

## **WHEN YOUR EXCESS CARRIER FAILS YOU**

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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. In 2019, Al recovered \$2.7 million on behalf of the San Diego Unified School District in a bad faith lawsuit against San Diego Unified's Excess WC insurer. In 2020, Al similarly recovered \$1.3 million for the City of Escondido in a bad faith case against the City's Excess WC insurer. Other recent recoveries from Excess WC carriers include: over \$1M recovered on several claims for California Self-Insurers' Security Fund; \$775k for Long Beach Transit; Over \$700k for San Diego County Schools JPA; Another \$325k for San Diego Unified; and \$175k for City of Buena Park. Al currently represents the Cities of Manhattan Beach & Irvine, North County Fire Protection District, California Water Service, CSISF, and SDJPA in disputes with Excess WC carriers.

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 \$28 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. 5<sup>th</sup> 640 (the “CIGA v SDJPA case”);

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

San Francisco Bart Dist. v General Reinsurance Corp., 111 F. Supp. 3<sup>rd</sup> 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.
- 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. 4<sup>th</sup> 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?

## Joinder of Excess Cases

General Reinsurance Corp. v WCAB, 65 Cal. Comp. Cases 1441 (2000) (the “St. Jude Joinder Case”). Cited with approval by CIGA v SDJPA.

Joinder of Excess in WCAB permitted?

St. Jude Joinder Case indicates “yes.”

But this issue is not completely settled. What about the fact that WCAB does not have jurisdiction to resolve coverage disputes with Excess?

Other Excess Arguments: St. Jude Joinder Case overruled by later cases on jurisdiction. Also, in St. Jude situation the coverage disputes (whether penalties awarded against self-insured employer were covered) was adjudicated in Superior Court ( see General Reinsurance Corp. v St. Jude Hospital 107 Cal. App. 4th 1097).

Limited Purpose of Joinder: Prevent Excess from contending Stipulation & Award should not have included certain body parts? Prevent Excess from not paying on C&R by later raising apportionment issues?

Language for Insured to include in Requesting Settlement  
Authority from Excess

The insured is requesting the insurer's authority to enter into the proposed Stipulations with Request for Award. This Stipulation will conclusively establish the disability amounts owed by the insured to the claimant and will confirm the insured's responsibility to pay for all future medical care for the body parts/conditions identified in the Stipulation. Since the Policy's retention has already been exceeded, the insurer's authorization to enter into this Stipulation is an acknowledgement that the insurer is hereby agreeing to reimburse the insured pursuant to this Stipulation, including reimbursement for the disability payments paid in connection with this Stip & Award as well as all payments for future medical care for the listed body parts/conditions. If this is incorrect, please so advise us and provide us with the insurer's reasoning.

## 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.
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- ❖ 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.
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- ❖ What result?
  - ❖ Apportionment indicated?

## Hypothetical #6 (Finding \$'s in Other Claims)

- Claimant seriously injured back in work accident in 1995 (the claim at issue with excess).
- Claimant suffered another back injury in 2006.
- Claim expenses for 1995 injury prior to the 2006 injury were \$700,000. Expenses paid on 1995 injury from 2006 to present were \$200,000.
- Expenses paid on 2006 claim were \$300,000.
- In 2015 the AME apportioned between the two injuries as follows:
  - 75% to 1995 injury
  - 25% to 2006 injury
- Excess for 1995 claim, with \$500,000 SIR, paid \$300,000 and asserted nothing further was owed due to apportionment issues.

### ❖ What result?

\$700,000

75% of \$500,000 = \$375,000

1,075,000

<500,000>

<300,000>

275,000

# 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. 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.
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- ❖ 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.
- Insured has policy with \$3 million retention from 2000 to 2005 and from 2005 to 2010 the retention is \$250,000. Claim expenses are \$750,000.

❖ What result?