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TEXAS INSURANCE LAW NEWSBRIEF



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THIRD COURT OF APPEALS RULES THAT WORKER'S COMPENSATION CARRIER CAN BE A SUBCLAIMANT UNDER TEXAS LABOR CODE

In December 2002, Emmit Hines sustained a compensable injury during the course and scope of his employment with CRES Management. For almost two, years American Alternative Insurance Corporation ("AAIC") paid benefits for the worker. During those two years, Service Lloyds was the insurance carrier responsible to compensate the worker for his injury. AAIC sent a written request to Service Lloyds requesting reimbursement of the benefits erroneously paid by AAIC, but Service Lloyds declined the invitation for reimbursement submitted by AAIC. AAIC ultimately requested dispute resolution with the Texas Department of Insurance, Division of Workers' Compensation (the "Division"). The Division ordered Service Lloyds to reimburse AAIC for benefits paid while Service Lloyds was the liable carrier. The district court affirmed the Division's decision, and the Third Court of Appeals affirmed and held that a worker's compensation carrier can be a subclaimant under Texas Labor Code section 409.009, and that the Division has jurisdiction to order the reimbursement regardless of the existence of any dispute regarding the amount of benefits to which the injured employee is entitled. *See Serv. Lloyds Ins. Co. v. Am. Alternative Ins. Corp.*, No. 03-08-00766-CV, 2010 WL 668877 (Tex. App.—Austin Feb. 25, 2010).

STATUTE OF LIMITATIONS FOR NEGLIGENCE ACTION NOT TOLLED BY DEFENDANT'S TRAVELING IN AND OUT OF THE STATE FOR A PERIOD TOTALING MORE THAN FOURTEEN DAYS

In *Zavadil v. Safeco Insurance Company of Illinois*, No. 14-09-00568-CV, 2010 WL 606159 (Tex. App.—Houston [14th Dist.] Feb. 23, 2010), Safeco Insurance Company of Illinois ("Safeco") filed a negligence suit against a driver involved in a motor vehicle accident with one of their insureds. The driver filed a motion for summary judgment arguing that the suit is time-barred under the two-year statute of limitations applicable to negligence actions. Safeco filed a cross motion for partial summary judgment, relying on the driver's stipulation that she traveled outside the State of Texas on various occasions during the two-year period after the accident, and that the time she spent outside of the state totaled at least fourteen days. Safeco relied on Section 16.063 of the Texas Civil Practice and Remedy Code tolled the limitations period for a total of fourteen days, and the suit, filed two years and thirteen days after the accident was timely. The trial court granted Safeco's motion for summary judgment and denied the driver's. The driver appealed.

The Court, relying on *Kerlin v. Saucedo*, 263 S.W. 3d 920 (Tex. 2008), and *Ashley v. Hawkins*, 293 S.W. 3d 175 (Tex. 2009), reversed the decision of the trial court and dismissed Safeco's suit with prejudice. The Court reasoned that the driver had never ceased to be a Texas resident, since the cause of action

accrued, and her brief intermittent excursions outside of the state boundaries did not affect the ability of state courts to exercise personal jurisdiction over the driver; therefore, the driver had not been “absent” from Texas for purposes of 16.063; therefore, section 16.063 did not toll the limitations period.

NORTHERN DISTRICT OF TEXAS UPHOLDS PREVIOUS RULING IN *MID-CONTINENT II*

The Court in *Mid-Continent Casualty v. Eland Energy*, No. 3:06-CV-1578-D, 2010 WL 610713 (N.D. Tex. Feb. 22, 2010), allowed supplemental briefing by the parties, because it determined that its initial opinion relied on a waiver analysis that had not been previously briefed. After considering the supplemental briefing, the court adhered to previous rulings in favor of Mid-Continent. See *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, Civil Action Nos. 3:06-CV-1576-D, 3:06-CV-1578-D, 2009 W.L. 3074618, at *1-*3 (N.D. Tex. March 30, 2009) and *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, Civil Action No. 3:06-CV-1576-D (N.D. Tex October 22, 2009).

In *Mid-Continent II*, the court held:

Mid-Continent could waive the conditions precedent intended to benefit it, tender the limits of the Umbrella Policy to Sundown, and terminate further obligations to Sundown, including funding the *Blanchard* settlement. Because Mid-Continent could do so, a reasonable jury could not find it breached the Umbrella Policy. Mid-Continent is entitled to have summary judgment dismissing Sundown’s breach of contract counterclaim based on Mid-Continent’s failure to participate in and fund the *Blanchard* settlement.

The Court ruled that summary judgment was proper based on the undisputed record that showed Mid-Continent, by its conduct, had waived its rights to require the insured to meet conditions precedent found in the policy. The Court noted that it was not improperly construing the policy against the insured, instead, it based its ruling on Mid-Continent’s conduct. The Court reiterated that Mid-Continent’s waiver did not extend beyond Hurricane Katrina claims to other claims. The Court further stressed that its ruling in *Mid-Continent II* only applies to Mid-Continent’s refusal to participate in or fund the settlement of the *Blanchard* lawsuit; and further, the ruling did not address whether a reasonable jury would find that Mid-Continent violated Texas Insurance Code Section 541.060(a)(2)(A) by failing to effectuate a fair settlement in the *Blanchard* case.

[Editor's Note: For the past 4 years, our firm has had the privilege of representing Mid-Continent in this Hurricane Katrina litigation where it was sued for many millions of dollars in alleged contractual and extra-contractual damages. Congratulations to Chris Martin and Robert Dees who successfully implemented the strategies to have all of the claims dismissed summarily by the court through a series of dispositive motions following discovery. And, we extend our special thanks to the senior executives of Mid-Continent who had the courage and perseverance to both stand on their right to pay covered claims when submitted by its insured and their right to fight when falsely accused of wrongdoing.]

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