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Work. Comp. Law § 29(1): Balancing the Equities in the Apportionment of Workers' Compensation Litigation Costs–New York Adopts the Total Benefit Doctrine

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tributing spouses solely on the ground that a professional degree should not be considered marital property represents, it is argued, an unduly narrow adherence to traditional concepts of property. Indeed, this approach contradicts the primary objective of the Equitable Distribution Law, which is to provide the courts with the necessary flexibility to effect a just distribution of marital assets in light of the spouses' respective contributions. Therefore, a distributive award to reimburse the working spouse, not only for his or her contributions to the education, but also in restitution for any personal loss suffered, is the most equitable solution.[172]

Hilary Gingold

WORKERS' COMPENSATION LAW

Work. Comp. Law § 29(1): Balancing the equities in the apportionment of workers' compensation litigation costs—New York adopts the total benefit doctrine

Section 29(1) of the Workers' Compensation Law[173] grants in-

363, 365 (Sup. Ct. Monroe County 1982) (when there are few marital assets and wife is self-supporting, distributive award guarantees return of investment).

[172] *See* Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517, 554-58 (1981). As one commentator notes, the working spouse's contributions "are an immediate investment in the non-working spouse's degree and a future investment in a better way of life for both"; deprivation of the "yield on investment does that spouse a grave injustice." *Id.* at 544. It is generally accepted that supporting spouses are entitled to some restitution with respect to their contributions. *See* Moss v. Moss, 80 Mich. App. 693, 694-95, 264 N.W.2d 97, 98 (1978) (per curiam); *Conner*, 97 App. Div. 2d at 102-03, 468 N.Y.S.2d at 492-93; *cf.* Farash v. Sykes Datatronics Inc., 59 N.Y.2d 500, 505, 452 N.E.2d 1245, 1246-47, 465 N.Y.S.2d 917, 918-19 (1983) (plaintiff permitted reliance damages despite unenforceability of oral contract).

[173] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984). Because litigation delays threatened to transform injured workers into wards of the state, workers' compensation laws were passed to allow immediate compensation for injury. Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery*, 52 ST. JOHN'S L. REV. 395, 396 & nn.4-5 (1978). These laws provide employees injured on the job with benefits equal to a percentage of their lost earnings. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.50, at 11 (1982). Workers' compensation guarantees employees benefits based upon a precalculated table and releases employers from uncertain tort liability. *See* Note, *New Policies Bearing on the Negligent Employer's Immunity From Loss-Sharing*, 29 ME. L. REV. 243, 246-47 (1978). The statutory benefits are granted regardless of fault, and the costs are ultimately borne by the consumer. *See* Wolfe

jured employees the right to sue a negligent third party, notwithstanding a prior award of benefits under the statute.[174] To prevent double recovery by the employee, the employer or compensation carrier is granted a lien on judgments against a third party equal to the amount of compensation it has paid.[175] In recognition of the

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v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 508, 330 N.E.2d 603, 605, 369 N.Y.S.2d 637, 640 (1975); Note, *supra*, at 246-47; *see also* Atleson, *Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees*, 19 BUFFALO L. REV. 515, 541 (1970) (employers may "pass on the cost to consumers").

In its original form, § 29(1) offered employees a choice of remedies. Workman's Compensation Law, ch. 816, § 29. [1913] N.Y. LAWS 2293 (current version at N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984)). The law allowed employees either to pursue a common-law tort action against a negligent third party, or to collect benefits under the workers' compensation laws and thereby assign any tort remedy to the compensation carrier. *Id.* The compensation carrier could then sue a negligent third party and retain any recovery in excess of the benefits paid. Travelers Ins. Co. v. Brass Goods Mfg. Co., 239 N.Y. 273, 277-78, 246 N.E. 377, 378 (1925). The inequity resulting from this system was partially remedied by a 1935 amendment that required compensation carriers to give two-thirds of any excess recovery to the employee. Workman's Compensation Law, ch. 328, § 29, [1935] N.Y. LAWS 830 (current version at N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984)). The compensation carrier was permitted to retain one-third of the excess recovery as an incentive to bring the suit, *see* Cox v. Belmont Iron Works, 104 Misc. 2d 801, 806, 429 N.Y.S.2d 542, 545 (Sup. Ct. Erie County 1980) (dictum), and to ensure that the carrier would use best efforts to secure a recovery for the employee, Gegan, *supra*, at 397 n.8. To eliminate the need for employees to make an election, the legislature amended the statute again in 1937. *See* Workman's Compensation Law, ch. 684, § 29, [1937] N.Y. LAWS 1556 (current version at N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984); *infra* note 174.

