



November 13, 2012

COURT FINDS AN INSURER MUST INDEMNIFY A GENERAL CONTRACTOR FOR THE INJURIES OF AN INDEPENDENT CONTRACTOR

Late this past Friday evening, the Dallas Court of Appeals affirmed a trial court's decision that an insurer owed a duty to indemnify a general contractor for a judgment in an underlying bodily injury lawsuit. Bacilio Zapata ("Zapata") suffered severe bodily injuries while performing tree cutting services for Andregg Contracting, Inc, and he obtained a favorable verdict in the underlying suit. Andregg sought indemnity from its insurer, Mid-Continent Casualty Company ("Mid-Continent"). Mid-Continent filed a declaratory judgment seeking a determination that it did not owe a duty to indemnify the general contractor because Zapata was an employee of the general contractor and therefore excluded under the CGL policy.

The case was tried to the bench. The trial court found that Zapata was an independent contractor rather than an employee and concluded that Mid-Continent owed a duty to indemnify the general contractor for the judgment in the underlying suit.

On appeal in *Mid-Continent Casualty Company v. Andregg Contracting, Inc. and Bacilio Zapata*, No. 05-11-00637-CV (Tex. App.—Dallas, November 9, 2012), the appeals court considered the arguments of the parties and affirmed the trial court's finding that the general contractor did not exercise the necessary degree of control over Zapata to establish employee status. The Court noted that the general contractor used subcontractors for 100% of its work, and Zapata was hired for a short-term project to help the general contractor clean up two excavation sites. Mid-Continent argued that Zapata was injured while performing the specific task of tree cutting—a task for which the general contractor had greater control over Zapata. The Court rejected Mid-Continent's argument that a determination of worker's status (independent contractor or employee) is subject to individual analysis for each isolated task. Accordingly, the Court of Appeals affirmed the trial court's judgment that Mid-Continent had a duty to indemnify Andregg.

COURT IS WITHOUT JURISDICTION TO DETERMINE IF AN EMPLOYEE EXHAUSTED ITS ADMINISTRATIVE REMEDIES UNDER *RUTTIGER*

Recently, the Beaumont Court of Appeals affirmed a trial court's dismissal of an employees' suit for common law and statutory bad faith arising from the handling of a worker's compensation insurance claim. In *Robert Bean v. Texas Mutual Insurance Company, Phillip W. Smith, and Debbie K Garrett*, No. 09-11-00123-CV (Tex. App.—Beaumont, November 9, 2012), an employee sued its worker's compensation insurer and two of its adjusters for the wrongful handling of his worker's compensation claim.

Upon the Defendants' motion, the trial court dismissed the employee's claims because he had not exhausted his administrative remedies. While the case was on appeal, the Texas Supreme Court held in *Tex. Mut. Ins. Co. v. Ruttiger*, No. 08-0751, 2012 WL 2361697, (Tex. June 22, 2012), that an administrative dispute resolution process provided by the Worker's Compensation Act is the sole remedy available to address covered employee's claims, and that a worker's compensation claimant has no cause of action against a

compensation insurer under the Texas Insurance Code for unfair settlement practices or for the breach of the duty of good faith and fair dealing.

The Court concluded in light of the Supreme Court's decision in *Ruttiger*, the Court lacked jurisdiction to evaluate whether the employee exhausted his administrative remedies because the judicial doctrine of exhaustion of remedies is part of the parcel of exclusive jurisdiction granted to the administrative agency. As a result, the Court affirmed the trial court's dismissal.

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