The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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APPELLATE COURT HOLDS EXPERT MEDICAL TESTIMONY NECESSARY TO PROVE CAUSATION FOR EXTENT OF INJURY ISSUE

Last week the San Antonio Court of Appeals concluded an injured employee's testimony was insufficient to prove causation for an extent of injury claim and reversed and rendered the underlying decision. In *City of Laredo v. Garza*, 2009 WL 1331578 (Tex. App. — San Antonio May 13, 2009), Garza was injured on the job while placing carpet into a trash dumpster. It was undisputed that he broke his knee cap and injured his ankle in the incident. But the parties disputed whether the incident also caused L4-L5 and L5-S1 disc herniations, L5-S1 radiculopathy, and complex regional pain syndrome. At the administrative level, it was determined that Garza's injuries included his knee and ankle, but not the other injuries. Garza appealed the decision to the district court in Webb County and after a bench trial (including testimony from four witnesses and medical records admitted without objection), the court found Garza's injuries included the L4-L5 and L5-S1 disc herniations, L5-S1 radiculopathy, and complex regional pain syndrome.

On appeal the court reviewed the testimony provided at trial along with the medical records and found that Garza first complained about his back four weeks after the accident. And, Garza's own doctor testified an injured back will manifest symptoms within days of an injury. The court then focused on Texas law related to lay person testimony involving issues of causation and medical treatment. The court explained lay testimony is "adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between an event and the condition." Thus, generally, "lay testimony establishing a sequence of events [that] provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation." (citations omitted).

Unlike other cases finding lay testimony sufficient, this case presented an attenuation issue since Garza waited to report his back injury. Given (1) the lack of temporal proximity between the accident and Garza's report of back pain; (2) the medical expert's testimony that someone with disc herniations, even if that pain is masked by another injury, should feel intense pain, at the most, a week after the incident; (3) the expert's testimony that Garza's back injuries could be caused by something other than the accident; and (4) the fact that the medical records themselves contain conflicting opinions with regard to whether Garza suffered from disc bulges or disc herniations, the court concluded the evidence failed to establish such a strong, logically traceable connection between Garza's on-the-job accident and his injuries. Accordingly, the district court's finding that the back injuries were related to the on the job incident was reversed.

POLICY LIMITS TENDER ENDS INSURER'S OBLIGATION EVEN IF INSURED OBJECTS TO CLAIM PAYMENT AND LAWSUITS ARE STILL PENDING

Recently a federal district court in the Northern District of Texas affirmed an insurer's right to pay a tendered claim to exhaust policy limits and, in turn, terminate the duty to defend. *Mid-Continent Cas. Co. v. Eland Energy Inc. and Sundown Energy, L.P.*, Cause No. 3:06-CV-1576D (March 30, 2009, slip opinion).

The insured's facility in Louisiana was damaged by Hurricane Katrina, causing crude oil to escape into flood waters. Following the storm, the insured was ordered to clean up the site. During clean up, Hurricane Rita struck and caused additional damage. In addition to the clean up costs, there were five lawsuits filed against the insured. The insured tendered its claim to Mid-Continent who provided CGL coverage for the facility, including an oil and gas endorsement. Pursuant to a reservation of its rights, Mid-Continent accepted the defense of the lawsuits. Mid-Continent also monitored the insured's efforts to comply with the government mandated clean up.

When the insured's clean up and anticipated costs approached policy limits, Mid-Continent indemnified the insured for $1 million for the clean up costs. In doing so, Mid-Continent informed the insured that the payment exhausted the primary policy's limits and ended Mid-Continent's obligations under the primary policy. Similarly, when the insured's clean up costs approached the $5 million excess limits, Mid-Continent issued payment for the claim. Having exhausted its policies, Mid-Continent withdrew from the defense. The insured contended, however, that it informed Mid-Continent that it did not want indemnification for the clean up. It specifically informed Mid-Continent that it wanted to hold the claim "in abeyance" until its obligations on the pending lawsuits and potential future lawsuits was determined. The insured refused the payments and tendered the checks to the court.

