

COMMONWEALTH OF PENNSYLVANIA

DDP ROOFING SERVICES, INC. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
STATE WORKERS' INSURANCE FUND : DOCKET NO. 4098

OPINION

Now before the Board of Claims is the State Workers' Insurance Fund's ("SWIF") motion for summary judgment. By its claim, DDP Services, Inc. ("DDP"), a Pennsylvania Corporation, seeks a refund of a premium assessment paid to SWIF for workers' compensation coverage in effect from the period of September 1, 2009 to August 10, 2010. In its motion for summary judgment, SWIF asserts that the Board lacks jurisdiction over the claim due to DDP's failure to exhaust its administrative remedies pursuant to Section 1712.1(b) of the Procurement Code.

Legal Standard

The Board may grant summary judgment for the relief requested only when it finds no genuine issue of material fact as to a necessary element of the cause of action. Pa.R.C.P. 1035.2. An issue is material "if its resolution could affect the outcome of the case under the governing law." Farabaugh v. Pennsylvania Tpk. Comm'n, 911 A.2d 1264, 1267 (Pa. 2006). Summary judgement is proper when the pleadings, depositions, answers to interrogatories, admissions of record and affidavits on file support the conclusion that no issue of material fact remains, and the moving party is entitled to judgment as a matter of law. Kapres v. Heller, 640 A.2d 888, 890 (Pa. 1994). In deciding a motion for summary judgment, the Board must find that the case is clear and free from doubt when viewing the record in the light most favorable to the non-moving party.

DeWeese v. Weaver, 880 A.2d 54, 59 (Pa. Cmwlt. 2005). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Pennsylvania Public Utility Com. Bar Asso. v. Thornburgh, 434 A.2d 1327, 1329-1330 (Pa. Cmwlt. 1981). Only when there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law will summary judgment be granted. Skipworth by Williams v. Lead Indus. Ass'n, 690 A.2d 169, 171 (Pa. 1997).

Background

The facts, taken in the light most favorable to DDP, are as follows. DDP held a SWIF workers' compensation policy for several years, including the period covering September 1, 2009 to August 10, 2010. During this period of September 1, 2009 to August 10, 2010, DDP was also insured by private carriers for workers' compensation liabilities for employees working and/or residing elsewhere than in Pennsylvania pursuant to other states' workers' compensation laws. Despite the private policies for these other states, employees working in those other states during the September 1, 2009 to August 10, 2010 period filed claims under the Pennsylvania Workers' Compensation Act, which were paid by SWIF.

In late 2010, SWIF determined by audit that DDP owed an additional premium assessment for the September 1, 2009 to August 10, 2010 period. DDP did not pay this premium assessment and, by that time, had obtained alternate workers' compensation coverage from a private insurer for future periods. DDP did not have workers' compensation coverage through SWIF after August 10, 2010 until, as detailed below, it applied for a new policy in 2013.

When DDP sought a new SWIF workers' compensation policy in August of 2013, SWIF denied the application. SWIF stated at the time that it would not issue a new policy unless DDP

paid the outstanding premium assessment of \$133,836.00 for the period of September 1, 2009 to August 10, 2010. SWIF did so despite the fact it had communicated to DDP by letter dated July 19, 2013 that the old premium assessment amount demanded had been “written off” as a “bad debt” and that DDP’s balance with SWIF was zero. However, a payment agreement was ultimately reached and, on August 21, 2013, SWIF sent a letter containing a payment plan to DDP. DDP ultimately paid the full premium assessment for the September 1, 2009 to August 10, 2010 period in accordance with the payment plan and received the 2013 workers’ compensation policy it sought.

Relative to its payment of the premium assessment for September 1, 2009 to August 10, 2010, DDP has admitted that it did not submit to SWIF any administrative claim for a refund of moneys paid. (DDP’s Response to Respondent’s Request for Admissions dated July 26, 2016, First Exhibit to Motion for Summary Judgment). However, on January 7, 2014, DDP filed suit against SWIF in the Delaware County Court of Common Pleas seeking repayment of this premium assessment. After SWIF filed preliminary objections to the jurisdiction of the Delaware County Court of Common Pleas (and asserted that the Board held jurisdiction), the parties filed a stipulation on March 20, 2014, agreeing to a transfer of venue to the Board. The Delaware County Court of Common Pleas transferred the case to this Board by Order of April 30, 2014.

A restated claim was filed with this Board on June 9, 2014, making the same averments as the suit in the Delaware County Court of Common Pleas and asserting causes of action for breach of contract and unjust enrichment. On June 23, 2014, SWIF filed an answer with new matter, to which DDP filed a response.

Now, some two years later, after the conduct of substantial discovery, SWIF has filed this motion for summary judgment asserting that the Board lacks jurisdiction.¹ It does so now on the basis that DDP has waived jurisdiction by failing to file an administrative claim with the contracting officer for SWIF pursuant to Section 1712.1(b) of the Procurement Code. See 62 Pa.C.S. § 1712.1(b).

To support its contention, SWIF asserts that DDP's claim arose on the date that SWIF issued its payment plan letter (August 21, 2013) and that DDP, in order to preserve its rights, was required to file an administrative claim with SWIF by February 21, 2013. SWIF further notes that DDP has admitted that it did not make such a filing. For this, SWIF relies upon admissions made by DDP in a response to SWIF's request for admissions. These are as follows:

9. Relative to the six 2013 payments totaling \$133,836.00, DDP did not submit to SWIF, pursuant to 62 Pa.C.S. § 1712.1(b), any administrative claim for a refund in full or in part, or any document in support of such refund, at any time before the January, 2014 filing of its Complaint in the Court of Common Pleas of Delaware County, that is marked Document 4.

Response: Admitted.

