



The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF



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SPECIAL REPORT ON TEXAS WORKERS' COMPENSATION BAD-FAITH LITIGATION

Trends in Texas Workers' Compensation Bad-Faith Litigation

In September 2007 MDJW first reported a re-emerging trend of bad faith lawsuits filed in Texas against workers' compensation insurance providers. In 2008 alone — twenty years since the Texas Supreme decision in *Aranda v. Insurance Company of North America*, 748 S.W.2d 210 (Tex. 1988), which gave rise to the bad faith cause of action against an insurance company in Texas — there has been a proliferation of hundreds of bad faith workers compensation suits filed across the state making it the fastest growing category of bad faith suits in Texas by percentage this year. As predicted, this area of litigation will grow more intense due to the factors mentioned in our last special report are recognized by more and more plaintiff's lawyers.

This year there have been multiple court decisions and several recent news articles that address Texas workers' compensation bad faith litigation. It is apparent this litigation spree has caught the attention of media outlets and attorneys alike. From all the information analyzed thus far one particular correlation is worth noting: work place injuries have dropped off due to both safer work environments and more conscientious employers, yet more workers comp bad faith lawsuits are being filed. The primary explanation seems to be a more aggressive approach to identifying and filing lawsuits for *any* claim which is disputed, and whose benefits are delayed or denied — for *any* reason.

A quote displayed on the website of an aggressive law firm representing injured workers in bad faith lawsuits reads:

Delaying or denying a valid workers' compensation claim is an example of insurance bad faith — a failure on the part of the workers' comp insurance company to pay covered benefits Insurance companies must have a reasonable basis to deny a claim. They often don't.

This type of rhetoric is common among plaintiff's counsel and provides the basic philosophy for filing bad faith lawsuits in Texas. In light of the continual increase in bad faith workers' compensation suits in Texas, combined with a large favorable response to the initial report, we have drafted this Special Edition of our Newsbrief to update our readers on this trend and outline some recently recognized defenses which comp carriers should consider in defense of such extra-contractual claims in Texas. Questions about any of the issues addressed in this report can be directed to any of our firm's lawyers.

Morris and Ruttiger Decisions Revisited

The September 2007 *MDJW Special Edition Newsbrief* reported on the *Morris* and *Ruttiger* cases which were very large bad faith verdicts against the carriers and which first signaled the re-start of this type of bad faith case in Texas. Since then, both decisions have been appealed to the Houston Court of Appeals. Uniquely, these cases were filed by the same law firm, Doyle Raizner, against the same carrier, Texas Mutual Insurance Company (“TMI”). According to a recent news story, TMI has only lost two bad faith lawsuits in its seventeen year history. The same article reported the number of bad faith claims against TMI numbered about 15 compared to its 90,000 claims handled over the same time period. For the benefit of our readers a condensed summary of these two decisions and the appellate update for each is provided below.

Morris v. Texas Mut. Ins. Co., No. 2004-53230, in the 11th Judicial District court, Harris County, Texas. **\$745,000** jury verdict awarded. The jury awarded Morris \$50,000 for past mental anguish; \$25,000 for past damage to his credit reputation; \$50,000 for future damage to his credit reputation; and \$120,000 in attorneys fees. The jury further awarded Morris \$500,000 in additional damages because it found that TMI knowingly violated the insurance code, an amount that the trial judge reduced to \$250,000.

Facts: Morris injured his back in June, 2000 while working for the Justin Community Volunteer Fire Department. He reported his injuries to Texas Mutual Insurance Company for workers’ compensation benefits. Three years later, he needed emergency treatment for a ruptured disc that he argued was caused by the work-related injury. The insurer supposedly agreed to pay for the care. However, the carrier did not promptly make payment for his treatment.

Morris filed a lawsuit against the insurance company for violations of the Texas Insurance Code. He contended that the insurance company’s representative failed to offer a prompt, fair and equitable claim settlement, nor did she properly investigate his claims. Additionally, the company allegedly failed to give a reasonable explanation for why payment was delayed. The Plaintiff also argued that the Defendants’ conduct was a breach of the common law duty of good faith and fair dealing and violated the Deceptive Trade Practice Consumer Protection Act. Morris sought damages for the economic loss he experienced due to the insurance company’s failure to timely pay as well as exemplary damages for what he argued constituted legal malice.

