

WORK COMP REPORTER

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“Early Intervention: The Key to a Full Subrogation Recovery”

P & S SUCCESSFULLY DEFENDS CARRIER’S RECOVERY OF ENTIRE SUBROGATION LIEN

By Mary Markantonis

Pappas & Suchma recently represented a self-insured governmental entity in a suit filed by an injured worker. The 14th Court of Appeal upheld the trial court’s order dismissing a plaintiff’s suit against a self-insured governmental entity for conversion of settlement proceeds. In a reversal of the usual facts presented by these subrogation cases, the self-insured governmental entity (SIGE), represented by counsel, presented, negotiated and finalized the settlement of its subrogation claim against a third party tortfeasor.

While driving a bus for its employer, the employee was injured in a head-on collision by the third party driving the wrong way on the contra-flow lane. Liability was clear on the part of the third party tortfeasor, who had an auto insurance policy with \$25, 000 limits. The SIGE’s lien exceeded the amount of policy limits.

Interest and Discount Rates

4-1-11 to 6-30-11
3.74%



The SIGE, through its attorney sent notice to the third party's auto insurance carrier of its claim. Five months later, the SIGE sent a Stowers demand to auto insurance carrier. In response, a week later, the auto carrier sent a letter to the SIGE assenting to the Stowers demand and for the first time noting that a copy of it was being sent to the injured employee's attorney.

Three days later, the injured employee's attorney sent a letter to auto carrier stating that the SIGE's release will not release his client's claim and had a copy of the letter sent to the SIGE's counsel. After two more weeks pass, the injured workers' attorney sent a letter to the auto carrier's counsel requesting that the settlement be stopped. The counsel for the auto carrier responded that the settlement would not be stopped. The SIGE signed the Release and the auto carrier paid the policy limits to the SIGE. The Release only released the claim of the SIGE and did not release any claims of the injured worker.

Some 5 months later, the injured worker filed her suit against the third party tortfeasor, his auto carrier and the SIGE. In her original petition, she sued the third party for personal injuries, the auto carrier for conversion and civil conspiracy and the SIGE for civil conspiracy. The injured worker also sought a declaratory judgment that the SIGE was not entitled to attorneys' fees under Tex. Lab. Code § 417.003, that the SIGE did not have the right to release her claim against the third party, that the release executed by SIGE did not prohibit her from suing the third party for personal injuries and that SIGE's attorney did not actively represent or actively participate in obtaining a third-party recovery.

The SIGE, represented by Pappas & Suchma, moved for dismissal on several grounds: the injured worker's suit being one for money damages was not maintainable under the Declaratory Judgment Act, the injured worker's failure to allege a clear and express waiver of governmental immunity of suit for her specific claims in tort, and the injured worker's failure to give pre-suit notice.

Pappas & Suchma argued in their brief that the injured worker's claims though couched in requests for declaratory relief were "easily recognized as a transparent attempt to seek Metro's partial recovery of its lien and to recover attorney's fees." As such, the injured worker's suit was a suit for money damages and impermissible under the Declaratory Judgments Act.

The appellate court agreed with the trial court on the first two points. The injured worker did not present any justiciable controversy regarding attorney's fees under Section 417.003 because absent a third party suit in which the SIGE is not represented, there was no basis for awarding attorney fees.

The injured worker argued that immunity was waived based upon the reasoning in *Mata* which relied on the *Barfield* case. But the appellate court distinguished *Mata* from this case on the basis of the claimed relief: in *Mata*, the plaintiff was seeking attorney's fees, but in this case the claimant was seeking only a declaration that the SIGE was not entitled to attorney's fees.

Finally, the appellate court stated that even if the issue of immunity had been reached, the recent case of *Travis Central Appraisal District V. Norman* disapproved of the reasoning of *Mata* relied upon by the injured worker. *Travis* held that since Chapter 504 was amended to include § 504.053(e) ("Nothing in this chapter waives sovereign immunity..."), it no longer supports waiver of sovereign immunity under the *Barfield* standard.

Pappas & Suchma handles subrogation matters including the apportionment of attorney's fees pursuant to Tex. Lab. Code § 417.003. This case shows that early representation of the workers' compensation carrier in subrogation claims can result in the recovery of the entire lien.

1. *Paula Russell v. Metropolitan Transit Authority of Harris Co.*, TX, NO. 14-10-00726-CV, 2011 WL 1757665 Tex. App.—Houston [14th] May 10, 2011). See the full opinion at <http://www.14thcoa.courts.state.tx.us/opinions/html opinion.asp?OpinionId=88234>.

2. *University of Texas Health Science Center at San Antonio v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 317 (Tex. App.—San Antonio 1999, pet. denied)

3. *City of La Porte v. Barfield*, 898 s.W.3d 288 (Tex. 1995)

4. *Travis Central Appraisal District V. Norman*, NO. 09-0100, 2011 WL 1652133 (Tex. Apr. 29, 2011)

Texas Department of Insurance Division of Workers' Compensation

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MEMORANDUM

DATE: May 9, 2011

TO: Workers' Compensation System Participants

FROM: Matt Zurek, Executive Deputy Commissioner for Health Care Management & System Monitoring

RE: DWC Form-026, *Request for Reimbursement of Payment Made by Health Care Insurer*

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) has revised the DWC Form-026, *Request for Reimbursement of Payment Made by Health Care Insurer*. Health care insurers and/or their authorized representative are required to file this form to request reimbursement from the appropriate workers' compensation insurance carrier.

Health care insurers and/or their authorized representative must use this form on and after August 1, 2011. The revised form is available for download from the TDI website at www.tdi.state.tx.us/forms/form20.html.

The form was revised to provide clarity to workers' compensation system participants on the processing of

The attorneys at Pappas & Suchma, P.C. have been and will continue to be your ally in navigating the ever changing landscape of Texas Workers' Compensation law. If you have any questions, please do not hesitate to contact Dean, Jane, Tommy or Jerry at any time. The Houston office number is 713-914-6200.



“the achievements of an organization are the result of the combined efforts of each individual”