The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT UPHOLDS SUMMARY JUDGMENT THAT INSURER IS ENTITLED TO RETURN OF EXCESS SETTLEMENT FUNDS PAID TO INSURED IN ERROR

The U.S. Court of Appeals for the Fifth Circuit recently upheld a district court judgment that an insurer that mistakenly paid more than $500,000 in excess of an agreed settlement of a Hurricane Ike case was entitled to have the extra money returned unconditionally. In *National Casualty Co. v. Kiva Construction & Engineering, Inc.*, No. 12-20217, 2012 WL 5473563 (5th Cir. Nov. 12, 2012), the underlying dispute involved a settlement agreement between Kiva and National Casualty concerning hurricane damage to a number of marine vessels owned by Kiva. National Casualty accidentally paid more than the agreed amount. Kiva would not immediately return the overpayment, and instead offered various repayment terms that were not satisfactory; National Union then brought suit for breach of contract and "money had and received."

During the adjustment of Kiva's insurance claim, several disputes arose between the parties. National Casualty agreed to pay $710,000 to settle the entire claim, both disputed and undisputed, and sent several checks to its attorneys to fund the settlement. The largest of those checks for $610,000 was received and cashed by Kiva's owner. A clerical error resulted in the issuance of a second check for $610,000, which Kiva also cashed. When National Casualty asked for the excess payment back, Kiva refused to tender the entire amount, instead offering various partial repayments or unsecured repayment terms. National Casualty refused and brought suit. Kiva counterclaimed, alleging breach of contract and certain first-party bad faith causes of action.

Kiva's defenses and affirmative claims alleged that National Casualty breached the settlement agreement first by not paying the full agreed settlement amount. Kiva also argued that National Casualty should have mitigated its damages by accepting Kiva's partial reimbursement offers. The district court and the Fifth Circuit rejected these arguments. To the courts, all that mattered was that National Casualty had paid more than the settlement amount, and Kiva refused to remit the overpayment. Since Kiva had no legal right to the money, National Casualty was not required to accept any terms other than full repayment of the entire excess amount. The Fifth Circuit held that the district court properly granted summary judgment on National Casualty's claims for relief. The court also rejected Kiva's argument on procedural grounds that judgment against it on its own claims should not have been granted.

FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF GENERAL LIABILITY INSURER ON HOME HEALTH SERVICE'S AUTO POLICY CARRIER'S DUTY TO DEFEND

Judge Keith P. Ellison, a Federal District Judge in the Houston Division of the Southern District of Texas, issued an order last Monday on pending motions for summary judgment filed by co-insurers in *Colony Ins. Co. v. Progressive County Mut. Ins. Co.*, C.A. No. 4:12-cv-167 (S.D. Tex. Nov. 26, 2012). The insured,

Bell Tech Enterprises, was providing services to Carlos Jackson, who was confined to a wheelchair, afflicted with cerebral palsy and other serious conditions. In July 2008, Jackson was transported in a van owned by Bell Tech, which broke down at a gas station. The time Jackson spent in the broken down van is disputed, but it was undisputed that Jackson died later that day from hyperthermia and dehydration due to "environmental exposure."

Jackson's estate filed suit against Bell Tech in state court. Bell Tech tendered the defense and indemnity of the matter to its general and professional liability insurer, Colony Insurance Company. The court found that Colony's letter to Progressive "tendering to Progressive Insurance as a co-carrier that may have a potential duty to defend and indemnify our mutual insured," and inviting Progressive to join in the defense, was a sufficient tender on behalf of Bell Tech Bell Tech's rights were subrogated to Colony under the transfer of rights provision in the Colony policy.

The court further found Progressive had a duty to defend. The Progressive auto policy covers damages caused by "accident and resulting from the . . . use of a covered "auto."" Progressive argued the auto was not the but for cause of Jackson's death and that the allegations are of medical negligence related to Bell Tech's custodial care of Jackson. The court disagreed. Jackson's injuries occurred while the vehicle was being used for one of its inherent purposes, transporting patients; the purpose of the vehicle had not yet been fulfilled as Bell Tech had not finished transporting Jackson; the hyperthermia allegedly occurred while Jackson was in the van, which is within the natural territorial limits of the vehicle; and a hot July day in a vehicle caused the "environment exposure" that caused the hyperthermia.

The court denied summary judgment to both Colony and Progressive on the duty to indemnify, because there were disputes related to the length of time Jackson was actually in the van and whether Jackson was provided water in accordance with his care plan. Thus, the court found a genuine issue of material fact as to whether or not the auto was the but for cause of hyperthermia and dehydration.

