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OVERCOMING EXCESS WC COVERAGE CHALLENGES

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Al Haverkamp represents policyholders in insurance coverage disputes and bad faith lawsuits with a particular focus on representing workers' compensation self-insurers in disputes with their Excess WC insurers. Highlights of Al's recoveries from Excess WC carriers include the following settlements of US District Court bad faith lawsuits: $3.3 million for the City of Manhattan Beach; $2.7 million for the San Diego Unified School District; $1.3 million for the City of Escondido; $775,000 for Long Beach Transit; and $562,500 for the City of Oceanside. Al has also recovered over $2M on multiple claims for the San Diego County Schools Joint Powers Authority and the California Self-Insurers' Security Fund. Al has also achieved recoveries for the City of Buena Park, North County Fire Protection District, and California Water Service.

Al acts as insurance coverage counsel for the SDJPA and has presented on the topic of Excess WC reimbursement policies for the California Self-Insurers' Association, the National Council of Self-Insurers, and PARMA. Al has recovered over $30 million for institutional clients in insurance coverage disputes.

Major Differences Between Primary &Excess WC Policies

- Public entities are allowed to self-insure for WC.
- Self-Insured Public entities are not required to purchase an Excess Policy. (Labor Code § 3702.8).
- Primary WC policies must contain a clause stating the “insurer will be directly & primarily liable to any proper claimant for payment of compensation”. Not true for Excess.
- Excess is solely a contract to reimburse the self-insured employer, it is entirely separate and apart from the self-insured's obligation to the injured employee.
- An Excess policy is not a WC policy and not subject to Division 4 of the Labor Code.
- WCAB does not have jurisdiction to resolve a contract dispute between a self-insured employer and its excess carrier.

In Coverage Dispute Between Excess & Self-Insured Employer, Superior Court Can Find Different DOI Than WCAB

- Claimant worked as a BART police officer from 1979 to 2005. After retiring he developed cancer due to carcinogen exposure at work.
- BART and claimant entered into Stip & Award which stated there was dispute over DOI, but based on AME reporting a CT date of 1990 - 1991 is agreed to.
- BART excess in 1990 – 91 with GenRe, $250,000 retention.
- Evidence = Exposure to carcinogens to 2005. BART excess in 2005, $4M retention.

❖ Was Genre precluded from contending the DOI was 2005?

San Francisco BART Dist. v General Reinsurance Corp., 111 F. Supp. 3rd (ND Cal. 2015)

In Coverage Dispute Between Excess & Self-insured Employer, Superior Court Will Independently Determine Whether Injury Was Specific Or CT

- Claimant & SD Schools entered into Stip & Award which stated claimant suffered a specific injury in 2003. However, facts indicate injury was really a 2003 - 2004 CT.
- If injury was specific, then CIGA likely owed reimbursement. If a CT, then CIGA likely did not owe reimbursement.

❖ Was CIGA bound by the Stip & Award stating the injury was specific?

CT Coverage Issues

A. Conflict between Labor Code and Excess Policy Language

- Labor Code 5412: Date of CT when EE first suffers disability and knew the disability was caused by employment.
- Labor Code 5500.5: establishes a 1 year “look back” liability from 5412 date of injury.
- Policy language: only coverage for a CT when the EE’s last day of exposure to work conditions causing or aggravating the CT was within the policy period.

The Conflict Between Labor Code & Policy Language

- Labor Code 5412 date of injury was 8/30/14, so the 5500.5 lookback is 8/30/13 – 8/30/14.
- Liberty's Excess Policy 7/1/13 – 7/1/14. AmTrust's Excess Policy 7/1/14 – 7/1/15.
- Stipulated that last day of exposure to work injurious conditions was 8/30/14.
- If Liberty & AmTrust were primary insurers, Liberty would owe 91.7% of the reimbursement.
- What result?

SD Schools JPA v Liberty Ins. Corp. 2018 U.S. Dist. Lexis 5505

Hypothetical #1
Difficulties In Determining Last Day Of Exposure

- Claimant develops carpal tunnel from repetitive use. Goes off work in 2012 and has surgery.
- Returns to work in 2013 with restrictions (limit keyboard activities to 30 minutes, take 5 minute stretching breaks every 30 minutes, wear wrist braces as needed). Works until 2020, but has repeated flare-ups that sometimes require conservative treatment.
- Is the last day of exposure 2012 or 2020?
- Retention exceeded in 2018.
- Potential problems when last day of exposure untethered from 5412 date of injury.

Hypothetical #2
Last Day Of Exposure Problems

- Claimant reports a wrist/hand CT and is off work in 2002. She returns to work in 2003 with work restrictions but has to leave work in 2004 because of her wrists/hand. She again returns to work in 2005 and continues to treat for her wrist/hand including missing workdays until her retirement in 2008. In 2011 the AME says all injuries are inextricably intertwined and constitute a single CT injury from 2000 (date of hire) to 2008.

