BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN TEETERS, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 1657466.01 THIRD PARTY SETTLEMENT DECISION UNDER IOWA CODE SECTION 85.22(3) Headnote: 3400

STATEMENT OF THE CASE

Bryan Teeters, claimant, filed a petition seeking approval of a third-party settlement agreement under Iowa Code section 85.22(3). Defendants Menard, Inc., employer, and XL Insurance America, Inc., insurer, oppose the settlement.

This matter came before the undersigned for an arbitration hearing on April 14, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 11, as well as Defendants' Exhibits A through K. Claimant testified on his own behalf. Defendants called Jacquie DeLuca. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties filed post-hearing briefs on May 27, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the settlement agreement between claimant and the third-party should be approved; and

2. The extent of defendants' entitlement to indemnification.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

On December 5, 2018, Brian Teeters sustained injuries during the course of his employment for Menard, Inc. (Hearing Report) Teeters was transporting freight along Interstate 35 when Jose Garza, an employee of MSF Transport, LLC, merged from the right shoulder into Teeters' lane, causing a collision. (See Exhibit G, page 1) According to the investigating police officer, Garza did not merge with a safe distance from Teeters. (Exhibit 7, Deposition Transcript, page 17) Teeters' work-related accident entitled him to workers' compensation benefits. To date, Menard has paid Teeters $79,905.63 in indemnity and medical benefits. No benefits have been paid since April 2021. (Hearing Transcript, page 8) Menard asserts Teeters may require additional medical care and may be entitled to additional benefits in the future. The workers' compensation claim is ongoing in this matter.

On May 13, 2019, Menard filed a tort action against Garza, MSF Transport, LLC, and Cano & Sons Trucking, LLC, in the United States District Court for the Southern District of Iowa. (See Joint Exhibit 6) Menard brought claims against the third-party tortfeasors for property damage to the Menard truck that was driven by Teeters at the time of the motor vehicle accident. Pursuant to Iowa Code section 85.22(2), Menard provided Teeters notice to file suit within 90 days or Menard would subrogate Teeters' rights and proceed on its own. (Exhibit 8)

Instead of joining Menard's lawsuit, Teeters retained an attorney and filed a tort action in the District Court of Story County against the same third-party tortfeasors alleging that his bodily injuries were caused by their negligence. (See Hr. Tr., p. 36) Menard subsequently filed a notice of its workers' compensation lien with the District Court of Story County; however, Menard did not otherwise intervene in the personal injury claim.

Teeters entered into a contingent fee agreement with his attorney providing, in part, for an attorney fee equal to one-third of the gross recovery if his case settled before the filing of a lawsuit, or two-fifths of the gross recovery if his case settled after the filing of a lawsuit. (Exhibit 5, page 1) The agreement also provided that Teeters was required to reimburse his attorney for costs advanced by the law firm on his behalf. (Id.)

Following a two-day jury trial in January 2021, Menard obtained a favorable judgment in which the third-party tortfeasors were found to be 70 percent at fault for the motor vehicle accident. (Joint Exhibit 11) Menard did not call Teeters as a witness at trial. (Hr. Tr., p. 28) Additionally, Menard prevented the third-party tortfeasors from offering evidence or argument at trial regarding Teeters' medical records and prior criminal convictions. (See Exhibit D, pages 1-2) According to Menard, the federal case

related solely to Menard's property damages and, accordingly, Teeters' medical records and prior criminal convictions were irrelevant. (Ex. D, pp. 5-6)

Menard incurred $64,690.89 in attorney fees to obtain said judgment. (See Joint Exhibit 3, page 1) Menard attorneys conducted written discovery, participated in five depositions, filed pretrial motions, and filed numerous documents in anticipation of the trial. (See Hr. Tr., pp. 51-52)

After Menard obtained the favorable judgment against the third-party tortfeasors, Teeters filed a Motion for Partial Summary Judgment in his bodily injury case, asking the court to "issue an order finding Defendants 70% at fault in this subsequent matter." (JE12, p. 1) The motion is dated April 28, 2021. (Id.) The motion was never ruled upon, however, as Teeters and the third-party tortfeasors scheduled the case for mediation shortly thereafter. Teeters notified Menard of the mediation and invited its counsel to participate. Menard declined the opportunity; however, Menard asked Teeters' attorney to provide status updates.

