



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **TEXAS SUPREME COURT HOLDS CPRC SECTION 33.004 DOES NOT REVIVE CLAIMS OTHERWISE BARRED BY A STATUTE OF REPOSE**

Last Friday the Texas Supreme Court held CPRC section 33.004(e) did not revive a claim otherwise barred by a statute of repose, as distinguished from a statute of limitations. In *Galbraith Engineering Consultants, Inc. v. Pochuca*, the Pochucas purchased a home that developed problems related to the French drain system during the eight years after it was constructed. The Pochucas sued the builder for negligence and DTPA violations. In response, the builder answered and designated Galbraith (and others) as responsible third parties for purposes of proportionate responsibility under chapter 33 of the CPRC.

After the court granted the motion to designate, the Pochucas amended their petition to join the designated parties as defendants. Galbraith moved for summary judgment under the applicable statute of repose, contesting joinder because more than ten years had elapsed since the completion of the improvement. The trial court granted the motion, but the court of appeals reversed the summary judgment and remanded the case against Galbraith for further proceedings.

The primary issue was whether CPRC 16.008 (statute of repose) precluded a claim (otherwise barred by limitations) from revival through application of CPRC 33.004(e). Galbraith argued section 33.004(e) only revived claims “barred by limitations.” After a general overview of the statute of repose and its application, the court analyzed the Legislative intent as it related to the term “limitations” in section 33.004(e). Ultimately, the court concluded a narrow construction of the term “limitations” was necessary to avoid defeating the recognized purpose for statutes of repose, that is, the establishment of a definite end to the potential liability, unaffected by rules of discovery or accrual. The judgment of the court of appeals was reversed and judgment was rendered to dismiss the Pochucas’ claim against Galbraith because it was barred by the applicable ten-year statute of repose.

### **APPELLATE COURT VACATES TRIAL COURT JUDGMENT AND DISMISSES CLAIMS WITH PREJUDICE AFTER TRIAL VERDICT AWARD OF OVER \$4,000,000 PLUS ATTORNEYS’ FEES**

Last Thursday a Houston appellate court vacated a trial court judgment and dismissed Plaintiff’s claims with prejudice after a trial verdict was awarded in the amount of \$4,218,799 plus \$114,000 in attorney fees. In *Cunningham Lindsey Claims Management, Inc. v. Snyder* (2009 WL 1795022 Tex. App. — Houston [14<sup>th</sup> Dist.] June 25, 2009), Snyder, 57, a psychiatric nurse at Christus St. Joseph Hospital in Houston, was assaulted on the job by a disturbed patient. Snyder’s employer was self-insured for workers’ compensation, but all claim decisions were made by its claims-adjusting company. Two months after the incident, Snyder’s treating surgeon recommended a cervical surgery. In response, the adjuster filed a denial with the Texas Workers’ Compensation Commission (TWCC, now Texas Department of

Insurance, Division of Workers' Compensation Insurance). The adjuster contended the denial was simply an "extent of injury" denial permitted under TWCC rules; on the other hand, Snyder alleged that the denial was both untimely and an improper denial of a neck injury. Snyder alleged the denial was based solely upon "an adjuster's diagnosis" of the MRI, and that each doctor (including IME and designated doctors) confirmed an injury to his neck, making the denial allegedly unreasonable and in bad-faith. The parties pursued relief through a Benefit Review Conference and a subsequent Contested Case Hearing. After the CCH, an administrative decision was issued by TWCC finding Snyder's claim was compensable and extended to and included aggravation of the cervical spine. The hearing officer's decision was upheld on appeal.

Five months after Snyder had cervical surgery, he sued his employer, Cunningham Lindsey and its adjusters alleging violations of Article 21.21 of the Texas Insurance Code and the DTPA. The jury returned a verdict in favor of Snyder on October 26, 2006 and this appeal was filed in May 2007. The dispositive question on appeal was whether the trial court had jurisdiction to award damages to a workers' compensation claimant based upon exclusive jurisdiction principles and Snyder's requirement to exhaust his administrative remedies.

On appeal Snyder argued his claims arose solely from a dispute about whether he sustained a compensable injury. According to Snyder, he could not have instituted medical dispute resolution until the compensability issue was resolved. Although Snyder *characterized* his injuries as the result of a wrongful compensability dispute for which he had exhausted his administrative remedies, the Court found his claims were *actually* dependent on the determination that he was entitled to preauthorization of the surgery in December 2002. The appellate court incorporated a comprehensive analysis of the two types of dispute resolution offered to injured workers under the Workers' Compensation Act. The court then evaluated the jurisdictional evidence and concluded Snyder had not exhausted his administrative remedies prior to filing suit.

Here, Snyder waived his right to contest or dispute the determination that surgery was not medically necessary in 2002. Because he waived this right, he was not permitted to litigate it in district court; so the court held Snyder's claim for damages for delayed surgery "is made no more viable simply by restating it under the other legal theories" of bad faith or statutory violations.

**Editor's note:** This decision has potential wide-spread implications on the state-wide litigation spree in the area of workers' compensation bad faith lawsuits. In 2006, during the early wave of workers' compensation bad-faith litigation, the *Snyder* verdict sent ripple effects through the Texas legal community in the insurance bad-faith context. The \$4 million dollar verdict in a conservative venue was a startling result given the apparent mild damage model presented at trial. *See MDJW Special Report on Texas Workers' Compensation Bad-Faith Litigation* (September 7, 2007). Given this new decision, it is imperative that carriers require injured workers to pursue both compensability/extent of injury claims as well as medical dispute resolution prior to filing bad-faith lawsuits. Another related issue involves the filing of a bad-faith lawsuit within limitations, but prior to exhaustion of the dispute resolution process. MDJW will continue to monitor this case and other issues relevant to bad-faith litigation in the workers' compensation context. For additional information on the *Snyder* decision or other workers compensation bad-faith issues, please contact any lawyer on our MDJW Insurance Team.

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