



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

While bad faith lawsuits in Texas arising out of workers' compensation claims have been around since the creation of the bad faith tort in Texas 20 years ago, the number of such suits has been dwarfed by bad faith suits arising out of property, liability, life and health claims. Recently, however, the number of bad faith allegations against workers' compensation carriers has risen at an alarming level in the state. The number of such suits in Texas has reached unprecedented numbers in recent months. Such suits are being filed across the state by numerous different firms. A few successful jury verdicts and multiple large settlements in recent months seem to have fueled the surge in extra-contractual workers' comp allegations.

In light of the recent increase in bad faith workers' compensation suits in Texas, we have created this Special Edition of our Newsbrief to update our readers on this recent 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 should be directed to any of our firm's lawyers.

Workers' compensation policies provide an exclusive remedy which generally protects an employer from a lawsuit. If an employee suffers a work-related injury, the employer provides a state-regulated schedule of benefits to cover medical care and lost wages during recovery. In exchange for policy benefits, the employee forfeits the right to sue his employer. Therefore, workers' compensation benefits become the sole exclusive legal remedy. In some cases, this protection is extended to insurers who are acting as agents for the employer.

Like most areas of the law, however, there are exceptions to this general rule. One exception is bad-faith on the part of the insurer or its representative. A successful bad-faith suit might be triggered by an insurers' non-payment of claims, delay payment of claims, denial of claims, or the like.

Over the past six months, we have noticed an upward trend in the number of bad-faith lawsuits filed against workers' compensation carriers. Frequently, these cases feature an employee who has received benefits from the carrier based upon the underlying claim; however, the above-mentioned claims handling issues can instantly (and exponentially) increase a claimant's damages beyond the state-regulated scheduled benefits. For example, one recent lawsuit alleged that the delay of payment for temporary income benefits caused Plaintiff's divorce and foreclosure on a homestead. These damages were over and above the \$8,000 in benefits that were disputed.

Common areas of damages often overlooked by carriers who evaluate bad-faith lawsuit exposure are attorney fees. Often, in these types of cases, attorney fees through trial can exceed \$100,000 and, given a jury finding in favor of the plaintiff, it is almost certain that a jury will award more damages to a plaintiff than to his attorneys. These factors taken together create a sobering reality—but not a hopeless situation.

Based on the bad faith compensation cases our lawyers have defended in recent years, we believe the dizzying number of new bad-faith lawsuits against workers' compensation carriers stem from two likely sources.

Jury Verdicts and Settlements

The first, and most obvious, trigger is multi-million dollar verdicts or settlements. Exaggerated verdicts in bad-faith workers' compensation litigation have even surfaced in traditionally-conservative venues like Houston, Texas, and its surrounding areas. Examples of eye-catching jury verdicts include the following:

- ***Bakowski v. Insurance Company of North America***, No. 1997-17510; in the 151st Judicial District, Harris County, Texas. **\$875,000** settlement. Settled with the jury panel waiting in the hall prior to trial.

Facts: A workers' compensation carrier settled an alleged bad-faith claim involving subsequent medical treatment for a 20-year old on-the-job-injury. Bakowski was injured in 1982 and entered into an agreed judgment with the workers' compensation carrier, in 1984, which required the carrier to pay for lifetime future medical. Bakowski did not seek treatment for several years. When he finally sought treatment for chronic pain syndrome and post-traumatic stress disorder, the carrier took the position that the treatment was not related to the original accidents.

- ***Ray Ferguson Interests, Inc. v. Texas Workers' Compensation Insurance Fund***, No. 103 609; in the 240th Judicial District Court, Fort Bend County, Texas. **\$7,920,000** jury verdict awarded.

Facts: A jury determined a workers' compensation provider owed a paving contractor up to \$7,920,000 in actual damages, punitive damages and attorney fees for Texas Insurance Code violations. The jury also awarded damages on Plaintiff's contract claims. All the claims concerned premiums and workers' classifications for five 1-year policies.

