McConnaughhay Duffy Coonrod & Pope Weaver PA

Claims Notes

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Aguilera Opens The Door To Civil Actions Against Workers' Comp Carriers

On June 16, 2005, the Florida Supreme Court announced in Aguilera v. Inservices, Inc., 905 So. 2d 84, that an insurance carrier's intentional tortious conduct will not be shielded by workers' compensation statutory immunity.

In April 1999, Aguilera suffered injuries to his back and right leg at work. Tests at emergency room revealed blood in his urine, and he was prescribed medication. His care was controlled by Inservices. Subsequent to his return to work in May, he began to complain of kidney and bladder pain. Inservices denied authorization to be treated by a urologist on the grounds that the injury was not work related. One month later his condition worsened, and on June 17, 1999, Inservices was advised that urological care was needed on an emergency basis. The reports of his doctors (including the opinion of the carrier's own doctor) that he should not return to work were disregarded, and Inservices advised Aguilera they were terminating his benefits effective July 9, 1999.

Over the next 6 months, Inservices case managers and personnel:

- intentionally blocked Aguilera's receipt of medication;
- denied an emergency request for urology care, despite having in its possession medical records that established medical necessity;
- unilaterally cancelled tests which their own nurse scheduled;
- refused a request for emergency surgery on what was learned to be a fistula, or hole in Aguilera's bladder, and insisted on a second opinion;
- violated Aguilera's counsel's instructions that there be no direct contact with Aguilera, and instead appeared at a physician's office and urged Aguilera to lie to his attorney that the case manager had not appeared; and
- required Aguilera to submit to painful invasive tests that were contraindicated.

Aguilera's ultimate surgery, which was diagnosed as an emergency in June 1999, was not finally approved until March, 2000, by which time he had been urinating blood and feces for over ten months. In that time, no fewer than 6 doctors in addition to his initial treating physician had opined that the injuries were related to the initial accident and required urgent surgical treatment.

Aguilera's amended complaint set forth causes of action for bad faith, intentional infliction of emotional distress, breach of contract, and declaratory relief. The carrier moved to dismiss, asserting workers' compensation immunity. The trial court denied the motion but the district court reversed, and was of the opinion that the allegations merely concerned the manner in which the claim was processed and, therefore, immunity applied.

The Supreme Court disagreed, finding that Aguilera alleged harm caused subsequent to and distinct from the original workplace injury. The tort of intentional infliction of emotional dis-

tress is recognized under Florida law, where a party's conduct is more than simply bad faith or a breach of contract, and where the intentional conduct is outrageous. "[While] workers compensation legislation does immunize an insurance carrier for mere negligent conduct, simple bad faith and minor delays in payment, it does not afford blanket immunity for all conduct during the claim process, particularly intentional tortious conduct such as that presented in this case."

The Impact of Lamb is Felt

In the August newsletter, the Florida Supreme Court case of Lamb v. Matetzschk was discussed, wherein the Court held that "the plain language of Rule 1.442(c)(3) mandates that a joint proposal for settlement differentiate between the parties, even when one party's alleged liability is purely vicarious." Response to this ruling was swift, as demonstrated in the First DCA case of Heymann & Heymann v. Free, 2005 Fla. App. LEXIS 14301, issued September 8, 2005. In Heymann, the First DCA embraced the language of Justice Pariente's concurring opinion in Lamb, that requiring a unified proposal for settlement to apportion fault between equally liable defendants discourages settlement and is contrary to the legislative intent to *encourage* settlement, as clearly expressed in Section 768.79, Florida Statutes. The results here deprive a significant attorney's fee award based on a requirement of Rule 1.442 not contained in Section 768.79, Florida Statutes. The First DCA asked the Florida Supreme Court to consider whether Rule 1.442 should be amended to better state the requirements of a valid proposal for settlement.

Provision of Social Security Number Violates Federal Privacy Act

In a case that will soon have an impact on **all** insurance claims, as well as the discovery process in Florida, the Florida Supreme Court held on November 3, 2005, that it was error for a Judge of Compensation Claims to deny a petition for benefits given the claimant's refusal to provide his social security number as required by Section 440.192. The Court found that the requirement violated the federal Privacy Act and did not fall within any of its exceptions. Florida Division of Workers' Compensation v. Cagnoli, 2005 Fla.. LEXIS 2121.

Have a question or issue you'd like to see in a future newsletter? Email Stephan Lampasso in our Fort Lauderdale office at slampasso@mcconnaughhay.com.

The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

Upcoming Seminar

Florida Workers' Compensation and General Liability Issues in Claims Handling
Atlanta, Georgia
03/21/2006 & 03/22/2006

Registration information is available online at www.mcconnaughhay.com.

Additional Resources

At McConnaughhay, Duffy, Coonrod, Pope & Weaver, P.A., we are dedicated to advancing the law surrounding workers' compensation, employment litigation, product liability, and general civil litigation. To foster the exchange of information and knowledge, we provide practitioners, employers, insurers and laypeople with comprehensive online resources relevant to these practice areas.

For access to our additional resources, click here.

McConnaughhay, Duffy, Coonrod, Pope & Weaver, P.A. serves clients in a wide array of civil litigation. The scope of our practice extends from traditional insurance-related issues to complex litigation in state and federal courts.

We represent businesses in diverse industries, as well as many of the country's leading insurance companies with regard to matters related to:

- Automobile Liability
- Business, Corporate and Commercial Law
- Civil Rights
- Commercial Litigation
- Communications and Media
- Complex and Multi-District Litigation
- Construction Law
- Corporate Law
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- Religious and Nonprofit Organizations
- Slander and Defamation
- Motor Vehicle Liability
- ToxiTorts
- Trucking Accidents
- Workers' Compensation
- Wrongful Death

The depth and breadth of our experience is evidenced by the fact that our lawyers have effectively handled cases concerning minor property damage as well as those involving catastrophic personal injuries. Whether a suit in which a client faces a multi-million dollar exposure or the smallest litigated case, we provide competent representation and the care and attention our clients need and expect.

In all litigation matters, we strive to cost-effectively deliver the best possible results to our clients. We understand the importance of containing litigation costs without sacrificing comprehensive representation. This is accomplished by establishing close working relationships with our clients and employing a team approach in which seasoned lawyers work in tandem with younger associates.

At the McConnaughhay firm, we are committed to serving clients, both inside and outside of the litigation setting, and to adding value to our client relationships.

For additional information on our practice, contact:

Brian S. Duffy, Esq.
bduffy@mcconnaughhay.com
P.O. Drawer 229
Tallahassee, FL 32302-0229
Phone: 850.222.8121
Fax: 850.222.4359