

ORAL ARGUMENT – 03/28/01
00-0547
AMERICAN MOTORIST V. FODGE

CZUCHNA: A worker's compensation claimant cannot pursue for extra contractual claims in the courts without first having exhausted her administrative remedies as to each claim for benefits over which the commission normally has exclusive jurisdiction if the tort causes of action are related to the deprivation of those benefits.

Here, Ms. Fodge has claimed that she - in her suit she only seeks relief for separate injuries which are meaningfully distinct from her claim for indemnity and medical benefits under the statute.

However, a plain reading of the petition in the TC reveals that all of the claims and causes of action arise out of the same grievance. That is, a wrongful deprivation of primarily medical benefits but also some indemnity benefits.

Further careful reading of the petition reveals that Ms. Fodge seeks statutory benefits which are ordinarily within the province of the commission to award. The petition sets forth 28 separate acts of wrongful conduct on the part of the carrier. And then after detailing those denials - they are all denials and delays of indemnity medical benefits - and after doing so it seeks the following damages at page 9, paragraph 6: "As a proximate result of the tortuous conduct of defendants, your plaintiff was damaged in that your plaintiff suffered not only the loss of those sums due and owing under the worker's comp. insurance policy, but also suffered the following additional damages." And then among the additional damages that are set forth it list loss of wages in the past.

ABBOTT: Hasn't there already been a determination by the commission?

CZUCHNA: The only thing that was determined by the commission was that Ms. Fodge sustained a compensable injury in the course and scope of employment. That as a consequence of that she suffered a period of disability of 20 days.

ABBOTT: And so you're saying that she would have to go back to the commission to pursue these further claims. Why would these claims not be subsumed within her initial appearance at the commission?

CZUCHNA: Because the commission has the authority to decide entitlement to benefits. There has to be some relationship between the benefits which are the basis of the cause of action in tort to a determination as to those benefits at the administration agency. You can't go to the commission on - Did I suffer injury in course and scope - have the commission say yes, and then file a bad faith lawsuit and say: You know what you didn't pay me enough benefits; you didn't pay me based on the proper average with the wage; you didn't pay me for the appropriate period of

disability. The commission has the authority to decide that and Ms. Fodge must go back to the commission to have them decide whether or not she's entitled to additional benefits based on longer period of disability or based upon a different average _____.

ABBOTT: What about the claims that are asserted here that don't fall within - I'm not certain about whether or not the commission has the authority to award such damages for - let's say damage to her credit rating. Does the commission have the authority to enter an award or to decline an award for a like that?

CZUCHNA: No. The commission does not have the authority to grant that.

ABBOTT: Why didn't she not go ahead and pursue those types of claims?

CZUCHNA: The commission has the authority to determine her entitlement to benefits. The claim in the lawsuit is that the deprivation of those benefits resulted in having this damage to credit reputation, or perhaps a worsening of the physical condition. Those are dependent upon a determination by the commission that she was entitled to those benefits. And as you know, primarily we're talking about medical benefits here. The commission needs to have determined that Ms. Fodge was entitled to a particular medical treatment, or payment for a particular medical service before she can pursue that in court. And while the commission doesn't have the authority to grant the relief in tort - damage to credit reputation - worsening of physical condition - they clearly have the authority given to them by the legislature to make that determination as to the entitlement to benefits.

HANKINSON: In this particular instance since the commission ended up awarding her benefits for the 20 day period of temporary disability, if after that was concluded the carrier did not pay the benefits that the commission awarded her, what is her remedy then? Does she go back to the commission or does she go to court to enforce the award?

CZUCHNA: She certainly can go under the act to seek judicial enforcement of the order. There's a whole different scheme for that. As to the tort claim...

HANKINSON: I'm looking at the underlying benefits claim. One of her allegations is underpaying the temporary income benefits. And it's hard to tell from that allegation if that means she didn't think she got enough temporary income benefits in the first instance, or whether or not she's saying that the carrier didn't pay what the commission said they were supposed to pay.

CZUCHNA: I agree that the pleadings are somewhat vague and difficult to read. But I will say this. An underpayment of temporary benefits - temporary income benefits are based upon the average weekly wage...

HANKINSON: No I understand that. Let's say that what she is complaining about is - I was supposed to get 20 days and here's how much I was supposed to get. I got a check for \$1,000 less

than what the commission said. Does she need to seek a judicial remedy at that point in time for enforcement of the commission's award or does she go back to the commission at that point in time if there has been an underpayment of the award let's say?