TEXAS SUPREME COURT HOLDS REMAND IS PROPER REMEDY WHEN TRIAL COURT FINDS NO VALID IMPAIRMENT RATING IN COMP CASE

The Texas Supreme Court, in accordance with its opinion in *American Zurich v. Samudio* that issued this summer, recently reiterated that remand is a proper remedy when a trial or appellate court finds that there is no valid impairment rating in a worker's compensation dispute. In *DeLeon v. Royal Indemnity Co.*, No. 10-0319, 2012 WL 5661980 (Tex. Nov. 16, 2012), the claimant had suffered a back injury in the course and scope of his employment, and sought worker's compensation benefits. The carrier paid medical benefits, but disputed the claimant's entitlement to impairment benefits. A doctor determined the claimant's impairment rating to be 20%, and the TDI Worker's Compensation Division followed the doctor's opinion.

While the dispute was on appeal to district court, the Austin Court of Appeals in a separate case determined that the authority underlying the doctor's conclusion was invalid. The trial court therefore reversed the Division's decision, and the Austin Court of Appeals upheld the trial court's ruling. The Court of Appeals also stated that "no mechanism exists in the [Worker's Compensation] Act to remand matters back to [the Division]."

This summer, in *Samudio*, the bulk of the Supreme Court's opinion dealt with jurisdictional issues raised where the only impairment rating properly before the trial court is invalid. The Supreme Court held that the trial court still had jurisdiction to hear the appeal from the administrative proceedings. The Supreme Court also determined that even though the court system could not impose its own rating where no proper rating was available, the courts did have the power to remand to the Division for further proceedings. Applying *Samudio*, the Court in *DeLeon* reversed the court of appeals and remanded the appeal to the trial court, with instructions to remand the case to the Division.

TEXARKANA COURT OF APPEALS UPHOLDS TRIAL COURT JUDGMENT THAT VIAGRA PRESCRIPTION NOT LINKED TO WORKPLACE INJURIES

In a worker's compensation appeal, the claimant, acting pro se, appealed from a no-evidence summary judgment finding that his Viagra prescription was not linked to his compensable injury. The Texarkana Court of Appeals affirmed the trial court's ruling recently in *Castleberry v. New Hampshire Insurance Co.*, No. 06-12-00059-CV, 2012 WL 5507460 (Tex. App.—Texarkana Nov. 14, 2010) (mem. op.), agreeing that the claimant presented "admissible medical evidence establishing causation between the compensable injury and the disputed erectile dysfunction condition."

The injury in question occurred in January 2009 when the claimant fell from a 10-foot ladder, landing on his back and hips. The insurer covered treatment for pain, and also for prescriptions for antidepressants and Viagra. Eventually, the insurer contested the applicability of the antidepressants and Viagra to treatment of the injury sustained. An appeals panel of the Division of Workers' Compensation sided with the insurer, and the claimant sought judicial review.

The court of appeals reviewed all the evidence provided by the claimant and noted physician reports that included a statement that "I certainly have my suspicions about him, but without direct observation I will probably have to give him the benefit of the doubt … he is on shaky ground, but without clear evidence otherwise without being able to see him with direct observation, I am going to re-prescribe his medications and give him no second chance or any leeway." The court concluded that the claimant's evidence was insufficient, and failed to show a link of the prescription of Viagra to treatment for the on-the-job injury that the claimant sustained. The court therefore affirmed the summary judgment.

MDJW UNIVERSITY: FIRST FRIDAY SEMINAR, THIS FRIDAY, DECEMBER 7th "MULTI-CARRIER PROBLEMS & SOLUTIONS"

Our next "First Friday" webinar will be held on December 7, 2012 at noon Central. Patrick Kemp, a partner in our firm's Austin office will discuss "Multi-Carrier Problems & Solutions." This course offers an overview of coverage issues that insurance professionals frequently encounter when dealing with claims involving co-primary and/or excess liability carriers. Mr. Kemp will discuss defense and indemnity allocation issues, policy limit demands, and other carrier disputes when other insurers are implicated in claims or suits.

Mr. Kemp focuses his practice on insurance coverage and litigation. He has experience in coverage analysis and insurance litigation arising out of homeowners, commercial property, commercial general liability, business auto, and umbrella policies. His experience includes first and third-party representation at both trial and appellate levels.

This course is certified by the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their adjuster number available during the training in order to request credit for the course.

Register for this webinar at: https://student.gototraining.com/rt/4759937915905706240.

After registering, you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar. If you have never participated in one of the MDJW webinars, or, if you have had trouble in the past connecting to a webinar, please use the following link to check your computer's connectivity: http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010