, not the Director of Insurance. 215 ILCS 5/535, 536 (West 2002). The two are simply not interchangeable.

¶199 Similarly, the orders for the conservation and liquidation of Legion in no way grant the Fund any rights. Even assuming the majority has properly taken judicial notice of those orders, their provisions, consistent with the Code, appointed the Director of Insurance, rather than the Fund, as the conservator and liquidator of Legion. But see *supra* ¶174 ("the Fund *** is the

conservator of Legion"). In addition, section 191 of the Code states, in pertinent part, that "[t]he Director [of Insurance] *** shall be vested by operation of law with the title to all property, contracts, *and rights of action of the company* as of the date of the order directing rehabilitation or liquidation." (Emphasis added.) 215 ILCS 5/191 (West 2002); see 215 ILCS 5/193(3) (West 2002). Thus, the Chancery court's conservation and liquidation orders properly gave the Director of Insurance the right to pursue reimbursement of the sum Legion paid to Sanchez. The Director did not pursue that right in the case before us. In addition, section 192(3) provides that the Director of Insurance can institute a proceeding on Legion's behalf and clarifies that "[n]othing in this subsection shall be construed to affect the standing of the Illinois Insurance Guaranty Fund *** to sue or be sued under applicable law." 215 ILCS 5/192(3) (West 2002). Accordingly, the Director's right to sue on Legion's behalf is a mechanism wholly separate and distinct from the Fund's right to seek relief. Furthermore, section 193 states that "[u]pon the entry of an order directing liquidation," the Director is responsible for liquidating the business's property and may "sell or compromise all debts or claims owing to the company" with or without the court's approval, depending on the value of the claim. 215 ILCS 5/193(1), (2) (West 2002). As a result, the Director has the right to compromise any claim by Legion for reimbursement from Sanchez. Notably absent is any provision permitting this court to appropriate that right.

¶200 These statutes and orders indicate that only the Director of Insurance may pursue reimbursement for sums paid by Legion to Sanchez. Even when these provisions of the Code are read in conjunction with the Insurance Guaranty Fund Act, the result is the same. The legal authorities cited by the majority simply do not permit this court to transfer Legion's assets to the

Fund. We further note that the orders of conservation and liquidation appear to enjoin any entity from interfering with the Director's conduct with respect to Legion's assets and debts, including bringing proceedings against Legion's assets in any case other than the case in the Chancery Division. Accordingly, had the Director pursued and obtained the $145,018.71 paid by Legion, any attempt by the Fund to obtain that sum would necessarily have been brought before the Chancery case, not the Law Division case that is the subject of this appeal.

¶201 I also respectfully disagree with the majority's belief that permitting Sanchez to retain any of the $265,205 would result in a double recovery for Sanchez. It strikes me fair to suggest that one man's double recovery is another man's windfall, because as it stands, the court's order, which suggests that the trial court may be required to give PWS money which it has never paid, undeniably contemplates a windfall to PWS. See *LaFever*, 185 Ill. 2d at 402 (Finding that the premise behind section 5(b)'s fees and costs provision is "that an employer should not get 'something' (a reimbursement on workers' compensation payments) for 'nothing.' "). PWS represents that "[h]ow it distributes, as between its subrogees, the amounts recovered is not a matter relevant to Sanchez."

¶202 Two observations are immediately apparent. The first is that neither Legion nor the Fund is a "subrogee" of PWS. One can readily see that either could have filed a claim for subrogation for monies paid, but neither did. Second, it is the duty of the court to adjudicate this lien, which explicitly involves deciding if there is any party to the litigation that is entitled to reimbursement. There is not. Further, it is naive to think that PWS is going to all of this effort to benefit someone other than itself. It has indicated only that *IT* is entitled to the entire amount of monies

paid to Sanchez in the workers' compensation case. As our supreme court has recognized, the neutral result anticipated by section 5(b) is that the employer will come out even, not that the employer will profit. See *Dierkes*, 191 Ill. 2d at 332. It appears that here, however, PWS intends to, and may, come out ahead under the majority's analysis. Awarding PWS the $145,018.71 paid by Legion would be nothing less than a windfall.

¶203 For reasons unknown, the Fund has never properly and legally attempted to recover the $120,186 it paid Sanchez. It never filed a lien. It did not intervene in the underlying action. In other words it didn't protect its lien interest and that is now effectively forfeited. In addition, the Director of Insurance, the only individual that appears to have any right to the $145,018.71 paid by Legion, has not sought recovery of that sum. In addition, PWS, who seeks the recovery of both sums, in anticipation of keeping them, has no legally recognizable right to either sum. Thus, if a double recovery were to result, it would not result from an order by this court properly denying recovery of those funds to PWS but rather, from inaction on the part of the Fund, Legion's estate, or any other entity claiming a valid right to that sum. *Cf. Smith*, 377 Ill. App. 3d at 5-6 (the employer's insurance company petitioned to intervene in order to assert its workers' compensation lien). Contrary to the majority's conclusion that the $145,018.71 and $120,186 cannot be kept by Sanchez, neither this court nor the trial court has the authority to confiscate the money rightly paid to Sanchez in the absence of a claim brought by an entity with the right to such money. I would reverse the judgment and remand for the trial court to enter an order adjudicating the lien of PWS to the amount it actually paid, which is $0, an order which would finally, appropriately and mercifully end this litigation.