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Get Your Excess WC Carrier to Pay

Presented By:

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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; and $775,000 for Long Beach Transit. 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.

Excess WC Reimbursement Policies Differ from typical WC Policies

a) Insured has to qualify as a self-insurer under Labor Code
b) Per “occurrence” retention
c) Effect of Retention
   – No immediate duty to defend or investigate owed by insurer.
   – Insured controls claim within retention.
d) Exhaustion of Retention
   – Insurer’s obligation to reimburse
   – Insurer’s right to control
   – Insured’s obligations
   – Settlement considerations

Case Law Addressing Differences Between Primary & Excess WC Policies

CIGA v San Diego County Schools Risk Management Joint Powers Authority (2019) 41 Cal. App. 5th 640 (the “CIGA v SDJPA case”);

San Diego County Schools Risk Management Joint Powers v Liberty Ins., 339 F. Supp. 3rd 1019 (SD Cal. 2018), (the “SDJPA v Liberty case”);

San Francisco Bart Dist. v General Reinsurance Corp., 111 F. Supp. 3rd 1055 (ND Cal. 2015), (the “BART case”).

Key Legal Differences Between Primary & Excess WC Policies

- A self-insured employer is not required to purchase an Excess Policy. Not true for other employers.
- Primary WC policies must contain a clause that 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.
- A State or Federal Court can find a different date of injury from that found by WCAB for purposes of adjudicating dispute between the self-insured employer & Excess carrier.

Key Legal Differences Between Primary & Excess WC Policies

— A State or Federal Court can independently determine whether an injury was specific or a CT for purposes of adjudicating a coverage dispute between the self-insured employer and the Excess carrier.

— The fact a Stip & Award approved by a WC Judge references/merges multiple injury claims does not necessarily mean that apportionment amongst these claims is required for purposes of determining the Excess reimbursement owed.

Retention Issues

How many retentions apply to a claim?

a) Specific Injury Claim (“Bodily Injury by Accident”)
   - example: Employee falls off ladder and fractures pelvis

b) Cumulative Trauma (“Bodily Injury by Disease”)
   - example: typist develops carpal tunnel

c) Hybrid of Specific Injury and CT
   - example: Janitor lifting bundles of paper for years, noticed pain, then has event where shoulder gives way while lifting something

d) Be Wary of Pro Rata Apportionment
   - A hybrid specific injury and CT (300k retention, $600k in expenses)

Cases: McClatchy Newspapers v Cont’l Cas. Co., 2015 US Dist. Lexis 62925 (ED Cal. 2015).

Supervalu, Inc. v Wexford Underwriting, 175 Cal. App. 4th 64 (2009).

Duties of an Excess WC Reimbursement Insurer

a) Duty to Investigate
   - Raise apportionment issues
   - Address apportionment issues

     What about policy language stating insurer has no duty to investigate?

b) Evaluate Claim Objectively
   - Cannot place insurer’s interests ahead of insured’s interests

c) Reasonably Interpret Policy

d) Promptly Pay Claim

e) Reservation of Rights letters
   - Only have legal effect when the insurer pays a claim

Consequences of Insurer not Honoring its Duties / Contractual Obligations

a) Breach of Contract
   - Damages = policy benefits owed plus interest

b) Bad Faith
   - Damages = attorneys' fees expended in proving coverage

c) Punitive Damages
   - Three to five times the breach damages plus attorneys' fees passes constitutional muster

d) Policy Interpretation Rules all Favor Insureds
   - Coverage grants broadly viewed
   - Exclusions narrowly construed
   - Ambiguities construed in favor of insured
   - Insured's reasonable coverage expectations given effect

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 and has surgery which doesn't go well. Because of favoring her left 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 & 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 the non-industrial injuries.

❖ What is coverage result?

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?

Hypothetical #3

Apportionment Involving Separate Industrial Injury with a Different Employer

- Claimant injures back working for City and has three back surgeries. Four years later she is deemed permanent and stationary with work restrictions. She starts working for a non-profit and starts to exceed her work restrictions and advises her treating doctor she has increased back pain due to this recent work.
- The treating doctor sends her to have injections in her hip which result in complications leading to her needing a hip replacement. The hip replacement is problematic with many complications.
- The medical evidence is clear she received the injections partly because of her back problems associated with her City injury and partly because her recent work at the non-profit exacerbated those conditions. AME says 50/50 responsibility (between City and non-profit) for hip problems and related complications. Unfortunately, non-profit was uninsured and was not financially viable.
- The City's excess refuses to reimburse claiming much of the claim expenses should be apportioned to the non-profit.

