

OPINION

¶ 1

BACKGROUND

¶ 2 In 2009, Anthony Cozzone, a roofer employed by Fellows Roofing, Ltd., tripped and fell through a skylight on a commercial building rooftop in Broadview, Illinois. He died from his injuries the same day. Anthony was the father of two sons, then ages four and two. Anthony had never married the children's mother, Shawna Bell.

¶ 3 Anthony's father, Benjamin Cozzone, filed this wrongful death and survival action (wrongful death action) as special administrator of Anthony's estate against: (1) Garda CL Great Lakes, Inc., the tenant of the commercial building; (2) S.N.A.P., a family partnership which owned the building; and (3) Alexander Christopher and Nicholas Christopher, principals of S.N.A.P. Garda and S.N.A.P. then brought Fellows into the case by filing third-party contribution actions against it.

¶ 4 After the accident, Bell filed a claim for the sons under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits from Fellows. An Illinois Workers' Compensation Commission arbitrator found that Anthony's death arose out of and in the course of his employment. The Commission ordered, among other things, that Fellows pay Bell a combined weekly sum of \$466.13 for the benefit of the sons until they reached adulthood. Fellows then asserted a workers' compensation lien against any funds which Anthony's estate might receive from the premises owner and tenant through the wrongful death action.

¶ 5 The parties engaged in settlement negotiations in the wrongful death action during which Fellows refused to compromise its workers' compensation lien. The remaining parties—the estate, S.N.A.P., the Christophers, and Garda—entered into a settlement under which S.N.A.P. and Garda collectively paid the estate \$745,000 and also assigned their contribution claims

against Fellows to the estate. The trial court found that the settlement was made in good faith and approved it. The estate's attorneys received a 33% contingency fee of \$248,333.33 from the settlement. The court also ordered that \$117,539.16, the amount of the workers' compensation payments Fellows had paid to date, be deducted from the settlement and placed in escrow. Fellows then stopped its periodic workers' compensation payments for the children, still asserting its lien by taking a credit against its future payments under section 5(b) of the Act (820 ILCS 305/5(b) (West 2012)).

¶ 6 The contribution action against Fellows then proceeded to a jury trial, at which the estate stood in place of the landlord and tenant pursuant to their assignment of contribution rights. The jury found Fellows 100% at fault for Anthony's death. After this unfavorable verdict, Fellows waived the workers' compensation lien it had lodged against the proceeds of the settlement between the estate and the underlying defendants, and moved to dismiss the contribution claims against it based on that waiver. The estate objected. It asked the court to enter an order voiding the waiver and requiring Fellows to immediately pay the full amount of its maximum contribution liability, *i.e.*, its total workers' compensation liability, pursuant to the doctrine established by *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991). The trial court denied the estate's request and granted Fellows' motion, finding that Fellows could waive its lien even after the unfavorable jury verdict.

¶ 7 The court entered judgment against Fellows only for \$35,892.01, representing the difference between the escrowed funds and the amount of additional workers' compensation liability Fellows incurred during the period between the other parties' settlement and the disposition of the contribution trial.

¶ 8 The estate also requested that the court approve a proposed “distribution of its assigned contribution action,” including a request for additional attorney fees of \$29,384.79 for work on the contribution trial and \$20,349.40 for out-of-pocket costs. The estate’s attorneys arrived at the \$29,384.79 figure by multiplying the \$117,539.16 amount of Fellows’ workers’ compensation lien (the escrowed funds) by 25%. The 25% figure was, in turn, apparently based on section 5(b) of the Act, which requires employers to pay an employee’s attorneys 25% of the gross amount of any reimbursement of workers’ compensation payments the employer receives from the “fund” consisting of damages received by an employee through a personal injury claim. 820 ILCS 305/5(b) (West 2012). In support of their claim, the estate’s attorneys argued that their success at the contribution trial in obtaining a determination that Fellows was 100% responsible for Anthony’s injuries, increased the value of the estate. Fellows took no position regarding these fees, as its aggregate liability would not change regardless of how the monies were distributed.

