

CAUSE NO. 08-0742

IN THE SUPREME COURT OF TEXAS

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*IN RE: LIBERTY MUTUAL FIRE INSURANCE COMPANY,*  
*Relator*

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PETITIONER'S REPLY TO THE RESPONSE TO THE  
PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF CONTENTS .....	ii
INDEX OF AUTHORITIES .....	iii
ARGUMENT .....	1
A. Nickelson Ignores the Specific Administrative Remedy Available for His “Denial of Access” Claim.....	2
B. Equitable Estoppel Does Not Relieve Nickelson of the Duty to Exhaust Administrative Remedies.....	4
C. Nickelson Did Not Prove Bad Faith and Evidence of Bad Faith Does Not Trigger District Court Jurisdiction. ....	5
D. Liberty’s Superseded Pleadings Contain No Judicial Admissions and Cannot Override TWCC’s Exclusive Jurisdiction.....	6
CONCLUSION AND PRAYER.....	7
CERTIFICATE OF SERVICE.....	8

## INDEX OF AUTHORITIES

CASES	PAGE
<i>American Motorists Insurance Co. v. Fodge</i> , 63 S.W.3d 801 (Tex. 2001) .....	1, 3, 5, 6
<i>Davis v. Dallas County Schools</i> , 259 S.W.3d 280 (Tex. App.–Dallas 2008, no pet.) .....	4
<i>Gregson v. Zurich American Insurance Co.</i> , 322 F.3d 883 (5 <sup>th</sup> Cir. 2003). .....	3
<i>In re Texas Mutual Insurance Co.</i> , 157 S.W.3d 750 (Tex. App.–Austin 2004, orig. proceeding) .....	6
<i>Retzlaff v. Texas Department of Criminal Justice</i> , 135 S.W.3d 731 Tex. App.–Hous. [1 <sup>st</sup> Dist.] 2003, rule 53.7 motion granted) .....	7
<i>Sigel v. Buccaneer Hotel Co.</i> , 40 S.W.2d 168 (Tex. App.–Galveston 1931, writ ref'd.) .....	4
<i>Valadez v. Barrera</i> , 647 S.W.2d 377 (Tex. App.–San Antonio 1983, no writ) .....	7
<i>Van Independent School District v. McCarty</i> , 165 S.W.3d 351 (Tex. 2005) .....	4
<i>Wilmer-Hutchins Independent School District v. Sullivan</i> , 51 S.W.3d 293 (Tex. 2001) (per curiam) .....	4
<b>STATUTES</b>	
Tex. R. Civ. P. 65 .....	7
TWCC Rule 134.650 .....	2

## ARGUMENT

In his Response to Liberty's Petition, Nickelson argues he does not have to exhaust mandatory administrative remedies specifically tailored for workers' compensation medical benefits claims. No Texas decision has ever supported such an attack on the workers' compensation administrative process and this Court should grant mandamus to prevent Nickelson from doing so here. Like the trial court and the Corpus Christi Court of Appeals in this case, Nickelson simply ignores the dictates of this Court's decision in *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001).

The following facts, discussed in Liberty's Petition, are established beyond dispute and illuminate the fatal flaws in Nickelson's Response:

- The only issue in this case concerns medical benefits. All issues connected with income benefits, including impairment rating and date of maximum medical improvement ("MMI"), have been resolved by agreement. This includes the "bad faith" claim, which Nickelson's attorney conceded does not involve income benefits.<sup>1</sup>
- Nickelson never attempted to exhaust administrative remedies for the remaining medical benefits claim. He has never denied this.
- Liberty never attempted to block Nickelson's "access" to medical care and there is no evidence of any such action by Liberty.

Nickelson's position – that his case is so unique that he is exempt from the requirement of exhaustion of administrative remedies – rests entirely on Nickelson's own "worries" about potentially being denied future medical care. *See* Response at 2, 5, 6, 8

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<sup>1</sup>In the trial court below, counsel conceded that Nickelson has no "bad faith" claim relating to TWCC's determination of income benefits, MMI, or the 0% impairment rating because Liberty complied with TWCC's findings on these issues. *See* Record Tab 9, Hearing Transcript at 14, lines 3-13.

(citing Appendix to the Petition, Tab 7, Affidavit of Raymond Nickelson, at 1-2). He claims there is no administrative remedy for such concerns and this relieves him from the jurisdictional exhaustion requirement. As Liberty showed in the Petition, this is untrue.

