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Louisiana Workers Compensation

Chapter 17

Claims Against Third Parties

Between the employer and the employee, fault is not an issue in a workers' compensation claim. An employee injured in a job accident is entitled to workers' compensation benefits regardless of whether fault on the part of the employer, the employee or a third person contributed to the accident. Because a third person is not a party to the workers' compensation compromise, however, a third person at fault in an employee's accident may be liable to the employee for damages and to the employer for reimbursement of workers' compensation benefits paid as a result of the accident. In such cases, the Louisiana Workers' Compensation protects against double recovery on the part of the employee by granting the employer's claim for reimbursement priority over the employee's claim for damages.

Who is a Third Person?

The Louisiana Workers' Compensation Act preserves the right of an injured employee, and any person obligated to pay compensation, to seek tort damages against a third person. La. R.S. 23:23:1101(A) and (B). A third person is a person who (1) is not immune from tort liability and (2) has a legal liability to pay damages for the employee's compensable injury, sickness, or disease. La. R.S. 23:1101(A).

> EXAMPLE: Employee is injured while in the course of employment with Employer. The accident resulted from the use of a defective product. Unless the manufacturer of the defective product is otherwise immune from liability (immunity is discussed below), Employee may seek tort damages from the manufacturer of the defective product, and Employer or Insurer may seek reimbursement from the manufacturer of the defective product for any workers' compensation benefits that it has to pay as a result of the accident.

The term "third person" includes any party that causes injury to an employee at the time of the employee's accident or at any time thereafter provided that the employer or insurer is obligated to pay workers' compensation benefits because the injury caused by the third person aggravated the employee's job injury. Under La. R.S. 23:1101(C), when a subsequent accident, caused by the fault of a third party, aggravates an employee's work-related injury, the employer is entitled to reimbursement from the third party. Haynes v. UPS, 05-2378, 933 So. 2d 765 (La. 7/6/06).[1]

The term "third person" also includes a medical provider whose treatment aggravates an employee's job injury. In Looney v. Glasscock Drilling, 625 So.2d 1110 (La. App. 3rd Cir. 1993), the court held that an employee waived the right to future compensation benefits by settling, without employer's consent, a malpractice claim against the physician who treated the employee's job injury. In Durham v. Pontiac-Cadillac-GMC Trucks, Inc., 572 So.2d 1080 (La. App. 1st Cir. 1990), the court reached the same result in suit against an ambulance service for alleged aggravation of a job injury due to mishandling and inordinate delay in transporting the employee.

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[1] The issue n Haynes was whether the employee was required to obtain written approval from the employer prior to settling with the third party, under the penalty of forfeiting his benefits pursuant La. R.S. 23:1101(B), when the third party was at fault in a subsequent accident, not related to employment, that aggravated the employee's job injury. The Louisiana Supreme Court held that the employee forfeited his right to benefits by settling the claim without his employer's approval.

Who is Immune from Liability?

An injured employee has no cause of action against, and an employer or insurer has no right of reimbursement from, persons immune from tort liability for the employee's injury. Under La. R.S. 23:1032, persons immune from tort liability are:

1. **Employer**

Workers' compensation benefits are an employee's exclusive remedy against an employer for injuries sustained in a job accident. Generally, employers are immune from tort liability for injuries sustained by an employee in a job accident.

Dual Capacity

The employer's tort immunity extends to actions brought under a dual capacity theory. La. R.S. 23:1032(A)(1)(b).

> EXAMPLE: Employee is injured while in the course of employment with Employer. The accident resulted from the use of a defective product manufactured by the employer. Because the employer is immune from liability, the employee may not sue employer for tort damages caused by the employer's defectively manufactured product. Even though the employer in this case acts in a dual capacity, i.e., employer and manufacturer of the defective product, the employer still retains its immunity to tort liability.

