

CASE NO. 08-0742

IN THE SUPREME COURT OF TEXAS

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

**REAL PARTY IN INTEREST, RAYMOND
NICKELSON'S RESPONSE TO
RELATOR'S PETITION FOR WRIT OF
MANDAMUS**

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Real-party-in-interest Raymond Nickelson (Nickelson) sued Relator, Liberty Mutual Fire insurance Company (Liberty) seeking *de novo* review of his impairment rating (“IR”) of 0% and date of Maximum Medical Improvement (MMI) pursuant to Tex. Lab.Code §410 *et seq.* and joining an original cause of action pursuant to Tex.Lab.Code § 416.002 for breach of the duty of good faith and fair dealing due to Liberty wrongfully denying Nickelson *access* to medical appointments for a compensable injury. The *de novo* review was resolved in Nickelson’s favor through a Texas Department of Insurance, Division of Worker’s Compensation (DWC) approved agreed judgment. (See TAB 6, Relator’s Record in Support of Petition for Writ of Mandamus).

The “bad faith” claim is the only remaining issue.

Nickelson seeks only non-economic damages; not medical reimbursement nor prospective medical costs as apparently alleged in Relator’s petition.

ISSUES PRESENTED

Whether an administrative remedy exists for a blanket denial of *access* to a medical provider erroneously made by a carrier pursuant to a 0% Impairment Rating (IR).

Whether Relator is equitably estopped from asserting an exhaustion of remedies defense to Nickelson's claim against it for breach of the duty of good faith and fair dealing.

STATEMENT OF FACTS

Nickelson made a claim for workers' compensation benefits as a result of a work-related injury that occurred on or about June 4, 2003 which was denied by Liberty.

Liberty then conceded it failed to follow the law as set forth in Tex.Lab.Code §409.021 and agreed that Nickelson's injury to his neck, shoulder, and low back were compensable pursuant to a Benefit Dispute Agreement entered into on December 3, 2003. (See Real-Party-in-Interest's Exhibit 3 and 4 attached hereto and incorporated herein by reference).

Liberty paid temporary income benefits to Mr. Nickelson from June 5, 2003 until January 21, 2004. (See TAB 1 of Relator's Record in Support of Petition for Writ of Mandamus, Affidavit of Margaret Rodriguez at page 4, or TAB 3 of Relator's Appendix to the Petition for Writ of Mandamus). Dr. Robinson, the Texas Workers' Compensation Commission Designated Doctor reported that, on January 7, 2004, Mr. Nickelson reached Maximum Medical Improvement ("MMI") with a 0% Impairment Rating (IR). (See TAB 1, Exhibit 7 of Relator's Record in Support of Petition for Writ of Mandamus).

On April 6, 2005, a Benefit Review Conference ("BRC") was held in which Mr. Nickelson disputed the date of MMI and the 0% Impairment Rating. (See TAB 1, Exhibit 13 of Relator's Record in Support of Petition for Writ of Mandamus).

In Dr. Adame's report dated July 22, 2005, Dr. Adame concluded that Mr. Nickelson had a "whole person" Impairment Rating of 15%. (See TAB 1, Exhibit 17 of Relator's Record in Support of Petition for Writ of Mandamus). A second BRC was held on September 28, 2005, and a Contested Case Hearing ("CCH") was held on October 26, 2005 before the Texas Department of Insurance, Division of Workers' Compensation (DWC) to decide the following disputed issues:

1. the date of maximum medical improvement (“MMI”);
2. the impairment rating.

(See TAB 1, Exhibit 19 of Relator’s Record in Support of Petition for Writ of Mandamus).

At the conclusion of the CCH, the Hearing Officer filed an Order sustaining the 0% impairment rating. (See TAB 1, Exhibit 19 of Relator’s Record in Support of Petition for Writ of Mandamus).

After reviewing the Hearing Officer’s Order, Liberty by and through its employee, Margaret Rodriguez, told Mr. Nickelson that he was not entitled to any further income nor medical benefits not already paid as of the Benefit Contested Case Hearing. (See TAB 7 of Relator’s Appendix to Petition for Writ of Mandamus).

The Hearing Officer’s Order, in compliance with Texas law, specifically stated that the Claimant remained entitled to medical benefits for the compensable injury. (See TAB 1, Exhibit 19 of Relator’s Record in Support of Petition for Writ of Mandamus).

