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ARBITRATION CLAUSE RULED ENFORCEABLE

The Texas Supreme Court recently delivered an opinion in *In re Odyssey Healthcare, Inc. and George Portillo, Realtors*, 09-0786.53 Tex. Sup. J. 717; 2010 Tex. LEXIS 357 reversing a trial court's decision that refused an employer's request to compel arbitration against an employee, as the employer's arbitration agreement stated. This decision by the Texas Supreme Court upholds the long standing tradition that arbitration agreements between an employer and employee are enforceable.

FACTS OF THE CASE

Guadalupe Morales worked in El Paso for Odyssey Healthcare, Inc., which provides hospice care. Morales alleged that she injured herself when she tripped on an uneven step at a patient's home. She sued Odyssey and her supervisor, George Portillo, for negligence.

Odyssey is a non-subscriber and instead of having workers' compensation insurance, it elected to provide an "Occupational Injury Benefit Plan." Morales enrolled in this plan as a condition of her employment. Once Morales sued, Odyssey moved to compel arbitration, relying on the arbitration clause/agreement obtained in the benefit plan.

The agreement between Morales and Odyssey stated in relevant part:

*All claims and disputes described below including injuries caused by negligence that cannot otherwise be resolved by the Company and you are subject to **final and binding** arbitration. **This binding arbitration is the only method for resolving any such claim or dispute.** (Emphasis in original).*

The Company is engaged in transactions involving interstate commerce...and your employment involved such commerce. The Federal Arbitration Act will govern the interpretation, enforcement, and proceedings under this arbitration requirement.

Unless otherwise agreed to in writing by the parties, the arbitrator selected by the parties...shall be selected by a panel of arbitrators located in Dallas County, Texas.

Adequate consideration for this arbitration requirement is represented by, among other things, your eligibility for (and necessarily any receipt of) benefits under this plan and the fact that it is mutually binding on both the Company and you.

The Company reserves a right to amend, modify, or terminate the Plan at any time; provided, however, that no such amendment or termination will alter the arbitration provisions corporate into this booklet with respect to, or reduce the amount of any benefit payable to or with respect to you under the Plan in connection with, an Injury occurring prior to the date of such amendment or termination. In addition, any such amendment or termination of the arbitration provisions incorporated into this booklet shall not be effective until at least fourteen (14) days after written notice has been provided to you.

The trial court after hearing the Motion to Compel Arbitration denied Odyssey's motion. The Court found that the arbitration provision forcing Morales to arbitrate in Dallas was unconscionable.

As a result of this ruling, Odyssey filed a writ of mandamus to the Court of Appeals in El Paso. However, the Court of Appeals denied the petition for mandamus. Thus, a petition for mandamus was sent to the Texas Supreme Court.

THE TEXAS SUPREME COURT'S DECISION

The Texas Supreme Court determined that the trial court abused its discretion by refusing to grant the Motion to Compel Arbitration.

The Supreme Court addressed Morales' several arguments in this case. Specifically, Morales asserted several grounds on why the arbitration clause was invalid and unenforceable, including substantive unconscionability, a non-waiver of provision of the Texas Workers' Compensation Act, a Tenth Amendment violation by the Federal Arbitration Act, and illusory promises for lack of mutual consideration.

Unconscionability:

Morales contended the arbitration clause was unconscionable because it would force her to arbitrate in Dallas, and she would incur substantial expense by having to produce witnesses in Dallas. Testimony from Odyssey showed that Odyssey intended to arbitrate all illusory claims covered by this agreement in Dallas, and never agreed to arbitrate any claims elsewhere. The Texas Supreme Court concluded that when a party contests an arbitration due to substantial expense, that party bears the burden of proving the likelihood of incurring such costs, and must provide some specific information concerning those future costs. (*In re FirstMerit Bank, N. A.*, 52 S. W. 3d 749, 756 (Tex 2001).

In this particular case, Morales failed to show any specific information or evidence about what costs Morales would likely incur. Additionally, the Court noted that nothing in the agreement required he arbitration to occur in Dallas. The agreement was simply that the arbitrator must be selected from a Dallas panel of arbitrators. The Court went on to say that even if the arbitrator were to conduct arbitration in Dallas, and even if this would cause Morales to incur substantial expense, the arbitrator may still "assess whether the cost provision in this case would hinder effective vindication of the employee's statutory rights and, if so could modify the contract's terms accordingly." *In re Poly-America, L.P.*, 262 S. W. 3d 337, 357 (Tex. 2008).

Non-Waiver of the Texas Workers' Compensation Act

Morales stated that Texas Labor Codes Section 406.033(e) rendered an arbitration agreement void. This particular section of the Labor Code states that the cause of action may not be waived by an employee's injury of death. However, the Texas Supreme Court stated that an agreement to arbitrate is a waiver of neither a cause of action, nor the rights provided under Section 406.033. Rather, it is an agreement that those claims should be tried in a specific form. Thus, the Court rejected Morales' argument.

Federal Arbitration Act Violating the Tenth Amendment

Morales argued that the Federal Arbitration Act violated the Tenth Amendment by encroaching on a state power to an act and regulate its own workers' compensation system. However, the Court concluded that compliance with the Federal Arbitration Act would not directly impair Texas' ability to structure integral operations in areas of traditional government functions. Thus, argument was also shot down.

Arbitration Provision Lacks Consideration

Lastly, Morales contended that the arbitration provision lacked consideration and was illusory for lack of mutual obligation. The Court stated that an arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it all together. In this particular Injury Plan, Odyssey's right to amend or terminate the agreements, had limitations and as such, were not illusory.

WHAT DOES THIS MEAN?

The decision by the Texas Supreme Court shows that arbitration clauses and agreements are enforceable. Thus, if an employee sues an employer and an arbitration agreement has been entered into, the employer should file a Motion to Abate Proceedings and Compel Arbitration. If the arbitration agreement has been carefully drafted, it should stand as being enforceable against any allegations by the employee that it is not.

From this case, the Texas Supreme Court looked at four different things and held that the arbitration agreement was valid. If an employee contests and arbitration agreement, they will usually claim that the arbitration clause is unconscionable. As an employer, show that the employee does have substantive rights or remedies. Even though the employer may be able to pick the arbitrator from a particular venue, this is not unconscionable.

Secondly, Plaintiffs also state that the arbitration agreement usually lack consideration or are illusory for lack of mutual obligation. An arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether. Make sure that your arbitration agreement has limitations on this. If it does, these limitations, as the Texas Supreme Court has noted, do not make the arbitration agreement illusory.



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