The dual capacity doctrine bars a tort claim against an employer even when the employer as lessee contractually assumes responsibility for defects in the leased premises. Dufrene v. Doctors Hospital of Jefferson, 836 So.2d 309 (La. App. 5th Cir. 2002); Robinson v. Archdiocese of New Orleans, 731 So.2d 979 (La. App. 4th Cir. 1999); Martin v. Stone Container Corp., 729 So.2d 726 (La. App. 2d Cir. 1999); Douglas v. Hillhaven Rest Home, Inc., 709 So.2d 1079 (La. App. 1st Cir. 1998); Hesse v. Champ Service Line, 707 So. 2d 1295 (La. App. 3rd Cir. 1998).

Intentional Acts of the Employer

An employer's tort immunity does not extend to injuries caused by the employer's intentional acts. La. R.S. 23:1032(B). An employee who is injured by an employer's intentional act may pursue an action in tort while at the same time receiving workers' compensation benefits. The employee may not, however, recover twice for the same damages. Gagnard v. Baldridge, 612 So.2d 732 (La. 1993). The employer gets a credit against its tort liability for the workers' compensation benefits paid by the employer or its workers' compensation insurer. In Gagnard, the court held specifically that the credit goes to the employer as the intentional tortfeasor, not to the workers' compensation insurer.

Vicarious Liability for Intentional Acts of Employees

An employee may sue an employer under the doctrine of respondeat superior for the intentional acts of a co-employee. Jones v. Thomas, 426 So.2d 609 (La. 1983). An employer is responsible for the intentional acts of an employee when the employee's conduct is so closely connected in time, place and causation to the employment duties that it constitutes a risk of harm attributable to the employer's business. Benoit v. Capitol Mfg. Co., 617 So. 2d 477 (La. 1993), *citing*, Lebrane v. Lewis, 426 So.2d 609 (La. 1983). The factors to be considered in determining whether an employer is vicariously liable for an employee's intentional tort are: (1) whether the tortuous act was primarily employment rooted; (2) whether the violence was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment. Lebrane, *supra*. The employer's vicarious liability does not extend to tortuous conduct motivated by purely personal considerations entirely extraneous to the employer's interest. Smith v. Carl Woodard, Inc., 568 So.2d 1360 (La. 1990).

2. Officer, director, stockholder or partner of the employer

Tort immunity extends to officers, directors, stockholders and partners of the employer, provided that the officer, director, stockholder or partner was engaged at the time of injury in the normal course and scope of employment. La. R.S. 23:1032(A)(1)(b) and La. R.S. 23:1032(C)(1).

3. Co-employee

An injured employee's co-employees are immune from tort liability provided that they were engaged at the time of injury in the normal course and scope of employment. La. R.S. 23:1032(A)(1)(b). Co-employees include the employees of the injured employee's statutory employer. As with employers, co-employees are not immune from liability for their intentional acts.

4. Statutory Employer

As discussed more fully in Chapter 1, when a party (referred to in the statute as the "principal") undertakes to execute any work that is a part of its trade, business or occupation, and contracts with another party (referred to in the statute as the "contractor") to execute the whole or any part of the work, the principal is the statutory employer of the contractor's employees. La. R.S. 23:1061(A)(1). A statutory employer is immune from liability and, therefore, is not a "third person" from whom an employee may seek tort damages for a job injury or an employer or insurer may seek reimbursement for workers' compensation benefits paid to an employee.

What May the Employer or Insurer Recover in a Claim Against Third Person?

1. **Reimbursement**

If the employer or insurer is a party in a suit against a third party, any damages recovered against the third party are apportioned so that the claim of the employer or insurer for reimbursement of compensation actually paid takes precedence over the claim of the injured employee. If the damages are not sufficient or are only sufficient to reimburse the employer or insurer for compensation actually paid, then damages are assessed solely in the employer or insurer's favor. La. R.S. 23:1103(A)(1).