[174] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984). Under present law, an injured employee, or in the case of death, his dependents, need not choose a remedy immediately. *Id.* Instead, the employee may begin to receive workers' compensation benefits and subsequently institute an action against a third-party tortfeasor within 6 months of the compensation award. *Id.* Nevertheless, the action must be brought before the expiration of 1 year from the date on which the action accrued. *Id.* Third-party suits enable the injured party to recover more than the statutory award, which generally does not go beyond an amount "necessary to keep the worker from destitution." 1 A. LARSON, *supra* note 173, § 2.50, at 11. An employee may, however, still assign a cause of action to an employer or compensation carrier, who would, in turn, be entitled to retain one-third of any recovery in excess of the compensation already paid to the employee. N.Y. WORK. COMP. LAW § 29(2) (McKinney Supp. 1983-1984).

[175] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984); *see, e.g.*, Becker v. Huss Co., 43 N.Y.2d 527, 538, 373 N.E.2d 1205, 1207, 402 N.Y.S.2d 980, 982-83 (1978); Curtin v. City of New York, 287 N.Y. 338, 343, 39 N.E.2d 903, 905 (1942). By allowing third-party suits and granting recovery liens, the compensation carrier is returned to the position it would have been in had the third party not been negligent. *See* 2A A. LARSON, *supra* note 173, § 71.20, at 14-7. The third party is liable only for the damages he would normally have had to pay, and the injured employee, instead of recovering the statutory percentage of lost earnings, receives a full damage award. *Id.* Granting liens on third-party recoverings also bolsters the viability of the compensation system. *See* Granger v. Urda, 44 N.Y.2d 91, 97, 375 N.E.2d 380, 382, 404 N.Y.S.2d 319, 321 (1978); Castleberry v. Hudson Valley Asphalt

substantial benefit inuring to employers and compensation carriers by virtue of third-party suits,[176] the legislature amended section 29(1) in 1975 to require the apportionment of reasonable litigation costs, including attorneys' fees, between the employer and the employee.[177] The implementation of this remedial legislation has been uneven, however, because the statutory language is ambiguous.[178] Recently, in *Kelly v. State Insurance Fund*,[179] the Court of Appeals held that the carrier's equitable share of litigation costs may

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Corp., 70 App. Div. 2d 228, 231-32, 420 N.Y.S.2d 911, 914 (2d Dep't 1979). Because third-party suits decrease the cost of the system to carriers, employers' workers' compensation payments are less costly. These payments may, in turn, be deducted as a cost of operating a business. N.Y. CONST. art. I, § 18.

[176] *See* Memorandum of the Law Revision Commission Relating to the Apportionment of Attorneys' Fees in Third-Party Actions under Workmen's Compensation Law §§ 29 and 227, [1975] N.Y. LAW REV. COMM'N REP., *reprinted in* [1975] N.Y. Laws 1551, 1551 (McKinney) [hereinafter cited as Memorandum]. While a recovery in excess of a carrier's liability under the statute benefited the carrier by allowing it to recoup its payments, the burden of recovery costs remained on the employee and the carrier obtained a free ride. O'Connor v. Lee Hy Paving Corp., 480 F. Supp. 716, 719 (E.D.N.Y. 1979). If both an employer and a third party were negligent, the employer would receive full reimbursement for compensation benefits paid, while the employee would have to bear all the litigation costs. Memorandum, *supra*, at 1551; *see* Atleson, *supra* note 173, at 516.