Mr. Nickelson perfected an appeal of his Impairment Rating dispute by timely filing suit on March 21, 2006, in a Nueces County District Court, pursuant to Tex. Lab Code §410 et seq., said petition is now superseded by Plaintiff’s Second Amended Original Petition. (See TAB 3 of Relator’s Record in Support of Petition for Writ of Mandamus and Real-Party-In-Interest’s Exhibit 1, attached and incorporated herein by reference).

After continued delays and denials of access to medical providers, Plaintiff filed suit for Breach of the Duty of Good Faith and Fair Dealing, pursuant to §416.002

Tex.Lab.Code (See Real-Party-In-Interest's Exhibit 2 attached and incorporated herein by reference).

Due to the conclusive medical evidence in favor of Mr. Nickelson, the dispute regarding the Impairment Rating and date of Maximum Medical Improvement were successfully resolved in his favor with an Agreed Judgment of a 14% Impairment Rating benefits, the two (2) year statutory maximum of temporary income benefits, plus interest as a statutory penalty for the wrongful delay of the economic benefits. (See Real-Party-In-Interest's Exhibit 5 attached and incorporated herein by reference and TAB 6 of Relator's Record in Support of Petition for Writ of Mandamus).

Finally, Liberty's Statement of facts is incomplete: Liberty omitted the fact that it denied access to medical appointments as an immediate consequence of the report of Dr. Peter Robinson which gave Nickelson a 0% Impairment Rating. Liberty's Petition for Writ of Mandamus simply states "temporary income benefits terminated in light of the January 7, 2004 report. However, Liberty has never denied the fact that its previous denial of access to medical care providers was purely based upon a 0% IR. (See TAB 7 of Relator's Appendix to the Petition for Writ of Mandamus, Affidavit of Raymond Nickelson).

ARGUMENT

THE HOLDING IN *FODGE v. AMERICAN MOTORIST* HAS NOT BEEN TRIGGERED

Liberty places substantial reliance upon *Fodge v. American Motorists Insurance Co.*, 63 S.W.3d 801 (Tex.2001). *Fodge* does not change the law of workers' compensation, it merely states a rule of law that has been in place since the inception of the Workers' Compensation Act. See *Truck Ins. Exch. V. Seelbach*, 339 S.W.2d 521, 523

(Tex. 1960); *Escajeda v. Cigna Ins. Co.*, 934 S.W.2d 404-405 (Tex.App.—Amarillo 1996, no writ); See Tex. Civ. Stat. Ann. Art. 8307, §5 (Vernon 1966) (stating “[a]ll questions arising under this law, if not settled by the parties interested therein and with the provisions of this law, shall, except as otherwise provided, be determined by this Board”). (See Real-Party-In-Interest’s Exhibit 6, attached and incorporated herein by reference).

When the Workers’ Compensation Act directs that an action be taken in a certain way, it may be performed in other. *Truck* at 523;

The bulk of Liberty’s motion relies upon *orbiter dictum* to make the point that a claimant must exhaust his or her administrative remedies and that bad faith liability is not even a possibility on a non-covered claim. Nickelson agrees with the authorities but denies it applies in this case to bar access to the trial court.

When the Texas Supreme Court was urged by Texas Mutual Insurance (TMI) in an *amicus curiae* brief to take the position that the Breach of the Duty of Good Faith and Fair Dealing was all but completely destroyed by the new workers’ compensation medical dispute resolution scheme, the same extreme position that Liberty takes today, the Supreme Court wrote: “we need not go so far here...” *Fodge* at 804.

Nonetheless, the facts in the present case don’t trigger the concerns raised in *Fodge* because Liberty has failed to show what administrative procedure(s) Mr. Nickelson should have exhausted in order to have the *right of access* to his medical providers. Mr. Nickelson wasn’t allowed to see a doctor in order to request a treatment that would trigger a preauthorization requirement, and this fact was due solely to Liberty’s misrepresentation directly to Mr. Nickelson, regarding the legal effect of a 0%

Impairment Rating. Liberty's actions meet the "delay of medical treatment" specifically excepted in the holding of *Fodge*. *Id* at 804.

Nickelson's case is also very closely analogous to the facts of the U.S. Fifth Circuit case of *Gregson v. Zurich American Insurance Company*, 322 F.3d 833 (C.A. 5 [Tex. 2003]).

