

**ADVISORY NO. 376**  
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**TOPIC:        *DOWNS CLASS ACTION FILED IN HIDALGO COUNTY***

A new class action case has been filed against numerous workers' compensation carriers, third party administrators, at least one insurance broker, and a limited number of employers in Hidalgo County (a county in the Rio Grande Valley region of Texas). The case identifies one hundred fifteen defendants in a petition more than 100 pages long. The three and one-half pages identifying defendants in the class action are appended to this Advisory.

The petition alleges that the defendants have failed to "take timely action necessary to trigger the statutory right under §409.021 Tex. Lab. Code to refuse to initiate benefit payments under the Act to the plaintiffs and to their health care providers." The petition requests a declaratory judgment finding each of the defendants in breach of contract and declaring rights with respect individual employees. Plaintiffs also request an injunction requiring each defendant to withdraw the denials of the claims (Notice of Refusal or NOR), to file notices of initiation of benefits, and to simultaneously initiate all workers' compensation benefits "as required by the Act." Finally, against the defendants involved with the claims of the twenty four named plaintiffs, the petition asserts individual claims (not asserted in behalf of the class) for the breach of the duty of good faith and fair dealing "and other torts" arising out of the failure of the defendants "to investigate these plaintiffs' circumstances after August 31, 2002 and to initiate the payment of workers' compensation benefits to and on behalf of plaintiffs."

By way of historical background, after the new law became effective on January 1, 1991, all stakeholders in Texas workers' compensation believed that a carrier's Notice of Refusal filed within the first sixty days following the date of first written notice of injury preserved all defenses to the claim. It was universally recognized that no defenses were waived. In 2000, the San Antonio Court of Appeals announced a different interpretation of the statute. According to the San Antonio Court, failure to file a NOR within seven days could result in a waiver of all defenses to the claim. After overruling a Motion for Rehearing on August 30, 2002, the decision of the San Antonio Court of Appeals was affirmed by a five to four decision of the Texas Supreme Court. *Continental Casualty Company v. Downs*, 81 S.W.3d 803 (Tex. 2002). Justice O'Neill is the only one of the five majority opinion justices remaining on the court. The author of the dissenting opinion is currently the Chief Justice of the Supreme Court.

During the 2003 legislative session, the Texas Legislature amended the statute effective September 1, 2003, to clarify its previous intention that there would be no waiver unless the Notice of Refusal was filed more than sixty days after the first written notice.

FLAHIVE, OGDEN & LATSON

In summary, for dates of injury on January 1, 1991 until August 31, 2003, the Supreme Court has determined that a carrier's failure to file a Notice of Refusal within seven days (or to timely pay benefits and then file the NOR within sixty days) waived the carrier's right to assert the defenses.

There may be a number of defenses to the appropriateness of presenting this issue in the context of a class action claim in Hidalgo County. Not the least of those should be the Supreme Court holding in *American Motorists v. Fodge*, 63 S.W.3d 801 (Tex. 2001) barring the trial of workers compensation related issues prior to exhausting administrative remedies at TWCC.

Additionally, notwithstanding the general belief that a sixty-day deadline applied, many cases were disputed within seven days of first written notice. In the absence of a dispute within the first seven days, if benefits were timely and continuously paid, a dispute filed within sixty days was timely. Also, it is clear from two Courts of Appeal cases that a defense to the existence of workers' compensation insurance coverage cannot be waived.

For all cases in which the timely waiver issue was litigated (pre or post *Downs*), the decision by the Contested Case Hearing Officer should be binding on all parties. The Hearing Officer decision and order, the Appeals Panel decision, and any judgment entered on Judicial Review will be final and not subject to appeal under principles of *res judicata*. Similarly, if the compensability of the claim was litigated, and the *Downs* issue was not raised, and the decision was not appealed, the final decision would be binding on the compensability question as well as the question of waiver. *Plaintiff's request for class certification is limited to those cases which have not yet been adjudicated by TWCC.*

For cases pending in judicial review involving a potential *Downs* waiver, and where that waiver was not raised at a "Benefit Review Conference," the issue "may not be considered." TEX.LAB.CODE § 410.151(b); §410.302. The issue of whether or not an employee is barred from first raising a *Downs* waiver before a trial court on timely judicial review of an Appeals Panel decision is presently pending before the Supreme Court in *Hefley v. Sentry Ins. Co.* 131 S.W.3d 63 (Tex. App. – San Antonio, pet. filed). The Petition for Review was filed on Oct 15, 2004 and Sentry Insurance Company responded on October 27, 2004.

Thus, the purview of the class will be limited to non-adjudicated, non-coverage disputes as to which the notice of refusal was not "timely" (filed within seven days or benefits paid timely and NOR filed within sixty days).

In addition, there are a number of defenses under the Act remaining unresolved after the 2002 Supreme Court decision in *Downs*. Those particular defenses are beyond the scope of this

Advisory, but we would be happy to review those in detail with any client requesting assistance in evaluating the potential scope of this new case. For a copy of the petition, please email the request to Patsy Shelton at [pgs@fol.com](mailto:pgs@fol.com).