Update: *Morris v. Texas Mut. Ins. Co.*, 2008 WL 4092921, Tex. App.-Hous. (14 Dist.), August 26, 2008 (NO. 14-06-00651-CV)(pet. not filed yet but is expected soon) the Houston Fourteenth Court of Appeals upheld a trial court judgment against Texas Mutual, including the award of extra-contractual damages, but reversed the damage award to the plaintiff for “loss of credit reputation.” A appeal to the Texas Supreme Court is expected any day.

Ruttiger v. Texas Mut. Ins. Co., No. 05-CV-0796, in the 122nd Judicial District Court, Galveston County, Texas. **\$385,000** jury verdict awarded.

Facts: On June 21, 2004, Ruttiger, 35, an electrician’s helper tripped at work while carrying a load of electrical equipment. He sought medical attention that day, and was diagnosed with a bilateral inguinal hernia, requiring surgery. The workers’ compensation carrier denied the claim, contending that Ruttiger was not hurt on the job, but was injured while playing softball the weekend before.

However, in January, 2005, Texas Mutual accepted the claim and began paying Ruttiger benefits. Ruttiger sued Texas Mutual Insurance Company and the adjuster for bad-faith and DTPA violations. According to Ruttiger, the Defendants did not obtain information from Ruttiger or any of his treating doctors before denying his claim. Rather, he said, they relied on the employer's belief that Ruttiger had hurt himself playing softball. Ruttiger also claimed that income benefits were delayed, which caused him to be evicted from his apartment and lose his car.

Update: *Texas Mut. Ins. Co. v. Ruttiger*, 265 S.W.3d 651 (Tex. App. — Houston [1st Dist.] (July 31, 2008) (slip op.)(pet. filed September 25, 2007), the Houston First Court of Appeals upheld a trial court judgment against Texas Mutual, including the award of extra-contractual damages, but reversed the damage for loss of credit reputation. An appeal to the Texas Supreme Court is pending...

Briefly, several lessons learned from these two decisions include:

- Courts are not prone to awarding damages for loss of credit reputation;
- Texas courts have thus far rejected the notion that the administrative comp process should "police" claims handling;
- Adjusters can expect to be named in bad faith lawsuits to attempt to defeat diversity jurisdiction;
- Rumors and other disputed facts about the claimant and their injury should be verified for accuracy during a claim; and
- Juries are willing to award damages for mental anguish, attorneys' fees, and alleged "knowing" bad faith conduct in these types of cases.

We will continue to monitor these two cases and others similar to them as they proceed through the Texas Supreme Court. It is unlikely though that the Court will provide clarification on these issues during the next twelve months.

Recent Decisions Related to Exhaustion of Administrative Remedies

Schwartz v. Gallagher Basset Services, Inc.

On October 23, 2008, the First Court of Appeals in Houston held a workers compensation claimant was required to exhaust her administrative remedies before suing her workers' compensation insurer for unreasonable delay or denial of benefits, even though insurer ultimately agreed on medical necessity and paid for foot surgery more than a year after injury. In *Schwartz v. Gallagher Basset Services, Inc.*, 2008 WL 4670516 (Tex. App.—Houston [1st Dist.] October 23, 2008), Plaintiff sued Gallagher for damages arising from Gallagher's alleged unreasonable delay and denial in authorizing her requested foot surgery necessitated by an on-the-job injury.

After a preauthorization request for surgery was denied Plaintiff underwent an independent Medical Examination which revealed she needed toe surgery as well as a possible procedure to treat a neuroma deformity on her foot. Gallagher approved the foot surgery, but the doctor who performed the surgery reported the delay in timely approval for the initial surgery had caused the injury to develop into a more serious condition which required additional treatment including a second surgery. Plaintiff sued Gallagher alleging claims for violations of the Texas Insurance Code and DTPA, breach of the duty of good faith

and fair dealing, and legal malice. Several months later the parties entered into a benefit dispute agreement that the neuroma deformity was compensable.

Gallagher later filed a plea to the jurisdiction and the trial court granted it and dismissed the suit. Plaintiff appealed the denial of a new trial. Plaintiff argued the exhaustion of remedies doctrine is inapplicable because she had no administrative remedies to exhaust. According to Plaintiff, there was no dispute as to the medical necessity of her surgery at the time the underlying suit was filed, because Gallagher ultimately agreed the surgery was necessary. The court concluded the plea to the jurisdiction was proper because neither Plaintiff's petition nor the record indicated Plaintiff exhausted her administrative remedies and obtained a Commission determination that the surgery was medically necessary when first requested. The court went on to dismiss Plaintiff's claims since the impediment to jurisdiction could not be removed.

