

ORAL ARGUMENT – 10/24/01
00-1309
CONTINENTAL CASUALTY CO V. DOWNS

BRENNER: Should §49.021 be interpreted to make an otherwise noncompensable claim, compensable based on a technicality. Technicality that doesn't exist in the statute. Technicality that doesn't exist in the rules created to interpret the statute. A technicality that must be created by opinion of the court.

O'NEILL: What's the administrative penalty if it's not complied with?

BRENNER: Up to \$5,000 per day. And that's every day for each violation.

O'NEILL: Up to 7 days?

BRENNER: No. It's \$5,000 per day until payment is made as required under the act. For example, if there is 40 to 50 days of payments it could be \$5,000 times 50.

HANKINSON: Does that mean that if you get past the 7 day period and there's no notice of refusal to pay benefits, and no benefits paid, it gets to be 40 days out, and at that point in time the carrier determines to contest the compensability, then what happens then? Do they have to start paying benefits until compensability is actually adjudicated? Do they just get to go on without paying benefits? Does it stop then the running of the administrative fine? I'm trying to figure out how it works.

BRENNER: Section 409.021 contemplates two parts. One part deals with when you initiate the payment of benefits. The other part deals with when you must initiate - the time period for evaluating compensability and disputing compensability. Part A, we believe, deals with initiating benefits. That requires us to initiate benefits within 7 days of the date that the benefits accrue.

HANKINSON: Or it requires you to give notice that you are refusing to pay.

BRENNER: That's correct. If we don't dispute, we have to pay.

HANKINSON: What if you don't do either one?

BRENNER: If we don't do either one for a period of 60 days, then we void the right to dispute. You must dispute within 60 days or we hold the claim.

HANKINSON: But tell me how that works with the administrative violation provision in part (e). That's what I'm having a hard time with.

BRENNER: The administrative violation provision and the adjudication of administrative violation is under §415 of the Texas Labor Code. Section 415 allows the commission to come in and audit a file. The purpose is for them to determine whether we complied with payment requirements, and if we haven't complied to access appropriate penalties for the failure to comply. They can do an evaluation at anytime.

HANKINSON: But I just want to know how - you say that the legislature has already built in a consequence for failing to comply with part A. And the consequence is, that you are subject to being fined for an administrative violation for each day of the violation. I can't figure out how that works. If you fail to either pay or notify that you're refusing to pay under (a), and time just keeps running and at some time before the 60 days where you would lose the right to challenge compensability, is the fine going to run automatically through that whole 60 day time period?

BRENNER: The commission has discretion when they evaluate as to how to set the fine. They can set it at zero. They can set it at \$5,000 per day depending on this severity violation.

HANKINSON: Did your carrier get fined in this case for failing to comply?

BRENNER: The record doesn't reflect whether...

HANKINSON: Well did you?

BRENNER: I don't know the answer to that.

HANKINSON: You contested like on the 48th day or something like that. Is that right?

BRENNER: That's correct.

HANKINSON: Well is the usual procedure then to run the fine from the 7th day to the 48th day, or does it run...

BRENNER: Again, that depends on the circumstances of the case.

HANKINSON: But we don't really know then that the fine really will work to make sure that the carriers comport with the requirements of part A. We're not sure.

BRENNER: What we know is that the commission has issued fines just during this year to carriers.

RODRIGUEZ: But you're saying there may be no fine at all, right?

BRENNER: In this case.

RODRIGUEZ: But I'm talking about the commission has the discretion not to fine if they decide for some reason that no fine was _____.

BRENNER: I believe that's correct. I believe that complies with due process requirements.

RODRIGUEZ: But even if there has been a technical violation of that provision?

BRENNER: That's correct.

HANKINSON: Under your interpretation of the statute since you say that there's no waiver if a carrier fails to meet the requirements of part A, that means that we've got a beneficiary who is not getting paid and doesn't have notice of refusal?

BRENNER: Perhaps. Perhaps not.

HANKINSON: Let's say like in this case the total absence, there was no compliance with A. You didn't send notice within 7 days and you didn't start paying benefits. Because that's what happened in this case isn't it?

BRENNER: It was not disputed within 7 days and based on the record there was no initiation of benefits.

HANKINSON: So if that ends up happening and then the carrier decides on the 45th day, and there's not a requirement that they give notice of refusal, but just that they are going to actually contest compensability at that point in time, do they have to start paying benefits then?

BRENNER: The way that procedure works is if the carrier doesn't pay benefit from day zero to 45 and disputes on 45, under the commission's interpretation the carrier has to pay benefits for that 45 day time period from the time that benefits accrue up until the time of the dispute.

HANKINSON: And what provision in the statute would we look to show that in fact they would be required to pay for those 45 days?

