

# NO. 09-0310

IN THE SUPREME COURT OF TEXAS

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TEXAS MUTUAL INSURANCE CO. F/K/A TEXAS WORKERS'  
COMPENSATION INSURANCE FUND

*Petitioner*

V.

SONIC SYSTEMS INTERNATIONAL, INC. AND  
RANDY CROIX, EDDIE CROIX INSURANCE AGENCY, INC.

*Respondents.*

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On Petition for Review from the Fourteenth Court of Appeals, Houston, Texas  
No. 14-07-00103-CV

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**TEXAS MUTUAL INSURANCE COMPANY'S  
MOTION FOR REHEARING ON DENIAL OF PETITION FOR REVIEW**

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**June 21, 2010**

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## INTRODUCTION

This case concerns the exclusive jurisdiction of the Division of Workers' Compensation ("DWC") to decide whether a carrier properly denied Texas workers' compensation benefits. Employer Sonic sued Texas Mutual alleging that the carrier wrongfully denied Texas benefits to an Alabama employee. The DWC held that no benefits are due: "The Carrier *is not liable for benefits* and it is so ordered." CR V:1314 (emphasis added). The court of appeals' judgment nevertheless allows employer Sonic to pursue claims that Texas Mutual wrongfully denied Texas benefits. *See Sonic Systems Int'l, Inc. v. Croix*, 278 S.W.3d 377, 396 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2008, pet. denied) ("We reverse the portions of the judgment ordering that Sonic take nothing on all its contractual and extra-contractual causes of action against TMI to the extent they are based on TMI's denial of Cochran's claim for Texas workers' compensation benefits.").

The errors in the court of appeals' opinion merit this Court's attention. Forcing the carrier to trial on wrongful denial of benefits that the DWC has determined are *not* due undermines the DWC's exclusive jurisdiction, as squarely held in *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) ("*Fodge*"). The fact that Texas Mutual should prevail on remand if the Court does not grant the petition does not justify denying the petition. Texas Mutual should not be required to establish at trial that the worker and employer, not Texas Mutual, delayed the Texas proceedings, the worker filed the Alabama benefits claim, and the employer agreed to pay Alabama benefits. The DWC has already held this conduct constituted an election of Alabama

remedies by the employee binding on the employer. Under *Fodge*, that finding precludes this suit.

In allowing Sonic to take Texas Mutual to trial for wrongful denial of Texas benefits, the court of appeals said it was bound by what it had said in its own earlier mandamus opinion. 278 S.W.3d at 387. That earlier statement was: “the issues to be finally determined in the judicial review case are not determinative of Sonic’s contract claims.” *Id.* at 388 (quoting mandamus opinion). That earlier statement was erroneous with respect to any contract claim based on a denial of Texas workers’ compensation benefits because *Fodge* precludes any such contract claim. That erroneous statement is not binding on the court of appeals or this Court.

This Court should grant the petition both to uphold *Fodge* and exclusive DWC jurisdiction over an employer’s workers’ compensation claims and to address the court of appeals’ misconceived notions about law of the case.

## ARGUMENT

**A. This Court has held the DWC’s jurisdiction to determine whether a carrier properly denied workers’ compensation benefits is exclusive and has not permitted suits interfering with that jurisdiction: this is one of those suits.**

This Court has vigorously protected the DWC’s exclusive jurisdiction to determine whether a carrier has properly denied workers’ compensation benefits. The Court has prohibited bad-faith claims-handling lawsuits based on a denial of those benefits unless, until, and except to the extent the DWC has determined that the benefits are due. *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (“*Fodge*”). (“Because only the [DWC] can determine a claimant’s entitlement to

compensation benefits, it follows . . . that ‘[a]llowing courts to award damages for wrongful deprivation of benefits would circumvent the [DWC’s] jurisdiction’ and therefore could not be permitted.”) *Fodge* holds that a court cannot “award damages for a denial in payment of compensation benefits without a determination by the [DWC] that such benefits were due.” *Id.*

The requirement of a DWC determination that workers’ compensation benefits are due is, thus, a jurisdictional prerequisite to any lawsuit asserting damages against a carrier for wrongful denial of those benefits. *Id.* at 805 (requiring dismissal of claims for which there was no DWC determination). *Fodge* precludes suits based on an alleged wrongful denial of Texas benefits because the issue of “entitlement to the contested benefits” is “a matter within the [DWC’s] exclusive jurisdiction.” *Id.* at 804.

This Court has held that interference with the DWC’s exclusive jurisdiction is important enough to warrant mandamus relief. *In re Liberty Mutual Fire Ins. Co.*, 295 S.W.3d 327, 329 (Tex. 2009) (requiring dismissal of bad-faith claims-handling lawsuits based on a denial of benefits where the plaintiff failed to obtain a DWC determination that the benefits were due). Such mandamus relief is justified “to prevent a disruption of the orderly processes of government.” *Id.* at 328.

*A fortiori* this Court should not allow this bad-faith claims-handling suit to go forward: the DWC has held that Texas Mutual “is not liable for benefits” under the Texas Workers’ Compensation Act to *either* the worker or the employer Sonic because “none are due.” CR V:1314, 1303.