[177] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984). The amended portion of this statute provides in pertinent part:

> Should the employee or his dependents secure a recovery from such other, whether by judgment, settlement or otherwise, such employee or dependents may apply on notice to such lienor to the court in which the third party action was instituted . . . for an order apportioning the reasonable and necessary expenditures, including attorneys' fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor.

Id. This amendment, founded upon principles of fairness, *see* Di Meglio v. Hartford Ins. Co., 116 Misc. 2d 191, 200, 455 N.Y.S.2d 498, 503 (Sup. Ct. Queens County 1982) (citing [1975] N.Y. LAWS 1551 (McKinney)), is "not subject to the general rule against retroactivity," Greenough v. Deblinger, 84 Misc. 2d 463, 464, 376 N.Y.S.2d 869, 871 (N.Y.C. Civ. Ct. Queens County 1975).

[178] *See* Survey, *Worker's Compensation Law*, 54 ST. JOHN'S L. REV. 641, 642 (1980). *Compare* O'Connor v. Lee Hy Paving Corp., 480 F. Supp. 716, 722-23 (E.D.N.Y. 1979) (carrier contributes amount that past payments and future payments bear to total recovery) *and* Cox v. Belmont Iron Works, 104 Misc. 2d 801, 805-06, 429 N.Y.S.2d 542, 545 (Sup. Ct. Erie County 1980) (apportionment of attorneys' fees should be based on the total benefit that will accrue to the compensation carrier, including release from future liability) *with* Van Deusen v. United States Fidelity and Guar. Co., 81 App. Div. 2d 1026, 1027, 440 N.Y.S.2d 130, 132 (4th Dep't 1981) (contribution of carrier for attorneys' fees calculated on the direct benefit inuring to such carrier through lien on employee judgment) *and* Castleberry v. Hudson Valley Asphalt Corp., 70 App. Div. 2d 228, 235, 420 N.Y.S.2d 911, 916 (2d Dep't 1979) (rigid formula not used when attorneys' fees would "swallow up" employers recovery through the lien).

[179] 60 N.Y.2d 131, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983).

be assessed as a percentage of both the total amount of past benefits paid and the present value of estimated future benefits to the claimant.[180]

In *Kelly*, a sheetmetal worker was electrocuted while working with a power drill on a construction site.[181] Workers' compensation death benefits were paid to his widow and child by his employer's compensation carrier.[182] The compensation carrier also served as the employer's general liability insurer.[183] Petitioner, executrix of her deceased husband's estate, instituted a suit against the general contractor[184] and several prime contractors, one of whom impleaded the decedent's employer.[185] Although the employer was among the parties found negligent, liability was imposed upon only two contractors.[186] On appeal, however, the Appellate Division ordered the employer either to consent to a fixed percentage of liability or to face a new trial.[187] The employer consented, and the decedent's wife petitioned the Surrogate's Court for a distribution of the recovery proceeds between the compensation carrier and herself pursuant to section 29(1).[188] In response to the petitioner's application for an apportionment of litigation costs, the carrier argued that its recovery of past compensation payments would constitute its sole realizable benefit.[189] Moreover, since the carrier, as liability insurer, was responsible for the employer's share of liability and would not benefit from the imposition of such liability, it argued that its share of costs should be reduced by the percentage

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[180] *Id.* at 135, 456 N.E.2d at 792, 468 N.Y.S.2d at 851.

[181] *In re* Kelly, 110 Misc. 2d 356, 357, 442 N.Y.S.2d 373, 374 (Sur. Ct. N.Y. County 1981). At the time he was electrocuted, Kelly was working in a crawl space where a heat and air-conditioning duct was to be installed. Kelly v. M.C. Elec. Co., 68 App. Div. 2d 657, 660, 418 N.Y.S. 28, 29 (1st Dep't 1979).

[182] 60 N.Y.2d at 135, 456 N.E.2d at 792, 468 N.Y.S.2d at 851.