BRENNER: That would be not only §409.021, but the rules interpreting the statute.

HANKINSON: What if a carrier begins paying benefits under (a)(1) within 7 days, and then decides on the 45th day to contest compensability. Can they stop paying benefits at that point in time having contested compensability?

BRENNER: Yes.

HANKINSON: But there's no requirement at that point in time that they give the notice that's required under (a).

BRENNER: They must.

HANKINSON: Is that in the rules?

BRENNER: It's under the statute. We believe §409.021(b) says whether it's within 7 days, or anytime, when you decide to stop benefits you have to give notice of your refusal to pay.

HANKINSON: But (a) would only require you to do it not later than 7 days. Is there something in the rules some place that would require a similar notice to be given under (c)?

BRENNER: Yes. The rules require us to give notice of the initiation of benefits, actually when we initiate and start paying, and it also requires us to give initiation of termination, and when we terminate we are required to state the reason for termination.

HANKINSON: In order to know how this statute works, then we really have to study the rules that go with it because there's a whole lot more in the process that's working here?

BRENNER: Without question.

ENOCH: Continental Casualty in this case will have to pay whatever that period of time between that 7th day and the day it filed the contest here. Is that what you're saying?

BRENNER: Perhaps that's right.

ENOCH: This isn't the matter of whether ultimately it's determined that they don't owe any compensation. They will still have to pay for that some 40 days.

BRENNER: That hasn't been adjudicated. But I believe the commission rules as they are written require you to pay from the day the claim is filed to the extent benefits have accrued. There may be that no benefits have accrued. And in this case, the record is silent as to whether she actually provided all of the information necessary for benefits to begin accruing.

ENOCH: If you say this is not a compensable injury that's not the same thing as saying benefits accrue?

BRENNER: If you say this is not a compensable injury you're saying that there is no entitlement benefits.

ENOCH: You did not deny the claim within 7 days. You did not start paying the benefits within 7 days. You did not file your contest to compensability until toward the end of the second month. Right?

BRENNER: Until 48 days.

ENOCH: I thought I understood you to say in answer to the question that how the administrative process works is because you did not deny it by that 7th day, you will have to pay the benefits up to that 48th day until you file that appeal?

BRENNER: If they've actually accrue.

ENOCH: Now I'm talking about whether she provided the paperwork or anything.

BRENNER: No. Under death claims the benefits don't accrue until the claim is filed and documentation relating to it are provided. Now if they have accrued and there's an obligation to pay and we actually accept the claim, we do go back and recapture.

ENOCH: This is what I'm not understanding. If you don't deny within 7 days and you are ultimately ruled to have to pay it, I would assume you would have to pay it from the date the claim was made payable. So that's not an administrative enforcement of the failure to deny. That's just the results of the merits of the case you owe all that time.

BRENNER: Correct.

ENOCH: So I did misunderstand your answer in saying that you would be responsible for benefits if you fail to deny it in that day up to the point in time which you contested. You don't have to pay any benefits even if you don't deny it within 7 days if you ultimately win on the merits?

BRENNER: I don't know if that's correct. It's not clear. The rules as they are enacted currently require the carrier to pay benefits until the dispute is filed that have accrued after day 8.

HANKINSON: So even if you dispute on the 48th day, at that point in time you would have to write a check for the previous 40 whatever days?

BRENNER: Under the current rules that's correct.

HANKINSON: Do you agree that the legislature intended with provision (a) for benefits to start as soon as possible to a claimant?

BRENNER: Without question.

HANKINSON: Then what incentive would a carrier ever have to comply with part (a) if in fact they can just wait, make their determination later, and decide whether or not to _____, and therefore, avoid §.022 which seems to me to be the hammer over the carrier's head to say, you know you want to refuse benefits early, then you are going to get stuck with the reason you give. You want more time to investigate and start paying benefits. What incentive would a carrier have to ever begin paying benefits immediately when the legislature seemingly intended that to happen? It doesn't help the claimant very much if someone has to way to the 48th day and then get back payments.

BRENNER: The amount of benefits, \$467 a week. If they don't do that they are looking at exposure of \$5000 per day.

HANKINSON: Maybe.

BRENNER: Maybe. And of course you have to comply with due process. You have to see if there was a violation that warrants that type of sanctions. The wavier provides no due process. It's a draconian penalty that has no response as to why or the reason delay may have occurred.

We believe that §409.022 is referable to part (d), and that is that you have 60 days to evaluate whether a claim is compensable or not. You have a duty to make a good faith investigation under art. 21...

JEFFERSON: If you refuse to pay and you state the grounds within those 7 days but you're not limited to those grounds later on?

BRENNER: You have to state the grounds within 60 days, and that's the limitation period.

JEFFERSON: So the portion that says you must do it within 7 days is just void.

