CAUSE NO. 11-0039

IN THE SUPREME COURT OF TEXAS

AMERISURE MUTUAL INSURANCE COMPANY,

PETITIONER,

VS.

SVETLANA POPLIN,

RESPONDENT.

ON PETITION FOR REVIEW FROM CAUSE NO. 14-09-00222-CV
FOURTEENTH COURT OF APPEALS, HOUSTON, TEXAS

MOTION FOR REHEARING ON THE DENIAL OF PETITION FOR REVIEW

Respectfully submitted,

/s/ Steven E. Meyer

Scot A. Schwartzberg
State Bar No. 17870201
Steven E. Meyer
State Bar No. 24074710
Smith & Carr, P.C.
9235 Katy Freeway, Suite 200
Houston, Texas 77024
Telephone: (713) 933-6700
Facsimile: (713) 933-6799

Attorneys for Petitioner, Amerisure Mutual Insurance Company

TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes now Petitioner, Amerisure Mutual Insurance Company (hereinafter "Amerisure"), and submits this Motion for Rehearing on the Denial of Petition for Review requesting that the Court (1) reconsider its denial of the petition for review; (2) grant review; and (3) reverse the court of appeals' decision, affirming the trial court's judgment. In support thereof, Amerisure would respectfully show the Court as follows:

REASON FOR REHEARING

The Court should grant the petition for review because new case law has developed after Amerisure's petition for review had been filed demonstrating that a conflict exists among the courts of appeals that did not exist at the time of Amerisure's filing of its petition for review. *See Holmes v. Tex. Mut. Ins. Co.*, 335 S.W.3d 738 (Tex. App.—El Paso 2011, reh'g denied). As such, this Court's decision, should this petition be reconsidered, will resolve the conflict among the courts of appeals.

ISSUE PRESENTED

In this case of first impression, does Texas Labor Code § 410.253 require a party seeking judicial review of a final decision of the Division of Workers' Compensation (hereinafter "DWC") to serve any opposing party to the suit by citation?

ARGUMENT AND AUTHORITIES

Amerisure respectfully requests the Court reconsider its initial denial of the petition for review. In this case, the Fourteenth Court of Appeals held Section 410.253 does not require service by citation when seeking judicial review of a DWC decision in district court. *See Poplin v. Amerisure Mut. Ins. Co.*, 321 S.W.3d 909 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Subsequent to the filing of the petition for review, the Eighth Court of Appeals considered the very same issue in *Holmes v. Tex. Mut. Ins. Co.*

In *Holmes*, the injured employee sought judicial review of a final decision of the DWC. *See Holmes*, 335 S.W.3d at 739. The employee timely filed his petition for review of the DWC decision in district court; however he failed to serve notice or citation upon the defendant until after the limitations period expired. *See Id.* at 741-42; *see also* TEX. LAB. CODE ANN. § 410.252(a). The Eighth Court of Appeals noted "the plaintiff must exercise diligence **in serving citation** to interrupt the running of limitations." *Holmes*, 335 S.W.3d at 741 (emphasis added). The court of appeals further pointed out that the insurance carrier was never served with the original petition, nor was it "aware that [the employee] filed suit against it in district court. Rather, their first notice of suit was five-and-a-half years later when [the employee] filed his First Amended Petition." *Id.* at 742.

The employee in *Holmes* claimed "he did all that he was required to do by filing the petition and asking that the Clerk mail it to [the insurance carrier]". *Id.*

In rejecting that argument, the court of appeals held that "the ultimate responsibility to **ensure that citation was had to the defendant** still falls to the plaintiff. When the plaintiff learns, or by the exercise of diligence should have learned, that the citation was not issued or served on the defendant, it is still incumbent upon him to ensure that the job gets done." *Id.* (emphasis added). Consequently, the court of appeals affirmed the lower court's granting of summary judgment on the basis that the limitations period for seeking judicial review had run.

Holmes is a prime example that an appellate court in Texas is of the opinion that service of citation is required when seeking judicial review of a DWC decision as is the case in other civil cases. More importantly, the *Holmes* decision conflicts with the Fourteenth Court of Appeals' decision in this case. The *Holmes* decision required service by citation when seeking judicial review in district court, whereas a contrary appellate court opinion arose out of *Poplin*. In the case at hand, the court of appeals held mailing a petition, as opposed to service of citation, is sufficient to satisfy the service requirements when seeking judicial review. *See Poplin*, 321 S.W.3d 909. This conflict deserves resolution and guidance from this Court.

The *Poplin* decision had been in existence for almost six months before the conflicting *Holmes* case was decided. Thus, the *Holmes* court had the opportunity to base its analysis on the *Poplin* decision, holding service of citation was not mandatory, when rendering its decision. *See Holmes*, 335 S.W.3d at 742. Instead,

the *Holmes* court chose a contradictory approach, finding that service of citation is required when seeking judicial review of a DWC decision.

Granting Amerisure's petition for review is particularly significant because of the conflicting nature between the two appellate court cases mentioned above. If not, the answer to the threshold question "Which rule of law binds us?" will become burdensome and complex. *See* Tex. R. App. P. 56.1(2), (6). Moreover, the lower courts will be hindered; having to sort out the conflict between the competing appellate court decisions concerning this issue. By granting Amerisure's petition for review, this Court's decision will put an end to the existing conflict.