The May 24, 2021, mediation resulted in an agreement to settle the personal injury claim for $175,000.00. (Ex. 11, p. 1)

There is no evidence or testimony that the settlement between claimant and the third-party tortfeasors is unfair or unreasonable. The greater weight of evidence supports the claimant's conclusion that settlement of his claim against third party defendants is an adequate settlement under all the facts and circumstances of the case.

Although Teeters had entered into a contingent fee agreement providing for an attorney fee equal to two-fifths of the gross recovery, Teeters and his attorney agreed to a lesser attorney fee. (Hr. Tr., p. 34) According to the Settlement Statement contained in Exhibit 11, Teeters' attorney fees totaled $25,000.00, less prepaid expenses of $7,567.71. (Ex. 11, p. 1) In total, Teeters' attorneys accepted an attorney fee of $17,422.39, or approximately 10% of the third-party settlement. (Id.; Ex. 11, p. 1)

Since Teeters' injuries were partly caused by the negligence of Garza, MSF Transport, LLC, and Cano & Sons Trucking, LLC, Menard is entitled to reimbursement from Teeters' settlement proceeds for the workers' compensation benefits it has paid to Teeters. Reimbursement to a defendant is reduced to reflect the costs the claimant incurred by pursuing a tort judgment, including attorney fees and litigation expenses.

After receiving notice that the personal injury claim had settled, Menard advised claimant's attorney that it would not be reducing its workers' compensation lien of $79,905.63 to account for claimant's attorney fees. Menard asserts that it is entitled to the full amount of its lien, without an offset for attorney fees, because it incurred significant legal expenses to secure a favorable judgment in its own lawsuit, which Teeters used to his advantage to secure a settlement in his personal injury lawsuit. In other words, Menard asserts that it has already borne its portion of the expenses of recovery by incurring its own legal fees securing a favorable judgment in the property damage suit.

Teeters contends the property damage lawsuit was separate and distinct from

the bodily injury lawsuit, and the fault percentage calculated by the jury in the property damage lawsuit was of no benefit in resolving the personal injury suit at mediation. In fact, Teeters asserts the jury award was detrimental to settlement negotiations as the jury award locked him into a finding that he was 30 percent at fault for the motor vehicle accident. Teeters asserts that he was not 30 percent at fault and would have been able to prove the same had his personal injury claim proceeded to trial.

Teeters further asserts Menard did not have the protection of his interests in mind when it obtained the judgment in the property damage lawsuit. Rather, Menard's primary objective was to recover the property damages related to the tractor-trailer involved in the motor vehicle accident, which was totaled. (See Ex. D, p. 5) Indeed, Menard sought to exclude Teeters' medical and criminal records from the property damage lawsuit as, "The above-captioned matter relates solely to Plaintiff's property damages and, accordingly, Teeters' medical records, medical history, and/or drug/alcohol use history should be excluded pursuant to Fed. R. Evid. 401 and 403 as irrelevant." (Ex. D, p. 5) In response, Menard asserts an underlying dispute in the property damage lawsuit was which company's driver was at fault for the accident. (Ex. D, p. 7)

CONCLUSIONS OF LAW

The first issue to be addressed is whether the settlement agreement between claimant and the third-party tortfeasors should be approved.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Iowa Code section 85.22(3) provides:

> Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the workers' compensation commissioner.

The power to approve settlements in this case is exclusively with the industrial commissioner, and not with the court. Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993). The workers' compensation commissioner has authority to grant written approval of a settlement between an employee and a potential third-party tortfeasor in situations such as this, i.e., where the employer/workers' compensation insurer refuses to give its consent to a settlement reached between the employee and the third-party tortfeasor. Iowa Code section 85.22(3); Shirley v. Pothast, 508 N.W.2d 712, 717 (Iowa 1993).

Settlements which avoid prolonged, extensive and uncertain litigation are encouraged by the law. White v. Flood, 138 N.W.2d 863, 867 (Iowa 1965); Moore v. Bailey, 163 N.W.2d 435 (Iowa 1968). Obviously, the legislature contemplated the possibility of settlements when it enacted section 85.22. In doing so, it did not provide

the employer/insurer with an absolute veto of any settlements entered into by the employee and a third party. Instead, the statute provides for approval by the industrial commissioner as an alternate means of effecting a settlement. Iowa Code section 85.22(3). In this context, the Iowa Supreme Court has said that the workers' compensation commissioner's responsibility is to protect the rights of both employers/insurers and employees from unfair and inadequate settlements of claims. Shirley v. Pothast, 508 N.W.2d 712, 717 (Iowa 1993).

The third-party personal injury case was mediated by Paul Thune, a well-known and respected mediator. There is no evidence or testimony indicating that the third-party settlement is not fair and reasonable.