[183] *Id.* at 140, 456 N.E.2d at 795, 468 N.Y.S.2d at 854.

[184] *Id.* at 135, 456 N.E.2d at 795, 468 N.Y.S.2d at 851. The City of New York was the owner of and the general contractor for the project on which Kelly was working at the time of his death. Kelly v. M.C. Elec. Co., 68 App. Div. 2d at 659, 418 N.Y.S.2d at 29.

[185] *In re* Kelly, 110 Misc. 2d at 357, 442 N.Y.S.2d at 374. The employer was impleaded by M.C. Electric Co. and was named in a cross-claim by the City. *Id.*

[186] *See* Kelly v. M.C. Elec. Co., 68 App. Div. 2d at 661, 418 N.Y.S.2d at 30.

[187] *Id.* at 662, 418 N.Y.S.2d at 31.

[188] 60 N.Y.2d at 135, 456 N.E.2d at 792, 468 N.Y.S.2d at 851.

[189] *Id.* at 137, 456 N.E.2d at 793, 468 N.Y.S.2d at 852. The carrier alleged that the value of its lien would be severely undermined if the court "assess[ed] costs against the speculative amount of benefit inuring to the carrier from being relieved of its obligation to make future payments." *Id.*

of liability attributable to the employer.[190] The Surrogate's Court held that the statute required apportionment of litigation costs based upon the total benefit each party received from the award.[191] It concluded that the release from having to make future compensation payments qualified as a "benefit" even though the carrier, in its capacity as general liability insurer, was consequently liable for damages imposed upon the employer.[192] The Appellate Division, First Department, affirmed.[193]

The Court of Appeals also affirmed, holding that the assessment of the carrier's contribution toward the employee's cost of effecting a recovery against third parties should be based upon the total benefit inuring to the carrier.[194] Chief Judge Cooke, writing for a unanimous Court, noted that the Court's interpretation of section 29(1) was supported by the legislative history of the statute.[195] The amendment providing for apportionment was promulgated by the legislature to stem inequity.[196] The statutory grant of broad discretion, coupled with the absence of a rigid formula for apportionment, was construed by the Court as indicative of a legislative intent to apportion costs in the manner most favorable to the employee.[197] Thus, the Court was not swayed by the compensa-

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[190] *Id.* at 140, 456 N.E.2d at 795, 468 N.Y.S.2d at 854. Normally, the carrier shares an injured employee's interest in suing a negligent third party because the carrier is entitled to a portion of any recovery by virtue of its lien. *Id.* Where the employer's compensation carrier and liability insurer are the same and the employer has been impleaded by the third party, however, the shared interests no longer exist. Indeed, since the carrier, as liability insurer, may be liable for damages to an injured employee, the carrier's interests may be adverse to those of the employee. *See id.* The carrier argued that equitable apportionment rules should not be applied in such a situation. *Id.* Although this argument found some support in lower court holdings, *see, e.g.*, France v. Abstract Title Div. of Title Guar. Co., 57 App. Div. 2d 721, 722, 395 N.Y.S.2d 782, 784 (4th Dep't), *modified sub nom.* Becker v. Huss Co., 43 N.Y.2d 527, 373 N.E.2d 1205, 402 N.Y.S.2d 980 (1977); Myers v. Cornell Univ., 97 Misc. 2d 195, 198, 410 N.Y.S.2d 986, 988 (Sup. Ct. Chemung County 1978), the Court found this contention to be inconsistent with the underlying rationale of equitable apportionment, *Kelly*, 60 N.Y.2d at 140-41, 456 N.E.2d at 795, 468 N.Y.S.2d at 854; *see supra* notes 176-77.

[191] 110 Misc. 2d at 364-67, 442 N.Y.S.2d at 377-79.

[192] *Id.* at 364, 442 N.Y.S.2d at 377.

[193] Kelly v. State Ins. Fund, 94 App. Div. 2d 609, 461 N.Y.S.2d 989 (1st Dep't 1983).

