



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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DESPITE TEXAS ADMINISTRATIVE CODE PROVISION TO THE CONTRARY, DALLAS COURT RULES WORKERS COMPENSATION CARRIER WAIVED RIGHT TO CONTEST COMPENSABILITY OF EXTENT OF INJURIES

Last Thursday, the Dallas Court of Appeals ruled that a workers compensation carrier waived its right to contest the compensability of the extent of the claimed injuries when it failed to contest the issue pursuant to Texas Labor Code Section 409.021(c). *Zenith Ins. Co. v. Ayala*, 2009 WL 471279 (Tex.App.—Dallas February 26, 2009.) The carrier received its first notice of claim on March 1, 2006. The initial diagnosis was augmented on April 13, 2006 to include a diagnosis of lumbar radicular syndrome. The insurer did not dispute compensability of the Lumbar Condition until July 28, 2006 - 62 days after notice of the injury. The insurer argued that 28 Tex. Admin. Code § 124.3 operates to remove any waiver period in cases where the extent of any injury, whether existing or new, is at issue. The Texas Administrative Code provides that section 409.021 does not apply to disputes about the extent of an injury. In reaching its decision, the Dallas court relied on its previous ruling in *Sanders v. American Protection Ins. Co.*, 260 S.W.3d 682, 685 (Tex.App.— Dallas 2008, no pet.). In doing so, it acknowledge that the case it relied on in the *Sanders* case, *State Office of Risk Mgmt. v. Lawton*, 256 S.W.3d 436 (Tex.App.-Waco 2008, pet filed), is now before the Texas Supreme Court.

MANDAMUS GRANTED TO ALLOW CARRIER DISCOVERY OF INSURED'S "UNDERSTANDING OF COVERAGE" TO DEFEND BAD FAITH CLAIMS

Last Tuesday, Houston's Fourteenth Court of Appeals conditionally granted a writ of mandamus to compel a Harris Court district court to allow an insurer to conduct discovery regarding its insured's "understanding of the coverage" purchased as of the time it was purchased. *In re Liberty Mut. Ins. Co.*, 2009 WL 441897 (Tex.App.—Houston [14th Dist.] February 24, 2009, orig. proceeding.) Hurricane Katrina flooded Gulf Atlantic Operators ("GAO") asphalt refinery and terminals located in Chickasaw, Alabama. Its insurers denied GAO's claims in excess of \$5 million, applying a sub-limit applicable to damage in flood zones in the policy. GOA sued for breach of contract and various extra-contractual claims alleging the flood zone determination was inaccurate. GAO won a partial summary judgment on its breach of contract claims, in which the trial court initially determined that the \$5 million sub-limit did *not* apply to its claims as a matter of law.

In their efforts to defend the suit, the insurers issued discovery requests and third-party subpoenas seeking information concerning GAO's understanding of the policy's coverage and the \$5 million sub-limit. GAO sought a protective order from the trial court to prevent the insurers from pursuing the discovery. The trial court granted the requested relief, ruling that the insurers were prevented "from seeking

discovery to justify their denial of GAO's Katrina claims beyond the documents or information that were before Defendants at the time GAO's Katrina claims were denied.” The court of appeals avoided ruling on whether the insurers’ defense was limited by what they knew at the time of the denial, ruling instead that the insurers were entitled to present evidence to the jury of what a reasonable insurer would have done given all of the facts.

LEGISLATIVE UPDATE

The Texas Legislature is in regular session. Legislators have until Friday, March 13 (60th day) to file most bills. To date, more than 4,000 bills have been filed. In addition to the insurance bills that have previously been reported (*Newsbrief* December 8, 2008), bills have also been introduced to change the way courts operate in Texas:

SB 992 would reorganize the Texas judicial system:

District Courts: Repeals statutes that assign specific district court jurisdiction or requires that a district court give preference to specific types of cases (e.g., civil law, criminal law, or family law); Designates all district courts as courts of general jurisdiction. The local board of judges by local rules will designate the specified class of cases that courts will be assigned; Raises the minimum amount in controversy jurisdiction for district courts from \$250 to \$10,000.

Justice Courts: Repeals Chapter 28, Government Code, Small Claims Courts; Requires that the Texas Supreme Court promulgate new rules of civil procedure for small claims and eviction proceedings; Requires that new rules of civil procedure include provisions similar to those in Chapter 28 (e.g., judges may assist litigants in trial of cases; standards relaxed for pleadings and limited discovery); Allows judges of justice courts to adopt local rules, which may include transfer of civil and criminal cases within a county; and Provides that awards of a justice court cannot exceed \$10,000 exclusive of interest and costs.

Other: Transfers appointment authority of presiding judges from the Governor to the Chief Justice of the Texas Supreme Court; Creates the Judicial Committee for Additional Resources (JCAR), which upon request may make available additional resources to a specific case.

SB 445 would require the Texas Supreme Court to promulgate rules that would allow jurors to ask questions directed to a witness or to the court and take notes regarding the evidence during civil trials. SB 445 was heard and voted favorably from the Senate Jurisprudence Committee last Wednesday.

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