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WIEDNER & MCAULIFFE, LTD.  
ATTORNEYS AT LAW

## **CREDIT UNDER UNINSURED MOTORIST PROVISION DOES NOT PERMIT AN ATTORNEY'S FEE UNDER SECTION 5(b) OF THE WORKERS' COMPENSATION ACT**

In *Taylor v. Pekin Insurance Company*, the Supreme Court of Illinois had occasion to consider the application of Section 5(b) of the Workers' Compensation Act as opposed to the credit allowed the employer under the uninsured motorist provisions of the employer's automobile liability policy. In interpreting the provisions of the Workers' Compensation Act as opposed to the automobile insurance policy, the court held that the credit superceded the subrogation provisions of the Workers' Compensation Act.

Billy Taylor, an employee of Herr Funeral Home, was driving a vehicle when he was struck by an uninsured motorist. Herr insured its vehicles under an automobile liability policy issued by Pekin Insurance Company. Pekin also acted as Herr's workers' compensation insurance carrier.

Taylor collected \$162,588.33 in his workers' compensation claim, and thereafter made a claim under the uninsured motorist coverage. The parties chose arbitration

under the uninsured motorist provisions and a judgment was entered in favor of Taylor in the sum of \$250,000. Pekin thereupon deducted the compensation payment of \$162,588.33 from the \$250,000 awarded under the automobile insurance policy and delivered payment of \$87,411.67 to Taylor.

Taylor then filed suit against Pekin asking for a declaration that entitled him to \$40,647, which was 25% of the \$162,588.33 compensation recovery contending that the subrogation provisions of Section 5(b) of the Act would entitle him to that 25%. Pekin filed a motion to dismiss contending that neither the automobile policy nor any other statute authorized Taylor to collect attorney's fees.

The setoff utilized by Pekin was based on the following provisions in the automobile policy:

*Any Amounts otherwise payable for damages under this coverage shall be reduced by all sums paid or payable for the bodily injury under any workers' or workmen's compensation law, disability benefits law or any similar law. Any payment under this coverage*

*to or for a covered person will reduce any amount that person is entitled to recover under the Liability Coverage of this policy.*

The pertinent provision of Section 5(b) is as follows:

*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.)*

In finding for Pekin, the court stated:

*There is no statutory or contractual basis to compel Pekin to pay an attorney fee in the amount of 25% of its contractual setoff where no third-party claim has been filed. Our holding is consistent with Illinois' long-standing adherence to the*

*'American Rule' whereby a successful party generally is responsible for his or her own attorney fees in the absence of a statute or contractual agreement allowing the recovery of fees.*

*Under the auto policy, Pekin is entitled to a setoff of the full amount of workers' compensation benefits paid to plaintiff, without deducting 25% for attorney fees.*

**EDITOR'S NOTE:** This credit provision has been applicable for many years and our office has been contacted to calculate the estimated value of a workers' compensation claim when the claimant prefers to proceed only on its uninsured motorist claim without proceeding to collect workers' compensation benefits. This may occur when the employer is uninsured or the employee does not wish to injure the employer's loss record. The uninsured motorist provision provides a credit for amounts "paid or payable" under the Workers' Compensation Act, thereby permitting a credit if compensation benefits are not actually paid.

*Taylor v. Pekin Insurance Company  
No. 105158, decided November 20, 2008*

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