Mr. Gregson, the claimant, sued Zurich for failing to fill his prescription medicine. Even though Zurich denied payment, the Fifth Circuit observed that Tex. Lab. Code §413.031(a)(1) did not apply to give him the right to initiate medical dispute resolution. (See Real-Party-In-Interest's Exhibit 7, attached and incorporated herein by reference).

This particular section was amongst those referenced vaguely by Liberty at the trial court level, in its argument that Nickelson should have exhausted his administrative remedies. Apparently, the United States Fifth Circuit failed to find an administrative remedy available to Mr. Gregson where Liberty claims one exists for Mr. Nickelson.

The Fifth Circuit in *Gregson* went on to hold: Mr. Gregson was never required to seek authorization from payment, or to exhaust any particular remedy before he pursued his extra contractual claims, because no such administrative remedy was available to address the carrier's wrongful denial of benefits. Similar to the present case, Mr. Gregson's workers' compensation carrier had signed an agreement that he had a compensable injury.

Mr. Nickelson's affidavit is clear and unequivocal. (See TAB 7 of Relator's Appendix to the Petition for Writ of Mandamus, Affidavit of Raymond Nickelson). Nickelson's evidence establishes that *Fodge* has not been triggered. Significantly,

Liberty has never denied that the access to medical providers was denied or delayed. This unchallenged statement, at a minimum, establishes a fact question that Liberty has acted in bad faith and is subject to Tex. Labor Code §416.002, Exemplary Damages. (See Real-Party-In-Interest's Exhibit 2, attached and incorporated herein by reference).

EQUITABLE ESTOPPEL

Liberty wrongfully and in bad faith, construed a 0% Impairment Rating (IR) as a defense against any further liability for future medical care and communicated such to Nickelson. (See TAB 7, Relator's Appendix to Petition for Writ of Mandamus and Real-Party-In-Interest's Exhibits 8, 9, 10 and 11, attached and incorporated herein by reference).

Under the principle of equitable estoppel, Liberty is barred from asserting any applicable administrative remedy available yet not exhausted by Nickelson. Equity bars Liberty from benefitting from its own wrongs because Liberty intentionally conveyed erroneous information to Nickelson of which Liberty intended Nickelson to rely upon, and Nickelson did in fact rely on said misrepresentation to his detriment. Liberty cannot now hide behind technical or general propositions of law which were held out of reach of Nickelson through the misrepresentations of Liberty. *Sigel v. Buccaneer Hotel Co.*, 40 S.W.2d 168, 173-74 (Tex.App.—Galveston 1931, writ ref'd).(TAB 7 of Relator's Appendix to the Petition for Writ of Mandamus, Affidavit of Raymond Nickelson).

**NICKELSON'S PROOF CONCLUSIVELY ESTABLISHES THAT
RESPONDENT, THE HON. THOMAS GREENWELL, DID NOT ABUSE HIS
DISCRETION BECAUSE LIBERTY BREACHED ITS DUTY OF GOOD FAITH
AND FAIR DEALING AS A MATTER OF LAW**

An insurer owes a duty of good faith and fair dealing in the processing of workers' compensation claims. *Aranda v. Insurance Co. of N. Am.* 748 S.W.2d 210, 212 (Tex.1988). The contract between a worker's compensation carrier and an employee creates the same special relationship as that between an insurer and an insured. *Id.* at 212. An insurer denies a contract exists under a verified denial. T.R.C.P. 93; *Powers v. Adams*, 2 S.W.3d 496, 498 (Tex.App.—Houston [14th Dist.] 1999, no pet.) "Liberty Mutual Fire Insurance Company has never denied a contractual relationship in this claim". The duty owed is to the insured. *Id.* At 212.

Breach of the duty of good faith and fair dealing occurs when the liability to pay under the contract becomes "reasonably clear" and the insurer denies payment. *Univ. Life Ins. Co. v. Giles*, 950 S.W. 2d 48, 56 (Tex. 1997); *State Farm Fire and Casualty Co. v. Simmons*, 963 S.W. 2d 42, 44 (Tex. 1988); *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex.1994). The issue of whether Relator refused to honor the medical duty of continued medical coverage is not in dispute, and it has been admitted by Liberty in prior pleadings. (See Real-Party-In-Interest's Exhibits 8, 9, 10 and 11 attached and incorporated herein by reference. See also TAB 1, Exhibit 19 at page 4 of Relator's Record in Support of Petition for Writ of Mandamus).

