THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
AUGUST 2015 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-861-6709

UNINSURED EMPLOYERS GUARANTY FUND/EXCLUSIVITY

- Claimant did not violate Section 305(d) when he filed a civil action to preserve his ability to recover in tort against his employer prior to the expiration of the two year statute of limitations that applies to civil actions notwithstanding he filed a Claim Petition against the Uninsured Employers Guaranty Fund .

  (Section 305(d) provides that:

  > *When any employer fails to secure the payment of compensation under this act as provided in sections 305 and 305.2, the injured employe or his dependents may proceed either under this act or in a suit for damages at law as provided by article II.)*

  This is because, in the context of the required liberal construction of the Act to fulfil its humanitarian purpose, the Claimant had only 13 days after receiving the letter from the Bureau advising the employer did not have insurance to file a civil action before the two year civil statute of limitations had run; he filed a praecipe to issue a writ of summons the day the statute of limitations on a tort action had run Claimant then waited almost 11 months to file his complaint in the trial court. Claimant could not hold off on filing his complaint indefinitely at the risk of forfeiting his claim.

  The fact that Claimant commenced the action with a praecipe for a writ of summons, delayed filing his complaint for 11 months, and requested that his tort action be stayed pending resolution of his workers' compensation claim shows that Claimant's first choice was not to recover tort damages.

- Section 1603(b) of the Act provides in pertinent part that:

  > *An injured worker shall notify the Uninsured Employers Guaranty Fund within **45 days** after the worker knew that the employer was uninsured…. No compensation shall be paid from the fund until notice is given and the department determines that the employer failed to voluntarily accept and pay the claim or subsequently defaulted on payments of compensation. **No compensation** shall be due **until notice is given.***

A Claimant's failure to provide the Uninsured Employers Guaranty Fund with notice within 45 days of actual knowledge that an employer is uninsured does not act as a complete bar to compensation, but rather, delays the provision of compensation to the date notice is given.

This means that compensation for past medical treatment or lost wages is payable so long as a claimant notifies the Uninsured Employers Guaranty Fund of the claim within 45 days of actual knowledge that the employer is not insured. However, those that do not meet the statutory deadline are only entitled to compensation for medical treatment or lost wages incurred from the date notice was provided.

- The legal standard for determining when an injured worker knew the employer was not insured is not when the claimant "should have known," of the insurance status of the employer.

  Rather, the inquiry is when the claimant obtained actual knowledge of his employer's insurance status.

  Whether a claimant 'knew' that his employer was uninsured is a factual determination to be made by the WCJ.

- The Uninsured Employers Guaranty Fund was created in 2006 to provide workers' compensation benefits to workers, injured in the course and scope of their employment, where their employers did not have workers' compensation insurance.

  The Uninsured Employers Guaranty Fund is not an insurer and is not subject to penalties, unreasonable contest fees or any reporting and liability requirements under section 440.

  However, the Fund has all of the same rights, duties, responsibilities and obligations as an insurer.

  An injured worker may recover from the Fund by first providing the Fund with notice of a claim within 45 days after the worker knew that the employer was uninsured.

  The Fund must start its inquiry into whether to commence making payments to an injured employee within ten days of receiving notice of a claim by demanding proof of insurance for the injured worker from the employer.

If the Fund does not receive proof of insurance within 14 days, there shall be rebuttable presumption of uninsurance.

If the claim is not voluntarily accepted by the Fund within 21 days of receiving notice of the claim, an injured worker may file a claim petition with the Bureau. The claim petition must name both the employer and the Fund as defendants.

The Fund is required to exhaust all remedies at law to seek reimbursement from the uninsured employer for any payments made by the Fund as a result of an award or a voluntarily accepted injury.

The Department of Labor and Industry may, on the Fund's behalf, investigate, prosecute, and seek restitution from an uninsured employer for not insuring the payment of compensation.

The Fund may also seek reimbursement through asserting its right to subrogation over any recovery an injured employee receives from the employer or a third party.

Notwithstanding the exclusivity principle of the Act, an uninsured employer loses its immunity when it does not fulfill its obligations under the *quid pro quo* bargain and may be sued at common law where it fails to insure for workers' compensation liability.

When any employer fails to secure the payment of compensation under the Act as provided in sections 305 and 305.2, the injured employee or his dependents may proceed either under this act or in a suit for damages at law as provided by article II.

This provision offers the employee an election either to proceed under the Act and accept its compensation schedules or to secure relief outside the Act by an action at law for damages against his employer."

Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund) No. 21 C.D. 2014 (Decision by JUDGE COHN JUBELIRER, August 5, 2015) 8/15

IRE

- The Pennsylvania Supreme Court issues PER CURIUM granting claimant's Petition for Allowance of Appeal to address issue:

  Whether the Commonwealth Court overstepped its appellate function in making credibility judgments which is the sole function of the Workers' Compensation Judge?

- It will be recalled that the Commonwealth court had held that since whether a physician is qualified to perform an IRE is governed by the Act, a WCJ may not impose greater qualifications than those set forth in the Act. Therefore, the WCJ could not reject the testimony of the Bureau designated IRE physician, who was Board-Certified in Physical Medicine, Rehabilitation, And Pain Medicine, on the basis that brain injuries were not within his specialty.

  The Commonwealth Court further held in their decision that the WCJ's rejection of the testimony of the employer's IRE physician as unpersuasive was not supported by substantial evidence where the WCJ did not cite any provisions of the AMA Guides or other evidence in support of her reasoning that the IRE physician miscategorized or improperly grouped Claimant's injuries or that he improperly calculated Claimant's impairment rating. Moreover, Claimant did not elicit any evidence that could support the WCJ's reasoning.

IA Construction Corporation v. WCAB (Rhodes) No. 112 WAL 2015 (PER CURIUM August 26, 2015) 8/15