¶ 9 The court granted the estate’s request for reimbursement of the out-of-pocket costs of \$20,349.40, leaving a balance of \$16,912.31 which was to be deposited as directed by the probate court. The trial court observed that the contribution trial resulted in a “clear” benefit to the estate, and that the attorneys’ calculations regarding the contribution trial’s monetary benefit to the estate were “completely accurate.” It nonetheless denied the request for attorney fees because it could not discern that any of the normal bases to award fees, such as a governing contractual provision or fee-shifting statute (including section 5(b)), governed the situation. The estate has appealed both the order allowing the lien waiver and the denial of its request to distribute attorney fees for the contribution trial from the settlement proceeds.

¶ 10 We take judicial notice that three estates have been opened in the probate division of the circuit court of Cook County related to this matter: case No. 13 P 939, a decedent's estate in which Benjamin has been named as the administrator, and case Nos. 13 P 5652 and 13 P 5653, minor's estates for each of the two sons, in which Shawna has been named as the guardian.

¶ 11 ANALYSIS

¶ 12 The Act requires employers to compensate their employees for job-related injuries or illnesses, regardless of fault. Under the Act, an employer of a deceased employee can be required to pay, among other things, weekly periodic payments based on a percentage of the employee's salary for the employee's minor children until the youngest child turns 18, or 25 if the child remains a full-time student. 820 ILCS 305/7 (West 2012). In return for not having to prove fault, employees receive only workers' compensation benefits from their employers and cannot sue their employers to receive additional tort damages. See 820 ILCS 305/5(a) *et seq.* (West 2012). Sometimes, however, parties other than an employer cause an employee to be injured at work. Those employees can sue the third parties for damages. See 820 ILCS 305/5(b) (West 2012) ("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."). These third parties can, in turn, seek contribution from the employer under the Joint Tortfeasor Contribution Act (740 ILCS 100/2(a) (West 2012)), thereby pulling the employer into the employee's personal injury lawsuit. *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 165 (1991). One or more of the third parties may assign their rights to

contribution, even to a nontortfeasor plaintiff. *Block v. Pepper Construction Co.*, 304 Ill. App. 809, 813 (1999).

¶ 13 An employer's maximum liability in a third-party suit for contribution is limited to its liability to its employee under the Act. *Kotecki*, 146 Ill. 2d at 165. When an employee settles a claim for workplace injuries with a third-party tortfeasor, the worker's settlement proceeds are dedicated to repaying workers' compensation benefits back to his employer. 820 ILCS 305/5(b) (West 2012); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 398-99 (1998). The employer protects its rights to repayment by asserting a lien on the worker's recovery in an amount equal to the amount of workers' compensation due the worker. *LaFever*, 185 Ill. 2d at 399. Alternatively, to avoid or satisfy its liability for contribution to a third party, the employer may waive its workers' compensation lien and agree to forego any reimbursement for workers' compensation payments made to the employee. *Id.* By waiving its lien, the employer satisfies any judgment that has been entered against it for contribution. See *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657 (2001).

¶ 14 In determining when, and whether, to waive its lien, an employer engages in a strategic analysis involving the structure of the Workers' Compensation Commission award, the time value of money, the expected life span of the employee or his beneficiaries, the respective shares of liability of the various parties, and the likelihood of a large tort judgment against a third-party tortfeasor. See generally *Baltzell v. R&R Trucking Co.*, 554 F.3d 1124, 1128 (7th Cir. 2009). Waiving the lien locks in the status quo and allows an employer to pay any existing Workers' Compensation Commission periodic-payment award over the time span intended. In this case, the largest portion of Fellows' workers' compensation obligation was a fixed monthly payment for the benefit of Cozzone's children which could last for over 20 years. Because of inflation and the ability of an employer to earn interest on its money over time, an employer benefits when

it can pay a fixed amount in increments over time rather than immediately in a lump sum. If the employer retains its lien, and its contribution share of a large third-party settlement award is particularly large, the employer may be responsible to immediately pay a much greater amount than the present value of its future periodic payments,¹ even though its total obligation remains capped under *Kotecki*.