The Workers' Compensation Act has a separate "bad faith" statute specifically for workers' compensation claims. Tex. Lab. Code §416.002 "Exemplary Damages" reads, substantially as follows:

"Sec. 416.002 EXEMPLARY DAMAGES.

- (a) In an action against an insurance carrier for a breach of the duty of good faith and fair dealing, recovery of exemplary damages is

limited to the greater of:

- (1) four times the amount of actual damages; or
- (2) \$250,000.00.”

(See Real-Party-In-Interest’s Exhibit 2 and 12, attached and incorporated herein by reference).

Mr. Nickelson can prove bad faith if he establishes that the insurer either knew or should have known that liability was reasonably clear. *Simmons*, 963 S.W.2d at 44. Real-Party-In-Interests Exhibits 8 through 11 and TABS 2 and 4 of Relator’s Appendix to the Petition for Writ of Mandamus, establish all the elements for bad faith including Liberty’s refusal to pay—a fact that has been established by Liberty’s admissions and statements. (See also, TAB 7 of Relator’s Appendix to the Petition for Writ of Mandamus, attached and incorporated herein).

The hearing officer specifically ordered medical benefits on this compensable injury to continue in accordance with Tex.Lab.Code §408.021. (See TAB 1, Exhibit 19 of Relator’s Record in Support of Petition for Writ of Mandamus at page 4, last paragraph under “order” attached and incorporated herein by reference).

This provision is also known as the “lifetime medical” benefits section.

The “lifetime medical” provision reads as follows:

Sec. 408.021. ENTITLEMENT TO MEDICAL BENEFITS.

- (a) An Employee who sustains a compensable injury is **entitled to all health care reasonably required by *the nature of the injury* as and when needed**. The employee is specifically entitled to health care that:

- (1) cures or relieves the effects naturally resulting from the compensable

injury;

(2) promotes recovery; or

(3) enhances the ability of the employee to return to or retain employment.

(b) **Medical benefits are payable from the date of the compensable injury.**

(c) Except in an emergency, all health care must be approved or recommended by the employee's treating doctor.

(d) **An insurance carrier's liability for medical benefits may not be limited or terminated by agreement or settlement.**

Texas Labor Code § 408.021 (emphasis added, Vernon Supp. 2001). (See Real-Party-In-Interest's Exhibit 13, attached and incorporated herein by reference).

In statutory construction of the Texas Labor Code, the Worker's Compensation Appeals Panels decisions are to be given serious consideration by a court in construing the Workers' Compensation Act. See *Insurance Co. of the State of Penn. v. Moore*, 43 S.W.3d 77 (Tex. App.-- Fort Worth 2001, no pet.).

The Workers' Compensation Commission has repeatedly addressed the relationship between continued medical benefits as they relate to disability and impairment. The Commission has conclusively and without exception held that the right to medical benefits is not dependent upon disability nor impairment.

See Workers' Compensation Appeals Panel Nos. 92056, 92064, 92071, and 92078. (See Real-Party-In-Interest's Exhibit 14 through 17 attached and incorporated herein by reference).

Because Nickelson is clearly entitled to *access* of his medical providers and because Nickelson's affidavit is clear and unequivocal, (which Liberty does not refute),

Nickelson claims that Liberty has denied and therefore has delayed *access* to medical providers, has been established as a matter of law.

In the alternative, should such be necessary, Nickelson has carried his burden that he has a *bona fide* claim against Liberty for the breach of the duty of good faith and fair dealing under §416.002. (See Real-Party-In-Interest's Exhibit 2, attached and incorporated herein by reference).

**LIBERTY'S PRIOR PLEADINGS ADMIT LIBERTY'S BAD FAITH REASON
FOR DENYING NICKELSON ACCESS TO HIS MEDICAL PROVIDERS**

Although a carrier can have a good faith factual dispute on whether a claim is covered, they cannot stand behind a creative yet erroneous unsupported proposition of law and escape liability for the violation of the duty of good faith and faith dealing.