[194] Kelly v. State Ins. Fund, 60 N.Y.2d 131, 135, 456 N.E.2d 791, 792, 468 N.Y.S.2d 850, 851 (1983).

[195] *Id.* at 137-38, 456 N.E.2d at 793-94, 468 N.Y.S.2d at 852-53.

[196] *Id.*; *see supra* note 176.

[197] 60 N.Y.2d at 138, 456 N.E.2d at 793, 468 N.Y.S.2d at 852. According to the Court, the Legislature, following the recommendation of the Law Revision Commission, decided that a flexible approach should be adopted as the means most likely to serve the interests of an injured employee. *Id.*; *see* Memorandum, *supra* note 176, at 1551.

tion carrier's argument that apportionment is inequitable when the carrier is also the liability insurer with interests adverse to those of the claimant.[198]

It is submitted that the *Kelly* Court's decision to calculate the apportionment of litigation costs on a total benefit theory is supported by both economic and social policy considerations.[199] The basic premise upon which the Workers' Compensation Law depends is the willingness of both the employer and the employee to surrender important rights in return for a reasonably predictable outcome.[200] When accidents occur, however, the statutory benefits are meager and the rules strict.[201] Public policy, therefore, is ad-

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[198] 60 N.Y.2d at 140-41, 456 N.E.2d at 795, 468 N.Y.S.2d at 854. The Court observed that the employee had no control over the carrier chosen by his employer for workers' compensation or for general liability, and concluded that the fact that the same carrier is chosen for each type of insurance should have no impact on the recovery to which an injured employee is entitled. *See id.* at 141, 456 N.E.2d at 795, 468 N.Y.S.2d at 854.

[199] *See infra* note 200. If an employee who receives workers' compensation benefits chooses not to institute a third-party action, the compensation benefits are paid periodically as wages, and no attorneys' fees are imposed. *See* N.Y. WORK. COMP. LAW § 25(1)(a) (McKinney 1965); *see, e.g.*, Castleberry v. Hudson Valley Asphalt Corp., 70 App. Div. 2d 228, 236, 420 N.Y.S.2d 911, 916 (2d Dep't 1979). Therefore, it seems appropriate that an employee who recovers only an amount equal to his statutory benefits in a third-party action should not be charged with the attorneys' fees corresponding to such an award. *See* Indiana State Highway Comm'n v. White, 259 Ind. 690, 694, 291 N.E.2d 550, 554 (1973) (employee should not pay attorneys' fees that were incurred "to collect that, which the injured employee . . . [is] entitled to collect under a compensation award, without any suit or settlement"). Furthermore, if a third-party suit results in an award less than the employee's statutory entitlement, the employer remains liable for the difference between the award and the compensation provided for the injury by statute. N.Y. WORK. COMP. LAW § 29(4) (McKinney 1965); *see* Note, *Deficiency Compensation Under the Workmen's Compensation Law*, 35 ST. JOHN'S L. REV. 337, 337 (1961). In such a case, the amount awarded is deemed to be the recovery less the amount of "expenses reasonably and necessarily incurred in obtaining any recovery." Curtin v. City of New York, 287 N.Y. 338, 343, 39 N.E.2d 903, 905 (1942). Since attorneys' fees are included among these necessary expenses, "an injured employee suffers no dilution of the benefits to which he would otherwise be entitled." *Castleberry*, 70 App. Div. 2d at 238, 420 N.Y.S.2d at 918.

[200] *See* Atleson, *supra* note 173, at 515. The employee is required to give up his common-law right to sue the employer for negligence, and the employer must relinquish his right to assert any defense in tort in connection with the employee's claim for benefits. 1 A. LARSON, *supra* note 173, § 1.10, at 2. Upon injury to an employee, the Workers' Compensation Law becomes applicable, and the employee receives immediate limited benefits in accordance with the statute. N.Y. WORK. COMP. LAW §§ 10, 25 (1)(a) (McKinney 1965 & Supp. 1983). This scheme encourages employers to provide and maintain safe work areas since compensation benefits must be paid regardless of fault. *See* CHAMBER OF COMMERCE OF THE UNITED STATES, ANALYSIS OF WORKMEN'S COMPENSATION LAWS 3 (1970). Therefore, workers' compensation laws "promote frank study of causes of accidents (rather than concealment of fault)." *Id.*

