IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELAWARE INSURANCE GUARANTY ASSOCIATION, Plaintiff, v. STEPHANIE D. PICKERING, Administratrix of the Estate of Paul S. Logan, Sr., Deceased; CHROMALLOY AMERICAN CORPORATION, a Delaware corporation, successor by purchase or merger to Hires Turner Glass Company, a Pennsylvania corporation; J.E. WORKMAN, INC., a Delaware corporation and STATE OF DELAWARE, Defendants.	)	C.A. No. 04C-09-240 MMJ

Submitted: February 10, 2006
Decided: April 10, 2006

Upon Plaintiff's Motion for Summary Judgment.
GRANTED

MEMORANDUM OPINION

Michael L. Sensor, Esquire, Perry & Sensor, Wilmington, Delaware, Attorney for Plaintiff

Thomas C. Crumplar, Esquire, Jacobs & Crumplar, P.A., Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

Delaware Insurance Guaranty Association ("DIGA"), filed a Motion for Summary Judgment against Defendant Stephanie D. Pickering ("Pickering"), Administratrix of the Estate of Paul S. Logan, Sr., deceased. DIGA claims that it is entitled to judgment as a matter of law because there are no material facts in dispute. DIGA asserts that there was no insolvent insurance company involved in Pickering's claim, therefore, DIGA has no responsibility to pay Pickering's claim. Pickering agrees that there are no genuine issues of fact and that DIGA is seeking a ruling by this Court that DIGA has no obligation to provide insurance coverage where the identity of the compensation carrier is unknown and there is no formal order of insolvency. Pickering argues that it is impossible for Pickering to provide a formal insolvency order because the Delaware Compensation Rating Bureau destroyed records.

FACTS AND PROCEDURAL CONTEXT

On February 14, 2003, Paul S. Logan, Sr. ("Logan") filed a Petition to Determine Compensation Due ("Petition") before the Delaware Industrial Accident Board ("Board") seeking worker's compensation benefits. Logan alleged injury caused by occupational exposure to asbestos while he was employed by a business known as Harry C. Moore ("Moore"). Logan also named in the Petition two other

past employers, J.E. Workman and Hires Turner & Glass. Logan died shortly after the filing of the Petition.

At the time Logan's Petition was filed, the identity of Moore's insurance carrier could not be ascertained. By letter dated May 21, 2003, Logan's counsel requested a hearing before the Board. The letter outlined the unsuccessful efforts to locate the worker's compensation insurance carrier for Moore and suggested that DIGA should be deemed the carrier for Moore.

For purposes of this motion, the following facts, as set forth in the May 21, 2003 letter, are undisputed:

> H.C. Moore unfortunately is out of business and thus there is no way that the plaintiffs can contact them to determine who the workers' compensation insurance carrier was during the time period of 1961 to 1963 when he worked there. I am certain that if they complied with Delaware law they had a compensation carrier during this time.
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> I understand, however, that the Department of Labor or Industrial Accident Board does not keep records here in Delaware showing who were the carriers on risk for various risk for various employers. All of those records I understand have been transferred to a private organization in Philadelphia – Delaware Ratings Bureau. That organization will not answer any of my responses. They have told us that they will only respond to requests from the Industrial Accident Board [sic].

On May 22, 2003, the Board stayed the matter pending investigation of insurance coverage.

By letter dated June 12, 2003, the Delaware Compensation Rating Bureau, Inc. informed Logan's counsel:

> I am in receipt of your June 10, 2003 communication requesting worker's compensation coverage for the employer H. C. Moore for the period 1961 through 1963 or any information available.
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> This letter will serve as notification that the Delaware Compensation Rating Bureau has no record of the employer H. C. Moore in our file database. We only retain insurance coverage records back to 1987 and those records will soon be purged.

On April 23, 2004, Logan's counsel advised the Board that the name of the applicable worker's compensation carriers was "irrevocably unavailable." The Board ordered DIGA to appear and defend Logan's Petition on behalf of Moore. DIGA filed a Motion to Dismiss Claimant's Petition to Determine Compensation Due on June 2, 2004. The Board heard argument on DIGA's motion on July 22, 2004. By Order dated July 28, 2004, the Board ruled that it lacked jurisdiction to determine insurance coverage matters, and held that "the insurance coverage dispute must be adjudicated before the hearing on the merits can proceed." The Board stayed the matter "until the insurance coverage matters are decided in the appropriate forum." DIGA filed the instant action in the Superior Court on September 29, 2004.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist. In considering such a motion, the Court must evaluate the facts in the light most favorable to the non-moving party. Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[1]

ANALYSIS

The Delaware General Assembly enacted the Delaware Guaranty Association Insurance Act ("Act") to serve as a mechanism for the payment of covered claims against certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer.[2] The General Assembly established DIGA to carry out the purposes of the Act.[3]

DIGA is statutorily obligated to pay valid covered claims existing prior to an order of liquidation of insolvency, or arising within 30 days after the order of

[1] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962).