Univ. Life Ins. Co. v. Giles, 950 S.W. 2d 48, 56 (Tex. 1997); *State Farm Fire and Casualty Co. V. Simmons*, 963 S.W. 2d 42, 44 (Tex. 1988); *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex.1994).

The true reason that Liberty denied Nickelson access to his medical providers is found in Liberty's abandoned pleadings in Real-Party-In-Interests Exhibits 8 through 11 and TABS 2 and 4 of Relator's Petition for Writ of Mandamus. (Attached and incorporated herein). Abandoned pleadings are admissible for impeachment purposes under Tex. Rules Civ. Evid. 611(b), 613 (a,b), 801 (e) (1,2); (See Real-Party-In-Interest's Exhibit 18, attached and incorporated herein by reference). See also *Westchester Fire Insurance Co. v. Lowe*, 888 S.W.2d 243 (Tex.App.—Beaumont, 1994, no writ); *Valadez v. Barrera*, 647 S.W.2d 377 (Tex.App.—San Antonio 1983, no writ); *Long v.*

Knox, 291 S.W.2d 292 (Tex.1956); *Austin v. Jackson Trust & Savings Bank*, 125 S.W. 1d 936 (Tex.Civ.App. 1910).

The Court need only look so far as the first page of Real-Party-In-Interest's Exhibits 8, 9, 10, and 11 attached and incorporated herein by reference to establish that Liberty Mutual Insurance Company's position on Mr. Nickelson's right to any future medical care *was that he had no further entitlement*. Liberty specifically held the erroneous legal position that Mr. Nickelson was entitled to no further benefits as follows:

"...Plaintiff is not entitled to income *or medical* benefits other than those previously paid by Liberty."(*emphasis ours*).

(See Real-Party-In-Interest's Exhibits 8, 9, 10 and 11 attached and incorporated herein by reference).

Although Liberty has attempted to avoid judicially admitting bad faith by removing this language from its' live pleadings, such amendment neither removes the factual admission in the prior pleadings nor the rationale contained in TABS 2, 4 and 13 of Relator's Record in Support of Petition for Writ of Mandamus. Liberty can point to no statute or rule in the Workers' Compensation Act that permits a denial of access to a health care provider based upon an impairment rating outcome or dispute. That *is* the definition of the breach of the duty of good faith and fair dealing and the purpose the Texas Legislature placed § 416.002 within the Labor Code. (See Real-Party-In-Interest's Exhibit 2 and 13 attached and incorporated herein by reference).

Liberty's latest attempt to avoid liability is to come before this Honorable Supreme Court looking for shelter for an erroneous denial of access to medical providers while waiving the talisman of the "exhaustion of administrative remedies doctrine."

Liberty has once again failed to show an administrative rule or procedure specifically overlooked or ignored by Nickelson. Rather, as before, Liberty simply chooses to cite well-established but inapplicable law and argue that because said law is characterized as “comprehensive” Mr. Nickelson’s delay in access to medical providers has no remedy. It is axiomatic that an *applicable administrative remedy* exist in order to claim that one in the same has not been exhausted. Nonetheless, if an administrative remedy did exist, then this court’s remedy would be to abate and remand, not to dismiss the claim its entirety as requested by Liberty

CONCLUSION AND PRAYER

Does Nickelson have a right to access medical care for an injury that was agreed upon to be compensable? If he has such a right, does he have a remedy when that right is delayed or denied through misrepresentation? Or, as Liberty contends, should Nickelson simply go away.

A majority of Liberty’s Petition for Writ of Mandamus is dedicated to setting forth authorities which stand for the undeniable proposition that, when available, and barring limited circumstances not applicable here, all administrative remedies must be exhausted prior to a trial court exercising jurisdiction of an administrative appeal. However, jurisdiction cannot be conferred upon an administrative agency where no administrative remedy exists for a misrepresentation. Dispositively, no authority cited in the voluminous array of case law relied upon by Liberty, stands for such a proposition. None.

The trial court, Hon. Thomas Greenwell devoted a substantial amount of time reviewing Liberty’s Plea to the Jurisdiction and all of the attached exhibits before

denying same. (Compare the date of the Court's letter denying the relief requested by Liberty of January 30, 2008 and the date of the Status Conference which was held on November 30, 2007).