[201] Cox v. Belmont Iron Works, 104 Misc. 2d 801, 805, 429 N.Y.S.2d 542, 545 (Sup. Ct.

vanced by permitting, and indeed encouraging, suits against negligent third parties to enable the employee to obtain a recovery greater than the subsistence amounts provided by statute.[202] An employer who obtains a lien on the proceeds of any recovery, receives a direct benefit from the employee's suit.[203] This advantage, in addition to the release from future payment obligations, justifies compelling the employer to contribute to the employee's litigation costs with respect to the full benefit he derives from the recovery.[204] Moreover, it is submitted that the state's interests in preventing double recoveries and in ensuring the viability of the

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Erie County 1980). Generous awards are not provided under workers' compensation laws. *The Income Maintenance Objective*, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 53, 53 (1972). In fact, the statutory benefits usually do not meet minimum income standards. Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity*, in 1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMAN'S COMPENSATION LAWS 189, 191-92 (M. Berkowitz ed. 1973).

[202] *See* Cox v. Belmont Iron Works, 104 Misc. 2d 801, 805, 429 N.Y.S.2d 542, 545 (Sup. Ct. Erie County 1980) (citing Atleson, *supra* note 173, at 515). *See generally* 1 A. LARSON, *supra* note 173, § 2.50, at 11-12 (compensation system does not purport to restore what has been lost). Although the workers' compensation laws were passed to prevent an injured employee from becoming a burden on society, the statutory benefits do not adequately compensate the injured worker. *See* Kelly v. Sugarman, 12 N.Y.2d 298, 300, 189 N.E.2d 613, 615, 239 N.Y.S.2d 114, 117 (1963); *supra* note 174. However, if an injured employee brings a successful third-party suit, the employee may keep any excess over the amount of the carrier's lien. N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1983-1984). When such an action is brought by an employer or carrier, the excess may be divided between the employer and the employee, one-third and two-thirds, respectively. *Id.* § 29(2). Since the Legislature enacted § 29(2) primarily to promote employees' interests, *see* 2A A. LARSON, *supra* note 173, § 74.31(a), at 14-403 to 14-404 (1983), it is suggested that the interests of the injured worker should also be deemed paramount in apportioning attorneys' fees, *see* Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 88-89 (1980) (Blackmun, J., dissenting).

[203] N.Y. WORK COMP. LAW § 29(1) (McKinney Supp. 1983-1984); *see* Granger v. Urda, 44 N.Y.2d 91, 96, 375 N.E.2d 380, 381, 404 N.Y.S.2d 319, 320 (1978); Van Hoesen v. Owens-Illinois Glass Co., 79 App. Div. 2d 733, 734, 434 N.Y.S.2d 755, 756 (3d Dep't 1980), *rev'd on other grounds*, 53 N.Y.2d 918, 523 N.E.2d 817, 441 N.Y.S.2d 59 (1981); *supra* note 175.

[204] The total benefit theory is not unreasonably speculative. *See Kelly*, 60 N.Y.2d at 139, 456 N.E.2d at 794, 468 N.Y.S.2d at 853. Indeed, the Legislature provided for the estimation of future payments by reference to an annuitants table. N.Y. WORK. COMP. LAW § 29(2) (McKinney 1965). *See generally*, 2A A. LARSON, *supra* note 173, § 74.31(e), at 14-416 to -417 (1983) (description of formula for third-party liability). Many other jurisdictions require the carrier to pay a portion of the attorneys' fees incurred in suits brought by employees. *See* Davis, *Third-Party Tortfeasors' Rights Where Compensation-Covered Employers are Negligent—Where Do Dole and Sunspan Lead?* 4 HOFSTRA L. REV. 571, 600 (1976). A majority of these states "require allocation of legal expenses to the carrier in proportion to the total benefit realized from the third-party action, including both reimbursement of compensation benefits already paid to the employee and relief from future compensation liability." O'Connor v. Lee Hy Paving Corp., 480 F. Supp. 716, 721 (E.D.N.Y. 1979) (citations omitted); 2A A. LARSON, *supra* note 173, § 74.32(a)(4) & n.18, at 14-459 (1983).

