

Workers' Compensation Report

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Appellate Court Rejects Petitioner's Attorney's Fees Claim as to Future Medical Benefits Suspended by Virtue of Third-Party Judgment

In *Bayer v. Panduit Corp.*, 2015 IL App (1st) 132252, the Illinois Appellate, Court, First District, addressed the issue of whether the firm of Horwitz, Horwitz & Associates, Ltd. was entitled to a 25 percent attorney's fee "for future medical bills, lost wages, long term care, and other compensation." *Bayer*, 2015 IL App (1st) 132252, ¶ 37.

Panduit owns a manufacturing warehouse facility in DeKalb, Illinois. *Id.* ¶ 3. Acting as its own general contractor, they entered into a contract with Garbe Iron Works, Inc. for expansion of the facility. *Id.* Garbe subcontracted with Area Erectors, Inc. to perform structural steel erection services. *Id.* ¶ 4. The plaintiff, Ronald Bayer, was an employee of Area performing work as an iron worker. *Id.* ¶ 5. Bayer fell while working on the site and was rendered a quadriplegic. *Id.* Bayer filed a civil lawsuit against Panduit and Garbe, alleging negligence. Panduit then filed a third-party complaint for contribution against Area, arguing Area was also negligent in failing to ensure the safety of its employees. On October 1, 2012, Area and Bayer filed a joint motion for good-faith finding seeking approval of a settlement agreement between Bayer and Area. *Id.* ¶ 8. The court granted the motion for a good-faith finding and dismissed Panduit's third-party complaint against Area. *Id.* ¶ 9. Thereafter, Bayer settled his claim with defendant Garbe and the case proceeded to trial with Panduit being the sole remaining defendant. *Id.* ¶ 10.

In October 2014, a jury returned a verdict in Bayer's favor in the amount of \$64 million, which was the amount after the original \$80 million award was reduced by 20 percent for Bayer's own contributory negligence. During post-trial proceedings, Bayer filed a motion for attorney's fees and costs against Area under the Workers' Compensation Act. *Id.* ¶ 14. Citing § 5(b) of the Act, 820 ILCS 305/5(b), the motion sought an order compelling Area to pay attorney's fees representing 25 percent of future workers' compensation benefits for Bayer that had been suspended by statute as a result of the underlying settlement in the negligence action. *Bayer*, 2015 IL App (1st) 132252, ¶ 14. The circuit court granted Bayer's motion for attorney's fees with regard to both future workers' compensation payments and "future medical bills, lost wages, long term care, and any other compensation and benefit compensable under the Illinois Worker's [sic] Compensation Act." *Id.* ¶ 17.

On appeal, Area did not dispute that it owed 25 percent attorney's fees for the suspended permanent and total disability benefits, but argued it was not required to pay the 25 percent fee on suspended medical payments, contending that neither the Workers' Compensation Act nor the Illinois Supreme Court's holding in *Zuber v. Illinois Power Company*, 135 Ill. 2d 407 (1990), allow for recovery of attorney's fees for suspended medical payments. *Bayer*, 2015 IL App (1st) 132252, ¶ 38. Area further argued that allowing recovery of attorney's fees on the cost of future medical



expenses in addition to the one third fee on the third-party claim would amount to double recovery of attorney's fees. *Id.* On the issue of double recovery, Bayer argued that there is no risk of double recovery by Bayer's counsel because it "merely reduces the total amount of fees that Bayer owes his own attorney; and that such contribution is necessary because Area directly benefited from the work performed by Bayer's counsel." *Id.* ¶39.

The appellate court, reviewing the case *de novo*, found that the plain language of § 5(b) does not require the employer to pay attorney's fees for suspended future medical benefits. *Id.* ¶ 43. court noted that under § 5(b), the pool of money from which the employer has the right to reimbursement is the amount of compensation paid or to be paid by him to such employee, including amounts paid or to be paid pursuant to § 8(a) of the Act. *Id.* ¶ 43. The court also noted that §8(a) requires the payment of medical service to be made "to the provider on behalf of the employee" rather than directly to the employee. *Id.* The court then reasoned that since § 5(b) requires payment of the 25 percent attorney's fees "[o]ut of any reimbursement received by the employer pursuant to this section, and the proceeds out of which the employer is reimbursed," such language does not require the employer to pay attorney's fees on suspended future medical expenses. *Id.*

The court found that had the legislature intended to allow an attorney's fee on future medical expenses, then § 5(b) would have referred to compensation paid or to be paid by the employer "to or on behalf of the employee." Id. With regard to application of § 16a(D), the court disagreed with Area's contention that § 16a(D) precluded recovery of attorney's fees on future medical expenses. The court stated that § 16a(D) is limited in application to undisputed medical expenses and what fee the attorney can charge his own client. Id. ¶ 44. Therefore, the court concluded that §16a was inapposite to the issue before it. Id.

The appellate court concluded by distinguishing the Illinois Supreme Court's holding in *Zuber*, in which the Court held that § 5(b), allows for the assessment of fees and costs for both *past* and *future* compensation payments, but makes no mention of whether those "future compensation payments" included "suspended future medical expenses." *Id.* ¶ 45. The appellate court further noted that in *Zuber*, the employee was deceased and accordingly, future medical expenses were not at issue. *Id.* ¶ 46. Therefore, the appellate court concluded that the Illinois Supreme Court's holding in *Zuber* related only to "future compensation payments" as opposed to suspended future medical expenses. *Id.*

The court's ruling, while primarily focused on the plain language of the Act, does properly address the issue of double recovery. Twenty million dollars of the \$64 million jury verdict was for Bayer's future medical expenses, of which Bayer's counsel was entitled to one third in fees pursuant to his attorney-client contract. *Id.* ¶ 38. While Bayer argues that the 25 percent statutory attorney fees would just reduce the total amount of fees he owes his own attorney, Bayer's counsel would have already received the one-third fee from the civil case. Any additional fee then would be reimbursed to Bayer for benefits he was already compensated for in the civil suit, thereby amounting to double recovery for the future medical expenses.

Last November, the Illinois Supreme Court allowed a petition for leave to appeal in this case and will weigh in on this issue of attorneys' fees and the interpretation of Section 5(b). *Bayer v. Panduit Corp.*, 2015 Ill. LEXIS 1295 (Nov. 25, 2015). It may be set for oral arguments as early as May.

About the Authors

Bradford J. Peterson is a partner in the Urbana office of *Heyl, Royster, Voelker & Allen, P.C.* Mr. Peterson concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability,



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Vincent Boyle is an attorney at *Heyl, Royster, Voelker & Allen, P.C.*, Peoria, and focuses his practice on defending workers' compensation claims before the arbitrator, Workers' Compensation Commission, and the reviewing courts. Mr. Boyle is a frequent speaker on workers' compensation issues. He received his B.S. in 2006 from Bradley University and earned his J.D. in 2009 from the University of Illinois College of Law. During law school, Mr. Boyle participated in the Frederick Green Moot Court Competition, served as an articles editor for the *Illinois Business Law Journal* and was a Pro Bono Honors recipient.

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