CZUCHNA: She still has to go back to the commission, because part of the underpayment of the award is what is your average weekly wage and also what is the period of disability. The commission in this particular instance found that the period of disability based on the stipulation was 20 days. The carrier paid that.

HANKINSON: Let's say they paid her for 18 days instead of 20. I mean that's the issue I'm trying to get to. Where does she go with that complaint?

CZUCHNA: If it's 18 days, then I think she has her whole enforcement action under the statute and then she can...

HANKINSON: And that's in the courts?

CZUCHNA: That's the TC.

HANKINSON: Similarly, she has a claim - in terms of trying to fit what goes under the act and what the commission has the exclusive jurisdiction to decide verses what it does not, she also has a claim about delaying the mailing of temporary income benefits to your plaintiff. I don't see anything in the act that indicates that that conduct as well would be adjudicated by the commission, and doesn't her remedy there lie in the courts as well?

CZUCHNA: I will concede as to that sole claim - the delay in mailing of the check - that she has exhausted her administrative remedies.

HANKINSON: So that one does belong in court?

CZUCHNA: That one does belong in court. Going back to the underpayment, she has to go back and exhaust as to issues of the period of disability and the amount of compensation benefits based on the average weekly wage.

HANKINSON: Even if she already has an award she still goes back to the commission again to relitigate the same thing over again?

CZUCHNA: It's not the same thing. The only thing that she litigated was was she injured in the course and scope and dis she suffer a period of disability? She did not litigate...

HANKINSON: Oh, I see what you mean.

CZUCHNA: If she's claiming that she had a period of disability longer than the 20 days,

she's got to go back to the commission. If she's claiming that the carrier - after the commission award, American Motorist paid benefits for a period of disability - the 20 day period of disability based on what it deemed that the average weekly wage to be, therefore, the amount of the temporary income benefits _____. If there's a problem with that she needs to go back to the commission.

PHILLIPS: How about her surgery. She claimed _____. Did the commission ever pass on the surgery?

CZUCHNA: No. The issue about surgery did not come up until after dismissal of this case by the TC for lack of jurisdiction. We're not sure of the precise date. I think the parties are all in agreement, it's in the brief, and that it was well after the dismissal.

PHILLIPS: But she could bring another action if the need for surgery arose out of this _____ . It wasn't manifested until after the time the underlying case was _____.

CZUCHNA: She could bring, but whether - I suppose in a separate action. It's well outside the record and I don't want to go there. I think that that's not what she has alleged outside of the record and the brief on the merits is not actually in fact what happened, but it could conceivably be a basis for a different lawsuit.

HECHT: How much bad faith litigation is there against compensation carriers?

CZUCHNA: I can't quote you the numbers. I simply would refer the court to the amicus brief filed by the Texas Worker's Comp. insurance fund. The fund I think undeniably writes more worker's comp. insurance in the Texas than probably any other carrier. Certainly more than American Motors. They've given you some numbers based on reports filed by the state as to the sheer volume of those claims. I think that there probably are quite a few bad faith lawsuits filed in the courts based on an alleged wrongful deprivation of benefits under the statute.

What I would point out to the court what is missing, what is lacking in the lawsuit that was filed here is a claim that American Motorist committed some tortuous conduct which is completely unrelated to determination of entitlement to benefits by the commission. As an example, slander. Everything she's alleged is related to the deprivation of benefits. I think if there had been something like a slander, you slandered me in the claim's process, certainly the commission doesn't have authority to pass on that and you go to the courts.

ENOCH: How do you get to a judgment on the extra contractual claims before the worker's comp. board has rendered a judgment on the comp claim? It's hard for me to imagine an administrative process that's supposed to be more speedy and efficient and that sort of thing and actually take longer than trying a deceptive trade practices or a bad faith claim. How does this happen?

CZUCHNA: I think the statute does have speedy - I mean the statute is very detailed as to the time requirements. I think that what happens in most cases is these claimants fail to exhaust their remedies. They don't go to the commission and then begin the process.

ENOCH: Well this one has already gone to the commission. They are at temporary. Do they have...

CZUCHNA: Only as to: did she suffer injury in course and scope? And did she suffer an period of disability? Not as to entitlement to any of the medical benefits for which she claims we committed bad faith by not paying or delaying or denying authorization for.