❖ What result if non-profit insolvent and did not have WC Insurance?

❖ What result if non-profit had insurance?

Hypothetical #4

- Claimant files for specific injury to knee in 2000 and claim remains only a specific for 8 years.
- In 2008, during AME's deposition he states, without explanation, the injury was both a specific and a CT.
- As a result Claimant's counsel files a CT claim which is consolidated. However, a CT isn't supported by facts as initial injury was a knee buckling while walking down steps, Claimant had not reported any prior problems with knee, was working without any restrictions and testified prior to knee buckling incident, she played competitive tennis.
- Also, AME never mentioned a CT in any of his reports.

❖ What result?

Hypothetical #5

Apportionment Involving Multiple Injuries with Same Employer

- Claimant suffered a back injury in 2000 (the claim at issue with excess).
- Claimant also had reported back injury claims in 1985 and 1994.
- Not much is known about specifics of 1985 injury but only $280.00 of meds were paid, no TD or PD paid.
- The 1994 injury involved a back strain and about $10k in meds and $8k in TD was paid, no PD was paid.
- The last treatment for 1994 injury was in 1997 and after that Claimant worked without restrictions.

❖ What result?

❖ Apportionment indicated?

Hypothetical #6

- Claimant Policman filed a specific injury claim to his knees and low back in 2001
- Claimant also filed a CT injury claim to his knees, low back, neck, and cardio in 2003.
- The TPA appropriately opened two claim files and paid benefits off both claim files for close to 10 years.
- In 2007 claimant entered into a stip and award which included both injuries.
- In 2014 the AME was asked to address apportionment and he opined that the 2001 injury was actually not a separate injury, but rather just another minor injury that was part of the 2003 overall CT. He basically concluded that these injuries were inextricably intertwined.
- $200,000 was paid on the 2001 specific injury claim and $400,000 was paid on the 2003 CT claim. The retention was $300,000.

❖ What is the apportionment result?

Hypothetical #7

- 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?

Hypothetical # 8

- 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?

What policy covers a CT claim?

- Potential conflict between policy language and Labor Code Section 5500.5.
- Labor Code 5412 establishes CT date of injury as when EE first suffers disability and knew the disability was caused by employment.
- Labor Code 5500.5 establishes 1 year "look back" liability from 5412 date of injury. So, if 5412 date of injury is 12/15/15 the employers/insurers from 12/15/14 to 12/15/15 are responsible, usually prorate.
- Typical policy language: The EE's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

Hypothetical #9

- The Labor Code 5412 date of CT injury is 8/30/ 14, so the 5500.5 look back is 8/30/13 to 8/30/14.
- Excess Carrier A's policy runs from 7/1/13 to 7/1/14 with Excess Carrier B's policy running from 7/1/14 to 7/1/15.
- It is stipulated that the last day of exposure to injurious conditions is 8/30/14.
- Excess Carrier A contends no coverage under its policy because last day of exposure is beyond policy dates. Excess Carrier B contends Excess Carrier A owes 83% of the reimbursement sought by the insured.

❖ What result?

❖ San Diego County Schools JPA vs Liberty Ins. Corp. 2018 U.S. Dist. Lexis 5505

Problems w/San Diego Schools JPA ruling

- When is the last date of injurious exposure?
- Clerical worker develops carpal tunnel from repetitive use of hands/wrists and goes off work in 2005 and receives treatment and surgery. She returns to work in 2006 with work restrictions – limit repetitive keyboard and hand activities to no longer than 30 minutes straight, take 5 minute stretching breaks every 30 minutes, wear wrist braces as needed. She works until 2012 but has repeated flare-up of conditions which require treatment. AME says CT dates are 2004 to her last day of work in 2012.

❖ Problem: Retention is exceeded in 2008.

Hypothetical #10

- 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?

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