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## April 2016 Workers' Compensation Law Update

### Opt-Out or Opt-In: Sister State's Problems Make Texas Programs a Hot Topic

In February, we told you about the Oklahoma Opt-Out statute being ruled unconstitutional by the Oklahoma Workers' Compensation Commission. The next move? An appeal to the Oklahoma Supreme Court filed by Dillard's, the employer in that case, alleging that the Commission did not have jurisdiction to strike down the beleaguered statute.

The Oklahoma Supreme Court seems to have tipped its hand, however, on how it will decide the issue. In another case, decided on April 19, 2016, the Oklahoma high court held that the state's Workers' Compensation Commission had the power to determine whether a provision of the state's workers' compensation law was being unconstitutionally applied to a party in a proceeding before the Commission.

Many speculate that the Oklahoma Attorney General sees the writing on the wall and anticipates an unfavorable ruling by the Supreme Court, as evidenced by a Motion for a Stay of the Proceedings in the Oklahoma Supreme Court. The AG has asked for an additional two months to allow the Oklahoma Legislature to consider amendments that would address some of the key issues. In other words, they want time to see if the Legislature can fix the offending portions of the statute that resulted in the Commission's decision that the statute was unconstitutional. Of course, pending that stay, all Opt Out case decisions are on hold at the Commission level pending the outcome of the Dillard's appeal.

### Constitutional Questions - Next Up? Free Speech or "There must be more than one way to skin a cat."

Casey Sutterfield was a derrick hand who claimed a workers' compensation injury while working in North Dakota for a Texas Company**,** Teravita. He says that after his injury, his employer made misrepresentations about the availability of workers' compensation benefits and created a hostile work environment. He was either fired or resigned, depending on whom you believe. He returned home to Texas and filed a workers' compensation claim.

The carrier denied the claim, which was the subject of a contested case hearing in which the DWC ruled in favor of Mr. Sutterfield. Mr. Sutterfield then sued the employer, the carrier and two adjusters individually for discriminatory conduct, negligent misrepresentation, and conspiracy. The employer filed a motion to dismiss the suit asserting that it was based on the employer's

constitutional right to associate with the carrier and to petition the DWC, protected by the Texas Citizens Participation Act (TCPA). The Dallas Court of Appeals agreed and, on April 1, 2016, the Texas Supreme Court refused to review the Dallas Court's ruling.

The TCPA was enacted to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." The Dallas Court said that participation in a workers' compensation hearing at the DWC was an exercise of the employer's right to petition and that testimony at that hearing was "an absolutely privileged communication." Mr. Sutterfield argued that his claims against the employer were exempt under the TCPA because that act expressly exempts actions brought "under the Insurance Code or arising out of an insurance contract" from its protection. The Dallas Court disagreed, holding that his lawsuit was not brought under the Insurance Code, rather it was brought under the Texas Labor Code and common law and he sought damages, not under the insurance contract between the employer and carrier, but under the provisions of the Labor Code.

The Dallas Court dismissed Mr. Sutterfield's conspiracy claim and his claim for employment discrimination by presenting false testimony during the claim process because the TCPA protected the employer during the hearing process at the administrative level. The court refused to dismiss the employment discrimination claims regarding the hostile work environment, representations that he was not entitled to pursue benefits under the Workers' Compensation Act and wrongful discharge as well as the negligent misrepresentation claims, as those were based on statements made outside the DWC proceedings, and were not protected by the TCPA. The entire opinion can be found at ***Tervita, LLC v. Sutterfield***, 482 S.W.3d 280 (Dallas App. - 2015, pet. ref'd).

