



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



www.mdjwlaw.com

A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101

111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401

900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

March 15, 2010

FAILURE TO MEET BURDEN OF PROOF AND IMPROPER JURY ARGUMENT RESULTS IN REVERSAL OF \$116,726 UNDERINSURED MOTORISTS (UIM) JURY AWARD

Last Friday, the Eastland Court of Appeals reviewed a jury award of \$116,726 against an insurer whose policy provided \$20,000 in UIM policy limits, and reversed the judgment based on the insured's failure to meet her burden to establish coverage under the policy, insufficient evidence of damages and improper jury argument. In *Mid-Century Insurance Company of Texas v. McClain*, 2010 WL 851407 (Tex.App.-Eastland, March 12, 2010), the insured sued to recover underinsured motorist benefits and also asserted bad faith causes of action. The insured had recovered \$20,100 from the other driver's insurer, \$2,500 in PIP benefits, and Mid-Century had offered \$1,500 of its \$20,000 UIM policy limit to settle the underinsured motorist claim. The bad faith causes of action were severed and abated and the jury awarded \$116,726 after the trial of the contract claims. The court entered judgment against Mid-Century for the full amount of the judgment despite the \$20,000 UIM policy limit. This appeal followed.

The appellate court observed that in the contract action, the insured had the burden of proof to introduce her policy and establish that she had underinsured motorist coverage. And, that she had the burden to provide evidence of her settlement with the underinsured driver and his policy limits. Nevertheless, Mid-Century did not contest coverage and provided evidence that the UIM policy limits were \$20,000. But because the insured failed to meet her burden of proof to submit sufficient evidence in support of her past and future lost earnings claims, and because her counsel repeatedly argued and injected bad faith type allegations throughout the contract trial despite sustained objections, the court reversed and remanded the case for a new trial. The court also noted that on retrial, any judgment against Mid-Century should not exceed \$20,000.

FORT WORTH JURY AWARDS \$58 MILLION IN DAMAGES AGAINST BUILDER AND HOME WARRANTY COMPANY

Recently, in *Cull v. Perry Homes, et al.*, a Tarrant County jury awarded more than \$58 million in damages to a couple from Mansfield, Texas who sued Perry Homes and a home warranty company over structural and drainage problems in the home they bought from Perry Homes in 1996. The award included \$44 million in punitive damages. In 2002, an arbitrator awarded the Culls \$800,000, but Perry Homes and Warranty Underwriters appealed that award to the Texas Supreme Court. In a 2008 5-4 decision, *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008), the high court vacated the arbitration award and sent the case back to the trial court. And on March 1, 2010, the jury came back with the \$58 million award. Editor's Note: We will monitor this case and report on any significant developments.

WACO COURT OF APPEALS AFFIRMS DECISION THAT STROKE IS A COMPENSABLE INJURY

Recently, in *Fort Worth Independent School District v. Siefert*, 2010 WL 730362 (Tex.App.-Waco, March 3, 2010), the Waco Court of Appeals affirmed the trial court's holding that a stroke suffered by a school employee was a compensable injury pursuant to the Texas Workers' Compensation Act. Carol Seifert was a physical education teacher in the school district when she suffered a compensable knee injury. Treatment required four knee surgeries. During the fourth surgery, Seifert suffered a severe stroke which left her permanently disabled. After an administrative hearing, the appeals officer found that the stroke was not a compensable injury and the appeals panel affirmed that finding. Siefert appealed the decision to the district court where a jury answered "yes" to the question of whether the compensable knee injury extended to and included the stroke. The district court entered judgment in accordance with that finding.

The school district appealed the judgment, arguing that because Siefert suffered from a pre-existing condition, her stroke was not connected or was insufficiently connected to the surgery to be a compensable injury. The Court found that the District inadequately briefed this issue, because it provided no argument or authority regarding the legal standard required to establish causation. Additionally, the District argued that the trial court erred by refusing to admit unredacted copies of the administrative decision and order. Siefert had objected to the admission of these documents based on hearsay, lack of relevance, and prejudice. The trial court reviewed the documents and admitted redacted versions without setting forth the basis upon which it sustained Siefert's objections. The Court held that, based on the content of the redacted portion of the exhibits, even assuming that the exhibits were admissible pursuant to the public record exception to the hearsay rule, the district court could have reasonably excluded those portions of the exhibits due to irrelevance and prejudice. The Court further pointed out that the District made no effort to demonstrate the relevance or probative value of the redacted portions of the exhibits. Accordingly, the Court affirmed the trial court's finding that the stroke was a compensable injury.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
If you would like to add additional recipients or would like to unsubscribe, please reply to this e-mail with your request
For past copies of the Newsbrief go to www.mdjwlaw.com and click on our Texas Insurance News page.