Defendants do not have the right to control a claimant's litigation, unless there is some inability or unwillingness on the behalf of claimant to prosecute the claim. Krapfl v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 877, 880 (Iowa 1996). In the matter at hand, claimant pursued the personal injury action against the third-party tortfeasors. Claimant also pursued mediation and offered to include Menard in the same. Menard declined to participate or otherwise intervene in the personal injury lawsuit.

Based on this record, it is found that the settlement of $175,000.00 to resolve claimant's third-party tort action is fair and reasonable and should be granted. The undersigned hereby approves the settlement of $175,000.00.

The next issue to be resolved is the extent of defendants' lien for indemnification pursuant to Iowa Code section 85.22 from the proceeds of the settlement of claimant's third-party action.

Iowa Code section 85.22(1) provides:

> If compensation is paid the employee . . . under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed. . . and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

"[T]he purpose of . . . section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments." Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460 462 (Iowa 1988). The statutory scheme of section 85.22(1) is intended "to prevent double recovery by the injured worker in compensation in a law action as well as workers' compensation for the same injury." Liberty Mutual Ins. Co. v. Winter, 385 N.W.2d 529, 532 (Iowa 1986). The statute is designed to encourage employers to pay benefits because of the expectation they may recover those payments from responsible third parties. Daniels v. Hi-Way Truck Equip.,

Inc., 505 N.W.2d 485, 489 (Iowa 1993); Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460, 462 (Iowa 1988).

The commissioner has authority to decide the issue of allocation of recovery in a third-party settlement. See, e.g., Mata v. Clarion Farmers Elevator Co-op, 380 N.W.2d 425, 429 (Iowa 1986); Allen v. Allen Water & Wastewater Engineering, Inc., 549 N.W.2d 516, 519 (Iowa 1996). The authority of this agency concerning attorney fees arises from our authority to allocate monetary recoveries from third-party lawsuits to enforce the indemnity provisions of Iowa Code section 85.22. Mata v. Clarion Farmers Elevator Coop., 380 N.W.2d 425, 429 (Iowa 1986); Allen v. Allen Water & Wastewater, 549 N.W.2d 516, 619 (Iowa 1996). If this agency is asked to determine the amount of the indemnity under that Code section, then Iowa Code section 86.39 subjects the indemnity amount to this agency's approval of any attorney fees charged in connection with amounts allocated by the agency to the employer or its workers' compensation carrier.

It is well-settled that a claimant who receives workers' compensation benefits and later receives a third-party recovery on account of the same injuries is required to reimburse the Employer to the extent of benefits previously paid. Iowa Code § 85.22(1). In order to obtain this benefit, however, the Employer is responsible for payment of a pro rata share of attorney fees and costs. Id.; See also, Farris v. General Growth Development Corp., 381 N.W.2d 625, 627 (Iowa 1986); Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969). This concept is understandable, logical, fair, and equitable to all parties involved.

Menard contends that its reimbursement should not be reduced to account for Teeters' attorney fees from the third-party personal injury lawsuit because it has already borne its portion of the expenses of recovery by incurring legal fees securing a favorable judgment in the property damage suit.

Similar arguments were addressed by the Iowa Supreme Court in Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969) and Ahlers v. EMCASCO Ins. Co., 548 N.W.2d 892, 894 (Iowa 1996).

In Kirkpatrick, the plaintiff received workers' compensation benefits for injuries sustained in an automobile collision. (Id. at 260) The plaintiff retained counsel and entered into a one-third contingent fee contract. (Id.) The plaintiff subsequently filed a petition at law against the third-party tortfeasors. The workers' compensation carrier timely filed a Notice of Lien and intervened in the action. Eventually, a settlement agreement was reached between the plaintiff and the third-party tortfeasors.

Similar to Menard, the workers' compensation carrier argued no fee should be allowed as it intervened and employed counsel of its own and at no time did the injured worker's attorney represent its interest. The court provided:

> The insurance carrier cannot escape the statutory duty to pay plaintiff's attorney such fees as may reasonably be allowed by the trial court by employing counsel of its own and intervening, but the services rendered by insurer's counsel in settlement or prosecution of the lawsuit may have a

bearing on attorney fees allowed plaintiff's counsel.

Id. at 261.

The reasoning provided by the court in Kirkpatrick was later cited by the court in the case of Ahlers v. EMCASCO Ins. Co., 548 N.W.2d 892 (Iowa 1996).