Effective January 1, 1990, La. R.S. 23:1103 was amended to provide that the claim of the employer or insurer is satisfied from the first dollar of the judgment without regard to how the damages have been itemized or classified by the trier of fact.[2] This amendment overruled Louisiana Supreme Court decisions in Fontenot v. Hanover Ins. Co., 385 So.2d 238 (La. 1980) and Brooks v. Chicola, 514 So.2d 7 (La. 1987). Fontenot had held that an employer or insurer was not entitled to reimbursement of medical benefits paid out of an employee's award against a third party for pain and suffering. Brooks similarly had held that reimbursement for disability benefits paid was limited to the amount awarded for past loss of earnings. Under the 1990 amendments, the classification of damages does not matter. The employer or insurer is entitled to reimbursement out of the total amount of damages awarded, regardless of how those damages are calculated. In fact, at least one court has held that the precedence of the employer or insurer's lien over the employee's claim even extends to amounts awarded to the employee for property damage.[3]

One court held that the employer or insurer is not entitled to reimbursement or credit if it was aware that plaintiff filed a third-party suit and it failed to intervene. Houston Gen. Ins. v. Commercial Union Ins., 96-0379 (La. App. 1st Cir. 11/8/96), 682 So.2d 1341; Stafford v. Dow Chemical Corp., 415 So.2d 393 (La. App. 1st Cir, 5/25/82). In Shiver v. Wilson's Department Store, 89-CA-1363 (La. App. 4th Cir. 3/29/90), 559 So.2d 864, however, the court held that the failure to intervene did not waive right to reimbursement when the employer filed notice of its lien in the trial court record, although in improper form, and the other parties were aware of the employer's claim.

2. **Credit**

If damages awarded in a third-party claim exceed the amount of the employer or insurer's workers' compensation lien, the employer or insurer is entitled to a credit against its future compensation obligation in the amount of the plaintiff's net recovery (plaintiff's recovery after attorney's fees and costs are deducted), discounted at 6%.[4]

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[2] La. R.S. 23:1103(B)

[3] St. Tammany Parish Sch. Bd. V. Bullinger, 2014 0940 (La. App. 1 Cir. 12/23/14), 168 So.3d 493.

[4] La. R.S. 23:1103(A)(1)

In Breaux v. Dauterive Hospital Corporation, 2002-1072 (La. App. 3rd Cir. 2/5/03), 838 So.2d 109, the Third Circuit resurrected the ghost of Brooks v. Chicola in a case involving an employer's credit for settlement with a third party. The court, relying on Brooks and two other pre-1990 cases, held that an employer or its insurer is not entitled to a credit against future medical benefits for amounts that an employee receives from a settlement with a third party. In City of DeQuincy v. Henry, 2010-0070, 62 So.3d 43 (La. 3/15/11), however, the Louisiana Supreme Court rejected Breaux. The Supreme Court held that the 1989 amendments to La. R.S. 23:1102 and 1103 "clearly evidence the intent of the legislature to require that employers and their insurers receive a credit for the entire amount of any compromise or settlement, or for the entire amount of a judgment, no matter how the damages have been itemized or classified."[5]

3. Judicial Interest

An employer or insurer that files suit against a third party, or intervenes in an employee's claim against a third party, is entitled to judicial interest on the amount that it recovers. Darbonne v. Canal Refining Co, Inc., 614 So.2d 159 (La. App. 3rd Cir. 1993). Judicial interest on amounts paid before the employer filed suit or intervened is payable from the date that the claim was filed. Judicial interest on amounts paid after the claim was filed is payable on each payment from the date of the payment.

Limitations on the Employer or Insurer's Right to Reimbursement

1. Attorney's fees and costs

When the employer or its insurer asserts its lien through intervention, it is responsible for a portion of the reasonable legal fees and costs incurred by plaintiff in recovering the employer or insurer's lien. Reasonable fees shall not exceed one third of the intervenor's recovery for prejudgment payments or prejudgment damages. The employer or insurer is not responsible for attorney's fees attributable to the employer or insurer's credit against its future compensation obligation. La. R.S. 23:1103(2)(C).

Costs include taxable court costs and fees of experts retained by the employee. The pro rata share of the intervenor's costs is based on the intervenor's recovery of prejudgment payments or prejudgment damages.

