The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF
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FIFTH CIRCUIT CONCLUDES COVERAGE EXISTED FOR EMPLOYEE INJURED WHILE CLEANING MOBILE FOOD VEHICLE SINCE INJURY AROSE FROM "USE" OF VEHICLE

Recently, the Fifth Circuit concluded auto coverage existed for an employee who was severely injured in a fire while cleaning a mobile food vehicle unit because the injury arose from the "use" of the vehicle. In *Employers Mutual Casualty Insurance Company; Emansco Insurance Company v. Juan Miguel Bonilla and Isabel Molina*, 2010 WL 2946856 (5th Cir. July 29, 2010), Bonilla leased a mobile catering truck from Jolly Chef Express, Inc. Each day, Bonilla hired a driver and cook for his fleet. At the end of the day, the driver and cook would return the truck and clean it and prepare it for the next day. Bonilla hired Fabricio Fernandez and Isabel Molina to drive and serve as a cook on his truck. When they completed the route, Fabricio used a highly flammable liquid to remove the grease from the truck floor. Ultimately, the flammable liquid was ignited by a pilot light and Molina was severely injured.

Molina sued Bonilla and Jolly Chef in state court. Bonilla did not have insurance, but the truck was listed on Jolly Chef's three insurance policies – commercial general liability policy, auto liability policy, and commercial umbrella policy. Employers Mutual Insurance Company ("EMC") defended Bonilla under a reservation of rights. Molina won a judgment of $1,832,933.58 against Bonilla. Afterwards, EMC filed a declaratory judgment action on coverage issues in federal court.

After summary judgment motions were filed by each side, the district court granted EMC's motion, finding no coverage under any of the policies. Coverage was denied under the CGL policy, because neither Bonilla nor Molina were insureds. Coverage was likewise denied under the auto policy because the fire did not arise out of the "use" of the vehicle as a vehicle or maintenance of it. Lastly, coverage was denied under the umbrella policy under the "use" provision as well.

To analyze coverage, the Fifth Circuit looked to the seminal case of *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999) in making their decision. In *Lindsey*, the court set out a three prong test: (1) the accident must have arisen out of the inherent nature of the automobile, as such (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated, (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. Ultimately, the court held that if the Supreme Court were presented with the facts of this case, it would conclude that the accident occurred from "the inherent" nature of this mobile catering truck, that the accident occurred within the natural territorial limits of the automobile, and that the vehicle covered actually produced the injury. In determining that the auto policy provides coverage, the court determined that the umbrella policy did as well.

APPELLATE COURT REVERSES DECISION TO VACATE ARBITRATION AWARD DENYING COVERAGE

Last week, in an unusual decision, an appellate court concluded an arbitration award was proper and reversed a trial court's decision to vacate it because the accident was caused by an excluded driver. In *State Farm Mut. Auto. Ins. Co. v. Fred Loya Ins. Agency*, 2010 WL 3030978 (Tex. App.—San Antonio August 4, 2010), an accident occurred between Viridiana Anderson and a State Farm insured. The reporting officer cited Anderson for failure to control her speed. After paying for the damage to its insured's vehicle State Farm sought subrogation from Fred Loya Insurance Agency, Inc. contending Anderson was covered under a personal auto policy. Loya denied the claim contending Anderson was an excluded driver pursuant to a named-driver exclusion endorsement to the policy. State Farm then submitted its claim to arbitration which resulted in an award for State Farm's damages. The arbitrator acknowledged Loya's denial of coverage defense, but concluded he could not consider the defense because Loya had not properly pled it under the rules of the forum.

Loya timely filed an application to vacate the award on the grounds that (1) the arbitrator exceeded his authority by arbitrating a claim for which there was no coverage and (2) enforcement of the arbitration award violated Texas public policy by requiring Loya to provide coverage to an excluded driver. The court concluded equity required it to vacate the arbitration award. This appeal followed.

After reviewing the forum rules, the appellate court noted Loya left the Affirmative Defenses/Pleadings section blank at the arbitration proceeding. However, in the contentions section of the arbitration pleading form Loya asserted there was no coverage for the loss because the driver was excluded from the policy. The court recognized because Loya failed to properly plead its defense, the arbitrator was not authorized to consider the merits of the defense. Next, Loya argued it was against public policy to make an award in favor of State Farm since there is no coverage for the loss. Although the court agreed there was strong public policy in favor of recognizing the named-driver exclusion, the arbitration award in this matter did not in any way impugn the validity of the named-driver exclusion. Rather, the arbitrator simply applied the pleading rules of the forum. As a result the appellate court upheld the arbitration award despite no coverage under the Loya policy for this loss.

FEDERAL COURT DISMISSES INJURED EMPLOYEE'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES DESPITE A BENEFIT DISPUTE AGREEMENT

This summer, as the legal community awaits the Texas Supreme Court decision in *Ruttiger v. TMI*, a federal court concluded it lacked subject matter jurisdiction over a lawsuit filed by an injured employee since, despite reaching a benefit dispute agreement (DWC 24), he had not exhausted his administrative remedies as required by the Texas Workers' Compensation Act and Texas law. In *Edwards v. American Home Assurance Co. and AIG*, No. 4:09-cv-02096 (S.D. Tex. June 8, 2010), a claimant filed a lawsuit after reaching an agreement to pay benefits for damages flowing from an injury he suffered while in the course and scope of his employment. During the handling of his claim, a dispute arose whether Edwards was entitled to Lifetime Income Benefits (LIBs) based on injuries he suffered to his eyes. Nevertheless, the parties eventually entered into a benefit dispute agreement. Moreover, under the agreement Edwards agreed to release any extra-contractual bad faith claims he might have had against the carriers. Despite this agreement, Edwards filed suit in state court against his workers' compensation carriers. The carriers moved to dismiss the lawsuit, or alternatively, stay the proceedings pending a ruling in *Ruttiger*.

The court swiftly addressed the Texas Labor Code provisions that govern the exhaustion of administrative remedies issue and analyzed the holding in the *Am. Motorists Ins. Co. v. Fodge* to conclude, even in the face of a benefit dispute agreement between a claimant and a carrier, a claimant for workers' compensation benefits must first secure a final determination from DWC before commencing a lawsuit for bad faith denial of workers' compensation benefits.

Editor's note: Despite the pending *Ruttiger* decision and popular Hurricane Ike litigation, workers' compensation claimants and their attorneys are still filing lawsuits and seeking large damage awards for extra-contractual claims. The attorneys at MDJW have managed to stay several bad faith workers' compensation lawsuits pending the *Ruttiger* decision. And, decisions like *Edwards* will likely provide a more favorable environment to resolve outstanding bad faith lawsuits. We will continue to monitor and report on the workers' compensation bad faith litigation landscape as well as the *Ruttiger* decision.