HANKINSON: When a plaintiff fails to exhaust administrative remedies in this circumstance, what is the appropriate procedural mechanism that should be triggered in the TC? Dismissal or abatement and if it is one or both under what circumstances would each be?

CZUCHNA: I think it can be both. I think it depends upon - certainly within the discretion of the court, but I think it depends upon the facts of any given case. In this case, if the time for exhaustion of administrative remedies has passed, then certainly dismissal would be appropriate. In this case, she had one year from the date of the medical service to bring the dispute to the division of medical review. That time had certainly passed by the time of dismissal. The lawsuit was filed in 1995, the dismissal as in March 1997. Our affidavit makes clear that no attempt was made to exhaust. Her time had passed. Dismissal would be appropriate. And I think the courts that have addressed this issue have recognized that if your time for pursuing your administrative remedies has passed dismissal is appropriate.

HANKINSON: But if the time is not passed then abatement is appropriate?

CZUCHNA: Abatement could be appropriate, yes.

It is our position that entitlement to benefits is a predicate to a bad faith cause of action that is based on a wrongful deprivation of benefits. This court has said in Stoker that as a general rule you can't have a claim for bad faith when an insured has promptly denied a claim that is not covered. Stoker clearly is not a bad faith worker's comp case. It is a UM case. But there this court applied the reasoning in Aranda and said you can't have a bad faith cause of action where there's no coverage, because the first prong of the Aranda test is not met. The first prong of the Aranda test is is there's an absence of a reasonable basis. Under Giles, is liability reasonably clear? No, it's not clear if benefits are not owed. Thus, there must be a determination by the commission that benefits are owed before you can have a bad faith cause of action for deprivation of those benefits.

ABBOTT: But some of her claims are unrelated to the bad faith claim.

CZUCHNA: I don't believe that they are here. I think all of the claims in this lawsuit are

related to the deprivation of her worker's comp. benefits. Here all of her claims are, you deprived me of benefits to which I was entitled under the act. They're related. They're dependent upon or related to her entitlement to benefits.

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RESPONDENT

DANNER: There are two claims, there's two standards. That's the easiest way to view this situation. You have the comp claim. The standard for the com claim is the rules in the act. You have the bad faith claim. The standard over there is Giles: When it is reasonably clear the benefits are owed they should be paid. There is also a duty to investigate. They have to investigate, then they have to pay when it's reasonably clear. If you look at the procedure, the procedure to reconcile both of these - the comp claim and the bad faith claim is this: you start, you do the investigation. If your investigation concludes that it's reasonably clear it should be paid, you pay it. You do not have to go to the commission. Not every claim that arises has to go to the commission. The commission, the rules, the act, they are there in the event that there is a truly legitimate dispute over a claim.

HANKINSON: It sounds like though from this case though many of the claims that she's making relate to medical benefits. The medical benefits issues were apparently never taken to the commission if there was a dispute over what medical benefits she thought she was entitled to.

DANNER: I was not involved in the comp proceedings, so I don't know that much about it.

HANKINSON: But don't you agree though with respect to all these allegations relating to the failure to pay for medical benefits and treatment that all of those must have gone to the commission first before they could be the subject of a proceeding outside the commission?

DANNER: Let me answer your question and explain to you about the petition. The petition includes a claim for punitive damages. In order to get punitive damages you have to show the egregious conduct.

HANKINSON: But before we can even get to that, we have to look at the first question in terms of the jurisdictional issues that have been raised here before you can ever decide whether anyone's entitled to punitive damages. And my question to you is, all of these allegations that relate to the failure to pay medical benefits, none of those went to the commission. Is that correct?

DANNER: No they did not.

HANKINSON: And weren't they required to go to the commission?

DANNER: If she were seeking - she does not have to go - what she was seeking was medical treatment...

HANKINSON: That's right. For denying medical treatment to your plaintiff; refusing to pay or timely pay health care providers; cutting off medical benefits; refusing to authorize treatment; cutting off doctor's visits. Why aren't those matters that are exclusively within the jurisdiction of the commission and that she must exhaust her administrative remedies with respect to before they can be in anyway the subject of a claim for the conduct of the insurance company in a judicial proceeding?

DANNER: Some of those should be presented to the commission. And I agree with you on that.

HANKINSON: Which medical benefits claims should not be - which of the allegations with respect to medical