The law regarding the intervenor's responsibility for attorney's fees was somewhat different before January 1, 1990. The Louisiana Supreme Court established the intervenor's liability for attorney's fees in Moody v. Arabie, 498 So.2d 1081 (La. 1987). For

[5] In the subsequent case of Mercer v. Nabors Drilling USA, LP, 2011-2638 (La. 7/2/12), 93 So.3d 1265, the Louisiana Supreme Court clarified that, because both DeQuincy and Mercer involved settlements, not judgments, those decisions did not address the amount of the credit due for damages received in a judgment. Based on the court's analysis and conclusion in DeQuincy, however, the result likely would be the same.

this reason, the intervenor's portion of the employee's attorney's fees is commonly referred to as "Moody fees." Effective January 1, 1990, the Louisiana legislature codified Moody in part, limited Moody in part, and overruled Moody in part. La. R.S. 23:1103(2)(C) codifies Moody by holding the intervenor responsible for a portion of the attorney's fees and costs incurred in prosecuting the third-party action. The statute limits Moody by providing that the attorney's fees shall not exceed one third of the intervenor's reimbursement. Finally, the statute overrules Moody by providing that the intervenor is not responsible for attorney's fees related to the intervenor's future credit. (Under Moody, the intervenor was responsible for attorney's fees on the credit that it received against its future exposure as well as the amounts that it actually recovered.)

2. LIGA

La. R.S. 22:2055(6)(b)(iii) excludes claims against the Louisiana Insurance Guaranty Association for any amounts due to an insurer as subrogation, recoveries, or otherwise. This exclusion has been held to apply to the employer or insurer's claim for future credit as well the claim for reimbursement.

3. Waiver of Subrogation

Generally, a waiver of subrogation in a workers' compensation insurance policy prohibits an insurer from seeking reimbursement from the party in whose favor subrogation is waived. The waiver of subrogation, likewise, would prohibit the insurer from pursuing from the injured employee settlement proceeds that the employee received from the party in whose favor subrogation is waived.

Unapproved Settlements

La. R.S. 23:1102(A) requires that an employee notify the employer or insurer if the employee files suit against a third party to recover damages for the employee's work-related injury. Similarly, an employer or insurer who files suit against a third party must notify the employee in writing.

1. Remedies Against the Employee for Failure to Comply with La. R.S. 23:1102

If the employee settles the third-party claim without written approval from the employer or insurer, the employee forfeits the right to future compensation, including medical expenses. The approval must be in writing and must be obtained at the time of or prior to the settlement. La. R.S. 23:1102(B).

Buy Back Provision

An employee who has forfeited the right to future compensation may buy back the right to compensation by paying the employer or insurer the lessor of (1) the entire

amount of compensation benefits paid to or on behalf of the employee, less attorney's fees; or, if that amount exceeds fifty percent of the amount recovered in the settlement; or (2) fifty percent of the total amount recovered in the settlement.[6] If the employee buys back the right to compensation, the employer or insurer still receives a credit for the full amount of the settlement, less attorney's fees and costs paid by the employee in prosecution of the claim.[7] The employer's credit is not reduced by the amount that the employee paid to buy back the right to compensation.

For example, in Tolley v. James Construction Group, LLC, 2015-1323 (La. App. 4 Cir. 9/28/16), the employer was entitled to a credit equal to the full amount of the employee's net recovery from a third party even though the employee had paid 50% of his net recovery to buy back his right to compensation. The employee in Tolley settled a third-party claim for $15,000.00 without his employer's approval. The employee's net recovery from the third-party settlement, after attorney's fees and costs, was $8,631.28. The net recovery was not sufficient to satisfy the employer's lien, but the employee paid the employer 50% of his net recovery, $4,315.64, to buy back his right to compensation. The employee argued that, because he paid the employer $4,315.64 to buy back the right to compensation, the employer's credit against its future exposure was only $4,315.64 ($8,631.28 net settlement amount - $4,315.64 buy back). The court, however, held that, the employer was entitled to a credit against its future exposure for the full $8,631.28, the total amount of the settlement minus attorney's fees and costs.