- ***Morris v. Texas Mut. Ins. Co.***, No. 2004-53230, in the 11th Judicial District court, Harris County, Texas. **\$745,000** jury verdict awarded.

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.

- ***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.

- ***Snyder v. Christus Health Gulf Coast d/b/a Christus St. Joseph Hospital***, No. 2004-53229, in the 215th Judicial District Court in Harris County, Texas. **\$4,218,799** (plus \$114,000 in attorney fees contingent upon appeal) jury verdict awarded on October 26, 2006.

Facts: On October 9, 2002, 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. When Snyder's treating surgeon recommended a cervical surgery, two months later, 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 that the denial was simply an "extent of injury" denial permitted under TWCC rules; Snyder alleged that the denial was not only untimely, but basically denied any neck injury of any kind. Snyder alleged that 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 unreasonable and in bad-faith.

Plaintiff's Lawyers' Affirmative Pursuit of Bad-Faith Lawsuits

As illustrated above, it is not unusual for bad-faith workers' compensation verdicts or settlements to quickly reach critical levels. It is also apparent this trend is not going away in the near future.

The second factor contributing to the upward trend in bad-faith lawsuits filed against workers' compensation carriers comes from an active Texas state-wide pursuit of bad-faith cases by plaintiff's attorneys. We have noticed a steady increase in the number of continuing-legal-education presentations that are offered to both the plaintiff and defense bars during mainstream seminars and conferences throughout Texas. There is also a trend to conduct smaller, more intimate, presentations that focus on (for example) deposing insurance adjusters in bad-faith workers' compensation lawsuits. One thing is sure, workers' compensation carriers are increasingly becoming targets by plaintiffs who are exposed to alleged poor-claims handling.

Hulshouser v. Texas Workers' Compensation Commission: Exclusive Jurisdiction and Exclusive Remedy

A recent survey of Texas case law supports the above-mentioned workers' compensation claims-handling bad-faith trend. This litigation spree, however, is not without redress.

For example, in *Hulshouser v. Texas Workers' Compensation Commission*, Hulshouser alleged that the insurer breached its duty of good faith and fair dealing when the insurer denied his claim for benefits. *See Hulshouser v. Texas Workers' Compensation Commission*, 139 S.W.3d 789, 793 (Tex. App.—Dallas 2004, no pet.). Hulshouser complained that the insurer's denial of benefits aggravated his injury and caused him additional suffering, impairment, and loss of income. The Dallas Court of Appeals explained that a plaintiff may not pursue a bad faith cause of action if the bad faith claim is essentially a claim for workers' compensation benefits

and the alleged bad faith caused no independent injury, such as loss of credit reputation. *See id.* at 792 (citing *Aranda v. Insurance Company of North America*, 748 S.W.2d 210 (Tex. 1988)).

The court concluded that Hulshouser's bad faith claim was nothing more or less than a claim for workers' compensation benefits and that Hulshouser's alleged injury (further impairment and loss of income) was compensable under the TWCC. *See id.* at 793. Thus, the court concluded that the trial court properly dismissed Hulshouser's bad faith claim on the ground that the TWCC had exclusive jurisdiction. *See id.*

The *Hulshouser* court likewise held the plaintiff's damages were barred by the exclusive remedy provision of the Texas Workers' Compensation Act:

Plaintiff cannot recover herein damages for any harm resulting from Defendant's initial denial of compensability of, or delay in accepting compensability of Plaintiffs hernia condition, or for any delay in medical treatment for such hernia condition because, as a matter of law, such harm is part of, and constitutes a compensable injury and recovery of damages for such harm is precluded by the exclusive remedy provisions of the Texas Workers' Compensation Act. *Hulshouser*, 139 S.W.3d at 791. In reaching this ruling, the trial court explained that Hulshouser was precluded from recovering damages for "pain and suffering, mental anguish, lost earnings, loss earning capacity, impairment and disfigurement." *Id.*