compensation system are not compromised by requiring the employer to contribute to recovery costs on a total benefit basis.[205]

The Court's adoption of the total benefit apportionment formula conforms to the established principle that workers' compensation statutes should be construed liberally due to their remedial nature.[206] Therefore, it appears that the *Kelly* Court correctly interpreted this legislation in a manner that best implements the economic and humanitarian objectives of section 29, which was enacted primarily to protect the worker.[207]

In conclusion, it is submitted that requiring apportionment of attorneys' fees between employer and employee based upon a total benefit theory demonstrates "that the Court of Appeals was not unmindful of the economic and sociological considerations"[208] underlying the Workers' Compensation Law.

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[205] *See supra* note 175.

[206] *See* Merchant v. Pinkerton's Inc., 50 N.Y.2d 492, 495, 407 N.E.2d 443, 446, 429 N.Y.S.2d 598, 600 (1980); Hufsted v. Seneca Steel Serv., Inc., 41 N.Y.2d 140, 145, 359 N.E.2d 673, 677, 391 N.Y.S.2d 78, 82 (1976); Waters v. Taylor Co., 218 N.Y. 248, 251-52, 112 N.E. 727, 728 (1916). New York courts have construed ambiguous terms within the workers' compensation statute in the broadest sense. *See, e.g.*, Beaudette v. Heath, 280 App. Div. 305, 307, 114 N.Y.S.2d 140, 142 (3d Dep't 1952); Allied Muts. Liab. Ins. Co. v. De Jong, 209 App. Div. 505, 507, 205 N.Y.S. 165, 167 (1st Dep't 1924); Memorandum, *supra* note 176, at 1551; 3 T. SUTHERLAND, STATUTORY CONSTRUCTION § 71.06, at 345 & n.6 (4th ed. 1974); *see also* Travelers Ins. Co. v. Lumber Mut. Casualty Ins. Co., 20 N.J. Super. 265, 270, 89 A.2d 717, 719 (Ch. Div. 1952) (amendment permitting employee recovery of a percentage of attorneys' fees must be liberally construed because it is remedial in nature).

[207] *See* Heitz v. Ruppert, 218 N.Y. 148, 154, 112 N.E. 750, 752 (1916); Illaqua v. Barr-Llewellyn Buick Co., 81 App. Div. 2d 708, 708, 439 N.Y.S.2d 473, 474 (3d Dep't 1981) ("fundamental principle of compensation law is to protect the worker, not the employer"); Lorer v. Gotham Concrete & Cement Finish Corp., 8 App. Div. 2d 221, 224, 187 N.Y.S.2d 275, 277 (3d Dep't 1959) ("primary purpose of the Workers' Compensation Law is to protect the employee"); Memorandum, *supra* note 176, at 1551.

Courts tend to uphold the interests of the employer only in rare instances, usually where there is little social benefit to be derived from upholding the claim of the employee. *Compare* Bilello v. Eckert Co., 43 App. Div. 2d 192, 194, 350 N.Y.S.2d 815, 817 (3d Dep't 1974) (claimant who is in jail prior to a criminal trial is entitled to benefits as long as work related disability exists) *with* Packard v. Sperry & Sons, 39 App. Div. 2d 622, 623, 331 N.Y.S.2d 126, 127 (3d Dep't 1972) (benefits may terminate upon conviction). The employer's greater financial resources afford him a superior ability to absorb losses. *See* 1 A. LARSON, *supra* note 173, § 2.20, at 5; Atleson, *supra* note 173, at 541.

[208] J. RHODES, WORKMEN'S COMPENSATION 231 (1917).