2. Remedies Against the Third Person for Failure to Comply with La. R.S. 23:1102

The employer or insurer's rights against a third party that settles without approval depend on the timing of the settlement and the third party's notice of the employer or insurer's claim.

Unapproved Settlement after Intervention

La. R.S. 23:1102(C) provides that, when a suit has been filed against a third party, and the employer or insurer has intervened, the third party must have the employer or insurer's consent in writing to settle the claim. If, after the employer or insurer has intervened, the third party settles the claim without the employer or insurer's written approval, the third party is liable to the employer or insurer for the full amount of the employer or insurer's lien. Under these circumstances, the third party has "confessed judgment" to the employer or insurer. The employer on insurer is entitled to full reimbursement from the third party without having to prove that the third party was liable for the employee's injury.

The recovery of the entire lien from the third party does not revive the employee's forfeited workers' compensation claim. To revive the workers' compensation claim, the

[6] La. R.S. 23:1102(B)
[7] Id.

employee must still buy back the claim as described above. If the employee buys back the claim before the employer or insurer seeks reimbursement from the third party, the employer may only recover from the third party to the extent that the employee did not fully reimburse the employer or insurer.

Unapproved Settlement Before Suit or Intervention

If a third party has adequate notice of the employer or insurer's claim, and the third party settles with the employee without the consent of the employer or workers' compensation insurer, the settlement does not bar the employer or insurer from seeking reimbursement from the third party. Unlike the situation in which the employer or insurer has intervened, however, the third party has not confessed judgment. The employer or insurer must establish that the third party is liable for the employee's injury.

If a third party does not have adequate notice of the employer or insurer's claim, and the third party settles with the injured employee, the employer or insurer is not entitled to reimbursement from the third party. St. Paul Fire & Marine Ins. v. Whitmire, 578 So.2d 1180 (La. App. 5th Cir. 1991). The employer or insurer seeking reimbursement has the burden of proving that the third party had adequate notice of the claim.

Uninsured Motorist Implications

When an employee is injured in an automobile accident while in the course and scope of employment, and the party at fault is uninsured or underinsured, uninsured motorist insurance may be available to cover the injured employee's damages. Whether an employer or its workers' compensation insurer is entitled to reimbursement from the UM carrier depends of three factors: (1) whether the uninsured, at fault motorist, is immune from liability under La. R.S. 23:1032; (2) whether the employee paid the premiums for the UM coverage; and (3) whether the UM policy excludes reimbursement of workers' compensation benefits.

(1) The uninsured party must be legally responsible for the employee's injuries

If the at fault motorist is immune from tort liability, neither the injured employee nor the employer or workers' compensation insurer may recover from the UM carrier. The UM carrier stands in the place of the uninsured, at fault motorist. If the uninsured, at fault motorist is immune from liability, then the UM policy is not available to the employer or its insurer for reimbursement of workers' compensation benefits paid.

EXAMPLE: Employee is a passenger in a vehicle driven by Co-employee. The vehicle is involved in an accident, and Employee is injured. Co-Employee is at fault in the accident. Employee cannot recover from any UM carrier because the party at fault is immune from liability under La. R.S. 23:1032. Likewise, the employer and its insurer are not entitled to reimbursement from any UM carrier.

(2) No reimbursement is available when the employee paid for the UM policy

If the uninsured, at fault motorist is not immune from liability under La. R.S. 23:1032, the employer or its insurer may recover under the employer's UM policy. The employer or its insurer, however, has no right to reimbursement from a UM policy that was paid for by the employee. La. R.S. 23:1163 prohibits direct or indirect collection from an employee for workers' compensation insurance or workers' compensation payments. Allowing the employer or its insurer to recover under the employee's UM policy would violate this statute.

EXAMPLE: Employee is injured in an automobile accident while in the course and scope of employment while driving his own automobile. The party at fault is a third person, not immune from liability under La. R.S. 23:1032. The party at fault is uninsured. Employee may seek damages against the employee's UM carrier, but the employer or its insurer have no right of reimbursement from the UM policy paid for by the Employee.

