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## May 2016 Workers' Compensation Law Update

### News from the Bench

It was a busy month for Texas Courts of Appeals dealing with workers' compensation issues:

#### [A Carrier Has Up to 4 Years to Make Demand for Deductible Reimbursement](#)

Congratulations to our own Dan Price, who recently received a very favorable result from the Third Court of Appeals.

Multiple Guaranty Associations brought claims for breach of contract stemming from unpaid policy deductibles. The trial court granted Defendant Hill Bros.' summary judgment concluding the Associations' claims were time-barred. After determining that various Guaranty Associations had standing to bring suit on the underlying policy issued by an impaired carrier, the Third Court of Appeals reversed the trial court and remanded the case for further proceedings.

The appellate court held that the statute of limitations on a breach of contract claim for failure to reimburse deductibles does not accrue until a demand is made to the insured and the insured fails to pay on demand. Because large deductible endorsements do not specify the time period within which demand must be made by the carrier, the court concluded that demand for payment must be made "within a reasonable time." A "reasonable time for demand," the Court explained, is coincident with the four year limitations period for a breach of contract claim. In other words, in Texas, a carrier has up to four years to make a demand for reimbursement of a deductible, and the statute of limitations begins to accrue once the insured fails to make payment on demand.

Applying this rule to the Guaranty Associations' claims, the court reversed the trial court's judgment on limitations and remanded the case for further proceedings.

*Cal. Ins. Guar. Assoc., et al. v. Hill Bros. Transp. Co.*, 2016 WL 2991081 (Tex. App.—Austin 2016).

#### [Workers' Compensation Continues to be a GREAT Deal for Employers](#)

The exclusive remedy defense is alive and well. An injured worker won an \$8.7 million judgment at trial against his employer. The plaintiff was hired by Job Link, who assigned him to work for Tractor Supply. He was injured and brought suit against Tractor Supply. The Court found that he was a temporary employee of Tractor Supply, as he was working on their premises in the furtherance

of their day-to-day business, his injury was caused by his work for Tractor Supply, he was trained by, supervised by, and received his assignments from Tractor Supply employees.

The Court next considered whether Tractor Supply, who did not carry their own policy for their permanent employees, was covered under Job Link's policy. The court found that they were covered, because Job Link's workers' compensation policy contained a blanket Alternate Employer Endorsement and they provided the carrier with a list of covered client companies to the carrier listing Tractor Supply and describing the Plaintiff's job duties. The Court reversed the award of damages and held that Tractor Supply was entitled to the exclusive remedy defense.

*Tractor Supply Co. of Texas, LP v. McGowan*, 2016 WL 1722873 (Tex. App.—Waco 2016).

#### Strict Time Limits for Judicial Review

The time limit to seek judicial review is mandatory, and failure to seek judicial review before the deadline with deprive a court of jurisdiction to hear the claim. The claimant appealed an adverse Decision & Order to the Appeals Panel, who affirmed the Hearing Officer. The claimant then filed a bad faith action in district court, which was dismissed. The claimant did not appeal the dismissal, but several months later filed a new action seeking judicial review of the Decision & Order. Because the claimant did not file her action for judicial review within 45 days from the date the Appeals Panel's determination was mailed to her, the trial court lacked jurisdiction to hear her claim for judicial review.

*Baldwin v. Zurich Am. Ins. Co.*, 2016 WL 2907939 (Tex. App.—Austin 2016).

#### Loose Time Limits for Seeking Benefits

The Labor Code limits an injured worker's eligibility for income benefits to 401 weeks from the date of injury. The injured worker in this case did not receive a certification entitling him to IIBs until 423 days after the date of injury. The carrier argued that he was thus ineligible to receive any IIBs. The injured worker argued that the statute should be interpreted to mean that an injured worker cannot receive more than 401 weeks of income benefits total. The Court sided with the injured employee and found that the maximum number of weeks of income benefits, including TIBs, IIBs, and SIBs, that an injured worker can receive is 401, but that benefits can be paid after 401 weeks from the date of injury.

*Tex. Mut. Ins. Co. v. McGahey*, 2016 WL 2753981 (Tex. App.—San Antonio 2016).

