From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

This week, we will discuss a common pleas court case from Franklin County, Ohio which presents a novel question: Is an agreement not to contest a finding of permanent total disability actually a "voluntary settlement"?

Fishel Co. v. Republic W. Ins. Co., 163 Ohio Misc 2d 1, 2011-Ohio-2166, concerned an employee of a self-insured employer who injured his knee in 1989. In 2007, based upon the recommendation of his doctor and the deteriorating condition of his knee, the claimant sought permanent total disability ("PTD") benefits. The self-insured employer, who had never contested any aspect of the claim in the eighteen (18) years it had been pending, executed an "Agreement as to Award for Permanent Total Disability" (IC-22) but did not execute or file a self-insured settlement agreement (SI-42) with the BWC or consult with their excess workers' compensation carrier. (Like many self-insured employers, the employer had a policy in place with a fairly large self-insured retention.) The agreement pushed the cost of the claim past the employer's $300,000 self-insured retention, and triggered a request for excess coverage under a policy issued by Republic, Republic denied coverage, claiming that the agreement not to contest PTD was in fact a "voluntary settlement" without their written consent. A lawsuit resulted, and faced with cross-motions for summary judgment, the trial court was left to consider whether an agreement to consent to PTD was a "voluntary settlement," which precluded coverage.

After reviewing the history of settlements with self-insured employers and principles of insurance law, the trial court concluded that coverage was owed. The trial court held that the term "voluntary settlement" in a workers' compensation contest must be strictly construed, and should include only settlements made under the procedures set forth in R.C. 4123.65. In *Fishel*, the trial court held that the employer had simply not contested an award of PTD, which is not a "voluntary settlement." The execution of this document did not require the written consent of Republic, and therefore coverage was owed. The court equated the employer's actions in this case with admitting crucial facts in an answer to a complaint.

This decision is not binding on other courts and must be construed in the context of *Harasyn* and other decisions which minimize the rights of excess workers' compensation carriers in Ohio. It is likely that excess carriers will revise their policies to reflect situations like this in the future. If you have any questions, or would like to discuss these cases or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com