**A. Nickelson Ignores the Specific Administrative Remedy Available for His “Denial of Access” Claim.**

The first “Issue Presented” in Nickelson’s Response asks “[w]hether an administrative remedy exists for a blanket denial of *access* to a medical provider . . . .” Response at vi (emphasis in original). As noted in Liberty’s Petition, TWCC Rule 134.650 specifically addresses a prospective denial of future medical care. See Petition at 10, n.7. Although Rule 134.650 directly answers the first “Issue Presented,” Nickelson’s Response simply ignores it. The repeated assertion that “Liberty has failed to show what administrative procedure Mr. Nickelson should have exhausted in order to have the right of access to his medical providers” is untrue. Response at 4. Nickelson made no attempt to comply with Rule 134.650 prior to filing suit and has made no attempt to address that failure in his Response.

In any event, Liberty never denied Nickelson “access” to any medical care. The only evidence of any “denial of access” is Nickelson’s vague suggestion that after he was found to have a 0% impairment rating, he was “hoping that Liberty Mutual Insurance would not cut me off and worrying that I wouldn’t be seen by the doctors and that I wouldn’t get the neck surgery or back surgery I needed when the time came.” Nickelson Affidavit at 1-2 (Appendix to Petition for Writ of Mandamus at Tab 7). See Response at 2, 5, 6, and 8 (citing Affidavit). Apparently, that time never came because Liberty never

denied pre-authorization for neck or back surgery.<sup>2</sup> Nickelson has no “denial of access” claim.

Moreover, Nickelson’s “denial of access” theory is unsupported in Texas law. Although the Response cites *Gregson v. Zurich American Insurance Co.*, 322 F.3d 883 (5<sup>th</sup> Cir. 2003), that case highlights the defects of his theory. See Response at 5. In *Gregson*, the insurance carrier refused payment for antibiotic medication “incident to” compensable back surgery, *i.e.*, medication prescribed to prevent post-surgery infection. *Id.* at 884. The carrier had previously agreed to pay for all reasonable and necessary benefits incident to the surgery, including post-surgery medication. *Gregson*, 322 F.3d at 886. Distinguishing *Fodge*, the *Gregson* court held that the worker was not required to seek medical dispute resolution because the carrier had refused to provide previously approved medication that was “incident to” compensable medical treatment. *Id.* at 887. The case before this Court is controlled by *Fodge*, in which the injured worker, like Nickelson, disputed compensability issues, but never exhausted administrative remedies for a denial of medical benefits sought in connection with an on-the-job injury. *Fodge*, 63 S.W.3d at 802-803.

Nickelson filed a bad-faith suit seeking exemplary damages because he was allegedly worried about coverage for potential treatments. The Act and related TWCC rules cited in Liberty’s Petition are designed to allay exactly the kind of concerns Nickelson alleges by providing a targeted process for resolution of medical claims by

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<sup>2</sup>As discussed in the Petition, the Act and regulations require pre-authorization for treatments such as spinal surgery. See Petition at 8-9. Nickelson never sought such pre-authorization and made no attempt to address this issue in his Response.

TWCC's expert staff. A worker who, represented by counsel, simply throws up his hands, ignores available remedies, and files suit because of vague worries – legitimate or not – actually prevents expedited resolution of any real complaint. Nickelson's "denial of access" theory amounts to a complete circumvention of TWCC's exclusive jurisdiction and must be remedied by mandamus.

**B. Equitable Estoppel Does Not Relieve Nickelson of the Duty to Exhaust Administrative Remedies.**

In his second point, Nickelson asserts the discredited theory that equitable estoppel bars Liberty "from asserting any applicable administrative remedy available yet not exhausted by Nickelson." Response at 6. Nickelson cites no controlling cases for this proposition, perhaps because Texas law specifically rejects it.<sup>3</sup> Exhaustion of administrative remedies is a jurisdictional requirement unaffected by the doctrines of waiver and estoppel. *See, e.g., Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005) (subject matter jurisdiction cannot be conferred by waiver or estoppel); *Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294-95 (Tex. 2001) (per curiam) ("A party cannot by his own conduct confer jurisdiction on a court where none exists. Even if the District misled Sullivan as she claims, her failure to exhaust her administrative remedies is fatal to her action."); *Davis v. Dallas County Schools*, 259 S.W.3d 280, 286 (Tex. App.–Dallas 2008, no pet.) (jurisdictional requirement of exhaustion cannot be waived or subject to estoppel due to misleading conduct by a party).

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<sup>3</sup>The 1931 case Nickelson does cite held an adjoining property owner was equitably estopped from complaining about a building constructed to protrude over a public sidewalk. Response at 6 (citing *Sigel v. Buccaneer Hotel Co.*, 40 S.W.2d 168, 173-74 (Tex. App.–Galveston 1931, writ ref'd.). That case has nothing to do with the case before this Court.

The doctrines of waiver and estoppel did not confer jurisdiction on the trial court in this case or relieve Nickelson of his duty to exhaust administrative remedies.

