

*Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund, No. 21 C.D. 2014, filed August 5, 2015.*

**Issues:** (1) Whether Claimant's Claim Petitions are barred by Section 305(d) of the Act and (2) whether Claimant's Claim Petitions are completely or partially barred by Section 1603 of the Act.

**Answer:** The Claimant's actions in filing a tort action against the uninsured Employer did not bar his workers' compensation claim against the PA UEGF under Section 305(d) of the Act, although the Claimant's claim is partially barred by Section 1603 of the Act.

**Analysis:** This case involves two simultaneously issued Decisions, one involving the Employer and another involving the PA UEGF. Claimant filed Claim and Penalty Petitions against the Employer on April 15, 2009, seeking benefits for an injury that occurred on or about May 11, 2007. On April 28, 2009, the Bureau informed Claimant's counsel that the Employer did not have workers' compensation insurance on the date of the alleged injury. On May 11, 2009, Claimant filed a tort action against Employer, seeking damages for his injuries. The Claimant filed a Notice of Claim Against the Uninsured Employer and Claim Petition against the PA UEGF in January 2010.

The Petitions were assigned to the same WCJ, who issued separate Decisions and Orders, denying and dismissing both Petitions. The WCJ reasoned that Section 305(d) of the Act, 77 P.S. § 501(d), requires a claimant to choose between pursuing a tort remedy and a workers' compensation remedy. The WCJ ruled that once an injured employee files a civil action, he forfeits his ability to seek workers' compensation benefits. The WCJ further ruled that because the Claimant did not file the Notice of Claim within 45 days of learning that Employer was uninsured as required by Section 1603(b) of the Act and because the Claimant filed the Claim Petition against the PA UEGF concurrently with the Notice of the Claim instead of waiting 21 days as required by Section 1603(d) of the Act, the Claim Petition is barred.

The Claimant appealed both WCJ Decisions to the WCAB, who held that Section 305(d) of the Act barred all of Claimant's Petitions because Claimant forfeited his ability to pursue a remedy against both Employer and the PA UEGF by initiating his civil action. The WCAB further held that the WCJ erred in concluding that a claimant's failure to file notice within 45 days of leaning that an employer is uninsured, as required by Section 1603 of the Act, completely bars a claim against the PA UEGF. According to the WCAB, this Section only bars the claim until such time a claimant provides the PA UEGF with Notice.

The Claimant Petitioned the Commonwealth Court for review the WCAB Order. First, the Commonwealth Court held that the Claimant did not violate Section 305(d) when he filed a civil action to preserve his ability to recover in tort prior to the expiration of the statute of limitations. Claimant could not hold off filing his civil action claim for fear of losing the opportunity with the running of the statute of limitations. Based on the humanitarian principles of the Act, Claimant's actions in filing a tort claim do not bar him from making a workers' compensation claim against the PA UEGF. Second, the Commonwealth Court held that the letter from the Bureau notifying the Claimant that the Employer was uninsured

afforded the Claimant with the requisite knowledge that the Employer was uninsured. The Commonwealth Court affirmed the WCAB's ruling that 1603(d) does not completely bar a claimant who does not meet the 45-day notice requirement from receiving compensation from the PA UEGF; instead the Claimant's claim is barred until the date that the notice was given to the PA UEGF.

**Conclusion and Practical Advice:** (1) The filing of a tort action prior the expiration of the 2-year statutory period does not in and of itself bar a claimant from filing a Claim Petition seeking workers' compensation benefits. (2) If a claimant fails to file a Notice of Claim against the PA UEGF within 45 days of actual knowledge that an employer is uninsured on the date of an alleged injury, the claim is barred until the date the Notice of Claim is filed.

*Department of Labor and Industry, Uninsured Employers Guaranty Fund v. SCAB (Ohor Shyra and Ester Auto Group, LLC), No. 2334 C.D. 2014, filed August 26, 2015.*

**Issue:** Whether the PA UEGF is liable for death benefits under the Act based the WCJ's reliance on hearsay evidence on issues involving the employer-employee relationship and course and scope of employment.

**Answer:** No.

**Analysis:** Decedent's son filed a Fatal Claim Petition and a Claim Petition against the PA UEGF, alleging that the Decedent died on September 20, 2010, from head trauma sustained in a motor vehicle accident in the course and scope of his employment with Employer.

The WCJ found that the Decedent was an employee of the Employer and that the injury occurred within the course and scope of employment. Specifically, the WCJ relied upon the testimony of the Claimant's mother that the nature of the Decedent's work involved taking clients to auctions to purchase vehicles; that the Decedent worked only for the Employer; that the Employer directed Decedent to attend certain auctions; that the Employer supplied Decedent with a vehicle, an Auction ACCESS card and the money to pay for the cars; that the Decedent did not use his personal vehicle to travel to auctions; that Decedent died in a car accident while operating a Dodge Durango, which was registered to and insured by the Employer; that the Employer paid Decedent by commission; that the Decedent planned to take clients and a co-worker to an auction on the Thursday morning of the fatal accident, which was a day the Decedent generally worked consistent with the employment relationship; and that the Decedent was involved in a fatal car accident that day. The PA UEGF objected to the Mother's testimony on the basis of hearsay and lack of foundation grounds, which were overruled by the WCJ.

A Trooper testified that he retrieved vehicle information from the vehicle's registration and insurance cards at the accident scene; that he ran a license plate search; that he determined the vehicle was a 2001 Dodge Durango, which was registered to and insurance by the Employer. This testimony and the registration and insurance cards were also entered into evidence by the WCJ over the PA UEGF's objections based on hearsay and lack of foundation.

Based on the testimony and documentary evidence, the WCJ granted the Claimant's Claim Petition, finding that the Decedent was an employee of the Employer and not an independent contractor and that the Decedent was in the course and scope of employment when the fatal motor vehicle accident occurred.

The PA UEGF appealed the WCJ's Decision to the WCAB on the basis that the WCJ's findings were not supported by substantial, competent evidence, but only by inadmissible hearsay. The WCAB disagreed, reasoning that most of the Mother's testimony was not hearsay because it was based on her personal knowledge as Decedent's former wife and current co-habitant at the time of his death. Moreover, the Trooper's testimony was also based on his personal observations at the accident scene and was not hearsay. The WCJ's Decision was affirmed.

The PA UEGF appealed the WCAB's ruling to the Commonwealth Court on the same basis. The Commonwealth Court affirmed the WCAB's ruling, pointing to the relaxed evidentiary standard in workers' compensation matters and finding that there was a reasonable basis from which the WCJ could draw an inference or inferences that the Decedent was an employee of the Employer and that his death occurred within the course and scope of employment.

**Conclusion and Practical Advice:** Testimony based on a witness's personal knowledge is not hearsay and can support a ruling granting Fatal Claim and Claim Petitions in light of the relaxed evidentiary rules in workers' compensation proceedings.