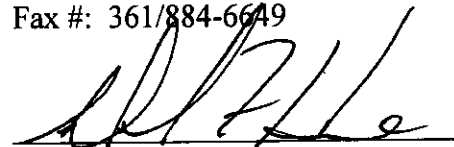
The Hon. Thomas Greenwell studied the motion and the evidence presented and properly denied Liberty's Plea to the Jurisdiction.

Liberty has failed to show an applicable administrative remedy for delayed *access* to a health care provider through misrepresentation because no such administrative remedy exists. For the reasons stated above, Real-Party-in Interest requests that this Honorable Court deny Liberty's Petition for Writ of Mandamus Regarding the Denial of its Amended Plea to the Jurisdiction and Motion to Dismiss, and for the Court make such other orders both general and special, at law and in equity to which Mr. Nickelson may show to be justly entitled.

Respectfully submitted,

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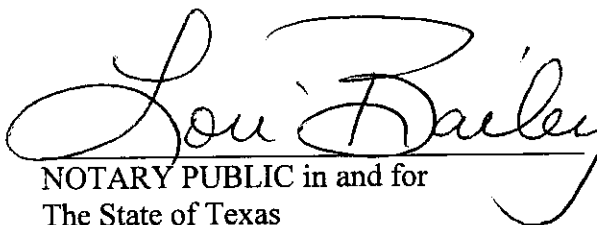
DANIEL F. HORNE
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Federal I.D.: 19284
Attorney for Real-Party-In-Interest
Raymond Nickelson

VERIFICATION

I hereby certify that I have personal knowledge of the facts set forth in Real-Party-In-Interest, Raymond Nickelson's Response to Petition for Writ of Mandamus Regarding Denial of Amended Plea to the Jurisdiction and they are true and correct.


DANIEL F. HORNE

SUBSCRIBED and SWORN TO before me the undersigned Notary Public, on this 7th day of November, 2008.


NOTARY PUBLIC in and for
The State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above foregoing instrument has been served on the attorney of record by facsimile and by U.S. Mail on The Honorable Thomas Greenwell, Nueces County District Court, 901 Leopard Street, Corpus Christi, Texas 78401, and Mr. David Plaut, Hanna & Plaut, L.L.P., 106 E. Sixth St., Suite 600, Austin, Texas 78701, on this the 7 day of November, 2008.


DANIEL F. HORNE

APPENDIX TO THE RESPONSE TO PETITION OF MANDAMUS

- EXHIBIT 1 Tex Lab. Code § 410 et seq.
- EXHIBIT 2 Tex.Lab.Code §416.002
- EXHIBIT 3 Texas Department of Insurance, Division of Worker's Compensation,
Benefit Dispute Agreement dated December 3, 2003.
- EXHIBIT 4 Tex. Lab. Code §409
- EXHIBIT 5 Agreement Letter dated May 22, 2007.
- EXHIBIT 6 Tex. Civ. Stat. Ann. Art. 8307, §5 (Vernon 1966)
- EXHIBIT 7 Tex. Lab. Code §413.031(a)(1)
- EXHIBIT 8 "Defendant Liberty Mutual Fire Insurance Company's Motion for Partial
Summary Judgment" (with Certificate of Service dated Tuesday, April 10,
2007 for overnight delivery on Wednesday, April 11th, 2007).
- EXHIBIT 9 "Defendant Liberty Mutual Fire Insurance Company's Plea to the
Jurisdiction and Motion to Dismiss" (with Certificate of Service dated
Tuesday, April 10, 2007 for overnight delivery on Wednesday, April 11th,
2007)."
- EXHIBIT 10 "Defendant's Motion to Quash and Protective Order" (with Certificate of
Service dated May 9, 2007).
- EXHIBIT 11 "Defendant's Motion to Quash Deposition of Margaret Rodriguez" (with
Certificate of Service dated April 6th, 2007).
- EXHIBIT 12 Verification of Daniel F. Horne

EXHIBIT 13 Tex. Lab. Code §408.021

EXHIBIT 14 Appeals Panel Decision No. 92056

EXHIBIT 15 Appeals Panel Decision No. 92064

EXHIBIT 16 Appeals Panel Decision No. 92071

EXHIBIT 17 Appeals Panel Decision No. 92078

EXHIBIT 18 Tex. Rules Civ. Evid. 611(b), 613 (a,b), 801 (e) (1,2)