In Ahlers, the claimant was injured while driving a school bus in the course of her employment. The claimant received approximately $35,000.00 in workers' compensation benefits. She subsequently brought a third-party suit against the driver of the vehicle that struck her school bus. EMCASCO Insurance Company, the workers' compensation carrier for her employer, intervened in the action to protect its right of indemnification and lien for workers' compensation benefits paid.

EMCASCO engaged in a significant amount of correspondence with the defendant-driver's liability insurance carrier concerning its lien rights prior to the defendant-driver's liability insurance carrier having any contact with the claimant's attorney. EMCASCO claimed that these conversations were the catalyst that produced a settlement between claimant and the defendant-driver's liability insurance carrier. Indeed, the defendant-driver's liability insurance carrier had decided to the settlement amount prior to claimant filing her lawsuit.

Relying on Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969), EMCASCO argued that the court must take account of the compensation payor's own efforts to obtain reimbursement when determining the extent to which a workers' compensation payor's indemnification rights are to be reduced by the employee's attorney fee. Ultimately, the Iowa Supreme Court did not reduce the amount owed for attorney fees based on EMCASCO's efforts to obtain reimbursement on its own. The court explained,

> Although the workers' compensation insurance carrier expended considerable efforts in preserving its lien rights, that is a routine practice in the event of third-party actions under Iowa Code section 85.22. We recognized in Krapfl v. Farm Bureau Mutual Insurance Co., 548 N.W.2d 877 (1996) (also decided this date) that the actions of a subrogated party in protecting its right to satisfy that subrogation interest from sums recovered through the efforts of the plaintiff's attorneys did not diminish the subrogated party's responsibility for a pro rata share of a reasonable attorney fee for collecting the entire sum. Id. at 879. That decision was based on our interpretation of the provisions of subsections 3 and 4 of Iowa Code section 668.5. We believe that similar considerations should prevail in apportioning fees under section 85.22(1).

(Id.)

Like EMCASCO, Menard argues that its effort in obtaining a liability judgment against the third-party tortfeasors was the catalyst that produced a settlement between Teeters and the third-party tortfeasors. Such an argument is unpersuasive.

Although Menard expended considerable effort in obtaining a favorable judgment in its property damage lawsuit, said lawsuit did not address or prove damages relating

to Teeters' bodily injury. Menard did not intervene or otherwise participate in the personal injury claim. Menard's activity in the personal injury lawsuit was limited to protecting its right to satisfy its subrogation interest from the sums recovered through the efforts of Teeters' attorneys. Menard in no way diminished the role of Teeters' attorney in securing recovery from the third-party tortfeasors. Consequently, the actions of Menard should not diminish its responsibility to pay a share of a reasonable attorney fee.

Defendants fail to acknowledge that they derive great benefit from claimant pursuing the third-party suit. The recovery from the third-party settlement is currently greater than the amount of benefits Teeters received from the defendant employer and workers' compensation carrier. In other words, defendants' lien for benefits paid to date will be completely satisfied by the third-party recovery. Had Teeters not brought the action and Menard activated its right to pursue the claim under section 85.22(2), it might have obtained a similar recovery without the necessity of incurring an attorney fee obligation. Menard nevertheless would have incurred attorney fees of its own in pursuing the same. It is only fair and reasonable that defendants pay the claimant's attorney fees and costs for the service of recovering their lien amount from the third-party tortfeasors.

The insurance carrier cannot escape the statutory duty to pay plaintiff's attorney such fees as may reasonably be allowed by the trial court by employing counsel of its own and intervening, but the services rendered by insurer's counsel in settlement or prosecution of the lawsuit may have a bearing on attorney fees allowed plaintiff's counsel. Kirkpatrick, 172 N.W.2d 259.

In determining the amount of the fee award, the agency is guided by the Supreme Court decision in Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969). The Court indicated that a one-third contingent fee contract may be reasonable but any determination must be based upon the facts and circumstances of a particular case. The agency should consider all the elements which have a bearing on the amount of attorney fees allowed in any given case including the time spent, the nature and extent of the services, the amount involved, the difficulty of handling the case, the importance of the issues, the responsibility assumed and the results obtained as well as the professional standing and experience of the attorney. Kirkpatrick, 172 N.W.2d at 261.

Teeters asserts defendants' recovery should be reduced by one-third to account for his attorney fees. Aside from citing to past decisions that have found a one-third reduction reasonable, Teeters provides no justification for reducing defendants' recovery by one-third. This is a particularly confusing argument given the fact Teeters' recovery from the third-party tortfeasors was not subject to a one-third contingency fee.