This very same issue is being considered in the case of *George v. Dallas County Hosp. Dist.*, No. 02-10-00357-CV, currently pending before the Second Court of Appeals. *See George v. Dallas County Hosp. Dist.*, No. 02/10/00357-CV, Appellee's Brief (attached as Tab "B"). In that case, the injured employee asserts that "the common law limitations defense, with its accompanying burden to prove due diligence in the service of citation, is not applicable to a workers' compensation judicial review case." *Id.* The employee bases his contention on the *Poplin* decision, which is in direct conflict with the decision rendered in *Holmes*. *George* shows that the court of appeals' decision in *Poplin* possesses the potential to spread this incorrect interpretation of the law into other appellate districts.

PRAYER

For the foregoing reasons, Petitioner, Amerisure Mutual Insurance Company, respectfully requests that this Court (1) reconsider its denial of Amerisure's petition for review; (2) grant the petition for review; (3) reverse the court of appeals' judgment, affirming the trial court's granting of summary judgment; and (4) render judgment in favor of Amerisure Mutual Insurance Company, and grant such other and further relief to which Petitioner is entitled.

Respectfully submitted,

/s/ Steven E. Meyer
Scot A. Schwartzberg
State Bar No. 17870201
Steven E. Meyer
State Bar No. 24074710
Smith & Carr, P.C.
9235 Katy Freeway, Suite 200
Houston, Texas 77024
Telephone: (713) 933-6700
Facsimile: (713) 933-6799

ATTORNEYS FOR PETITIONER
AMERISURE MUTUAL INSURANCE
COMPANY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Petition for Review has been mailed by certified mail, return receipt requested, to the following counsel of record for the Respondent on this 1st day of July 2011:

Dan Hennigan
1350 Nasa Parkway, Suite 115
Houston, Texas 77058 **VIA CMRRR 7008 1140 0004 7739 3860**

__/s/ Steven E. Meyer_____
Steven E. Meyer

PETITIONER'S APPENDIX

1. *Holmes v. Tex. Mut. Ins. Co.*, 335 S.W.3d 738 (Tex. App.—El Paso 2011, reh'g denied) ..... Tab A

2. *George v. Dallas County Hosp. Dist.*, No. 02/10/00357-CV, Appellee's Brief ..... Tab B

TAB “A”

Holmes v. Tex. Mut. Ins. Co.

No. 08-10-00003-CV

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

335 S.W.3d 738; 2011 Tex. App. LEXIS 1093

February 16, 2011, Decided

SUBSEQUENT HISTORY: Released for Publication April 20, 2011.
Petition for review abated by Holmes v. Tex. Mut. Ins. Co., 2011 Tex. LEXIS 286 (Tex., Apr. 8, 2011)
Rehearing denied by Holmes v. Tex. Mut. Ins. Co., 2011 Tex. App. LEXIS 3281 (Tex. App. El Paso, Apr. 20, 2011)

PRIOR HISTORY: [**1]
Appeal from the 172nd District Court of Jefferson County, Texas. (TC# E-171,301).
Holmes v. Tex. Mut. Ins. Co., 2010 Tex. App. LEXIS 930 (Tex. App. El Paso, Feb. 10, 2010)

JUDGES: Before Chew, C.J., McClure, and Rivera, JJ.

OPINION BY: GUADALUPE RIVERA

OPINION

[*739] In this worker's compensation case, Appellant, Leslie T. Holmes, appeals the trial court's summary judgment rendered in favor of Texas Mutual Insurance Company (TMIC). In five related issues, Holmes contends that summary judgment was improper on grounds that he failed to exercise due diligence in serving TMIC. We affirm.

BACKGROUND

Seeking judicial review of a decision from the Texas Workers' Compensation Commission Appeals Panel, Holmes filed suit against TMIC on October 20, 2003. Ten days later, the District Clerk issued citation for Holmes's petition, attempting to serve TMIC by certified mail. However, on November 6, 2003, the Post Office returned the mailing to the District Clerk, marking the mailing packet "IA." Holmes [*740] made no other attempts to serve TMIC with his petition.

Consequently, on June 19, 2006, the trial court ordered the case dismissed, noting that the case languished on the docket for more than eighteen months, that the case was placed on the "Try or Dismiss Docket" in May 2006, and that neither Holmes, nor his counsel announced [**2] ready for trial. One month later, Holmes filed a motion to reinstate, contending that he and his counsel were "unaware of the docket setting," and that they believed that the "case was not scheduled to be brought before the Court until 2007." Holmes further stated that he believed that TMIC was served in October or November of 2003, but did not know why TMIC failed to answer the suit. On July 19, 2006, the trial court reinstated the case.

After reinstatement, Holmes made no other attempts to serve TMIC and took no action in his case until he filed his First Amended Petition on June 19, 2009, and served the same on TMIC on June 24, 2009, nearly three years after reinstatement and more than five-and-a-half years after the suit was originally filed. On July 17, 2009, TMIC answered, raising the affirmative defense of limitations, that is, that limitations barred Holmes's suit because he did not file it within the time prescribed by the Texas Labor Code, nor did he exercise due diligence in serving TMIC with his suit. On August 10, 2009, TMIC moved for summary judgment on the basis of its limitations defense. Holmes responded that he did all he needed to do by simply filing the suit and [**3] asking the District Clerk to serve TMIC in October 2003. He did not explain the delay in serving TMIC, nor the inactivity between his failed attempt at service in October 2003 and the dismissal in June 2006, or the inactivity between reinstatement and eventual service of his First Amended Petition on TMIC in June 2009. After reviewing the

pleadings and the motions, the trial court granted TMIC's motion for summary judgment and dismissed Holmes's suit.

DISCUSSION

On appeal, Holmes raises five issues stemming from the trial court's order of summary judgment in favor of TMIC. Issue One contends that Holmes did all he was required to do by simply filing the suit with the District Clerk and requesting that she serve TMIC. Issues Two, Three, and Four, although not articulated well, seem to allege that the notation of "IA" on the green card was insufficient evidence to establish that service was not had on TMIC in October or November of 2003, and therefore, the trial court should have "carried" the matter until discovery was had. And Issue Five asserts that he timely filed suit on October 20, 2003, the first working day following the fortieth day after the appeals panel filed its decision with [**4] the commission. TMIC responds that Holmes's suit was filed beyond the fortieth day and that even if it was timely filed, Holmes failed to exercise due diligence in serving his suit on TMIC.

Standard of Review

We review a trial court's grant of a motion for summary judgment *de novo. Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). The party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). To determine if the non-movant raises a fact issue, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable [*741] jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

The Fortieth Day

Initially, we begin our discussion with Issue Five wherein the parties contest when the fortieth day to file suit fell. According to TMIC, because the appeals panel's decision was filed on September 8, 2003, the fortieth day for Holmes to file suit in district [**5] court was October 18, 2003. Holmes, on the other hand, disagrees, asserting that although October 18, 2003 was the fortieth day, his suit was timely filed on October 20, 2003, the first working day following the fortieth day as October 18, 2003, was a Saturday. We agree with Holmes.

The Labor Code requires that a claimant seeking review of a workers' compensation appeals decision must file suit for judicial review "not later than the 40th day after the date on which the decision of the appeals panel was filed with the division." *See* Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 269, § 1, sec. 410.252(a), 1993 Tex. Gen. Laws 987, 1209 (current version at Tex. Lab. Code Ann. § 410.252(a) (West Supp. 2010) increasing time period to 45 days). However, if the fortieth day falls on a Saturday, Sunday, or legal holiday, "the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday." Tex. R. Civ. P. 4 (stating that the computation of time periods is applicable to any statutory limitations or orders of a court). Here, October 18, 2003, was a Saturday; therefore, we find that Holmes's suit filed on the following Monday, October 20, 2003, was not time barred. Nevertheless, [**6] because Holmes's Original Petition was filed on the very last day of the limitations period, any service on TMIC, if service was completed, occurred after the limitations period expired. Accordingly, Holmes's suit will have interrupted the running of the limitations only if he exercised due diligence in serving TMIC, a decision we reach below. [1] *See Murray v. San Jacinto Agency, Inc*., 800 S.W.2d 826, 830 (Tex. 1990) ("Mere filing of suit, however, will not interrupt the running of limitations unless due diligence is exercised in the issuance and service of citation.").

1 Although TMIC argued in its motion for summary judgment that Holmes's suit was barred by limitations and lack of due diligence, the trial court's order does not specify which grounds it granted summary judgment on. Accordingly, we must uphold the ruling if it is correct on either ground. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006);*FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000) (cases stating that when a trial court's judgment granting a motion for summary judgment fails to specify the grounds upon which the court granted same, appellate court is required to affirm [**7] the summary judgment if any one of the independent summary-judgment grounds advanced in the motion for summary judgment defeats all of the plaintiff's claims). As will be discussed below, we find that summary judgment was proper due to Holmes's failure to exercise due

diligence in serving TMIC.

Due Diligence

When a plaintiff files his petition within the limitations period but does not serve the defendant until after the period expires, the plaintiff must exercise diligence in serving citation to interrupt the running of limitations. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). Indeed, a timely filed suit does not interrupt the applicable statute of limitations unless the plaintiff "exercises due diligence in the issuance and service of citation." *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (citing *Murray*, 800 S.W.2d at 830). If the plaintiff diligently effects service after the limitation period expired, the date of service [*742] relates back to the date of filing. *Proulx*, 235 S.W.3d at 215.

The plaintiff bears the burden to prove diligence when a defendant affirmatively pleads limitations and shows that service was not timely. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009). Diligence [**8] is determined by whether the plaintiff acted as an ordinarily prudent person would under the same or similar circumstance and whether the plaintiff acted diligently up until the time the defendant was served. *Proulx*, 235 S.W.3d at 216. An unexplained delay in effecting service constitutes a lack of diligence as a matter of law. *See Taylor v. Thompson*, 4 S.W.3d 63, 65 (Tex. App. - Houston [1st Dist.] 1999, pet. denied).

Here, TMIC was never served with the original petition, nor is there any evidence in the record that TMIC was ever aware that Holmes filed suit against it in district court. Rather, their first notice of the suit was five-and-a-half years later when Holmes filed his First Amended Petition. Holmes offers no explanation for the delay in serving TMIC, much less that he was doing anything in furthering his case against TMIC. Such an unexplained, lengthy delay in effecting service was certainly unreasonable and constitutes a lack of due diligence as a matter of law. *See, e.g., Gant*, 786 S.W.2d at 259 [**9] (holding that plaintiff failed to exercise due diligence as matter of law because he provided no explanation for delays in service for three periods totaling thirty-eight months);*Butler v. Ross*, 836 S.W.2d 833, 836 (Tex. App. - Houston [1st Dist.] 1992, no writ) (holding five-and-a-half months of inactivity and no service efforts between failed attempts at the wrong address and proper service at the correct address constituted a lack of due diligence).

Nevertheless, in Issue One, Holmes contends that he did all that he was required to do by filing the petition and asking that the Clerk mail it to TMIC. Although the Clerk of the Court has the duty, upon request by the plaintiff, to issue and deliver the citation as directed, *see* Tex. R. Civ. P. 99(a), and although a party "may ordinarily rely on the clerk to perform his duty within a reasonable time," *see Boyattia v. Hinojosa*, 18 S.W.3d 729, 733-34 (Tex. App. - Dallas 2000, pet. denied), the ultimate responsibility to ensure that citation was had to the defendant still falls to the plaintiff. *Bilinsco Inc. v. Harris County Appraisal Dist*., 321 S.W.3d 648, 653 (Tex. App. - Houston [1st Dist.] 2010, pet. denied). When the plaintiff learns, [**10] or by the exercise of diligence should have learned, that the citation was not issued or served on the defendant, it is still incumbent upon him to ensure that the job gets done. *Boyattia*, 18 S.W.3d at 734.

Here, the burden to ensure that service was had fell to Holmes despite his request to the District Clerk. Holmes has not explained any undertakings on his part in determining whether service was completed in over five years. Moreover, Holmes was even made aware that TMIC may not have been served when he acknowledged in his motion to reinstate that he did not know why TMIC did not file an answer. Yet, Holmes still made no inquiries into whether service was ever had. We believe that an ordinarily prudent person would check whether the original citation was actually served when the defendant failed to file an answer within a reasonable amount of time. *See Gonzalez v. Phoenix Frozen Foods, Inc*., 884 S.W.2d 587, 590 (Tex. App. - Corpus Christi 1994, no writ) (holding that "mere reliance on a process server and a delay of five months after the expiration of the statute of limitations do not, as a matter of law, constitute due diligence in procuring issuance and service of citation"); *Stoney v. Gurmatakis*, No. 01-09-00733-CV, 2010 Tex. App. LEXIS 3444, 2010 WL 1840247, at *3-4 (Tex. App. - Houston [1st Dist.] May 6, [*743] 2010, no pet.) [**11] (mem. op., not designated for publication) (holding attorney's failure to contact process server and clerk's office to inquire into service two months later was not due diligence as a matter of law).

Holmes also contends, in Issues Two, Three, and Four, that even if his original petition was not served on TMIC, there was a fact issued created by the notation "IA" on the returned mailing packet. He disputes TMIC's assertion that "IA" means "insufficient address," and even

suggests that TMIC refused service in late October or early November 2003. Thus, Holmes concludes that the trial court should have carried the issue pending further investigation into the matter. But the meaning of "IA" is irrelevant to whether Holmes exercised due diligence in serving TMIC after the citation was returned. Moreover, there is no evidence in the record that TMIC refused service in October or November 2003 - the green card and mailing packet were returned unsigned and unopened. It is clear that TMIC was never served with anything related to the suit until over five years later when it received Holmes's First Amended Petition. Holmes offers no explanation as to his failure to do anything in his suit or [**12] to serve TMIC for five years. Therefore, we find that Holmes failed to exercise due diligence as a matter of law in serving TMIC, and consequently, the trial court did not err in granting summary judgment in favor of TMIC.

Accordingly, Issues One, Two, Three, Four, and Five are overruled.

CONCLUSION

Having overruled Holmes's issues, we affirm the trial court's judgment.

GUADALUPE RIVERA, Justice

February 16, 2011

TAB “B”

DOCKET NO. 02-10-00357-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

SANTHAMMA GEORGE,
Appellant

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Appellee.

On Appeal from the 362nd Judicial District Court
Of Denton County, Texas
Honorable Bruce Farling, Judge

APPELLEE'S BRIEF

Michael J. Donovan
State Bar No. 05991050
Burns, Anderson, Jury & Brenner, L.L.P.
P.O. Box 26300
Austin, Texas 78755-6300
Tele: 512-338-5322
Fax: 512-338-5363

Counsel for Appellee,
Dallas County Hospital District

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL ..... Error! Bookmark not defined.

INDEX OF AUTHORITIES iv

STATEMENT OF THE CASE 1

POINTS OF ERROR PRESENTED..... 4

POINT OF ERROR NO. ONE.....4

THE TRIAL COURT DID NOT ERR IN GRANTING DCHD'S MOTION FOR SUMMARY JUDGEMENT AND SUBSEQUENT FINAL JUDGMENT UNDER LABOR CODE 410.253(A)(2). 4

POINT OF ERROR NO. TWO.....4

THE TRIAL COURT DID NOT ERR IN ENTERING FINAL JUDGMENT BASED ON THE LACK OF DUE DILIGENCE IN SERVICE OF THE PETITION BY GEORGE, AS GEORGE DID NOT PRESENT ANY EVIDENCE OF A FACT ISSUE.....4

POINT OF ERROR NO. THREE 4

THE TRIAL COURT WAS CORRECT IN GRANTING THE FINAL JUDGMENT AGAINST GEORGE, BASED UPON THE SUMMARY JUDGMENT THAT NO TIMELY JUDICIAL REVIEW LAWSUIT HAD BEEN FILED BY GEORGE.....4

SUMMARY OF THE ARGUMENT 7

ARGUMENTS AND AUTHORITIES..... 7

POINT OF ERROR NO. ONE (RESTATED) 7

THE TRIAL COURT DID NOT ERR IN GRANTING DCHD'S MOTION FOR SUMMARY JUDGEMENT AND SUBSEQUENT FINAL JUDGMENT UNDER LABOR CODE 410.253(A)(2). 7

POINT OF ERROR NO. TWO (RESTATED) 11

THE TRIAL COURT DID NOT ERR IN ENTERING FINAL JUDGMENT BASED ON THE LACK OF DUE DILIGENCE IN SERVICE OF THE PETITIONBY GEORGE, AS GEORGE DID NOT PRESENT ANY EVIDENCE ON THIS ISSUE.....11

POINT OF ERROR NO. THREE (RESTATED).....15

THE TRIAL COURT WAS CORRECT IN GRANTING THE FINAL JUDGMENT AGAINST GEORGE, BASED UPON THE SUMMARY JUDGMENT THAT NO TIMELY JUDICIAL REVIEW LAWSUIT HAD BEEN FILED BY GEORGE 15

CONCLUSION**..... 16**

CERTIFICATE OF SERVICE.....17

APPENDIX.....18

INDEX OF AUTHORITIES

Cases

Bass v. Texas Ass'n of School Boards,
55 S.W.2d 735 (Tex. App. – Corpus Christi 2001) 11, 12

Continental Southern Lines v. Hillard,
528 S.W.2d 828 (Tex. 1975) 11

Gant v. DeLeon,
786 S.W.2d 259 (Tex. 1990) 8

Holmes v. Texas Mutual Ins. Co.
(No. 08-10-00003-CV, El Paso 2011)(WL549308) 9

James v. Gruma Corp.,
129 S.W. 3d 755 (Tex. App.—Fort Worth 2004, rev. denied) 14

Maurico v. Castro,
287 S.W. 3d 476 (Tex. App.—Dallas 2009) 8

Poplin v. American Mutual Insurance Company,
321 S.W. 3d 909 (Tex. App.—Houston (14th District) 2010,
pet. for review filed 1/21/2011) 7, 9, 10

Proulx v. Wells,
235 S.W. 3d 213 (Tex. 2007) 8

Seagraves v. City of McKinney,
45 S.W. 3d 779 (Tex. App.—Dallas 2001) 14

Smith v. Travelers Casualty and Surety Company,
327 S.W. 3d 775 (Tex. App.—Eastland, no writ) 13

Taylor v. Thompson,
4 S.W. 4d 63 (Tex. App.—Houston (1st Dist) 1999, pet. denied) 9

Torres v. E.W. Johnson,
91 S.W. 3d 905 (Tex. App.—Forth Worth 2002) 12

Statutes

TEX. LAB. CODE § 410.302(b) 2
TEX. LAB. CODE § 410.303 2
TEX. LAB. CODE § 410.164(c) 9
TEX. LAB. CODE § 410.204(d) 10
TEX. LAB. CODE § 410.205(a) 15, 16
TEX. LAB. CODE § 410.252(a) 13
TEX. LAB. CODE § 410.253(a) 7, 9, 10, 14

Rules

TRCP Rule 21a 10, 14
TRCP Rule 22 13

DOCKET NO. 02-10-00357-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

SANTHAMMA GEORGE,
Appellant

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Appellee.

On Appeal from the 362nd Judicial District Court
Of Denton County, Texas
Cause No. 2009-40375-362
Honorable Bruce Farling, Judge Presiding

APPELLEE'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

NOW comes Appellee, Dallas County Hospital District, ("DCHD") and files this Appellee's Brief in support of affirming the judgment of the trial court.

STATEMENT OF THE CASE

This is a workers' compensation case. The Appeals Panel of the Division of Workers' Compensation, Department of Insurance held that Appellant, Santhamma George's ("George") compensable injury did not extend to include myelitis and that

George suffered no disability resulting from the compensable injury, but that she did suffer a compensable, flu shot injection injury.

George's suit for judicial review was limited to the issues decided by the appeals panel and on which judicial review was sought, section 410.302(b) of the Texas Labor Code. George appealed and sought judicial review of the following issues:

(1) Did George's compensable injury extend to and include myelitis; and

(2) Did George's compensable injury result in disability through the date of the hearing?

With respect to the issues George has appealed, George, as the appealing party, bore the burden of proof by a preponderance of evidence, section 410.303 of the Texas Labor Code.

DCHD also appealed the appeals panel decision, on the issue of whether the flu shot injection was job related and, thus, the injection itself considered a compensable injury (damage or harm to the body). DHCD filed its judicial review before George filed hers.

DCHD moved for summary judgment pursuant to Texas Rule of Civil Procedure 166a(i), because there was no evidence to support she timely filed her judicial review lawsuit and used due diligence in the issuance and service of citation.

In response to the motion for summary judgment, George relied upon the clerk's record to prove timely filing of her appeal with the courts. DCHD objected to George's response in that the evidence presented by George was not in admissible form. After appropriately sustaining certain objections, the trial court granted summary judgment.

George appeals the trial court's ruling on the summary judgment evidence and the final judgment entered by the Court.

POINTS OF ERROR PRESENTED

POINT OF ERROR NO. ONE

THE TRIAL COURT DID NOT ERR IN GRANTING DCHD'S MOTION FOR SUMMARY JUDGEMENT AND SUBSEQUENT FINAL JUDGMENT UNDER LABOR CODE 410.253(A)(2).

POINT OF ERROR NO. TWO

THE TRIAL COURT DID NOT ERR IN ENTERING FINAL JUDGMENT BASED ON THE LACK OF DUE DILIGENCE IN SERVICE OF THE PETITION BY GEORGE, AS GEORGE DID NOT PRESENT ANY EVIDENCE OF A FACT ISSUE.

POINT OF ERROR NO. THREE

THE TRIAL COURT WAS CORRECT IN GRANTING THE FINAL JUDGMENT AGAINST GEORGE, BASED UPON THE SUMMARY JUDGMENT, THAT NO TIMELY JUDICIAL REVIEW LAWSUIT HAD BEEN FILED BY GEORGE.

STATEMENT OF FACTS

On October 19, 2007, George received an influenza vaccination at Dallas County Hospital before checking in at work, at a "flu fair" put on by the hospital for the benefit of the general public. George filed a notice of injury and claim for compensation for allegedly sustaining an injury while acting in the course and scope of employment with DCHD. Appellee, DCHD, did not accept liability. The carrier believed the flu injection was not a compensable event and did not result in any compensable disability. The hearing officer, in a contested case hearing at the Texas Department of Insurance, Division of Workers' Compensation, found a compensable injury which was limited to the needle injection itself and did not extend to the diagnosis of myelitis, and resulted in no disability. (C.R. 038-041).

The claim proceeded to the administrative dispute resolution process. At the conclusion of the administrative dispute resolution process, the appeals panel of the Division of Workers' Compensation held George's compensable injury did not extend to myelitis, and did not result in disability through the date of the final administrative hearing. (C.R. 0042)

George then filed suit for judicial review on November 17, 2009, the last date of the 40 day limitations period. (C.R. 0002), styled *Santhamma George v. Dallas County Hospital District*, Cause No. 2009-40375-362. George alleged in her petition she was aggrieved by the appeals panel decision that her compensable injury did not extend to myelitis. George also alleged she was aggrieved by the appeals panel decision that the

compensable injury did not result in disability through the date of the final administrative hearing. (C.R. 0002-0007).

DCHD filed its original petition, styled *Dallas County Hospital District v. Santhamma George*, Cause No. 2009-40369-362, on November 12, 2009 issuing service of citation on George. The only issue appealed in this judicial review was injury in the course and scope of employment. (C.R. 0081) George filed her original answer on December 8, 2009 and her counter-claim to DCHD's claim on December 14, 2009 (C.R. 0108). On December 31, 2009, DCHD filed its Motion to Dismiss for Want of Jurisdiction based on George's failure to request service of process on DCHD (C.R. 0008). Following the filing of DCHD's motion to dismiss, George served DCHD with citation on January 26, 2010. DCHD filed its original answer by a general denial on February 10, 2010. (C.R. 0017). DCHD then filed its first supplemental answer on April 5, 2010, asserting its affirmative defense of limitations based on lack of due diligence in service of citation. (C.R. 0024).

DCHD moved for a no-evidence summary judgment under Rule 166a(i) based on its affirmative defense of limitations on April 12, 2010. (C.R. 0027). George filed her response June 3, 2010, which did not include any affidavits. (C.R. 0066). DCHD objected to George's response. (C.R. 0064). The Court granted DCHD's summary judgment on June 10, 2010, and entered a final judgment on September 9, 2010. (C.R. 0154). George first mentioned the *Poplin* case in her motion for new trial filed August 31, 2010. (C.R. 0143).

SUMMARY OF THE ARGUMENT

George challenged the administrative agency's ruling. Therefore, George bore the burden of proof on each issue by a preponderance of evidence.

When DCHD moved for "no-evidence" summary judgment, George had the burden of raising a genuine issue of fact on whether she used due diligence in the service of citation. Ultimately, George failed to present any admissible evidence that due diligence in service of citation was present in this case. As such, the trial court appropriately granted summary judgment.

Having granted summary judgment on the lack of a timely appeal being filed by George, due to the limitations period not being tolled by a filing of the petition since timely service did not follow, the trial court appropriately granted a final judgment in this judicial review lawsuit as well.

ARGUMENTS AND AUTHORITIES

POINT OF ERROR NO. ONE (Restated)

THE TRIAL COURT DID NOT ERR IN GRANTING DCHD'S MOTION FOR SUMMARY JUDGEMENT AND SUBSEQUENT FINAL JUDGMENT UNDER LABOR CODE 410.253(A)(2).

George argues, due to the language of section 410.253(a)(2) and the decision of *Poplin v. American Mutual Insurance Company*, 321 S.W. 3d 909 (Tex. App.—Houston (14th District) 2010; pet. for review filed 1/21/2011), the common law limitations defense, with its accompanying burden to prove due diligence in the service of citation, is not applicable to a workers' compensation judicial review case. To the contrary,

workers' compensation judicial review cases have used the same standard applied in personal injury lawsuits for quite some time, even in cases cited by George.

Proulx v. Wells, 235 S.W. 3d 213 (Tex. 2007), is an example where the Texas Supreme Court reiterated the decade long precendent that a personal injury suit will not be considered timely filed merely by the filing of a petition unless it is followed by the plaintiff exercising due diligence in the subsequent issuance and service of citation that falls outside the limitations period. "Date of service relates back to date of filing if Plaintiff exercised diligence in effecting service." *Gant v. DeLeon*, 786 S.W. 2d 259 (Tex. 1990). Once an affirmative plea has been pled by a defendant, as was done by DCHD on April 5, 2010, it is plaintiff's burden to present evidence showing its efforts on issuance and service of citation, "and to explain every lapse in effort or period of delay" (*Proulx* at 216). This burden is to show, using a standard of law an "ordinarily prudent person would have acted under the same or similar circumstances", that a material fact issue exists, in order to avoid a summary judgment (*Id.* 214). If lack of due diligence is established as a matter of law, Plaintiff's action must be dismissed (*Gant* at 260)

In *Maurico v. Castro*, 287 S.W. 3d 476 (Tex. App.—Dallas 2009), the circumstances were similar, with a petition filed before the statute of limitations had run but service not achieved until after the limitations had run. The plaintiff, as George in this case, presented no factual evidence explaining the thirty-one day delay in service. The Appellate Court ruled the trial court should have granted a directed verdict, as lack of due diligence was proven as a matter of law under those circumstances. The burden to act diligently continues up until the time defendant was served (*Id.* at 478).

Holmes v. Texas Mutual Ins. Co. (No. 08-10-00003-CV, El Paso 2011)(WL549308), in an example where the same standard is applied to a judicial review petition of a workers' compensation appeal. The court quoted past case law holding how an unexplained delay in effecting service constitutes a lack of diligence as a matter of law. *Taylor v. Thompson,* 4 S.W. 4d 63, 65 (Tex. App.—Houston (1st Dist) 1999, pet. denied). George's summary judgment response contained no affidavit from any witness, factual or expert, and instead relied solely on unsupported legal theories.

It was only at the hearing on the motion for new trial that George's argument shifted to the *Poplin,* holding as evidence she had done all she legally needed to do to "serve" DCHD by e-mailing a copy of her petition to counsel for DCHD. The court in *Poplin* did not discuss due diligence in it's decision, nor address the argument that the filing of an answer waived any right to object to the service performed; rather, it centered on an analysis of section 410.253 (a) of the Texas Labor Code. This section requires an appealing party to "simultaneously serve" an opposing party. The Court held service of citation by process is not required by this statute. This decision prompted a petition for review to be filed on January 21, 2011; it also is in conflict with the statutory requirement of section 410.164(c) of the Texas Labor Code, which requires an insurance carrier, at every administrative trial (benefit contested case hearing), to deliver to the claimant written notice of the true corporate name of the insurance carrier, and name and address of its registered agent for "service of process". This implies a service of process is necessary on the carrier's registered agent, while the court in *Poplin* deemed a copy of the petition, mailed to the insurance carrier's attorney of record at the administrative trial,

on the same date the petition for judicial review was filed, meets the requirements of section 410.253(a)(2). Section 410.204(d) of the Texas Labor Code also states each final appeals panel decision shall include language naming the name and address of the carrier's registered agent "for service of process" of any judicial review cause of action.

Even if this limited holding is ultimately upheld, it does not correlate with the facts at hand. George's counsel sent a copy of the petition by e-mail only to the attorney for DCHD on November 23, 2009, some six days after suit had been filed. In *Poplin*, a petition was mailed by certified mail to Carrier's counsel on the same day suit was filed, thus "simultaneously serving" an opposing party as required in section 410.253(a) of the Texas Labor Code. Under Rule 21a of the Texas Rules of Civil Procedure, unless ordered otherwise by a court order, service must be by personal service, courier, or by certified or registered mail, none of which was achieved by George.

Based on the above, the *Poplin* decision, in its limited finding based on facts not met by George's actions, does not relieve George of her obligation to prove due diligence up to the date service was achieved or, in the case at hand, up until the dated DCHD made a general appearance on December 31, 2009. Due to the unexplained delay of November 17, 2009 to December 31, 2009, the court's summary judgment and ultimate final judgment should be affirmed, based on the common law limitations defense applicable to this case.

POINT OF ERROR NO. TWO (Restated)

THE TRIAL COURT DID NOT ERR IN ENTERING FINAL JUDGMENT BASED ON THE LACK OF DUE DILIGENCE IN SERVICE OF THE PETITION BY GEORGE, AS GEORGE DID NOT PRESENT ANY EVIDENCE ON THIS ISSUE.

George attempts to place an unfounded "burden of proof" on defendant DCHD in its summary judgment response by virtue of a misplaced reliance or misinterpretation of past case law.

George first puts forth the notion that the general principle behind a statute of limitations is "timely notice of claims". What the Supreme Court actually said in *Continental Southern Lines v. Hillard*, 528 S.W.2d 828 (Tex. 1975) is "the primary purpose of a statute of limitations is to compel the exercise of a right within a reasonable time." (*Id.* at 832). The key is the pursuit of one's right through a cause of action, not the notice of same. The *Continental* case, as others cited by George on this issue, dealt with the correct party not being the party actually served, not with questions of due diligence being used between the date of filing within the statute of limitations and a delay in issuance of service well outside the limitations period. In *Bass v. Texas Ass'n of School Boards*, 55 S.W.2d 735 (Tex. App.—Corpus Christi 2001), the court actually pointed out "when a plaintiff incorrectly names a defendant in the pleading, the diligence of the plaintiff in preventing the running of limitations is not the issue, rather, the issue in whether…under the circumstances no party is misled or placed at a disadvantage by the error in pleading." In *Continental*, the injured passenger timely sued and served the wrong corporate entity as a defendant; in *Bass,* the workers' compensation plaintiff

timely sued and served the employer school district, but in the name of its third party administrator.

Under these cases, what sometimes is referred to as the "doctrine of misidentification" (*Bass* at 736) a tolling can take place between the original filing of the petition and the time the proper defendant entity was eventually named in amended pleadings. This is done when the defendant's assertion of the defense of limitations is barred because the Plaintiff can show the defendant was cognizant of the facts, was not misled or placed at a disadvantage. (*Id.* 736). This equitable tolling doctrine was followed in *Torres v. E.W. Johnson*, 91 S.W.3d 905 (Tex. App.—Fort Worth 2002), where the incorrect "E.W. Johnson Company", although timely sued and served, was not properly amended in a petition to "Emmett W. Johnson Company" until four months later. "Even in cases of misidentification, where the wrong legal entity was sued, the limitations period may be equitably tolled if the plaintiff can prove the proper defendant was not prejudiced by the mistake in pleading" (*Id.* at 905).

The bottom line is 1) George is wrong in applying the misidentification doctrine to her fact situation; 2) even if it did apply, any burden to prove "no harm, no foul" is on the plaintiff, not defendant. There is no switching of the burden of proof to DCHD regarding its summary judgment motion, and since George put on no evidence of due diligence, she correctly did not prevail.

George's assertion of a factual dispute existence, based on the "ordinarily prudent person" standard stated earlier, is limited to three theories unsupported by law:

1) Filing a counter-claim in DCHD's lawsuit, Cause No. 2009-40369-362 on December 3, 2009 is the equivalent to serving defendant in the lawsuit filed by George in Cause #2009-40375-362. George offers no statute or case law to support this belief, besides *Smith v. Travelers Casualty and Surety Company*, 327 S.W. 3d 775 (Tex. App.—Eastland 2010, no writ). *Smith* dealt with the Plaintiff filing an amended petition to add a new judicial review cause of action in a pending case, where the defendant had been timely served with citation of the original petition filed two months earlier. The court held section 410.252(a) just requires a "petition" be filed, not an "original petition". DCHD believes this logic only supports its position, as it is questionable whether a counter-claim can constitute a petition. "A civil suit in the district or county court shall be commenced by a petition" Rule 22, Texas Rules of Civil Procedure. Regardless, actions in a separate lawsuit cannot cure a party's service defects in another lawsuit. In addition, if, in fact, George was relying on the filing of the counter-claim to constitute service of the original petition in her cause of action, why did she then pay for issuance of citation by the district clerk on January 26, 2010, over six weeks later?

2) The filing of a general appearance pleading (Motion to Dismiss for Want of Jurisdiction) waived defendant's right to object to any service deficiencies or requirements, past or future. DCHD agrees its general appearance waived the obligation of George to have citation issued from that date

onward, but no statute or case law is offered by George to support the position this voluntary appearance somehow banned DCHD from asserting the past lack of due diligence of George in not pursuing service, the very legal argument it was stating in the motion filed on December 31, 2009. A party's general appearance in a suit does not waive service of process defects when the appearance occurs after the limitations period has run and the Plaintiff has not used due diligence in serving the party. *James v. Gruma Corporation*, 129 S.W. 3d 755 (Tex. App.—Fort Worth 2004, rev. denied). A general appearance did not waive statute of limitations defense where appearance did not occur until after the limitations period ran, and due diligence was not exercised in procurement of citations and service. *Seagraves v. City of McKinney*, 45 S.W. 3d 779 (Tex. App.—Dallas 2001).

3) The exchange of an original petition as an attachment in an e-mail sent six days after the petition was filed meets the requirements of TRCP Rule 21(a) and section 410.253(a)(2) of the Texas Labor Code. Once again, no case law is offered to support this legal theory.

The district court was correct in its finding that none of the above listed theories is sufficient to constitute evidence of a fact issue upon which to deny Defendant DCHD's summary judgment; therefore, the summary judgment and subsequent final judgment entered should be upheld.

POINT OF ERROR NO. THREE (Restated)

THE TRIAL COURT WAS CORRECT IN GRANTING THE FINAL JUDGMENT AGAINST GEORGE, BASED UPON THE SUMMARY JUDGMENT THAT NO TIMELY JUDICIAL REVIEW LAWSUIT HAD BEEN FILED BY GEORGE.

The Texas Labor Code is specific and clear on the ramifications of not timely appealing a final decision of the appeals panel of the Texas Department of Insurance, Workers' Compensation Division. section 410.205(a) of the Texas Labor Code states "a decision of the appeals panel regarding benefits is final in the absence of a timely appeal for judicial review." Therefore, the district court had no choice but to affirm the appeals panel finding, which was all that was stated in the final judgment entered on September 8, 2010:

"The Court finds and enters judgment confirming the final decision of the Texas Department of Insurance, Division of Workers' Compensation Appeals Panel in Decision Number 09112712, Docket Number 09112712-01-A1 on the issues presented by the Plaintiff in her action, specifically the issues of extent of injury and disability." (C.R. 0154)

Under the provisions of the Texas Labor Code, once outside the statutory 40 day deadline, George has no avenue in which to file a new judicial review lawsuit in an attempt to reverse the appeals panel findings. Therefore, the final judgment entered herein, unless reversed on appeal, will be the legal conclusion of the issues George attempted to keep in dispute. George's alternative language mentioned in the brief,

entering a take nothing judgment against George by dismissing her claims for want of jurisdiction, would have the same legal effect of the judgment entered.

CONCLUSION

In response to a no evidence summary judgment, George had the burden to raise a genuine issue of material fact that due diligence was exercised in the service in conjunction with the judicial review lawsuit which had been filed. Since no factual issues were raised by affidavit, and no evidence of due diligence presented for the actual period of November 17, 2009 (date of petition filed) to December 31, 2009 (date of general appearance by Defendant) George, as a matter of law, had not timely appealed the appeals panel decision at issue; therefore, a summary judgment based on the limitations defense was proper. A final judgment based on this finding was also proper to dispose of the lawsuit pursuant to the provision of Texas Labor Code, section 410.205(a)

PRAYER

WHEREFORE PREMISES CONSIDERED, Appellee respectfully requests that the judgment of the trial court be affirmed in its entirety.

Respectfully submitted,

BURNS ANDERSON JURY & BRENNER, L.L.P.
P.O. Box 26300
Austin, Texas 78755-6300
(512) 338-5322
(512) 338-5363 (Facsimile)

_____

Michael J. Donovan
State Bar No. 05991050
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing pleading has been forwarded this _____ day of April, 2011 in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure to the following:

Donald C. McLeaish
MCLEAISH & ASSOCIATES
P.O. Box 381609
Duncanville, TX 75138

Larry R. Wright
ATTORNEY AT LAW
406 S. Main Street
Winnsboro, TX 75494

Michael J. Donovan

APPENDIX

Tab No.

Texas Labor Code

Section 410.204..... 1

Section 410.205..... 2

Section 410.302..... 3

Section 410.303..... 4

Section 410.164..... 5

Texas Rules of Civil Procedure

Rule 22..... 6

Trial Court Order

Final Summary Judgment..... 7

Final Judgment 8