BRENNER: 409.021(a) which says you must do it within 7 days. You must pay or dispute within 7 days.

JEFFERSON: I'm talking about 409.22, the ground for the refusal specified in the notice within that 7 days constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding.

BRENNER: I agree. But it doesn't say the initial or the first. It says the grounds for dispute. And (c) gives you 60 days to evaluate your grounds for dispute. And then (d) talks about, and you have to read it with (d) that says, that an insurance carrier may reopen the issue of compensability...

HANKINSON: 409.022 is talking about the notice of refusal to pay benefits which is the procedure that's in part (a). And isn't it true that the CA's in this state have been interpreting 409.022 in fact to apply to that initial refusal not a later determination by a carrier to deny compensability after agreeing to pay benefits?

BRENNER: The appeals panel certainly has.

O'NEILL: Is it correct that you have urged your position to the legislature in light of the CA's opinion in this case, and they've declined to amend the statute to interpret it your way?

BRENNER: The amendment passed the initial committee hearings but did not make it up

to the calendar. The legislature didn't reject it. It never made it to the floor.

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HANKINSON: Would you tell us how the commission enforces provision (a) using the fines and administrative violation procedures and what the usual practice is of the commission on that?

McCLELLAN: The commission has discretion and they can go after that compliance of practices which is usually admittedly a drawn out process at times. It has to be investigated and then it goes through the commission's compliance and practice process.

HANKINSON: Is the commission pursuing Continental Casualty in this case?

McCLELLAN: I have no knowledge of any findings...

HANKINSON: How often does the commission actually assess fines for failure to comply with the act? I'm just trying to understand if it's a meaningful consequence or not. Can you tell us?

McCLELLAN: I cannot tell you. But I can tell you they have the right to do it on everyone.

HANKINSON: And you don't have any idea whether they are doing it or not?

McCLELLAN: I cannot tell you a number.

O'NEILL: And what parameters would they look at if they did?

McCLELLAN: The parameters they would look at would be the date. And you would need to look at the sufficiency of the first notice of injury to make sure it was sufficient to start its _____.

O'NEILL: And presuming it was they would say you didn't pay it so we fine you.

McCLELLAN: Yes.

O'NEILL: Which indicates that that is a mandatory provision that it was intended to be - you must start paying or notify within the 7 days. I mean don't those go hand in hand the fact that a penalty can be imposed that is mandatory?

McCLELLAN: Yes. And we do not dispute that the 7 day pay or dispute is mandatory. The whole problem comes down to the consequences. I do disagree with the San Antonio court saying that there was only one consequence, being the administrative violation. A carrier is also subject to interest on any past due or accrued benefits if any benefits are accrued. And an insurance carrier also under the labor code - a statutory bad faith provision exist under 416.002 - which if I think you can

show a separate harm or injury because of the lack of timeliness by an adjuster or an insurance carrier, you could assert that.

But this case really has to do with the express consequence provided under the statute, under 409.021, and the express right of it being 60 days that an insurance carrier has to dispute compensability.

HANKINSON: But no one is saying that they don't have 60 days. It's just that they also have an additional obligation under (a) to begin paying benefits if they want to take full advantage of the 60 days.

MCCLELLAN: Well that is the assertion by the respondent.

HANKINSON: You don't take the position that they have to begin paying benefits?

MCCLELLAN: There is no commission rule requiring - I know there is one appellate court decision that says that's tied to the 7 days (409.022). 409.022 does not tie expressly to the 7 days.

JEFFERSON: .022(a) says the insurance carrier's notice of refusal to pay benefits under .021 must specify the grounds for refusal. And then (b) says the grounds for refusal specified constitute the only basis for the carrier's defense. Now how is that not tied to the 7 day period?

MCCLELLAN: And (b) ties it to the issue of compensability in a subsequent proceeding unless the defense is based on newly discovered evidence. When you read that with 409.021(c), which says if an insurance carrier does not contest compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its rights to contest compensability. Not tied to 7 days. Not tied to any other provision. And then the second part says the initiation of payments by an insurance carrier does not affect the right of an insurance carrier to continue to investigate or deny the compensability of an injury during the 60 day period. By saying does not affect, they are not saying the initiation of payment then gives you another 53 days. Which the legislature could have easily said if they wanted to, you have a 7 day right to pay a dispute and then an additional 53 days if you do begin paying.

HANKINSON: But we still have to go back to (a) as being mandatory. Which seems to read and what the legislature intended was that benefits were going to be paid quickly to a claimant unless the carrier could make an early determination that they were prepared to stand by that it was not a compensable claim.

MCCLELLAN: And the commission strongly believes that is mandatory.