- What is the last day of last exposure? Which excess has to provide coverage?

Hypothetical #3
Last Day of Exposure Problems

- Claimant, a police officer, suffers a 2012 heart attack due to coronary artery disease. Due to police officer presumption self-insured public entity has to accept injury as work related.
- Claimant has four stents placed and returns to work a year later, full duties. Received regular check-ups, stress tests & heart monitoring.
- Claimant retires in 2022.
- Doctor reports are in conflict as to whether work from 2013 to 2022 constituted further injurious exposure.
- Problems for Public Entity if last day of exposure is 2022.

Violation Of Voluntary Settlements Provision

Provisions: you can't enter into a settlement agreement involving loss to excess, without excess consent.

Hypothetical: Stip & Award in 2005. Payments well within retention at that point. 2010 to 2020, FMC substantially increases to exceed retention.

Carrier Argument: self-insured employer breached voluntary settlements provision by entering into Stip & Award. Carrier contends this is a third party policy so self-insured employer is barred from recovery. No need for insurer to show it was prejudiced.

Are Excess policies third party liability policies?

Is a Stip & Award the type of settlement to which the voluntary settlements provision should apply?

Apportionment Hypothetical #1
Apportionment Involving Prior Non-Industrial Injury

- Gym teacher claimant has serious non-industrial injury to left knee in 1985 and to right knee in 1989.
- In 2000, she has work-related injury to left knee Anne has surgery which doesn't go well. Because of favoring her knee, her right knee goes bad and requires surgery. AME Report: 50% industrial, 50% non-industrial.
- In 2005, a stipulation and award is entered into (with approval of excess) involving both knees. Between 2005 and 2015 FMC skyrockets.
- In 2015, now that retention has been greatly exceeded, excess refuses to reimburse, claiming most of the medical payments were related to non-industrial injuries.

❖ What is coverage result?

Apportionment Hypothetical #2

- Police officer injures his right knee while arresting suspect in 1998. After favoring his right knee his left knee becomes symptomatic.
- By 2002, he had both knees replaced. A stipulation and award is entered into in 2005 (excess approves) which includes both the right and left knee. Both knees were included in the stipulation because treating doctor opined that left knee injury was caused by favoring right knee.
- In 2019, excess refuses to reimburse citing an opinion it obtained from an ortho surgeon stating most of the right knee problems were due to pre-existing non-industrial conditions and the left knee problems were not caused by the right knee problems and were 100% non-industrial. Excess states apportionment to these non-industrial causes means no reimbursement is owed.

❖ What is coverage result?

Apportionment Hypothetical #3

- Claimant hired as a police recruit in September 2001. Attended Police Academy for six months. First assignment on force was assisting a crime investigator. Claimant was exposed to horrific, violent crime scenes and as a result she developed PTSD/extreme anxiety. She was taken off work for two weeks. She returned to working normal patrol, but her PTSD/anxiety continued to haunt her such that she could no longer work as a police officer. Her last day was 8/31/2003.
- Claimant filed 2 CT claims, one ending March 2002 and a second ending August 2003. Stip & Award Referenced both claims and stated half of PD is attributed to 2002 and half to 2003.

- What result if medical evidence indicates only a single CT?
- Is self-insured employer estopped by Stip & Award from arguing only one CT?

Apportionment Hypothetical #4

- Claimant oversees/manages several departments within large store. During store remodel her hours and physical tasks increase. She develops MS which neurologists attribute to her increased work activities. Claimant files 3 WC claims with injury dates during remodel: (1) a CT causing MS; (2) a specific right hand; and (3) a specific left foot. Case settles with 3 F&As signed by WC Judge which award duplicative TD, PD and FMC. Current claim expenditures = $450k, reserves $1M, retention was $150,000. Excess refuses to reimburse asserting 3 injuries means 3 retentions and with apportionment no reimbursement owed.

❖ What result?

Issues with C & R's

- Watch out for adding old (still open for FMC but really dead files) to the C&R.

Problem: Hands excess carrier a potential apportionment argument.

❖ What to do?

Apportionment Hypothetical # 5

- Police captain developed severe bi-polar disorder due to job stress. For 20 years he is able to live at home with girlfriend and family providing home health care. However, his mental and physical condition deteriorated, and he needed either extensive home health care (nurses) or admission to a SNF. Treating psych recommended 24/7 LVN and 24/7 CNA and rejects placement in SNF. City pays for the 24/7 nurses. Excess refuses to reimburse, asserting City should not have relied on opinion of treating psych with respect to the following: (a) whether the additional HHC was necessary; (b) whether the additional HHC was due to industrial injury; and (c) whether SNF (less expensive) would have been acceptable. What result?

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