**B. Sonic’s status as an employer rather than a worker does not alter the exclusiveness of the DWC’s jurisdiction to determine the appropriateness of Texas Mutual’s denial of benefits.**

This case differs from *In re Liberty Mutual* and *Fodge* only in that the plaintiff here is an employer rather than an employee. That should make no difference. Sonic pursued recovery at the DWC as a subclaimant of its employee for recovery of Texas benefits, and the damages it seeks in this suit allegedly arise from Texas Mutual’s denial of those benefits to that employee. Moreover, every court of appeals that has interpreted *Fodge* has held the principles of *Fodge* apply to *any* party who sues a carrier for damages flowing from a denial of Texas workers’ compensation benefits – regardless of how the party characterizes his claim or otherwise attempts to distinguish his case from *Fodge*. As this Court stated in *Fodge*, a claim based on denial of Texas workers’ compensation benefits is “made no more viable simply by restating it under the other legal theories.” 63 S.W.3d at 804.

The Austin Court of Appeals and the Houston Fourteenth Court of Appeals have both stated that the principles of *Fodge* apply to suits by employers in the same way they apply to suits by workers. *See In re Texas Mutual Ins. Co.*, 157 S.W.3d 75, 79-81 (Tex. App.—Austin 2004, orig. proceeding) (applying *Fodge* to an employer’s claims against the carrier); *Sonic*, 278 S.W.3d at 387 (“[W]hen applicable, *Fodge* would preclude a cause of action whether the plaintiff is the employee or the employer.”). No court has held to the contrary.

The Austin and Houston courts are correct in concluding that *Fodge* applies to employers and workers alike. The Labor Code gives the DWC the exclusive jurisdiction

to decide whether employers like Sonic have any rights to recover under the Texas Workers' Compensation Act for benefits voluntarily paid to their employees. See TEX. LAB. CODE § 409.009 (giving DWC jurisdiction to adjudicate employer's rights as a subclaimant for benefits paid to the worker); *Texas Mutual Ins. Co. v. Sonic Systems Int'l, Inc.*, 214 S.W.3d 469, 484 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, pet. denied) (applying § 409.009 and holding that, if the worker could not recover under the Texas Act, neither could the employer). In remanding this case to the trial court, the court of appeals has interfered with that exclusive jurisdiction.

**C. Sonic has no valid basis for avoiding *Fodge*.**

Sonic attempts to distinguish *Fodge* by mischaracterizing the DWC's decision, erroneously suggesting the DWC did not actually rule no benefits were due. In so arguing, Sonic focuses on the DWC's incidental findings that the worker's injury was compensable and, but for the worker's election of remedies, would have been covered under the Labor Code. Sonic Br. on Merits at 13. This argument overlooks what *Fodge* has declared to be the bottom line: the DWC's holding that "[t]he Carrier *is not liable for benefits* and it is so ordered." CR V:1314 (emphasis added).

Neither this Court's decisions nor those of the court of appeals following those decisions have ever recognized an exception to *Fodge* simply because, if the worker and/or the employer had conducted themselves differently, the carrier *might* have been liable for the benefits. Can a worker sue for bad faith denial of medical benefits that *would* have been due if the worker had timely pursued the claim? *Fodge* holds the worker cannot, stating that, if Ms. Fodge "can no longer obtain the benefits she says she

should have had, then her damages claims related to [the insurer's] refusal to provide her such benefits would no longer be viable and should be dismissed." 63 S.W.3d at 805.

This same reasoning should apply to Sonic, whose only argument is that its worker's claims *would* have been covered if the worker had continued to pursue them in Texas instead of taking benefits under the laws of Alabama. To make an exception for Sonic would undermine the exclusive jurisdiction of the DWC to determine entitlement to benefits.

There is nothing unfair about applying *Fodge* to Sonic. Sonic voluntarily paid Alabama benefits in accordance with the Alabama benefit system. CR V:1318-22. Sonic did so contrary to explicit directives in Texas Mutual's policy advising against such voluntary payments. CR V:1280 ("Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost."). Sonic also demanded, and received, from Texas Mutual a full refund for premiums paid for *all* of its out-of-state workers, including this worker from Alabama. CR V:1497.

The likelihood that Sonic's conduct would prevent Sonic from recovering from Texas Mutual does not justify ignoring *Fodge*'s exclusive jurisdiction holding. Even assuming Texas Mutual would prevail on estoppel or proportionate responsibility grounds, or on the merits of Sonic's contractual and extracontractual claims, allowing a trial to go forward at all undermines the DWC's exclusive jurisdiction over Texas workers' compensation benefits. The DWC has held that Texas Mutual did not owe Texas benefits; that should be the end of the matter.

Texas Mutual's liability as to its denial of Texas benefits is the sole issue on which the court of appeals has remanded this case. *Sonic*, 278 S.W.3d at 396 (reversing solely as to "the portions of the judgment ordering that Sonic take nothing on all its contractual and extra-contractual causes of action against TMI *to the extent they are based on TMI's denial of Cochran's claim for Texas workers' compensation benefits*") (emphasis added). DWC has held that Texas Mutual is not liable for those benefits. Pursuant to *Fodge* and *In re Liberty Mutual*, Sonic has no viable claims it can pursue against Texas Mutual for denial of those benefits.

**D. The interests of the parties, the bar, and the jurisprudence of the State support this Court's intervention.**

Denial of review of the court of appeals' decision would leave a state of confusion on basic points of law this Court has so carefully established in *Fodge* and *In re Liberty Mutual*.

**CONCLUSION AND PRAYER**

For the foregoing reasons, Texas Mutual Insurance Company respectfully requests that the Court reconsider its denial of Texas Mutual's Petition for Review, grant this Motion for Rehearing, reverse the judgment of the court of appeals, and render judgment affirming the trial court's judgment in all respects. Texas Mutual seeks such other and further relief to which it may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing motion was served to all counsel of record listed below via U.S. First Class Mail on this the 21st day of July, 2010.

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