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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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FEDERAL DISTRICT COURT DENIES MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF EVIDENCE TO SHOW INTENT TO DECEIVE

In *Hinna v. Blue Cross Blue Shield of Texas*, 2007 WL 3086025 (N.D. Tex. October 22, 2007), a federal court denied Defendant's Motion for Summary Judgment because it failed to produce sufficient evidence to establish, as a matter of law, that Plaintiff made material misrepresentations in her application for insurance. Plaintiff applied for individual health care coverage with Defendant. On her application, Plaintiff answered "NO" to several questions asking about preexisting health issues or prior examinations. During the policy period Defendant received several claims from health care providers totaling \$28,061.26 emanating from a condition involving Plaintiff's liver.

In the course of evaluating the claims related to Plaintiff's liver condition, Defendant obtained Plaintiff's medical records which revealed, prior to applying for insurance coverage with Defendant, Plaintiff suffered from severe headaches. To treat her headaches Plaintiff had been to the emergency room, a neurologist, and had taken several different medications to control migraines. Thereafter, Defendant informed Plaintiff that it was rescinding the policy on the ground that Plaintiff had failed to disclose a history of migraine headaches on her application for coverage. Based on its underwriting guidelines, Defendant asserted that it would have declined Plaintiff's application for insurance, had it known of Plaintiff's history. The record, however, presented evidence that the severity of Plaintiff's history of headaches did not rise to the level where Defendant would have flatly refused to issue a policy to Plaintiff.

Under Texas law, an insured's misrepresentation is an affirmative defense that can allow an insurer to avoid liability on a policy. The two primary issues in this case dealt with Defendant's failure to prove two of the five elements for misrepresentation—namely (1) the intent to deceive on the part of the insured in making a representation and (2) the materiality of the representation. Under the limited circumstances establishing intent to deceive, the court concluded Defendant did not adduce any evidence that Plaintiff's misrepresentations were made with the intent to induce action. Instead, the record presented a genuine issue of material fact precluding summary judgment. On the other hand, the court determined that the summary judgment record conclusively established that Plaintiff's misrepresentations were material to the risk because Defendant assumed the risk associated with Plaintiff's history of migraines when it issued the policy.

APPELLATE COURT REVERSES DECISION TO MODIFY IMPAIRMENT RATING AFTER STATUTORY MMI WAS REACHED

Last Thursday an appellate court concluded that an injured employee's impairment rating ("IR") could not be changed unless substantial change occurred *before* his statutory maximum medical improvement ("MMI") date. In *Centre Ins. Co. v. Pollitt*, 2007 WL 3105273 (Tex. App.—Eastland October 25, 2007), Pollitt was injured in the course and scope of his employment and Centre accepted his claim and began paying benefits. Pollitt reached statutory MMI (expiration of 104 weeks), but subsequently underwent three spinal surgeries.

Pollitt then sought administrative relief to reevaluate his IR. After exhausting his administrative remedies, Pollitt filed suit and requested the trial court reevaluate his IR. The trial court held that Pollitt's IR should be increased due to his spinal surgeries. On appeal, Centre successfully argued that once statutory MMI is reached the trial court lacked authority to find substantial change of condition or to increase Pollitt's IR. The Appellate court reversed the trial court for two reasons: (1) because employees are required to exhaust their administrative remedies before seeking judicial review, the trial court has no greater authority than the Texas Department of Insurance; and (2) the two-year deadline for reaching MMI is mandatory.

ORDER MOVES GALVESTON FEDERAL JUDGE TO HOUSTON AND SHUFFLES CASE ASSIGNMENTS

Last week, following an investigation, an Order issued by an executive session of judges from the United States Southern District of Texas called for U.S. District Judge Samuel Kent to move from Galveston, where he was the only federal district judge.

The Order gave no explanation for the decision. Judge Kent was reprimanded recently, however, by the governing Judicial Council after a four-month investigation into allegations that Kent had improperly touched a court employee. The recent Order also redistributes Kent's Galveston cases among 11 other Houston judges. According to the Order, prospectively Kent will preside over 8.5 percent of Galveston cases. Judge Kent's current leave of absence will continue until January 2, 2008.

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.
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