Childers v. Gallagher Bassett Services, Inc.

In April 2008, the Fort Worth Court of Appeals affirmed summary judgment for Gallagher Bassett based on limitations because the lawsuit was not filed within two years from the date of denial. In *Childers v. Gallagher Bassett Services, Inc.*, 2008 WL 902796 (Tex. App.—Fort Worth, April 3, 2008)(not reported)(pet denied August 29, 2008), an injured employee filed a lawsuit to address alleged bad faith claims handling. Plaintiff's case was governed by a two-year statute of limitations for her common law and statutory allegations. The primary issue in this case involved a situation where the administrative resolution process had not been completed within two years of the claim denial.

Both parties cited to a Texas Supreme Court decision *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001), as it impacts the limitations issue. Childers argued there is no claim for bad faith until the procedures under the Texas Workers' Compensation Act have been concluded because, in essence, she has no entitlement to benefits that have been wrongfully denied, until that entitlement has been determined under the Act. In response, Gallagher Bassett argued the two year limitations period runs from denial because otherwise a claimant could delay indefinitely completing the administrative process and then have an additional two years to file a lawsuit.

In conclusion the court held the "accrual of the limitations period for a bad faith claim does not await the outcome of the administrative process, but rather begins at the same time as any other bad faith claim not connected to [the] Worker's Compensation Act remedies, and that accrual is on the date the insurer wrongfully denies coverage."

The *Childers* decision underscores the importance of carefully analyzing the statute of limitations and exhaustion of administrative remedies issue before engaging the litigation process in response to a workers' compensation bad faith lawsuit.

Texas Mutual Scores Victory as Judge Throws Out Bad Faith Claim

Several days ago, a judge in Guadalupe County, Texas, dismissed a case alleging TMI acted in "bad faith" in a workers' compensation case involving a pre-existing medical condition. In *Durst v. Texas Mut. Ins. Co.*, the trial judge ruled TMI established a reasonable basis for its decisions in handling the workers' compensation claim of an injured employee and, therefore, could not be held liable for bad faith as a matter of law.

TMI paid medical and income benefits to Durst after he suffered an on-the-job injury in November 2004. TMI, however, contended Durst's work injury did not extend to a pre-existing degenerative spine condition and, therefore, he was not entitled to workers' compensation benefits for that condition.

In a recent press release, Russell Oliver, president of Texas Mutual, said "We are heartened by the ruling." "The District Court applied a key and often misunderstood part of the law — the difference between an honest difference of opinion and bad faith. When the benefits dispute turns on medical expert opinion, we have to be able to rely on a doctor's opinion. Doctors sometimes disagree, and sometimes the Division of Workers' Compensation agrees with the other side's doctor. That is all that happened in this case."

"The vast majority of workers' compensation claims at Texas Mutual," Mr. Oliver added, "are paid with no dispute at all. Whether the claim is a small dollar claim or a large one, our goals are to pay correctly for actual workplace injuries, help the worker recover from actual workplace injuries, and get back to work when they're recovered from their workplace injuries."

Conclusion

Workers' compensation bad faith claims will continue to increase in Texas for as long as plaintiffs' lawyers think they can get large settlements and larger verdicts. The unique nature of consequential damages available to a comp claimant under Texas law makes such claims dangerous for the comp carriers. Delays or denials in the payment of wage benefits or medical benefits can result in significant consequential damages to some injured employees. As such, a delay or denial of a small amount of wage or medical benefits can, in some situations, result in a worsening of medical problems, an inability to pay mortgages or other living expenses, damage to credit or reputation, or other consequential damages. As always, carriers need to prioritize the proper and timely handling of workers' compensation claims. If sued for delays or denials of such claims, a prompt evaluation of potential exposures and available defenses coupled with an aggressive defense in appropriate cases are important to posture such cases for settlement or trial.

Martin, Disiere, Jefferson & Wisdom is deeply involved in this surge of bad-faith litigation in Texas. Our insurance attorneys are among the most experienced in the state at defending bad-faith claims for many of the top insurance companies. We also have an award winning Labor & Employment section that handles workers' compensation claims and, thus, we understand the unique nature of handling a worker's claim for benefits. Questions about any of the issues, trends, defenses, or strategies discussed in this Special Report should be directed to any of our firm's lawyers.

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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