The district court determined that Mid-Continent properly responded to its obligations under the policies, and the indemnity payments for clean up costs exhausted the applicable limits to the lawsuits arising from the same incident. And, the court also found no basis for the insured to instruct an insurer not to comply with its stated policy obligation by holding a claim in "abeyance."

Note: Martin, Disiere, Jefferson & Wisdom congratulates our client Mid-Continent Casualty Company and MDJ&W law partners Christopher Martin and Robert Dees in securing this significant decision.

APPELLATE COURT DETERMINES DEADLINE TO DISPUTE OCCUPATIONAL DISEASE

Recently, the San Antonio court of appeals considered the trigger for a workers' compensation carrier to dispute a claim for an alleged occupational disease. *Fire and Cas. Ins. Co. of Connecticut v. Miranda*, 2009 WL 1227822 (Tex. App. — San Antonio May 6, 2009). The employee was diagnosed with Hepatitis C on February 22, 2002 and alleged that he contracted the disease by way of either a puncture wound to his finger on June 26, 2000 or a June 25, 2001 scratch to his arm. The employee reported the second incident, but denied medical treatment. The employer, in turn, only reported the scratch to Fire & Casualty and no benefits were issued because none were owed. On March 4, 2002, the employer notified Fire & Casualty of Miranda's Hepatitis C diagnosis and indicated Miranda believed it was related to a work-place injury. After conducting its own investigation, Fire & Casualty disputed Miranda's claim on March 11, 2002, seven days after the diagnosis was reported.

The administrative hearing officer determined the employee did not contract an occupational disease in the course and scope of his employment, but Fire & Casualty had waived its right to contest compensability by not timely filing its dispute — within seven days of the notice of injury as opposed to the Hepatitis C diagnosis date. The Appeals Panel affirmed the hearing officer's decision and Fire & Casualty filed suit in district court. At trial, Fire & Casualty argued it could not have waived its right to contest compensability because Miranda's Hepatitis C was not diagnosed until February 22, 2002; therefore, it could not have known about the alleged occupational injury within seven days of receiving the notice of the right forearm scratch. The trial court agreed with the TWCC Appeals Panel, and this appeal by Fire & Casualty followed.

The San Antonio Court of Appeals, citing the Labor Code, noted a distinction in types of "injury" for the purpose of determining "date of injury." The "date of injury" for a non-occupational or accidental injury is the date on which the injury actually occurred; while the "date of injury" "for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment." Although the hearings officer determined June 25, 2001 as the date of the alleged injury, it was the date on which Fire & Casualty was first notified that Miranda claimed compensation for an injury in the form of an occupational disease that triggered Fire & Casualty's obligation to contest compensability for that injury. Therefore, based on its timely denial after notice of the Hepatitis C claim, the court concluded Fire & Casualty did not waive its right to contest Miranda's claim for an occupational disease and reversed the underlying decision.

U.S. SUPREME COURT GRANTS REVIEW OF STATE EFFORTS TO PREVENT CLASS ACTIONS AGAINST INSURERS IN FEDERAL COURTS

Last Monday, the United States Supreme Court granted a petition for writ of certiorari in an appeal from the Second Circuit in *Shady Grove Orthopedic Assoc. v. Allstate Insurance Co.*, 2009 WL 329585 (U.S.). The appeal involves a New York statute that prevents class action claims against insurers in federal courts. This decision could have far-reaching effects as several other states beyond New York have enacted similar legislation.

DRI BAD FAITH AND EXTRA-CONTRACTUAL CLAIMS SYMPOSIUM

The DRI Insurance Law Committee is presenting a seminar on emerging bad faith litigation issues at the Seaport Hotel in Boston June 18-19, 2009. Some of the nation's leading bad faith trial lawyers will cover topics including the future of the "genuine dispute" defense; defending "institutional" bad faith claims; winning trial strategies in bad faith cases; avoiding "set up" claims; trial strategies in punitive damage insurance cases; effective mediation strategies; choice of law and forum selection considerations; managing relationship with excess carriers; and ethical obligations and quandaries in bad faith insurance cases. MDJW Partner Chris Martin will be speaking on trial strategy considerations in bad faith cases.

For more information, go to http://www.dri.org/open/SeminarDetail.aspx?eventCode=20090045