#### Declaratory Judgment and Judicial Review: A Losing Combination

A claimant cannot bring a declaratory judgment action with an action for judicial review. The claimant filed suit against the carrier seeking judicial review of the Division's determination that her injury was no longer compensable based on an injurious practices defense. She also sought a declaration that the injurious practices defense is not a proper defense under the Workers' Compensation Act. The claimant brought suit against the carrier, but the Division intervened in the suit as a necessary party to the declaratory judgment action, which it considered "an impermissible

attempt to control state action.” The Court dismissed the declaratory judgment action and held that it was barred by the doctrine of sovereign immunity. The Court noted that the claimant did not challenge the validity of a statute, but rather its interpretation.

*Tex. Dept. of Ins. v. Green*, 2016 WL 2745063 (Tex. App.—Houston [1st Dist.] 2016).

A different Court of Appeals has also held that a claimant cannot bring a declaratory judgment action with an action for judicial review. The claimant sought judicial review of the Division’s determination that he was not a covered employee at the time of injury and that his injury was not compensable. He also sought declarations that he was a covered employee, regarding various provisions of the client contract at issue, and that a worker becomes a covered employee when certain criteria are met. The claimant brought suit against the carrier, the Division, and the Commissioner for all claims asserted.

The Court held that the judicial review claims were barred by sovereign immunity as against the Division and the Commissioner, and that no exception applied. Concerning the declaratory judgments, the Court held that sovereign immunity bars claims against the state that seek interpretation of a statute, as opposed to challenging the validity of the statute, and the claimant only sought interpretation of a statute. It held that the claims against the Commissioner did not allege an ultra vires act, as they challenged a discretionary act only – the decision to deny the claim for compensation, and were thus barred. It held that, even ignoring sovereign immunity, the remedies sought by the declaratory judgments were redundant, and in fact identical, to the relief sought in the judicial review action. Lastly, the Court held that a declaration sought regarding when any worker becomes a covered employee is not ripe for adjudication, as it concerns the rights of other workers not before the Court. All claims against the Division and the Commissioner were dismissed.

*Texas Dept. of Ins. v. Brumfield*, 2016 WL 293380 (Tex. App.—San Antonio 2016).

### **A New Leader for North Texas, and Austin Gets a New BRO**

Our little birds tell us that Hearing Officer Tom Hight has replaced Cheryl Dean as the North Texas Team Lead. Congratulations, Judge Hight!

We’ve also heard a rumor that Brenna Arredondo, who rose to prominence as a Customer Service Representative, is currently training to be the new permanent Benefit Review Officer in the Austin Field Office. We’re saddened to lose Ms. Arredondo in the customer service role, but we look forward to working with her as a Benefit Review Officer.

### **Compound Meds: Audit**

After receiving comments from system participants, Commissioner Brannan approved a revised Compound Medications Plan-Based Audit on April 28, 2016. The audit will look at prescribed compounds that were filled from September 1, 2014 through August 31, 2015. The goal of the audit is to: (1) promote the delivery of quality health care in a cost-effective manner; (2) ensure that doctors adhere to the ODG and medically accepted standards of care when prescribing compound

drugs; and (3) determine the appropriateness of medical decision making regarding prescription of compound drugs.

### **Deadly Fire was Intentional**

An investigation by the Bureau of Alcohol, Tobacco, Firearms and Explosives and the Texas State Fire Marshal's Office revealed that the April 2013 explosion at a fertilizer plant in West, Texas was intentionally set. This tragic fire claimed 15 lives and injured hundreds more. The operator of the plant did not carry workers' compensation insurance; however, because the fire was the result of an intentional act of a third party, the carrier would not have been liable even if the operator had coverage.

### **2016 Workers' Compensation Summit**

A national conversation on workers' compensation took place this month. It was a two day event where regulators, judges, insurance professionals, academics, union reps, lawyers, and medical professionals met to correct flaws in the worker's compensation system. It was so productive, that a follow up meeting is planned for some time in June or July to take place via telephone. While there were some complaints that the meeting was secretive, a list of attendees and notes from the event will be published soon.

### **NWCDN Conference**

National Workers' Compensation Defense Network (NWCDN) Fall Conference is being held in Chicago on September 21st and 22nd. The conference is limited to clients of NWCDN members and is by invitation only. If you are a client of the firm and would like to go, please contact Jane Stone at the email address listed above.