



FOR *the* DEFENSE

October 2018

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Craig Reese



Greetings, and welcome to fall and all the upcoming holidays and festivities.

As I look out the window today, I see a beautiful sunny day with temperatures in the low 70's. This is one of those rare fall days we enjoy in Texas. Of course, yesterday I thought I needed to build another ark it was raining so hard. I am sure that wherever you are, temperatures are changing and so are the leaves. It won't be long before Halloween, and then Thanksgiving and Christmas are just around the bend. I noticed that many of the stores are already putting up Christmas decorations. Everyone is in such a hurry. Take time and enjoy this time of year. Summer is behind us. Winter has not yet arrived. We at Fletcher Farley, while continuing to work hard on your cases, are taking advantage of this great weather. We will enjoy a corn dog at the State Fair and think of all our great clients. We greatly appreciate each and every one of you.

Workers' Compensation Benefits as the Exclusive Remedy for Borrowed Employees

Lorin Subar



Prior to September of 2013, under many common circumstances, a borrowed servant could file suit outside the limitations of the Texas Workers' Compensation Act ("the TWCA"), even though their general employer (generally an employment staffing agency) was covered under a workers' compensation policy. The upshot was that an employee could both receive benefits under the TWCA from their general employer, and still sue their "special employer," the business to which they had been assigned by the staffing agency, for

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Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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damages.

In 2013, the Texas Legislature passed new legislation providing that where a "temporary employment service" is covered by a policy of workers' compensation insurance, that same policy covers the clients of the employment service as well. The new Texas Labor Code provision, Tex. Lab. Code § 93.004, continues on to provide that if, in fact, the temporary service has insurance, both the temporary service *and* the clients of the temporary service are entitled to the protections of the exclusive remedy provisions of the TWCA.

But even when the general employer fails to carry the required workers compensation policy, a borrowed employee still may fall within the protections of the exclusive remedy bar under the TWCA if the special employer carries workers' compensation insurance. To obtain that benefit though, it becomes necessary for the special employer to prove that they had the right to control the special employee. Generally, this is done one of two ways. The first, the more simply approach, is based on the existence of a contract between the staffing agency and its client which, many times, explicitly sets out which entity controls the employee. The second, and less reliable avenue for proving control is to examine the facts and circumstances of the work itself. This includes an examination of the relationship between the employee and the special employer; who is supplying the tools, who is providing instruction and supervision of the employee and not simply the ends to be accomplished. Again, the query is not whether the employee, at the very moment of the accident, is performing a function for the special employer, but rather who, at that time, has the right to control the employee.

As many employment-related accidents carry with them some of the more traumatic accidents and injuries, it is important to conscientiously, thoroughly, and expeditiously investigate and document all aspects of an employment-related accident.

Conflicts Resolved

Fletcher Farley Favorable Decision

[Gene Rhee](#) recently obtained a decision in favor of his client, a workers' compensation carrier, following a Contested Case Hearing (i.e., a trial before the Administrative Law Judge). The Claimant claimed that on September 20, 2017, he was involved in a motor vehicle accident and suffered neck and back injuries. At the time, the Claimant was operating a tractor-trailer for his employer. The Carrier did not dispute that the Claimant was in the course and scope of employment at the time of the accident.



The Carrier did contest that the Claimant actually suffered injury as a result of the accident and that he was entitled to worker's compensation benefits as a result. In cross-examining the Claimant, the Carrier was able to highlight key facts raising doubts as to the Claimant's assertions, and on

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For more information and to register for this event, please [click here](#).

**Congrats
Mike Shipman**

**Re-Elected as Dallas
Area Vice President
of TADC**



We're proud to announce that [Mike Shipman](#) has been re-elected as Dallas Area Vice President of the Texas Association of Defense Counsel (TADC) at its annual meeting recently held in Santa Fe, NM.

To read more on the TADC, [click here](#).

**Fletcher Farley
Sponsored VCC Cares
Charity Golf Classic**

which the Carrier had based its denial of the claim. For example, though the Claimant claimed that he suffered cuts from broken glass, he had no reasonable explanation as to why his medical treatment records were devoid of any mention of lacerations. Additionally, though he was out of town at the time of the accident, the Claimant admitted that multiple healthcare facilities were accessible to him yet he chose not to seek immediate care following the accident. Even after the Claimant returned to his hometown, several days passed before he finally sought treatment.

The Administrative Law Judge considered all admitted evidence but found that the Claimant's credibility had been significantly undermined in light of the foregoing facts established during the proceeding. The Judge ultimately ruled that the Claimant did not sustain a compensable injury on September 20, 2017. Therefore, he did not sustain a disability and was not entitled to worker's compensation benefits.

Following the rendition of the Judge's decision and order, the Claimant timely filed a request for appellate relief. Following review of the record and the parties' post-trial briefings, the Appeals Panel upheld the ruling of the Administrative Law Judge. The deadline for the Claimant to initiate an action in district court-his only remaining option for relief-has passed and this matter is now final.

The 4th annual VCC Cares Charity Golf Classic was held on October 1st at The Lakes at Castle Hills in Dallas, TX. This event is a fundraiser for local and national charities.

To read more about VCC Cares and this event, please [click here](#).

TADC Annual Meeting

We are pleased to announce that [Mike Shipman](#) was Program Co-Chair at the Texas Association of Defense Counsel (TADC) Annual Meeting in Santa Fe, NM on September 19-23.

This meeting included CLE presented over a 2-day period on legal topics by attorneys from across the state of Texas.

Also participating at the conference from the firm, was [Craig Reese](#) who spoke on "What the Trial Lawyer Needs to Know About the Jury Charge."

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