Texas law is clear that a person entitled to insurance benefits is not entitled to extra-contractual damages simply because his or her claim was mishandled. *See Minnesota Life Insurance Co. v Vasquez*, 192 S.W.3d 774, 775 (Tex. 2006) ("Unquestionably, the insurance company here might have done better. But when insurers are negligent, the Texas Insurance Code does not grant policyholders extra-contractual damages.") Rather, besides proof of the breach of a common law or statutory duty, a party deprived of policy benefits must show damages "separate and apart from those that would have resulted from a wrongful denial of the claim . . ." *Provident American Insurance Co. v. Castaneda*, 988 S.W.2d 189, 198 (Tex. 1998); *see also Parkans International LLC v. Zurich Insurance Co.*, 299 F.3d 514, 519 (5th Cir. 2002) ("There can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions and omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits.")

Given Texas law, it is not uncommon for a Plaintiff to allege a carrier's actions or omissions resulted in mental anguish, damage to his credit, or some similar consequential loss. As the Texas Supreme Court noted in *Provident American Insurance Co. v. Castaneda*, *supra*, however, damages such as "loss of credit reputation [stem] from the denial of benefits, not from any failure of [the carrier] to communicate with [the insured] or to investigate her claim." *Id.* at 199. Therefore, in order to recover extra-contractual damages, a plaintiff must prove an independent act or omission resulted in damages separate and apart from those that would have resulted from a wrongful denial of the claim.

Additionally, in *Pickett v. Tex. Mut. Ins. Co.*, 2007 WL 2140948 (Tex. App.—Austin July 26, 2007), the Austin Court of Appeals affirmed the trial court's decision to dismiss Plaintiffs' claims for want of jurisdiction for failure to exhaust their administrative remedies and granted a take-nothing summary judgment on Plaintiffs' claims arising from disputes for which the administrative remedies had been exhausted. In this case the claimant suffered a back injury while performing duties for a home-cleaning service. The claimant argued that her work-related injury aggravated preexisting psychological conditions. The carrier accepted the claim paying income and disability benefits as well as hundreds of thousands of dollars for her healthcare. Subsequently, the carrier denied preauthorization for certain chronic pain management services related to the claimant's psychological disorders on the basis those medical services were not related to her compensable injuries or were

not reasonable and medically necessary. Although she was entitled to contest the carrier's decision through an administrative dispute resolution procedure, the claimant did not request review.

Several years after the injury, the claimant and carrier entered into a Benefit Dispute Agreement, but did not agree to coverage for specific medical treatment. Two months after entering the agreement the Plaintiffs sued the carrier asserting, among other claims, violations of the Texas Insurance Code and Deceptive Trade Practices Act. Analyzing the Texas Supreme Court's decision in *American Motorists Insurance Co. v. Fodge*, the court held that the application of *Fodge* (and specifically the administrative exhaustion requirement) did not violate Plaintiffs' constitutional rights. As part of its decision, the court reiterated the general rule that decisions by the Texas Supreme Court apply retrospectively. The court also held that the Texas Workers' Compensation Commission had exclusive jurisdiction over Plaintiffs' claims, including their tort claims and statutory violations even if Plaintiffs were seeking damages other than denied medical benefits. The court also concluded claims based on delay (as opposed to denial) were also subject to the *Fodge* administrative remedies exhaustion requirement.

Lastly, the Plaintiffs contend they incurred damages connected with the carrier's denial of payment for three final Commission orders (payments sought by a single healthcare provider) due to "numerous collection notices from healthcare providers for medical expenses that have not been paid." In route to its decision, the appellate court noted that a carrier is not legally accountable to a claimant if the claimant is subjected to collection efforts by her healthcare providers prior to a determination that the carrier is not responsible for payment. Any dispute regarding collection efforts by the healthcare provider against the Plaintiffs did not involve the carrier—therefore, summary judgment was appropriate.

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 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, understands 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.

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