The contingent fee agreement Teeters entered into with his attorney included a graduated scale. In the event claimant's case settled "before the filing of a lawsuit," claimant's counsel was to receive one-third of the gross recovery. In the event claimant's case settled after a lawsuit was filed, or if the case proceeded to trial and a judgment was obtained against the defendants, claimant's counsel was to receive two-fifths of the gross recovery. It is undisputed that Teeters filed a lawsuit against the third-

party tortfeasors in the Iowa District Court for Story County. It is also undisputed that Teeters and the third-party tortfeasors reached a settlement agreement on or about May 24, 2021. Therefore, at the time of settlement, claimant's counsel was entitled to two-fifths of the gross recovery.

However, while Teeters initially entered into a contingent fee agreement providing for an attorney fee equal to two-fifths of the gross recovery, claimant's counsel agreed to accept a lesser fee following the third-party settlement. (Hr. Tr., p. 34) In total, Teeters' attorney accepted an attorney fee of $17,432.39, or approximately 10 percent of the third-party settlement.

Despite this reduction in attorney fees, claimant's counsel asserts Menard is obligated to pay one-third of claimant's attorney fees based on the original fee contract. Menard reasonably contends a one-third reduction would be inequitable under these circumstances. In the overwhelming majority of cases, this is a non-issue as the parties typically reach an agreement as to the amount of attorney fees without the necessity of agency or district court intervention.

It is customary that the employer pays the same percentage attorney's fee as the employee if the case is handled by the attorney on a contingent fee basis. See Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969). Defendants are not aware of any case in which a defendant's lien has been reduced by an amount greater than what the employee paid in legal fees. Teeters did not address why Menard's recovery should be reduced by one-third, as opposed to one-tenth or two-fifths, in his post-hearing brief. Presumably, claimant's attorney felt the attorney fees paid by claimant were fair and reasonable for the work provided.

After considering all the evidence in the record, it is determined that the claimant shall be entitled to attorney fees equal to 10 percent of all past and future benefits.

Menard is entitled to reimbursement of the $79,905.63 it has paid Teeters in indemnity and medical benefits. However, as previously stated, Menard is obligated to pay a proportional share of claimant's attorney fees and court costs from the third-party lawsuit. Since the recovery from the third-party settlement is currently greater than the amount of benefits Teeters received from the defendant employer and workers' compensation carrier, Menard is not liable for 100 percent of the attorney fees at this time. Claimant's counsel is entitled to attorney fees equal to 10 percent. The amount of the attorney fees is 10 percent of $79,905.63, or $7,990.56. Menard's lien will be reduced by $7,990.56, it's proportional share of the third-party attorney fees.

Menard has a right of indemnification for future benefits payable and retains a lien against the proceeds of the third-party settlement against future payments made. Shirley v. Pothast, 508 N.W.2d 712, 717-719 (Iowa 1993).

In Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993) the court defined the term "credit." In 6 Larson Workers' Compensation Law, §74.31(e), the term "credit" is used to define the employer's right to have its liability satisfied by offsetting the future liability against the portion of the third-party recovery paid to the employee. The court concluded that the terminology, "[A]nd shall have a lien on the claim for such recovery

and the judgment thereon for the compensation for which the employer or the insurer is liable" was intended to provide the employer with an offset against the portion of the third-party recovery paid to the employee to satisfy the employer's liability for workers' compensation benefits that become payable in the future. The extent of the defendants' lien is not dependent upon the time at which the third-party recovery is obtained.

Menard is entitled to a lien and indemnification up to the full extent of the third-party settlement. Having already paid $79,905.63, defendants' remaining lien totals $95,094.37.

Defendants correctly assert their lien includes interest. However, they incorrectly assert the interest due must be calculated from the date claimant filed his lawsuit against the third-party tortfeasors on June 13, 2019. Iowa Code section 535.3 is quite limited in its scope. It allows interest on judgments only from the date of the filing of the petition on the claim for which judgment is entered, not from the date of the filing of a separate lawsuit, such as Teeters' third-party claim in the present case.

Iowa Code section 85.22(1) does not define the term "out of the recovery of damages" by the worker, and it is silent both as to when "legal interest" begins to accrue and the rate at which it accrues. Fortunately, the Iowa Supreme Court addressed this issue in Cincinnati Ins. Co. v. Konicek, 503 N.W.2d 420 (Iowa 1993).