EXAMPLE: Same facts as above, except that Employee was driving Employer's vehicle at the time of the accident. Employee may seek damages from Employer's UM carrier, and Employer or its insurer may seek reimbursement from Employer's UM carrier.

(3) A UM policy may validly exclude reimbursement to an employer or workers' compensation insurer

Most UM policies provide that the UM insurance does not apply to "the direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law." In Travelers Ins. Co. v. Joseph, 95-0200 (La. 6/30/95), the Louisiana Supreme Court held that this exclusion validly excludes any reimbursement to an employer or insurer of workers' compensation benefits paid to an injured employee. Subsequent appellate court decisions have held that the exclusion also bars an employer or workers' compensation insurer from taking a credit for the amounts that an employee receives from a UM insurer. Tommy's Novelty v. Velasco, 868 So.2d 962 (La. App. 2d Cir. 2004), Bergeron v. Williams, 764 So.2d 1084 (La. App. 1st Cir. 2000); Watson v. Funderburk, 720 So.2d 808 (La. App. 3rd Cir. 1998); Cleaning Specialists, Inc. v. Johnson, 695 So.2d 562. Consequently, if a UM policy contains this exclusion, and the exclusion is raised in response to an employer or insurer's suit or intervention, the employer or insurer will not be entitled to recover workers' compensation benefits paid to the injured employee and will not be entitled to a credit for any recovery from the UM insurer.

(4) The uninsured motorist carrier and the employer/workers' compensation insurer are solidary obligors such that payment by one extinguishes the obligation of the other to the extent of the payment.

In Cutsinger v. Redfern, 2008-C-2607, 12 So.3d 945 (La. 5/22/09), the Louisiana Supreme Court held that, when an employee is injured in a work-related automobile accident, the uninsured motorist carrier and the workers' compensation insurer are solidary obligors such that payment by one extinguishes the obligation of the other to the extent of the payment. Cutsinger did not address the employer's right to reimbursement from the UM insurer for workers' compensation paid to the employee or the employer's right to a credit for amounts that the employee receives from a UM insurer. As a solidary obligor, however, the employer, subject to the limitations discussed above, should be entitled to contribution or indemnity from the UM insurer for workers' compensation benefits paid to the employee. La. C.C. Art. 1804. Also, to the extent that the UM insurer paid damages for lost wages or medical expenses, those payments should extinguish the employer's obligation to pay workers' compensation benefits to the employee, i.e., the employer should get a credit for the amounts paid by the UM insurer.

Effect of Employee and Employer Fault on Reimbursement

a. Employee Fault

The recovery of the employer or its insurer is identical in percentage to the recovery of the employee. If the employee's recovery is reduced because of comparative negligence, the recovery of the employer or insurer is reduced by the same percentage. La. R.S. 23:1101(B).

> EXAMPLE: Employee is injured in a job accident caused, in part, by a third party. Insurer paid $40,000.00 in workers' compensation benefits. At trial, 85% of fault is attributed to the third party, and 15% of fault is attributed to the injured employee. Insurer's recovery from the third party is reduced to $34,000.00 (85% of $40,000.00) due to the employee's fault.

b. Fault of Employer or other Immune Party

Effective May 6, 1996, the fault of an employer, or any other party immune under La. R.S. 23:1032 from tort liability, shall be assessed as a percentage of aggregate fault of all persons causing or contributing to the employee's injury. The fault so assessed shall not be reallocated to any other person or party. The recovery of the employer or insurer is reduced by the percentage of the fault so assessed. La. R.S. 23:1104.

> EXAMPLE: Employer paid $40,000.00 in workers' compensation benefits. At trial, fault is allocated as follows: Employer – 25%, Statutory Employer – 25%, Third Party – 50%. The employer's recovery is reduced to $20,000.00 (50% of $40,000.00). The employer's recovery is reduced by its fault and the fault of the statutory employer, which is also immune from tort liability. The third party pays only that percentage of the employer's lien that corresponds to the third party's fault.