Goodbye '*Yellow Freight*' Road?

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Pursuant to *Yellow Freight System v. Workers' Compensation Appeals Board (Madara)*, 423 A.2d 1125 (Pa. Cmwlth. 1981), an employer's answer to a claim petition that is filed more than 20 days after the assignment of the claim petition to a workers' compensation judge (WCJ) is deemed to be a "late answer" and the employer is deemed to have admitted all well pleaded facts alleged in the claim petition. While not a complete default judgment, the granting of a *Yellow Freight* motion by a WCJ will often mean that a claim is found compensable and benefits are payable with the burden of proof shifting to the employer to prove that benefits should be modified, suspended or terminated.

There is much litigation over late answers and *Yellow Freight* motions made by claimant's attorneys who are seeking to lessen their burden of proof. To date, the case law developed around *Yellow Freight* has consistently indicated that if the employer receives notice of assignment of the claim petition to the WCJ, then the 20-day clock starts running from the date on the notice of assignment for the employer to file its answer.

What current law fails to take into consideration is the fact that in most instances (with the exception of self-insured employers) it is not the employer who is responsible for the payment of benefits to the claimant. Instead, it is the workers' compensation insurance carrier who will be paying benefits.

So, when a *Yellow Freight* motion is granted by a WCJ, the insurance carrier is the entity that is ordered to pay benefits to the claimant. Yet, the law does not give the insurance carrier a defense to a *Yellow Freight* motion based upon the fact that it did not receive either the claim petition or the notice of assignment of said claim petition to the WCJ. In that regard, the party ultimately responsible for the payment of benefits cannot defend itself based upon a lack of notice under *Yellow Freight*.

The law in that regard is prejudicial to the insurance carrier as it fails to give the carrier its due process. If the party ultimately responsible for the payment of benefits (the insurance carrier) is not provided notice of the assignment of the petition to a judge, how can it properly defend the claim and file a timely answer within 20 days? Often the employer believes that its insurance carrier is aware of a claim's status once it has

been reported, and does not pass everything it receives on to its insurance carrier. Sometimes, the Bureau of Workers' Compensation fails to list an insurance carrier at all on the notice of assignment of the claim petition, so only the employer would receive such notice. Occasionally, the Bureau will list the wrong insurance carrier for the employer for the alleged date of injury. In all of those instances, the insurance carrier ultimately responsible for the payment of benefits is not being provided with notice of assignment of the claim petition to the WCJ and is completely unaware that the 20-day time clock has started ticking for an answer to be filed.

In the recent case of *Erie Insurance Property & Casualty v. David Heater (Workers' Compensation Appeals Board)*, 316 A.3d 1104 (Pa. Cmwlth. 2024), the Commonwealth Court noted that the Workers' Compensation Act defines the term "employer" in two ways. The court cited to Section 103 and Section 401 of the Act which both contain definitions of the term "employer." The court noted that under Section 401 of the Act, the term "employer" includes the employer's "insurer if such insurer has assumed the employer's liability ..." 77 P.S. Section 701.

While the *Erie* case dealt with the issue of notice of an injury being provided to the insurance carrier by a claimant who was also the sole proprietor and owner of his own business, the holding by the Commonwealth Court can easily be applied to a *Yellow Freight* situation where the employer itself may have received notice of assignment of a claim petition to a WCJ, but the insurance carrier who is the party responsible for the payment of benefits has not.

Since the insurance carrier is the party responsible for the payment of benefits and "has assumed the employer's liability," it should be afforded the same rights as the employer under the act. The court in *Erie* further cited to Section 305 of the act and noted that Section 305(a)(1) provides that where an employer purchases workers' compensation coverage, the insurer "assumes the employer's liability hereunder and shall be entitled to all of the employer's immunities and protection hereunder."

So, why in the context of a *Yellow Freight* motion is the insurance carrier not being afforded the same immunities and protections afforded to employers? It is argued that if the insurance carrier can present evidence that it was never served with a copy of the notice of assignment of the claim petition to the WCJ, it should be able to defeat a *Yellow Freight* motion in the same way that an employer would by presenting such evidence.

There are other areas of the law where the insurance carrier is entitled to the same immunities and protections as the employer. These include offsets that can be taken for a claimant's receipt of unemployment compensation, severance and pension benefits. The courts have held that such offsets can be taken by the insurance carrier even when the employer is not a self-insured employer. In that instance, the courts have recognized that the insurance carrier steps into the shoes of the employer as the party ultimately responsible for the payment of benefits and, therefore, is entitled to the offsets to be taken against a claimant's benefits.

There is also a long line of instructive cases from the federal courts, including from the

U.S. Court of Appeals for the Third Circuit, that stand for the proposition that a potentially liable insurance carrier stands in the shoes of the employer and is entitled to all the due process rights and protections afforded to the employer. "Because the carrier is subject to liability on the claim, due process requires that it be given adequate notice and an opportunity to defend on the question of its direct liability to the claimant." *See National Mines v. Carroll*, 64 F.3d 135, 140 (3d Cir. 1995). The carrier is an interested party and the failure to afford the carrier notice of a claim violates "rudimentary demands of due process." *See Tazco v. Director, OWCP*, 895 F.2d 949 (4th. Cir. 1990).

In conclusion, attorneys representing employers and insurance carriers should be making the argument, in the context of a *Yellow Freight* motion, that if notice of the assignment of the claim petition is not properly served upon the insurance carrier ultimately responsible for the payment of benefits, then the employer and its insurance carrier cannot be deemed to have admitted any well-pled facts in the petition. The failure of the bureau to properly serve the insurance carrier with the notice of assignment of the claim petition should constitute a reasonable excuse for a late answer and the claimant's *Yellow Freight* motion should be denied. The insurance carrier's due process rights are being violated by not allowing it to present a defense to a *Yellow Freight* motion in the same way as an employer. The insurance carrier is absolutely a party to the litigation and should be afforded the same due process rights as the employer when it steps into the employer's shoes to defend against a claim for benefits.

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