

alert

VOLUME 13 ISSUE 5
September, 2003

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

RE-HEARING OPINION PROVIDES BASIS FOR PROPER REJECTION OF THE ACT

In our July 2003 Newsletter, we reported to you on the case of *General Casualty Company v. Carroll Tiling Service* where the Illinois Second District Appellate Court awarded compensation benefits to Todd Carroll, despite the fact that Todd, an officer of his father's company, had signed a Benefits Rejection Form prepared by General Casualty, the workers' compensation carrier for Carroll Tiling Service. This form, prepared by General Casualty, was entitled "Illinois Workers' Compensation Benefits Rejection Form" and provided:

If you are either the sole owner of your business or a business partner, Illinois'[s] workers compensation law automatically applies to you. This means that you are automatically covered under your business workers compensation policy and that your payroll will be included when we calculate the premium for your policy.

If you do not want to be covered under this policy, you must specifically reject the coverage by signing this form and returning it to your agent.

The rejection form by which Todd excluded himself from coverage was based on Section 3(17) of the Act, which provides in part as follows:

The corporate officers of any domestic or foreign corporation employed by the corporation may elect to withdraw

themselves as individuals from the operation of this Act. Upon an election by the corporate officers to withdraw, written notice shall be provided to the insurance carrier of such election to withdraw, which election shall be effective upon receipt by the insurance carrier of such written notice.

As a result of this coverage exclusion, the workers' compensation premiums were reduced and the insurance agent suggested that Carroll Tiling obtain major medical insurance coverage to include Todd. After Todd sustained a work-related injury, General Casualty denied coverage and filed a Declaratory Judgment action against Carroll Tiling and Todd Carroll, seeking a determination that it was not required to provide workers' compensation coverage to Todd. The trial court granted summary judgment for General Casualty, thereby denying Todd coverage for his accident. This judgment was reversed by the appellate court.

After reviewing Todd's Benefit Rejection Form, the appellate court noted that the form's signer *appears to withdraw only from insurance coverage* and that this withdrawal would be a violation of the Act. The court stated:

The Act provides that "[e]very policy of an insurance carrier, insuring the payment of compensation under this Act shall cover all the employees and the entire compensation liability of the insured." This provision, when read with the requirement that insurance obtained for an employer's workers' compensation benefits liability must cover the entirety of its liability, leads to the conclusion that the Act prohibits the withdrawal of an

individual employee from insurance coverage as well as prohibits an employer and its insurer from selectively omitting an employee from the coverage of a policy an insurer has issued to an employer. This conclusion is borne out by the Act's command, [a]ny provision in any policy, or in any endorsement attached thereto, attempting to limit or modify in any way, the liability of the insurance carriers issuing the same except as otherwise provided herein shall be wholly void."

General Casualty filed a petition for re-hearing, contending that the court's opinion had failed to apply the holdings of the *D. Mayer Landscaping* case (2000), where the appellate court had permitted the officers to "withdraw themselves as individuals from the operation of the Act." As a result, the officer's widow was denied death benefits because of the absence of coverage. In the instant case, the appellate court agreed that the Act permitted the corporate officers to elect to withdraw themselves as individuals *from the operation of the Act*. The General Casualty rejection notice form did not provide that Todd was withdrawing *from the operation of the Act and that the withdrawal of Todd from insurance coverage did not accomplish this*.

As explained by this decision, two separate steps must be taken to accomplish the rejection: 1) the corporate officer need first elect to withdraw himself as an individual from the operation of the Act; and 2) written notice is to be provided to the insurance carrier of such election to withdraw, which election would be effective upon receipt by the carrier of such written notice. In *General Casualty*, the court pointed out that the mere rejection of insurance benefits without an election to withdraw from the operation of the Act is not sufficient.

EDITOR'S NOTE: Now that the court has clarified the proper method for the corporate officer to withdraw from the operation of the Act and also from the workers' compensation insurance coverage, where does this leave the corporate employer, the officer employee, the insurance carrier and insurance agents?

1. What remedies are available to the

officer who withdraws from the operation of the Act? Section 5 provides in part as follows:

No common law or statutory right to recover damages from the employer ... for injury or death sustained by such employee, other than the compensation benefits herein provided, is available to any employee who is covered by the provisions of this Act ...

Since this officer is not "covered by the provisions of this Act," Section 5 should not prevent the officer from having a right to institute a civil action against his employer.

2. Should such an action be filed, what coverage is available to the employer? The general liability policy may exclude: "*Bodily injury*" to: (1) An "employee" of the insured arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business.

However, the employer's 1(b) coverage does apply to bodily injury arising out of the employment. It does exclude any obligation imposed by workers' compensation, but the employer of the withdrawing officer employee has no compensation liability. Therefore, it would appear that the 1(b) coverage should be applicable.

Finally, the *General Casualty* case suggests that an insurance agent may have liability because of his failure to notify the withdrawing officer employee of the effect of such withdrawal. In *General Casualty*, that possible action was rendered moot because Todd Carroll was awarded compensation benefits.

Frank J. Wiedner
Editor