## Get Out Your Insect Repellant - Zika Virus and Compensability

With the recent torrential rains, we expect a larger crop of mosquitos this spring and summer. The US Centers for Disease Control (CDC) issued an alert about the spread of the Zika virus, and Texas is included in the CDC's estimate of the areas in the United States where the mosquitos more likely to spread viruses like Zika, dengue, chikungunya and other viruses can be found. The National Institute for Occupational Safety & Health (NIOSH) recommends employers protect workers and workers protect themselves by using preventative measures including: protecting equipment in the field, removing debris from ditches, filling in areas that collect standing water, removing tires, buckets and items that collect standing water, and placing holes in containers that could collect standing water where mosquitos may breed. The CDC and NIOSH have also provided a link for insect repellant safety at
*http://www.cdc.gov/niosh/topics/outdoor/mosquito-borne/default.html*.

In Texas, insect bites and stings have been held not to be acts of God and are compensable when causation is established. It is not enough to show that the injury occurred while in the course and scope of employment. A claimant must also prove that the injury was of such kind and character as had to do with and originated in the employer's work, trade, business or profession. ***Standard Fire Ins. Co. v. Cuellar***, 468 S.W.2d 880 (Tex. Civ. App.-San Antonio 1971, writ ref'd n.r.e.). To show causation, the claimant must prove that the conditions and obligations of the employment placed him

or her in harm's way. ***Texas Workers' Comp. Ins. Fund v. Simon***, 980 S.W.2d 730 (Tex. App.-San Antonio 1998, no writ.) Employers whose workplace presents an increased risk for exposure to mosquitos should be especially cautious (agricultural, outdoor maintenance, road construction) and look into extra preventive measures.

## Air Ambulance Cases Continue

On April 14, 2016, the DWC held its Quarterly Insurance Carrier Meeting. The Division reported that the 484 pending air ambulance disputes have been abated pending resolution of litigation in state and federal court regarding reimbursement for those services. The Division reported approximately 30 new air ambulance cases are being filed each month, which will also be abated.

Martha Luevano, Director of Medical Fee Dispute Resolution (MFDR) at DWC, also reminded Carriers of the requirement to respond timely to medical fee disputes. It was noted that 12% of the time MFDR does not receive a response. Since a response is required by rule, failure to respond may result in an administrative violation.

## Will Lawyers Get a Break? DWC Rule Proposal Seeks to Update Legal Services Guidelines for First Time Since 1991

On April 1, 2016, the DWC posted a rule proposal for comment that would amend the guidelines for legal services provided to claimants and carriers. The stated purpose of the rule is to update the guidelines to reflect changes in the industry over the 25 years since they were adopted. The guidelines increase the maximum reimbursable time allowed at the beginning of a dispute for preparation and case management to encourage early resolution of disputes and require attorneys to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing from a claim.

Specific provisions would raise the maximum hourly rate for legal services for attorneys from $150 per hour to $200 per hour and raise the rate for legal assistants from $50 per hour to $65 per hour. Whoever reads this and responds with what we, at our sole lawyerly discretion, determine to be the best answer as to why lawyers are worth every penny, will receive an appropriately nominal gift card.

An entire section has been added to address attorney withdrawal from the claim to require attorneys to submit a notice of withdrawal to the client and opposing party. If the withdrawal occurs after notice of a scheduled DWC proceeding, the attorney must submit a motion to the presiding officer and show that the client has agreed to or does not oppose the withdrawal, or show that the client cannot be located. The presiding officer must find that good cause exists for the withdrawal. The rule provides guidance for the presiding officer in making the good cause determination, including the reason for the withdrawal, how close to the hearing date the attorney seeks permission to withdraw, the amount of approved attorney fees, and whether the attorney is willing to waive payment of approved fees. A stakeholder meeting was held April 25, 2016 and the informal

comment period closes April 29, 2016. We will keep you posted on the ongoing activity on this rule proposal.