[2] 18 *Del. C.* § 4202.

[3] 18 *Del. C.* § 4206.

liquidation.[4] "Covered claim" is defined as an unpaid claim which arises out of an insurance policy issued by an insurer, "if such insurer becomes an insolvent insurer after July 5, 1991."[5] The Act defines "insolvent insurer" as "an insurer licensed to transact insurance in this State, either at the time the policy was issued or when the insured event occurred, and against whom an order of liquidation with a finding of insolvency has been entered after July 5, 1991, by a court of competent jurisdiction in the state of domicile or in this State"[6] In *DIGA v. Christian Care Health Services, Inc.,*[7] the Delaware Supreme Court recently considered interpretation of the Act.

> The motivation behind the National Association of Insurance Commissioners Insurance Guaranty Association Model Bill, which the Delaware Insurance Guaranty Act follows, was a "national concern over the harms to the public resulting from insurance companies becoming insolvent."
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> The Delaware statute spreads the risk-of-loss and financial burden of protecting the public among "member insurers," by levying an assessment on the business they transact. The net-worth provisions included in the Act are intended to require those who are capable of absorbing the loss that occurs when an insurer becomes insolvent to bear that loss rather than allowing those capable of absorbing the loss to pass

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[4]18 *Del. C.* § 4208(a)(1).

[5]18 *Del. C.* § 4205(6)(a).

[6]18 *Del. C.* § 4205(7).

[7]Del. Supr., C.A. No. 244, 205, Steele, C.J. (Jan. 24, 2006).

> it on to the pool of funds created by the levied assessments. Thus the General Assembly apparently concluded, joining a national majority view, that the net-worth provision results in leaving more resources available for those entities less able to absorb an uncovered loss.

In this case, the Delaware Rating Bureau destroyed all records that predate 1987. Therefore, it is impossible to determine the identity of Moore's worker's compensation carrier. Obviously, there is no way to discover whether Moore's carrier is insolvent or still in business. The issue for the Court is whether by construing the Act liberally to effect its purpose,[8] Moore's carrier can be deemed "insolvent." When a statute is unambiguous, the plain meaning of words controls.[9] The Court is limited by what the statutory interpretation allows.

Clearly, Logan should be entitled to relief. All examining physicians have confirmed exposure to asbestos. Unfortunately, the current statutory law does not entitle Logan to relief. DIGA is statutorily permitted to pay only valid covered claims existing prior to (or shortly after) an order of liquidation of the insolvency.[10]

Moore is a family corporation that has been out of business for some time. Moore's lack of records normally would not be a problem because, under the law, employers are required to file proof of insurance. The purpose of such a filing is to

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[8] 18 *Del. C.* § 4204; *DIGA v. Christiana Care Health Services*, at note 39.

[9] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

[10] 18 *Del. C.* § 4208(a)(1).

enable the Board to contact the insurance carrier when a workers' compensation claim is made. In this case, however, the Board is unable to do so. The insolvency of the unknown carrier cannot be determined because of the actions of the Delaware Department of Labor, which has the responsibility of keeping pertinent records. The Department delegated its recordkeeping responsibilities to an out-of-state entity. That foreign entity destroyed all records of the identity of Moore's carrier. Currently, the Delaware Insurance Rating Bureau discards records every five years, even though it is clear that in many situations, such as cancer due to asbestos, there is a latency period of at least 20 years.

Despite diligent efforts, the carrier's identity must now be deemed irretrievable. The Court reluctantly must find that even the most liberal construction of the Act does not permit an unidentified worker's compensation carrier to fall within the Act's definition of "insolvent insurer."

The Court notes that in light of policies adopted by the Department of Labor and the Delaware Rating Bureau, the problems resulting from lack of records invariably will increase exponentially. Despite the General Assembly's policy of compulsory worker's compensation insurance, it is foreseeable that claimants who worked for an out-of- business employer, or an employer not retaining insurance coverage records, will be denied relief. The Court also notes that it is clear from the

overriding importance given by the General Assembly to the worker's compensation system, that leaving deserving claimants without relief is not an intended or desired result.

Unless or until the Act is amended to include worker's compensation carriers that cannot be identified, DIGA is statutorily barred from compensating in the absence of an order of insolvency. Other jurisdictions, such as Maryland and Pennsylvania, recognizing the public interest in prompt and certain compensation to employees, have established an Uninsured Employer's Fund. Perhaps Delaware should consider establishing such a fund or instituting some other means for filling the apparently unintended compensation gap.

CONCLUSION

THEREFORE, having found that the worker's compensation carrier for Defendant Pickering's deceased (Paul S. Logan, Sr.) cannot be identified, and thus cannot be deemed an "insolvent insurer" triggering coverage under the Insurance Guaranty Association Act, DIGA's Motion for Summary Judgment is hereby **GRANTED**.

Defendant Chromalloy American Corporation's unopposed request that it be dismissed with prejudice is hereby **GRANTED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston