

Oral Argument Request

No. 05-11-01455-CV

**IN THE FIFTH COURT OF APPEALS
DALLAS, TEXAS**

WILLIE ADDISON - APPELLANT

V.

**DIVERSIFIED HEALTHCARE/DALLAS, L.L.C. d/b/a
BROOKHAVEN NURSING CENTER - APPELLEE**

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Judge Gena Slaughter, Presiding Trial Judge
Trial Court Cause No. CC-10-05832-D

APPELLEE'S AMENDED BRIEF

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ATTORNEYS FOR APPELLEE

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TABLE OF CONTENTS

IDENTIFICATION OF THE PARTIES iv

REQUEST FOR ORAL ARGUMENT v

INDEX OF AUTHORITIES vi

RULES/STATUTES..... viii

 I. STATEMENT OF THE CASE 1

 II. RESPONSE TO ISSUES PRESENTED..... 2

 III. STATEMENT OF FACTS..... 2

 IV. SUMMARY OF ARGUMENTS 3

 V. ARGUMENTS AND AUTHORITIES 4

REPLY ISSUE 1: Trial Court did not err in entering summary judgment 4

 A. Standard of Review 4

 B. No genuine issue of material fact existed..... 5

REPLY ISSUE 2: The Trial Court did not err in granting summary judgment as the undisputed evidence established that Appellee was not a subscriber under the Texas Workers Compensation Act 6

 A. A nonsubscriber employer cannot be sued for wrongful termination under the Texas Workers’ Compensation Act 7

 B. An occupational injury employee benefit plan is not a workers’ compensation insurance policy..... 11

 C. Appellee never took steps to invoke Texas Labor Code Section 451.001 protections 17

CONCLUSION..... 19

PRAYER..... 19

CERTIFICATE OF SERVICE..... 20

APPENDIX:

1. DWC Certification of Employer Notice of No Coverage or Termination of Coverage for coverage January 09, 2009, to January 09, 2010, for Diversified Healthcare Dallas L.L.C. d/b/a Brookhaven Nursing Center
2. Affidavit of Tom Marks
3. DWC Certification of request of records on Willie Addison
4. September 9, 2011, Order Granting Defendant's Amended Motion for Summary Judgment

IDENTIFICATION OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a complete list of the parties to the trial court's final judgment, as well as the names and addresses of their trial and appellate counsel:

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This list is furnished so that members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests this matter be heard by oral argument pursuant to Rule 39.7 of the Texas Rules of Appellate Procedure. Appellee believes oral argument would materially aid the Court in the determination of the issues of law and fact presented in this Appeal.

INDEX OF AUTHORITIES

CASES	Page
<i>Alayon v. Delta Air Lines, Inc.</i> , 59 S.W.3d 283 (Tex. App. – Waco 2001, pet. denied).....	6
<i>Anderson-Berney Realty Co. v. Soria</i> 123 Tex. 100, 67 S.W.2d 222 (1933)	13
<i>Azubuike v. Fiesta Mart, Inc.</i> , 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet.)	5, 8
<i>Centeq Realty, Inc. v. Siegler</i> , 899 S.W.2d 195, 197 (Tex. 1995).....	5
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802, 816 (Tex. 2005).....	5
<i>Crain v. Thompson</i> , 510 S.W.2d 412 (Tex. App. – Dallas 1974).....	13
<i>Dresser Indus. v. Page Petroleum, Inc.</i> , 853 S.W.2d 505 (Tex. 1993)	15
<i>Ethyl Corp. v. Daniel Constr. Co.</i> , 725 S.W.2d 705 (Tex. 1987).....	15
<i>Exxonmobil Corp. v. Kirkendall</i> , 151 S.W.3d 594, 598 n.2 (Tex. App.—San Antonio 2004, pet. denied).....	9
<i>Frost Nat’l Bank v. Fernandez</i> , 315 S.W.3d 494, 508 (Tex. 2010)	4
<i>Gilbert Texas Const., L.P. v. Underwriters at Lloyd’s London</i> , 327 S.W.3d 118 (Tex. 2010).....	11
<i>Gilbert v. Fireside Enterprises, Inc.</i> , 611 S.W.2d 869 (Tex. Civ. App. – Dallas 1980, no writ).....	16
<i>Hunt v. Van Der Horst Corp.</i> , 711 S.W.2d 77 (Tex. App. – Dallas 1986, no writ)	16
<i>Leger v. Texas EMS Corp.</i> , 18 F. Supp. 2d 690 (S.D. Tex. 1998)	5, 8
<i>Mann Franfort Stein & Lipp Advisors, Inc. v. Fielding</i> , 289 S.W.3d 844, 848 (Tex. 2009)	4
<i>Patterson v. Mobil Oil Corp.</i> , 335 F.3d 476, 488 (5th Cir. 2003)	9
<i>Provident Life & Accident Ins. Co. v. Knott</i> , 128 S.W.3d 211, 215 (Tex. 2003)	4
<i>Science Spectrum, Inc. v. Martinez</i> , 941 S.W.2d 910, 911 (Tex. 1997).....	5

CASES	Page
<i>Storage & Processors, Inc. v. Reyes</i> , 134 S.W.3d 190 (Tex. 2004).....	15, 16
<i>Texas Mexican Ry. Co. v. Bouchet</i> , 963 S.W.2d 52 (Tex. 1998).....	5, 6, 8, 10, 11, 12
<i>Tigrett v. Heritage Bldg. Co.</i> , 533 S.W.2d 65 (Tex. Civ. App. – Texarkana 1976, writ ref’d n.r.e.).....	16
<i>Underwriters at Lloyd’s of London v. Gilbert Texas Const., L.P.</i> , 245 S.W.3d 29, 36 (Tex. App.—Dallas 2007)	11
<i>Watkins v. Diversitech Corp.</i> , 988 S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).....	5, 8

RULES AND STATUTES

<u>Rule/Statute</u>	<u>Page</u>
TEX. LAB. CODE ANN. § 401.011(18)	8, 9, 11
TEX. LAB. CODE ANN. § 406.003	9
TEX. LAB. CODE ANN. § 451.001	11, 17
TEX. R. APP. P. 38.1(g)	2
TEX. R. CIV. P. 166a(c).....	4

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APPELLEE'S AMENDED BRIEF

TO THE HONORABLE COURT OF APPEALS:

Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center, Appellee
herein, submits this Amended Brief as follows:

I.

STATEMENT OF THE CASE

Appellee does not dispute Appellant's Statement of the Case.

II.

RESPONSE TO ISSUES PRESENTED

REPLY ISSUE 1: Trial Court did not err in entering summary judgment

- D. Standard of Review
- E. No genuine issue of material fact existed

REPLY ISSUE 2: The Trial Court did not err in granting summary judgment as the undisputed evidence established that Appellee was not a subscriber under the Texas Workers Compensation Act

- A. A nonsubscriber employer cannot be sued for wrongful termination under the Texas Workers' Compensation Act
- B. An occupational injury employee benefit plan is not a workers' compensation insurance policy
- C. Appellee never took steps to invoke Texas Labor Code Section 451.001 protections

III.

STATEMENT OF FACTS

Appellee objects to the "Statement of Facts" in Appellant's brief in that he fails to abide by the requirement that the facts pertinent to a party's issues be stated without argument. See Appellant's Brief at III; TEX. R. APP. P. 38.1(g). Furthermore, Appellant's "Statement of Facts" does not set forth factual statements relevant to the issue before this court – namely whether the trial court appropriately found Appellee was entitled to summary judgment as Appellee is not a subscriber under the Texas Workers' Compensation Act.

This case arises from a claim for wrongful termination under Section 451.001 of the Texas Workers' Compensation Act. (CR 7-11). Appellant filed Plaintiff's Original Petition alleging a claim of wrongful termination under that provision due to the filing of a workers' compensation claim. (CR 7-11). However, the evidence established that Appellee was not a subscriber under the Texas Workers' Compensation Act. (CR 138-42). The evidence further established that Appellant never filed a workers' compensation claim with the Texas Department of Insurance, Division of Workers' Compensation ("DWC"), that he never hired a lawyer to represent him before DWC, and that he never testified in a DWC proceeding (CR 172-73; 178-79). The trial court granted summary judgment as an employer who is a nonsubscriber under the Texas Workers' Compensation Act cannot be held liable under Section 451.001 of the Texas Workers' Compensation Act as a matter of law. (CR 259).

IV.

SUMMARY OF ARGUMENTS

The Trial Court properly granted summary judgment in favor of Appellee as Appellee was a nonsubscriber under the Texas Workers' Compensation Act. Texas caselaw holds that nonsubscribers can not be held liable for wrongful termination under Section 451.001 of the Texas Labor Code. Appellee did not procure a Texas workers' compensation insurance policy, and filed the appropriate paperwork establishing that it elected to be a nonsubscriber under the Texas Workers' Compensation Act. Furthermore, Appellant did not file a workers' compensation claim with the DWC, he did not hire an attorney to pursue a workers' compensation claim, and he did not testify at an administrative proceeding before the DWC.

Accordingly, even if Appellee did have workers' compensation insurance, Appellant did not invoke any step to seek protection under Section 451.001.

IV.

ARGUMENTS AND AUTHORITIES

REPLY ISSUE 1: Trial Court did not err in entering summary judgment

A. Standard of Review

B. No genuine issue of material fact existed

The Trial Court properly granted Appellee's Motion for Summary Judgment. Appellant's pleadings only pled for wrongful termination under Section 451.001 of the Texas Labor Code. Because Appellee was not a subscriber under the Texas Workers' Compensation Act, it cannot be held liable under Section 451.001 of the Texas Labor Code.

A. Standard of Review

In reviewing the granting of summary judgment, an appellate court should conduct a *de novo* review of the evidence. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A movant for summary judgment is entitled to summary judgment if it can establish there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Franfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A defendant is entitled to summary judgment if it can conclusively negate at least one essential element of each of the plaintiff's causes of action. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Evidence is

conclusively established if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once a defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). In reviewing a trial court's granting of summary judgment, the Court of Appeals takes all evidence favorable to the non-movant as true, and indulges every reasonable inference in his favor. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

B. No genuine issue of material fact existed

Texas caselaw provides that nonsubscribers to the Texas Workers' Compensation Act cannot be held liable under Section 451.001 of the Texas Labor Code. *See Texas Mexican Ry. Co. v. Bouchet*, 963 S.W.2d 52 (Tex. 1998); *Watkins v. Diversitech Corp.*, 988 S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Leger v. Texas EMS Corp.*, 18 F. Supp. 2d 690 (S.D. Tex. 1998). Appellant failed to offer any evidence showing that Appellee represented it was a subscriber under the Texas Workers' Compensation Act. (CR 180-249). In fact, Appellant admitted that he did not know whether or not a workers' compensation policy existed. (CR 172).

The Trial Court properly entered summary judgment in favor of Appellee as Appellee submitted uncontroverted evidence from the DWC establishing that Appellee was not a subscriber under the Texas Workers' Compensation Act. (CR 138-39). Additionally, the

administrator for Appellee signed an affidavit confirming that Appellee did not purchase a workers' compensation insurance policy. (CR 140-142). Appellant produced no evidence to show that a workers' compensation insurance policy actually existed to rebut this evidence. (CR 180-249).

The Waco Court of Appeals has held that Section 451.001 of the Texas Labor Code “is designed to protect employees **who are entitled to workers' compensation benefits** from being discharged because they take steps to collect those benefits.” *Alayon v. Delta Air Lines, Inc.*, 59 S.W.3d 283 (Tex. App. – Waco 2001, pet. denied)(emphasis added). In the case at bar, there is no evidence that Appellant was entitled to benefits under the Texas Workers' Compensation Act because Appellee was not a subscriber to the Act. In keeping with the decision from the Texas Supreme Court, employees of nonsubscribers cannot recover under Section 451.001, just as they could not recover workers' compensation benefits under the Texas Workers' Compensation Act. *Bouchet*, 963 S.W.2d at 56. Because the evidence conclusively established that Appellee was not a subscriber under the Texas Workers' Compensation Act, no genuine issue of material fact exists, and Appellee was entitled to summary judgment as a matter of law.

REPLY ISSUE 2: The Trial Court did not err in granting summary judgment as the undisputed evidence established that Appellee was not a subscriber under the Texas Workers Compensation Act

- A. A nonsubscriber employer cannot be sued for wrongful termination under the Texas Workers' Compensation Act**
- B. An occupational injury employee benefit plan is not a workers' compensation insurance policy**

C. Appellee never took steps to invoke Texas Labor Code Section 451.001 protections

Appellant's Brief focuses on facts and caselaw asserting that an injured worker may bring suit against his employer for wrongful termination due to the filing of a workers' compensation claim. However, Appellant's Brief is based on the incorrect premise that Appellee was a subscriber under the Texas Workers' Compensation Act. Because the summary judgment evidence conclusively established that Appellee was a nonsubscriber under the Texas Workers' Compensation Act, Appellant is not entitled to sue under Texas Labor Code Section 451.001.

A. A nonsubscriber employer cannot be sued for wrongful termination under the Texas Workers' Compensation Act

As noted above, Appellee was entitled to summary judgment as it is a nonsubscriber under the Texas Workers' Compensation Act, and Section 451.001 does not afford a cause of action against a nonsubscriber. In addressing this point in Appellant's Brief, he cites to numerous cases finding liability against employers; however, in each of those cases the employer was a subscriber under the Texas Workers' Compensation Act. Therefore, none of the cases cited by Appellant have any bearing on the case at bar. There is no need to conduct any analysis of a causal connection between a workers' compensation proceeding and a termination as there was never any workers' compensation proceeding given that Appellant never even filed a workers' compensation claim with DWC. (CR 178-79). Nor does there need to be any consideration of a causal connection between Appellant's injury and the end

of his employment because Appellee cannot be held liable under Texas Labor Code Section 451.001 as a matter of law.

Appellant's Brief does not even address the Texas Supreme Court ruling in *Texas Mexican Railway Co. v. Bouchet*, which clearly holds Section 451.001 does not apply to nonsubscribers. 963 S.W.2d at 56. The Texas Supreme Court clearly stated "the Legislature's intent is unmistakable: article 8307c¹ is intended to apply only to employees and employers who act under the Texas Workers' Compensation Act." *Id.* While Appellant notes the existence of *Bouchet* in his Summary of the Argument, he does not attempt to distinguish the holding of *Bouchet* or its progeny in the body of his brief. *See also*, *Watkins v. Diversitech Corp.*, 988 S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Leger v. Texas EMS Corp.*, 18 F. Supp. 2d 690 (S.D. Tex. 1998). These decisions all hold that only employers who subscribe to the Texas Workers' Compensation Act can be sued for wrongful termination by an employee who alleges that he was terminated for filing a workers' compensation claim.

The Texas Labor Code defines "employer" under the Texas Workers' Compensation Act as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage." TEX. LAB. CODE ANN. § 401.011(18)

¹ The Texas Supreme Court went on to find that while it analyzed the *Bouchet* claims under article 8307c, it would reach the same result under Texas Labor Code §451.001. *Bouchet*, 963 S.W.2d at 56-57.

(Vernon 2006) (emphasis added). In order for an employer to demonstrate it is a subscriber to the workers' compensation system in the State of Texas, and thus for the employer to have "subscriber status," the employer needs to show it obtained "a workers' compensation policy by paying a premium to an authorized insurer." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 488 (5th Cir. 2003). In *Exxonmobil Corp. v. Kirkendall*, 151 S.W.3d 594, 598 n.2 (Tex. App.—San Antonio 2004, pet. denied), the San Antonio Court of Appeals adopted the Fifth Circuit's test in *Patterson* and held that in order for an employer to qualify as a workers' compensation subscriber under the Texas Workers' Compensation Act, it had to have workers' compensation insurance in effect from an insurance company authorized to write workers' compensation insurance in the State of Texas. *Exxonmobil*, 151 S.W.3d at 599; citing TEX. LAB. CODE ANN. §§ 401.011(18) and 406.003; and *Patterson*, 335 F.3d at 488.

While Appellant alleges that he was wrongfully terminated for filing a workers' compensation claim, both the DWC and Mr. Tom Marks, the Administrator of Brookhaven Nursing Center, have confirmed that Appellee was not a subscriber to the workers' compensation system during the pendency of Appellant's employment with Appellee. (CR 138-142). Therefore, Appellee cannot be sued for alleged wrongful termination under Texas Labor Code Section 451.001. The DWC Form-5, which was filed by Diversified Healthcare Dallas, LLC d/b/a Brookhaven Nursing Center with DWC on January 9, 2009, confirms that Appellee elected not to obtain workers' compensation insurance coverage under the Texas Workers' Compensation Act. (CR 138-39). This document evidences the

fact that Appellee was not a subscriber to the Texas workers' compensation system from January 9, 2009, through January 9, 2010. (CR 138-39). This evidence is further supported by the affidavit of Tom Marks, the Administrator of Brookhaven Nursing Center, who affirmed under oath that Brookhaven did not have Texas workers' compensation insurance coverage, and was not a subscriber to the Texas workers' compensation system on or about November 16, 2009, the date of the Appellant's claimed termination. (CR 140-142). Appellant offered no evidence to show that Appellee was a subscriber to the Texas Workers' Compensation system, nor is there any evidence to show that Appellee paid premiums to an authorized insurer for a workers' compensation policy. (CR 180-249). Likewise, Appellant offered no evidence whereby Appellee specifically represented that it was a subscriber under the Texas Workers' Compensation Act. (CR 180-249).

As Appellee was not a subscriber under the Texas Workers' Compensation Act, it may not be sued by Appellant under Texas Labor Code Section 451.001 for wrongful termination. *Bouchet*, 963 S.W.2d at 56. Texas caselaw is clear that nonsubscribers cannot be sued under this provision in the Texas Workers' Compensation Act, and Appellant cited no cases permitting such suits against nonsubscribers for statutory violation of an Act to which the employer does not subscribe. Accordingly, there is no genuine issue of material fact, and the trial court did not err in granting summary judgment in favor of Appellee.

B. An occupational injury employee benefit plan is not a workers' compensation insurance policy

Appellant attempts to argue that summary judgment should not be granted as Appellee's employee handbook contains a section titled "Workers' Compensation", and this creates a fact issue precluding the granting of summary judgment. However, one cannot create coverage by waiver and estoppel where coverage does not exist. *Underwriters at Lloyd's of London v. Gilbert Texas Const., L.P.*, 245 S.W.3d 29, 36 (Tex. App.—Dallas 2007), *aff'd Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010). Regardless of the wording contained in the employee handbook, if no workers' compensation insurance policy exists under the Texas Workers' Compensation Act, Appellee cannot be held liable for wrongful termination under the Texas Workers' Compensation Act.² *Bouchet*, 963 S.W.2d at 56.

The evidence conclusively established that Appellee did not carry a workers' compensation insurance policy subject to the Texas Workers' Compensation Act, and was not a subscriber to the Texas Workers' Compensation system. (CR 138-142). Thus, Appellee does not fall under the definition of "employer" in the Workers' Compensation Act and cannot be sued for wrongful termination under the Texas Workers' Compensation Act. TEX. LAB. CODE ANN. § 401.011(18); § 451.001 (Vernon 2006). As discussed above, only employers who subscribe to the Texas Workers' Compensation Act can be sued for wrongful

² It should be noted that Appellant has not asserted any claim for breach of contract or any other cause of action other than Section 451.001 of the Texas Labor Code.

termination by an employee who alleges that he was terminated for filing a workers' compensation claim. *Bouchet*, 963 S.W.2d at 56.

The existence of a handbook making vague references to workers' compensation in various states cannot in and of itself make an employer a subscriber under the Texas Workers' Compensation Act, when, in fact, there is no workers' compensation insurance policy under the Texas Workers' Compensation Act. Both the DWC and Tom Marks, the Administrator of Brookhaven Nursing Center, confirmed that Appellant did not have Texas workers' compensation insurance coverage, and was not a subscriber to the Texas workers' compensation system on or around November 16, 2009. (CR 138-142).

Appellant attempts to argue that Appellee should be held liable for failure to publish that it did not give notice "that any of the information in the handbook was not current or that any of the policies referred to in the handbook had lapsed." See Appellant's Brief, page 11. However, Mr. Marks gave unrebutted sworn testimony that Appellee posted a notice in the employee break room during Mr. Addison's employ which stated that it is not a subscriber under the Texas Workers' Compensation Act. (CR 141). Furthermore, Appellant testified that he did not even receive the Employee Handbook—which is what the Appellant is now relying on to "create" workers' compensation coverage:

- 22. Q. Do you recall if you ever received any handbook
- 23 or paperwork that -- that Brookhaven gave you when you
- 24 started employment there?
- 25 A. When I first started?
- 1 Q. Yes.
- 2 A. No, I didn't receive anything.

(CR 169-70). Appellant also testified that he was not even aware of whether Appellee carried workers' compensation insurance or not as set forth in his deposition:

- 20 Q. Did you believe Brookhaven had workers'
21 compensation?
22 A. I was unaware if they had it or not.

(CR 172).

Appellant cites several cases for the proposition that an employee can sue for breach of contract when an employer fails to provide workers' compensation coverage. *Crain v. Thompson*, 510 S.W.2d 412 (Tex. App. – Dallas 1974)(breach of contract suit following employee's death for allowing workers' compensation insurance policy to lapse); *Anderson-Berney Realty Co. v. Soria* 123 Tex. 100, 67 S.W.2d 222 (1933)(suit for injuries sustained after workers' compensation insurance coverage had lapsed). However, each of these cases are inapplicable because they involved breach of contract causes of action. In the case at bar, Appellant did not plead breach of contract against Appellee. Furthermore in both *Crain* and *Anderson-Berney*, the employer had a qualified workers' compensation insurance policy in place and failed to give notice that coverage had lapsed. Appellant has confirmed he was not ever aware of the existence of a workers' compensation policy. (CR 172).

In the case at bar, Appellee did maintain a policy to protect employees who may be injured on the job; however, the "Occupational Injury Employee Benefit Plan" ("the Plan") was not a workers' compensation policy governed by the Texas Workers' Compensation Act. (CR 143-163). Nothing in the handbook specifically states that employees will be covered under the Texas Workers' Compensation Act. (CR 143-163). Furthermore, the Plan

specifically states that Appellee has rejected coverage for Texas employees under the Texas Workers' Compensation Act. (CR 144).

The mere existence of the Plan does not permit injured workers to file a workers' compensation claim with the DWC as there is no licensed workers' compensation "insurer". Likewise, the reference in an employee handbook to workers' compensation does not create coverage under a state approved insurance policy when no such policy exists. In attempting to rebut the Amended Motion for Summary Judgment, Appellant's only "evidence" of the existence of a qualified workers' compensation insurance policy is the reference to the workers' compensation section of the handbook. Yet, by Appellant's own testimony, he did not even recall receiving a handbook when he started working with Appellant. (CR 169-70). Furthermore, the DWC has confirmed that Appellee is not a subscriber under the Texas Workers' Compensation Act, and Appellee's administrator has explained that the reference to workers' compensation in the handbook is referencing the Plan – not a workers' compensation insurance policy pursuant to the Texas Workers' Compensation Act. (CR 138-42).

It is undisputed that Appellee was a nonsubscriber under the Texas Workers' Compensation Act during the period of Appellant's employment. (CR 138-42). Accordingly, Appellee's employees could not file a claim with DWC, nor could they hire a lawyer, testify in a hearing, or receive benefits under the Texas Workers' Compensation Act. Likewise, Appellant cannot seek relief under Section 451.001 of the Texas Labor Code given that Appellee is a nonsubscriber under the Texas Workers' Compensation Act.

Appellant improperly cites *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987), and *Dresser Indus. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), for the proposition that an employer must meet the fair notice requirements of the express negligence doctrine and conspicuousness when employees are enrolled in a non-subscriber benefit plan. However, both *Ethyl* and *Dresser* involved contractual requirements for enforceable indemnity provisions which involved extraordinary risk-shifting. Neither case posits that an employer is required to comply with fair notice requirements related to subscriber status under the Texas Workers' Compensation Act. Regardless, as noted above, the unrefuted evidence was that Appellee did post a notice in the employee break room pointing out that it is a non-subscriber. (CR 141). Most importantly, however, the Plan does not involve risk-shifting. (CR 143-163). The Plan does not require employees to give up their right to sue their employer for on the job injuries. (CR 143-163). The Plan merely sets forth how Appellee intended to help its employees who might be injured on the job. (CR 143-163). As there is no extraordinary risk-shifting, the fair notice line of cases are inapplicable.

Likewise, the decision in *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004), is inapplicable to the case at bar because Appellant is not suing Appellee over a risk-shifting clause in a contract. In *Storage*, the employee sued the employer to recover for injuries sustained in the course and scope of his employment. The employer had asserted that the employee could not sue the employer because the employee had signed a release whereby he waived his common law right to sue for injuries by accepting the benefit plan. *Storage*

differs from the instant case because Appellant did not sue Appellee to recover for injuries sustained in the course and scope of his employment – he sued for wrongful termination under the Texas Labor Code. Furthermore, this matter differs from *Storage* because the Legislature amended Texas Labor Code Section 406.033 in 2001 and stated that for all injuries after September 1, 2001, an injured worker cannot agree to waive his right to sue for damages before an injury occurs. *Id.* at 192. The date of injury in *Storage* was April 13, 1995. *Storage* is not applicable because it was effectively superseded by statute and because, unlike the employee in *Storage*, Appellant has not claimed that he signed a pre-injury release of a right to sue for injuries sustained on the job.

Appellant also misinterprets the decisions in *Tigrett v. Heritage Bldg. Co.*, 533 S.W.2d 65 (Tex. Civ. App. – Texarkana 1976, writ ref'd n.r.e.), and *Gilbert v. Fireside Enterprises, Inc.*, 611 S.W.2d 869 (Tex. Civ. App. – Dallas 1980, no writ). Both of those decisions held that an employee may have a breach of contract cause of action against their employer to recover benefits under an occupational benefit plan. However, in the case at bar, Appellant did not plead a breach of contract cause of action nor did he plead any cause of action for injuries sustained on the job or for violation of the Plan, and instead chose to solely pursue a wrongful termination claim under Section 451.001 of the Texas Labor Code.

Appellant's reliance on *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77 (Tex. App. – Dallas 1986, no writ) is also misplaced. Once again, the *Hunt* decision is premised on the fact that the plaintiff's employer was a subscriber under the Texas Workers' Compensation

Act. *Hunt* does not hold that a nonsubscriber to the Texas Workers' Compensation Act can be held liable under Texas Labor Code Section 451.001.

Appellee can only be held liable under Texas Labor Code Section 451.001 if it is a subscriber under the Texas Workers' Compensation Act. Appellant failed to produce any evidence raising a genuine issue of material fact as to whether or not Appellee was a subscriber under the Texas Workers' Compensation Act. Because the evidence conclusively established that Appellee was a nonsubscriber under the Texas Workers Compensation Act, the trial court properly granted summary judgment in favor of Appellee.

C. Appellee never took steps to invoke Texas Labor Code Section 451.001 protections

In addition to the fact that Appellant cannot recover under Texas Labor Code Section 451.001 as Appellee was a nonsubscriber, Appellant failed to show that he undertook steps to seek protections under that provision. Specifically, Texas Labor Code Section 451.001 provides:

A person may not discharge or in any other manner discriminate against an employee because the employee has:

- (1) filed a workers' compensation claim in good faith;
- (2) hired a lawyer to represent the employee in a claim;
- (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; [] or
- (4) testified or is about to testify in a proceeding under Subtitle A.

TEXAS LAB. CODE ANN. §451.001. The summary judgment evidence established that Appellant did not file a workers' compensation claim; Appellant did not hire a lawyer to represent him in a workers' compensation claim; Appellant did not institute or cause to be instituted in good faith a workers' compensation claim; nor did Appellant testify in a proceeding under the Texas Workers' Compensation Act. (CR 172-73; 178-79).

The DWC has certified that Appellant never filed a workers' compensation claim with the administrative agency. (CR 178-79). Appellant confirmed that he never even contacted the DWC, nor did he hire a lawyer about a workers' compensation claim:

9 Q. Did you ever hire an attorney, aside -- aside
10 from Mr. Wall for this lawsuit, but did you ever hire an
11 attorney about a workers' compensation claim?

12 A. Did I ever hire an attorney about a workman's
13 compensation claim.

14 Q. Against Brookhaven?

15 A. No.

16 Q. Did you ever contact the Division of Workers'
17 Compensation in Texas about whether you could file a
18 workers' compensation claim against Brookhaven?

19 A. No.

20 Q. Did you believe Brookhaven had workers'
21 compensation?

22 A. I was unaware if they had it or not.

23 Q. But you never called the Division of Workers'
24 Compensation to see if they did; is that accurate?

25 A. Yeah, that's accurate.

1 Q. Did you -- and I take it you never went to the
2 Division of Workers' Compensation to try to actually
3 file a claim; is that accurate?

4 A. That's accurate.

(CR 172-73).

Appellant's own testimony confirms that he never took any predicate step under Section 451.001 of the Texas Labor Code to form the basis of a wrongful discharge or discrimination claim in violation of that section. Because the Appellee was a nonsubscriber under the Texas Workers' Compensation Act, and because Appellant never filed a claim with the DWC, hired an attorney to represent him on a DWC claim, or testified in a DWC proceeding, Appellee cannot be held liable under Texas Labor Code Section 451.001. Accordingly, Appellee was entitled to summary judgment as a matter of law, and the trial court did not err in granting Appellee's Amended Motion for Summary Judgment.

CONCLUSION

The Trial Court's order granting Appellee's Amended Motion for Summary Judgment should be affirmed. Appellant did not raise a genuine issue of material fact to preclude the granting of summary judgment. The summary judgment evidence conclusively established that Appellee was not a subscriber under the Texas Workers' Compensation Act, and, therefore, cannot be held liable under Texas Labor Code Section 451.001 as a matter of law. Therefore, the Trial Court properly granted summary judgment in favor of Appellee.

PRAYER

Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center prays the Trial Court's order granting Appellee's Amended Motion for Summary Judgment be affirmed, that all taxable costs on this appeal be taxed to Appellant, and all other appropriate relief.

Respectfully Submitted,

AYERS & AYERS

By: /s/ Julie B. Tebbets

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817-267-9009; 817-318-0663 Facsimile

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been forwarded via by certified mail, return receipt requested, to counsel for Appellee as follows:

On February 1, 2012, Appellee's Brief was served upon:

John E. Wall, Jr. **VIA CERTIFIED MAIL, RRR**
LAW OFFICES OF JOHN E. WALL, JR. **NO. 7010 2780 0000 4547 1550**
5728 Prospect Avenue, Suite 2001
Dallas, Texas 75206-7284.

COUNSEL FOR APPELLANT, Willie Addison

On February 7, 2012, Appellee's Amended Brief was served upon:

John E. Wall, Jr. **VIA CERTIFIED MAIL, RRR**
LAW OFFICES OF JOHN E. WALL, JR. **NO. 7010 2780 0000 4547 1598**
5728 Prospect Avenue, Suite 2001
Dallas, Texas 75206-7284.

COUNSEL FOR APPELLANT, Willie Addison

/s/ Julie B. Tebbets

Julie B. Tebbets

Appendix 1



Texas Department of Insurance
Division of Workers' Compensation
 7551 Metro Center Drive Suite 100, MS-92, Austin, Texas 78744-1609
 (512) 804-4000 (512) 804-4001 fax www.tdi.state.tx.us

STATE OF TEXAS §
 §
 COUNTY OF TRAVIS §

CERTIFICATION OF INSTRUMENT(S)

The Commissioner of the Division of Workers' Compensation, as the chief administrative and executive officer and custodian of records of the Division of Workers' Compensation has delegated to the undersigned the authority to certify the authenticity of documents filed with or maintained by or within the custodial authority of the Division of Workers' Compensation (DWC) of the Texas Department of Insurance.

Therefore, I, Wanda Diggs, Records Processing Manager hereby certify to the best of my knowledge and belief that the attached documents are true and correct copies of the documents described below. I further certified that the documents described below are filed with or maintained by or within the custodial authority of the Division of Workers' Compensation of the Texas Department of Insurance. Attached are copies of (Employer Notice of No Coverage Or Termination of Coverage.) for coverage January 09, 2009 to January 09, 2010 for:

Diversified Healthcare Dallas LLC
 dba
Brookhaven Nursing Center
1855 Cheyenne Drive
Carrollton, TX. 75010

I FURTHER CERTIFY that these records are kept by the DWC in the regular course of business and it was in the regular course of business of the DWC for an employee or representative of the DWC to make the records or to transmit the information thereof to be included in such records; and the records were made at or near the time or reasonably soon thereafter.

IN TESTIMONY WHEREOF, witness my hand and seal of office in Austin, Texas, this 13th day of July 2011.

ROD BORDELON
 Commissioner of the Division of Workers' Compensation


 Wanda Diggs, Records Processing Manager



Do not remove any of the attached records or detach this certification page. These actions nullify the certification.



*Street # 15 7551

Send DWC FORM-5 by certified mail or personal delivery to:
TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION
551 Metro Center Drive, Suite 100
Austin, Texas 78744

EMPLOYER NOTICE OF NO COVERAGE OR TERMINATION OF COVERAGE

INSTRUCTIONS

WHO MUST FILE: All employers (including former sole proprietors who have formed corporations which have only one employee) must file a DWC FORM-5 with the Texas Department of Insurance, Division of Workers' Compensation unless the employer:

- a. has workers' compensation insurance;
- b. is a certified self-insurer;
- c. is a self-insured political subdivision; or
- d. only employs employees who are exempt from coverage under the Texas Workers' Compensation Act.

WHEN TO FILE: See reverse side of form.

NO COVERAGE OR TERMINATION OF COVERAGE

1. Check one of the following:

The below named employer **ELECTS NOT** to obtain workers' compensation insurance coverage, pursuant to the Texas Workers' Compensation Act, Texas Labor Code, Section 406.004.

The below named employer has **TERMINATED** workers' compensation insurance coverage, effective date _____ of Policy Number _____ and has notified the _____ Insurance Company on (date) _____, pursuant to the Texas Workers' Compensation Act, Texas Labor Code, Section 406.007. Notice has been (will be) provided to employees on the following date: _____.

EMPLOYER INFORMATION (PLEASE TYPE OR PRINT:)

2. Employer Business Name Diversified Healthcare Dallas, LLC dba Brookhaen Nursing Center	3. Federal Tax ID Number 20-3072019
4. Employer Business Mailing Address 1855 Cheyenne Drive Carrollton, Texas 75010	
5. Description of Business Operations. Identify type and nature of business. long term care facility	

6. Name, Federal Tax ID Number and Address of each Business Location covered by this report, if different from the above. To identify additional locations, submit a DWC FORM 205.

Name _____

Address _____

City _____ State _____ Zip _____

Federal Tax ID Number _____

Name _____

Address _____

City _____ State _____ Zip _____

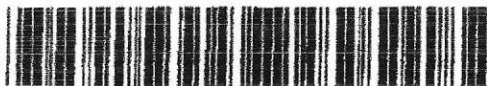
Federal Tax ID Number _____

PERSON PROVIDING THIS INFORMATION	
7. Name Doug Elliott	
8. Title Administrator	
9. Signature D Elliott	10. Date 1-5-09

DIVISION DATE STAMP HERE:

**RECEIVED
AUSTIN CENTRAL-DWC
JAN 09 2009
TEXAS DEPARTMENT OF INSURANCE
DIVISION OF WORKERS' COMPENSATION**

1-16-09ND



Appendix 2

WILLIE ADDISON

IN THE DISTRICT COURT OF

VS.

DALLAS COUNTY, TEXAS

DIVERSIFIED HEALTHCARE/
DALLAS, L.L.C. d/b/a
BROOKHAVEN NURSING CENTER

191ST JUDICIAL DISTRICT

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared Tom Marks, who, being by me duly sworn, deposed as follows:

1. My name is Tom Marks, Custodian of Records for Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated herein and said facts are true and correct. I am the Administrator of Brookhaven Nursing Center.

2. I am the Custodian of Records for Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center. Attached hereto are 31 pages of records of Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center. Said 21 pages of records are kept by Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center in the regular course of business and it was the regular course of business of Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center for an employee or representative of Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center with knowledge of the act, event,



condition, opinion or diagnosis recorded, to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the originals or exact duplicates of the originals.

3. Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center did not have Texas workers' compensation insurance coverage, and was not a subscriber to the Texas workers' compensation system on or around November 16, 2009. Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center did post a flyer confirming that it is not a subscriber under the Texas Workers' Compensation Act, and this flyer was posted in the employee break room during the term of Willie Addison's employment with Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center.

4. Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center did have an Occupational Injury Employee Benefit Plan in effect during the entire period of Willie Addison's employment which would cover injuries its employees might sustain while working at Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center, but it was not a workers' compensation insurance policy. A copy of the Occupational Injury Benefit Plan is attached hereto. Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center did not have insurance coverage under a workers' compensation insurance policy pursuant to the Texas Workers' Compensation Act at any time during Willie Addison's employment with Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center. The "Workers' Compensation" section contained in the Employee Handbook is referencing the Occupational Injury Benefit Plan.

5. Diversified Healthcare Services, Inc. is not affiliated with Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center or its parent company, Diversified Healthcare, L.L.C. Willie Addison was an employee of Diversified Healthcare Dallas, L.L.C. d/b/a Brookhaven Nursing Center.

FURTHER, AFFIANT SAITH NOT.

SIGNED this 7th day of July, 2011.


Tom Marks, Affiant

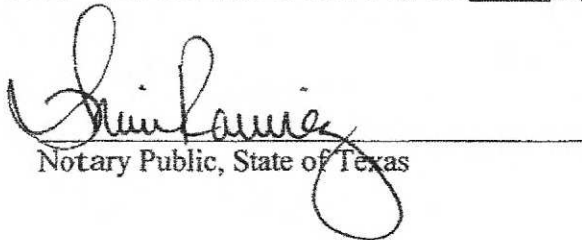
THE STATE OF TEXAS :

COUNTY OF DALLAS :

BEFORE ME, the undersigned authority, on this day personally appeared Tom Marks, known to me to be the person whose name is subscribed hereto and who stated to me under oath that he signed the foregoing instrument for the purpose and considerations therein expressed.

TO CERTIFY WHICH, WITNESS MY hand and seal of office on this 7th day of July, 2011.




Notary Public, State of Texas

My Commission Expires:

7-25-2012

Appendix 3



Texas Department of Insurance
Division of Workers' Compensation
7551 Metro Center Drive Suite 100 Austin, Texas 78744-1809
(512) 804-4000 (512) 804-4001 fax www.tdi.state.tx.us

STATE OF TEXAS
COUNTY OF TRAVIS

The Commissioner of the Division of Workers' Compensation, as the chief administrative and executive officer and custodian of records of the Division of Workers' Compensation has delegated to the undersigned the authority to certify the authenticity of documents filed with or maintained by or within the custodial authority of the Records Center, Division of Workers' Compensation (DWC) of the Texas Department of Insurance. The undersigned has likewise been delegated the authority to attest to the inability to locate records after a diligent search.

Therefore, I, Thomasina Tijerina, Records Manager for the Records Center, hereby attest that after a diligent search of the records filed with or maintained by or within the custodial authority of the Records Center of the Division of Workers' Compensation Division, the records described below have *not* been located. I further attest that to the best of my knowledge the records described below are the type of records that would normally be filed with or maintained by or within the custodial authority of the Records Center, Division of Workers' Compensation, of the Texas Department of Insurance.

IN TESTIMONY WHEREOF, witness my hand and seal of office in Austin, Texas, this
3rd Date of August, 2011

ROD BORDELON
Commissioner of the Division of Workers' Compensation

A handwritten signature in cursive script that reads "Thomasina Tijerina".

Thomasina Tijerina
Records Manager for the Records Center





Texas Department of Insurance

Division of Workers' Compensation
7551 Metro Center Drive, Suite 100 • Austin, Texas 78744-1609
512-804-4990 x319 • 512-804-4993 fax • www.tdi.state.tx.us

David Pettineo
AYERS & AYERS
4205 GATEWAY DR STE 100
COLLEYVILLE TX 76034

Date Processed: 8/3/2011
Employee : Willie Addison
Employee SSN : XXX-XX-8721

Form-155 REQUEST RESPONSE

The Division has performed a check of its records on the above named employee using the information provided and was unable to locate any claim files for this employee.

DWC #	Injury Date	Employer	Injury	ClaimType	*Comments
-------	-------------	----------	--------	-----------	-----------

Note: A separate request Form-153 must be submitted to obtain copies of above file(s). Please submit the request to the address found in the header of this form. A fee statement will be sent prior to receiving your copies.

Appendix 4

CAUSE NO. 10-05832

4065
000663

WILLIE ADDISON	§	IN THE DISTRICT COURT OF
	§	
VS.	§	
	§	DALLAS COUNTY, TEXAS
DIVERSIFIED HEALTHCARE/ DALLAS, L.L.C. d/b/a BROOKHAVEN NURSING CENTER	§ § §	191 ST JUDICIAL DISTRICT

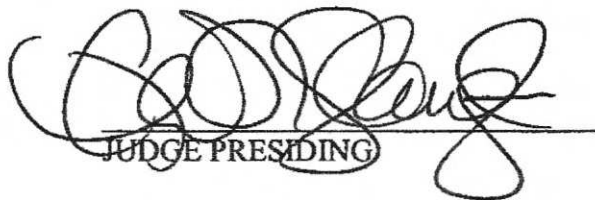
ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR SUMMARY JUDGMENT

The Court, having considered the Defendant's Amended Motion for Summary Judgment, the pleadings and evidence on file, and arguments of counsel, enters the following Order:

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center's Amended Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's claims against Defendant Diversified Healthcare/Dallas, L.L.C. d/b/a Brookhaven Nursing Center are dismissed.

SIGNED this 9th day of Sept, 2011.


JUDGE PRESIDING