¶ 15 Our supreme court has answered the question of whether an employer can waive its workers' compensation lien after having been found liable for contribution and thereby secure a dismissal of the contribution claims. In *LaFever*, the court reasoned that, regardless of when an employer waives its workers' compensation lien, its contribution liability is always capped at the same amount. *LaFever*, 185 Ill. 2d at 403-04. Whether the employer waives its lien before or after a verdict assessing its liability for contribution, the holding in *Kotecki*, and its progeny limit the maximum contribution liability of the employer to the amount paid and to be paid in workers' compensation benefits. *Id.* at 404. The estate contends that cases such as *LaFever* are distinguishable, because in those cases the underlying tort action was tried concurrently with the contribution action. We disagree. There appears to be no sound reason to deviate from the analysis in *LaFever* merely because, as in this case, the employer's liability for contribution was determined by verdict after plaintiff settled with the underlying defendants and received an assignment of defendants' contribution claims against the employer; the employer's maximum contribution liability is still limited to the amount of its workers' compensation obligation. See also *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 667-68 (2001). While the belated lien waiver creates an immediate financial detriment to the estate, it is permitted by the governing statutes

¹ The weekly workers' compensation periodic payments of \$466.13 for the Cozzone sons would generate about \$484,760 over the course of 20 years. While these payments are subject to a variety of contingencies, we note for illustrative purposes only that requiring Fellows to pay the \$484,760 in a lump sum now is significantly more valuable to the estate (and costly to Fellows) than paying that same sum in installments over the course of 20 years.

and controlling case law. Accordingly, we affirm the order allowing *Fellows* to waive its workers' compensation lien.

¶ 16 Although the estate's attorneys had already received a one-third contingency fee from the \$745,000 settlement, they filed a petition for an award of additional attorney fees relating to the contribution action. They did so after *Fellows* had waived its workers' compensation lien, but before the trial court resolved the estate's motion to void the lien waiver. As noted above, the contribution verdict did not change the aggregate damages due to the plaintiff. The benefits to the estate, according to the petition, included avoiding having to reimburse *Fellows* for its \$117,539.16 workers' compensation lien (the escrowed funds), and an additional judgment of \$35,958.20² for unpaid workers' compensation benefits which accrued during the pendency of the contribution action. Consents signed by both Benjamin and Bell agreeing to the distribution of \$29,384.79 to the estate's attorneys for their representation of the estate as assignee of the contribution claims against *Fellows* are attached to the fee petition. The consents do not, however, resolve the question before us, which is whether the estate's attorneys were entitled to a judicial order awarding these additional fees.

¶ 17 The petition itself refers to "Section 5(b) of the Work Comp [*sic*] Act," but a fair reading of the petition, the transcript of the proceedings before the trial court on May 8, 2015, and the estate's brief before this court reveals that the additional attorney fees being sought were to be paid by the estate, and not by *Fellows* pursuant to section 5(b) of the Act. Clearly, section 5(b) of the Act provides for fees to be paid by an employer based on the actual reimbursement of workers' compensation payments from a fund created by the employee or, as in this case, by the

² This sum was quantified as \$35,892.01 in an April 29, 2015 order and then as \$35,958.20 in a May 17, 2015 order. The record does not reveal the reason for the \$66.19 discrepancy.

estate of a deceased employee. 820 ILCS 305/5(b) (West 2012); *LaFever*, 185 Ill. 2d at 400. Section 5(b) does not authorize the payment of fees by anyone other than the employer.

¶ 18 The argument section of the brief before us contains no reference to section 5(b) and simply states that the trial court should have awarded fees on an unspecified “legal and equitable basis” and, even more vaguely, “for policy reasons and in the best interests of the minor heirs.” Neither the brief nor the fee petition claims there was any contract between the estate and the attorneys for the payment of additional fees for prosecuting the contribution claims. Nor has the estate made any arguments based on quasi-contract. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) provides that the argument section of an appellant’s brief “shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities.” We find that the estate has forfeited this issue by failing to cite authority in support of its position. *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009) (issue on appeal forfeited for failure to cite authority).

¶ 19 CONCLUSION

¶ 20 We affirm the orders granting Fellows’ motion to waive its workers’ compensation lien and denying the estate’s attorneys’ petition for attorney fees.

¶ 21 Affirmed.