10. Relative to the six 2013 payments totaling \$133,836.00, Claimant did not submit to SWIF, pursuant to 62 Pa.C.S. § 1712.1(b) any administrative claim for a refund in full or in part, or any document in support of such refund, at any time after its January, 2014 filing of its Complaint in the Court of Common Pleas of Delaware County, that is marked Document 4.

Response: Admitted

(DDP's Response to Respondent's Request for Admissions dated July 26, 2016, First Exhibit to Motion for Summary Judgment).

DDP responds that it provided SWIF with timely notice of its position that the premium assessment was not owed, and asserts that the suit filed with the Delaware County Court of

¹ At no point prior to its motion for summary judgment did SWIF object to or raise the defense of lack of jurisdiction.

Common Pleas tolled the limitations period. It also argues that SWIF waived its objection that the Board lacks jurisdiction by “stipulating” to the Board’s jurisdiction and through SWIF’s failure to raise the issue of timeliness in preliminary objections or new matter.

Discussion

It is axiomatic that in order to invoke the jurisdiction of the Board in a contract claim against a Commonwealth agency, a claimant must first comply with the requirement of Section 1712.1(b) to exhaust its administrative remedies by filing an administrative claim with that agency. 62 Pa.C.S. §1724. Section 1724(a)(1) provides as follows:

Jurisdiction

- (a) Exclusive Jurisdiction.—The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:
 - (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies).
 - ...
- (c) Limitations.—The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1.

62 Pa.C.S. § 1724

Section 1712.1 of the Procurement Code provides, in relevant part, as follows:

§ 1712.1 Contract controversies

- (d) Filing of claim.—A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.

(e) Limitations.—The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1....

62 Pa.C.S. § 1712.1(b) and (c).

Exhausting administrative remedies under Section 1712.1(b) before bringing a claim to the Board is not optional. The Commonwealth Court has highlighted the mandatory nature of Section 1712.1(b)'s requirement as follows:

As the Section 1712.1(b) provides, "A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum." [] Before a contractor can bring a claim, we have held that "Section 1712.1(b) mandates that an aggrieved contractor must initially file a claim with the Commonwealth contracting officer within six months of the date of accrual."

Buchart Horn, Inc. v. DOT, 1 A.3d 960, 964 (Pa. Cmwlth. 2010) (quoting Dep't of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 981 (Pa. Cmwlth. 2007) (emphasis added in Buchart Horn)).

While some inquiries respecting compliance with Section 1712.1(b) might involve the factual question of when a claim accrued and/or whether a claimant filed its administrative claim in a timely fashion, that does not appear to be an issue in this case.² Instead the Board is faced with a claimant who has, per its own admission, not filed an administrative claim with the agency at all. See DDP's Response to Respondent's Request for Admissions dated July 26, 2016, First Exhibit to Motion for Summary Judgment.³

² We believe DDP's claim respecting the additional premium amount required by SWIF for the September 1, 2009 to August 10, 2010 period accrued upon SWIF's demand for the premium assessment payment following its audit. Given the limited factual scenario presented this would appear to be sometime prior to the August 21, 2013 payment plan letter. (DDP's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment at Ex. F; Statement of Claim at ¶ 15, and Ex. K; SWIF's Answer with New Matter at ¶¶ 15 and 40; DDP's Reply to New Matter at ¶ 40). See Buchart Horn, 1 A.3d at 964.

³ Pa.R.C.P. 4014(d) provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission". No such motion has been made here.

To the extent that DDP's brief opposing SWIF's motion for summary judgment can be read to argue generally that SWIF was on notice from various communications of DDP's objections to the premium assessment and that the filing of its lawsuit in the Delaware County Court of Common Pleas was somehow an adequate substitute for the requisite administrative claim, we find this argument unpersuasive. Section 1712.1(b) requires the filing of an administrative claim with the contracting officer of the agency. Buchart Horn, 1 A.3d at 965. Although exactly who the "contracting officer" is within an agency may not always be precisely delineated (as appears to be the case here), it is clear that the administrative claim must be filed with the agency, not with a court or the Board. Id. Given the mandatory language of Section 1712.1(b), the Board cannot find the claim filed with the Delaware County Court of Common Pleas to be an acceptable substitute for the administrative claim required by Section 1712.1(b). Buchart Horn, 1 A.3d at 964; Dep't of Labor & Indus., Bureau of Workforce Dev. P'ship v. Dean Inst. of Tech., Inc., 88 A.3d 317, 325-326 (Pa. Cmwlth. 2014).

DDP assertions that its filing in the Delaware County Court of Common Pleas tolled the statute of limitations for filing with the Board and/or that SWIF has waived the bar of the statute of limitations or is estopped from asserting same are misplaced. While there is precedent for the idea that the limitations period contained in Section 1712.1(b) may be waived by conduct of the agency, that is not the issue here. Where a claimant fails entirely to meet the requirement to file an administrative claim with the agency, the statute of limitations and/or the tolling of same is moot. Moreover, the failure to exhaust the requisite administrative remedy goes to the Board's subject matter jurisdiction, which cannot be waived by the parties. Buchart Horn 1 A.3d at 964-65; Clairton Slag, Inc. v. Dep't of Gen. Servs., 2 A.3d 765, 781 (Pa. Cmwlth. 2010).

In light of the foregoing, judgment in favor of SWIF must be granted.

ORDER

AND NOW, this 19th day of October, 2016, upon consideration of the SWIF's motion for summary judgment, DDP's response, and briefing by the parties, it is hereby **ORDERED** and **DECREED** that SWIF's motion is **GRANTED**. Judgment is entered in favor of Respondent, State Workers' Insurance Fund and against the Claimant, DDP Services, Inc.

BOARD OF CLAIMS

ORDER SIGNED

Jeffrey F. Smith
Chief Administrative Judge