## Appeals Panel Update

Three Appeals Panel cases of interest in the past couple of months include:

APD 160228 (decided 3/24/16) - the hearing officer erred in appointing a new designated doctor after a CCH. The Appeals Panel noted the Rule 127.5(d) provision that a previously assigned designated doctor is on the claim unless and until the DWC authorizes or requires the doctor to stop providing services on a claim. The rules set out the reasons the DWC can authorize or require a doctor to get off a claim, none of which applied in this case. The Appeals Panel looked at the DRIS notes that the self-insured introduced during the CCH, and determined that those notes did not reveal any exception to the requirement that the initially appointed designated doctor should remain on the claim. The hearing officer appointed the second designated doctor because he exercised his discretion in appointing a new designated doctor because he was concerned that the initial doctor might "take umbrage in being instructed that his opinion of extent was rejected." The Appeals panel held that the hearing officer's reason for appointing a new doctor was not one of those set out in the rules and reversed the decision that the second designated doctor was properly appointed and held that the doctor was not properly appointed.

APD 160074 (decided 3/21/16) - the hearing officer erred in admitting testimony of a doctor whose identity was not timely exchanged and the decision on extent of injury, disability, MMI and IR was reversed and remanded for the hearing officer to make a decision without consideration of that doctor's evidence. The Appeals Panel determined that the doctor's name was received by the claimant after the normal business hours (10:00 p.m.) on the 15th day following the BRC, it was not timely exchanged (because it must be exchanged within 15 days of the BRC) and the hearing officer did not discuss the reasons for the late exchange or make a determination of good cause to allow the testimony despite the lack of timely exchange. The Appeals Panel excluded that doctor's testimony completely. The decision is silent on whether there was a report from that doctor in evidence.

APD 160057 (decided 3/10/16) - Sure hope this is a trend ! The hearing officer erred in holding that the claimant had not reached MMI per the treating doctor referral's alternate certification, where that doctor's opinion was based on the fact that the claimant needed further treatment (injections) but the compensable injury was limited to a lumbar sprain/strain (the other lumbar spine conditions having been determined not to be compensable and not having been appealed). As the designated doctor had rendered multiple certifications, one of which was for the lumbar sprain/strain only, the Appeals Panel reversed and rendered an decision using the designated doctor's certification that claimant had reached MMI and assigned an impairment rating based on the DWC-determined compensable injury. Of special significance to the Appeals Panel was the fact that there was no evidence establishing that the recommended injections were treatment for the lumbar sprain/strain, which was the only compensable condition.

## More Changes in DWC Hearings Division

The CCH landscape is changing at a fairly rapid rate these days. The retirement of David Wagner (Abilene), Carolyn Moore (Lubbock) and Cheryl Dean (Ft. Worth) ushers in a whole new crop of judges. In Houston there are three new faces, Robin Burgess, Early Moye, and Francisca Okonkwo. In Dallas/Fort Worth, DWC hired Amanda Barlow. Out West, Travis Dupree (Midland) and Teresa Boone (Lubbock)joined the Hearings team. Finally, two traveling Hearing Officers, Mayson Pearson and Dee Marlo Chico, will be filling in where needed. These changes should keep us on our toes for several months to come.

## The Results Are In - The Fate of Squidward Tentacles Hangs in the Balance

The March 2016 SLS newsletter featured a workers' compensation quiz inspired by the residents of Bikini Bottom. It turns out we have a lot of *Sponge Bob* fans among our readers, including several who were familiar with "The Splinter" episode. Many of you said Squidward did not sustain a compensable injury because he intentionally tried to injure himself.

However, the award goes to James Klingelsmith of Dresser-Rand for the most creative answer:

> Did Squidward sustain a compensable injury?
>
> Certainly he did, and this falls under the Jones Act. The employer condoned this behavior as evidenced by his presence the first time Squidward tried to open the cash drawer with his head (in order to cash out of course) and not saying anything.
>
> Squidward contends that: the employer failed to provide proper equipment, employer failed to properly train and the employer failed to require safe work methods.
>
> As a result of the employer's negligence, Squidward has difficulty with his short term memory and has to give up his plans to attend Medical School and will likely never be able to hold down a steady job.

Per James' request, the amount of the gift card has been donated to a local children's charity – Kid's Chance of Texas, Inc. Thank you James!