**C. Nickelson Did Not Prove Bad Faith and Evidence of Bad Faith Does Not Trigger District Court Jurisdiction.**

Nickelson's third argument, that he established a breach of the duty of good faith and fair dealing as a matter of law is incorrect factually and begs the jurisdictional question here. *See* Response at 6-10. Nickelson argues that Liberty denied Nickelson medical benefits because of his impairment rating. *See* Response at 9. He cites no evidence to support this. The superseded pleadings cited in the Response do not admit wrongful denial of medical benefits. *See* Response at 7, 8. (This argument is addressed in more detail below). In fact, Nickelson's affidavit claims that the reason he did not seek medical treatment was because of his own worries about possible denial of future medical benefits. *See* Appendix to Petition for Writ of Mandamus, Tab 7. There is no evidence in Nickelson's affidavit that Liberty prevented him from seeing a doctor or requesting medical treatment.

Even if Nickelson could point to evidence of bad faith, it would not cure the jurisdictional defect in his suit. Before the District Court can assume jurisdiction over a bad faith claim there must be an actual denial of medical benefits for which administrative remedies have been exhausted. *See Fodge*, 63 S.W.3d at 803. Exhaustion of administrative remedies is mandatory even where all claims in the suit are not within agency jurisdiction. Under *Fodge*, the District Court had no jurisdiction over Nickelson's extracontractual or "bad faith" claims because those claims were not predicated on a

TWCC finding that Nickelson was entitled to medical benefits. *Id.* See also *In re Texas Mutual Ins. Co.*, 157 S.W.3d 75, 81-82 (Tex. App.–Austin 2004, orig. proceeding) (issuing mandamus for a trial court’s failure to grant a plea to the jurisdiction because trial court could not acquire jurisdiction over a negligence claim for which exhaustion was not required if it had no jurisdiction over a predicate worker’s compensation benefits claim for which administrative remedies had not been exhausted).

Nickelson’s failure to pursue administrative remedies for his alleged medical benefits dispute precludes him from showing the necessary jurisdictional predicate for his bad faith claim. The District Court has no jurisdiction over any medical benefits dispute in this case, and thus likewise has no jurisdiction over the bad faith suit related to the unexhausted medical benefits claim.

**D. Liberty’s Superseded Pleadings Contain No Judicial Admissions and Cannot Override TWCC’s Exclusive Jurisdiction.**

In his final point, Nickelson argues that Liberty judicially admitted bad faith. See Response at 11. Nickelson’s argument is at odds with the facts. The only language Nickelson cites for his argument that Liberty admitted liability is a misleading, partial quote of language taken from one of Liberty’s superseded pleadings, which stated in full as follows:

This workers’ compensation case is a direct appeal from a finding by the Texas Department of Insurance, Division of Workers’ Compensation (formerly the Texas Workers’ Compensation Commission, referred to herein as the “DWC”) that plaintiff Raymond Nickelson is not entitled to income or medical benefits other than those previously paid by Liberty.

See Response, Appendix Tab 8 at 1. This sentence does not admit that Liberty denied medical benefits based on Nickelson's impairment rating or for any other wrongful reason. It accurately describes TWCC's findings.

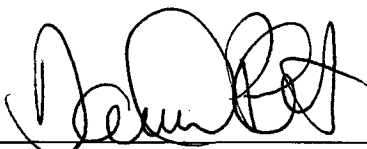
In any event, Liberty's amendment of its motions and pleadings (to prevent this misleading argument) precludes Nickelson from arguing the superseded pleadings establish a conclusive judicial admission. See Tex. R. Civ. P. 65; *Retzlaff v. Texas Dept. of Criminal Justice*, 135 S.W.3d 731, 737 (Tex. App.–Hous. [1<sup>st</sup> Dist.] 2003, rule 53.7 motion granted) (amended pleading makes the original pleading a nullity). The cases Nickelson cites on the rules of evidence for impeachment of witnesses by cross-examination actually undermine his argument that Liberty judicially admitted liability in superseded pleadings. See Response at 10-11 (citing *Valadez v. Barrera*, 647 S.W.2d 377, 382 (Tex. App.–San Antonio 1983, no writ) (“Any admission contained in an abandoned pleading ceases to be binding on the pleader in the sense that he is prevented from disproving facts alleged therein.”). Liberty did not admit liability and this would not, in any case, relieve Nickelson of his obligation to exhaust administrative remedies.

### **CONCLUSION AND PRAYER**

Because Nickelson failed to pursue available, mandatory administrative remedies, the District Court lacked jurisdiction over his medical benefits claims and abused its discretion in denying Liberty's Amended Plea to the Jurisdiction and Motion to Dismiss. Liberty therefore respectfully requests that this Court issue a writ of mandamus to the Respondent requiring that he dismiss the underlying action and for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of Petitioner's Reply to the Response to the Petition for Writ of Mandamus has been forwarded by certified mail, return receipt requested on this 19<sup>th</sup> day of November, 2008, to:

**Respondent:**

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