In the case of a worker who collects on a claim against a third party, reimbursement to the workers' compensation payor is not due until the worker receives it. Under section 85.22(1) (payment to be made "out of the recovery of damages"), indemnity to defendants is not "due" under section 535.2(1)(b) until Teeters actually receives payment on his third-party claim. (Id.) This interpretation is consistent with the general law of indemnity under contract, which is that no action for indemnity may be maintained until all valid conditions precedent have been met. See, e.g., Bay Ridge Air Rights, Inc. v. State of New York, 57 A.D.2d 237, 237–39, 394 N.Y.S.2d 464, 465–66 (1977) (obligation or liability that is subject of indemnity must have accrued and become fixed before indemnity action commenced); 41 Am.Jur.2d Indemnity § 40, at 730 (1968).

Teeters will not "receive" payment on his third-party claim until this agency approves the settlement award. Until such time, Teeters' recovery is, to some degree, still speculative. As such, I find defendants are not entitled to interest at this time. Once interest begins to accrue, the correct rate of interest under Iowa Code section 535.2(1) is five percent.

Menard has a right of indemnification for future benefits payable and retains a credit against the proceeds of the third-party settlement against future payments made. Shirley v. Pothast, 508 N.W.2d 712, 717-719 (Iowa 1993). Menard is entitled to a credit and indemnification up to the full extent of the third-party settlement. Having already paid $79,905.63, defendants' remaining credit totals $95,094.37.

Although the defendants have a credit totaling $95,094.37 for future benefits that may be payable, they are still obligated to pay a proportional share of claimant's attorney fees and court costs associated with the recovery of those lien amounts in the third-party suit. Coffey v. Mid Seven Transp. Co., 831 N.W.2d 81 (Iowa 2013); Marin v.

DCS Sanitation, 596 N.W.2d 62, 64 (Iowa 1999). Defendants must pay the attorney fees and costs associated with the recovery of their lien periodically if and when future workers' compensation benefits become due. Ewing v. Allied Constr. Servs., 592 N.W.2d 689, 690-691 (Iowa 1999). Defendants will owe one-tenth attorney fees for all benefits that may become payable into the future as they utilize the lien proceeds. Defendants remain fully responsible for any excess above and beyond the full third-party lien amount.

When an employer uses its lien to offset and satisfy its liability to the employee after the third-party recovery is distributed and the employer reimburses the employee for the amount of attorney fees allocable to the amount of the employer's liability that has been satisfied by the offset, then the amount reimbursed to the employee for fees becomes part of the remaining balance of the employee's share of the third party recovery which is subject to the employer's lien and available for offset to satisfy any further liability of the employer that subsequently arises.

The remaining credit applies to all medical benefits payable into the future as well as all weekly benefits ordered payable above and beyond the $79,905.63 already paid by Menard.

In addition, defendants should pay a proportional amount of claimant's court costs as they recoup their section 85.22(1) lien. As of the date of trial, $79,905.63 of the entire $175,000.00 lien had been satisfied, or 45.7 percent of the lien. Defendants should remain responsible for reimbursement of claimant's litigation costs to recover the third-party settlement proceeds in proportion to the amount of their lien periodically satisfied.

Teeters' litigation costs in the third-party suit total $7,291.66. (JE1, p. 1) As of the date of trial, 54.3 percent of the lien remains to be satisfied. As such, I conclude that defendants owe a proportionate share of litigation expenses totaling $3,332.29. I further conclude that defendants owe a proportionate share of litigation expenses totaling $3,959.37 as they recoup the remaining $95,094.37 of their lien. In order to reimburse these litigation expenses as they recoup their lien, it is ordered that defendants reimburse claimant $4.16 for every $100.00 of future medical or weekly payments they assert are covered by the third-party lien until they have reimbursed a total of $3,959.37 in litigation expenses.

ORDER

THEREFORE, IT IS ORDERED:

The third-party settlement of one hundred seventy-five thousand and no/100 dollars ($175,000.00) is approved.

Defendants shall be indemnified from the third-party settlement in the amount of seventy-one thousand nine-hundred fifteen and 07/100 dollars ($71,915.07).

Defendants shall have a lien and be entitled to indemnification of benefits that may become payable into the future, up to an additional ninety-five thousand ninety-four and 37/100 dollars ($95,094.37).

Defendants shall reimburse claimant's attorney costs to recover the third-party proceeds as outlined in the body of this decision until defendants' lien has been fully exhausted.

Signed and filed this 15th day of November, 2022.

MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Daniel McGinn (via WCES)

Sarah McGill (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.