HANKINSON: So if it's mandatory, then how does your interpretation of the statute actually fulfill that intent by requiring carriers to begin paying benefits as soon as possible unless they are absolutely sure that they should be denying, and in exchange for that, they get a full 60 days to be

able to actually determine whether it's compensable injury and will not have been deemed to have waived their right by having paid benefits during that time period?

MCCLELLAN: I don't believe the 7 days is tied to the 60 days, which is the position taken by the respondents. The 60 days stands alone by itself. Now the commission strongly believes they should do that.

HANKINSON: I understand your position about the 60 days. But what I'm just saying it seems to me to earn the privilege of the 60 days, you need to begin paying benefits early. Is that right?

MCCLELLAN: That is the intention of the statute yes.

HANKINSON: So how is that intention going to be fulfilled?

MCCLELLAN: The commission itself could, and there's a provision under ch. 410, to provide an expedited hearing. And if you look back at the old law, the old law required 20 days to pay or dispute. But there was no ultimate waiver consequence. And then after 20 days it was even 10 days more were added on for the worker's comp commission, the IAB to notify the insurance carrier. And then you set it for a prehearing.

There is no ultimate consequence other than the commission could step in and say we're setting a hearing on this tomorrow because someone comes forth and says I'm in dire straits. I'm in need of essential medical treatments. An issue of compensability is in dispute. That's ch. 410.025 of the labor code. It allows the commission to come in and immediately they could order a payment of benefits on an interlocutory basis subject to review through the dispute process.

I know it's a hard thing, but it's basically like someone running a red light and you get a traffic ticket for that. It doesn't mean you lose your driver's license just because you ran the red light. Now the act does provide if an insurance carrier continues to commit violations, they could lose their right to write worker's comp in Texas as an ultimate penalty under the administrative violations. And they are subject to the ongoing fines.

RODRIGUEZ: In this scenario where there is not been a denial or a grant of the benefits, no notice has been given whatsoever. And let's take this away from the death benefit context and talk just about an occupational injury. If you don't send any notice whatsoever, as I understand it, you can go get an interlocutory order or a benefit review conference, and the benefits or the timeliness of delivery of benefits is still going to be granted within that 60 day period. Correct? Let me rephrase it. I think Justice Hankinson's concerned that the injured worker in my scenario is not going to get timely benefits.

MCCLELLAN: And the insurance carrier to avoid the administrative violation if they did realize that they paid out of time may pay the benefits that were due up until at least the time of the

dispute. Justice Hankinson was asking where is the provision in the statute to cutoff benefits. 409.024 is the provision to cutoff benefits once they've been initiated. And you have to notify 10 days after you've cut off benefits, which is hard to run those two statutes together.

RODRIGUEZ: Let me go back to my issue here. No notice is given whatsoever. How is the injured worker going to get - the injured worker is going to get benefits correct if no notice has been given whatsoever?

MCCLELLAN: Within the 60 day window?

RODRIGUEZ: Yes.

MCCLELLAN: The commission rules that have been adopted actually since the initial decision in this case instruct the carrier to pay the accrued benefits. But they do not say that you've given up your right to contest compensability if you get that done within the 60 days, which is the ultimate hammer that the legislature put in the labor code which never existed under the law preceding injuries before 01/01/91.

RODRIGUEZ: Let me make sure I understand this. In an injury case, is temporary income benefits and medical going to be paid between the 7 to 60 day window?

MCCLELLAN: I would say it would ultimately be up to the insurance carrier. The commission rule says you need to pay accrued benefits. The statute itself doesn't require that. It's not contained in the statutory language. The statutory language provides the consequence of the administrative violation. And the other section provides the consequence of interest, and then the possible bad faith for not timely doing something.

The commission rules that have been adopted - actually adopted after the initial decision, but before the San Antonio court put in their second decision, pulling their first one, require an insurance carrier that disputes in that window to pay accrued benefits.

HECHT: So are you going to enforce the ruling or not? Do you enforce the rule or not?

MCCLELLAN: The commission is enforcing the rule. The current rule.

HANKINSON: The rule about paying benefits when you deny sometime or you contest sometime in those 60 days?

MCCLELLAN: Yes.

HANKINSON: That rules being routinely enforced?

MCCLELLAN: Yes. I believe most insurance carriers are paying the money to avoid, because

that money is a lot less than they would face in a compliance of practice violation if they don't pay that.

HANKINSON: So we don't know whether or not they are actually assessing administrative fines?

MCCLELLAN: And they have. I can't tell you...

HECHT: The brief says in 2000, 2,590 violations of some rules, \$2.3 million in fines. Do you take issue with that?

MCCLELLAN: No.

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RESPONDENT

HOWELL: I think in light of the questioning of the petitioner I would like to begin by going to this question that Justice Hankinson had asked about: how the administrative violations were or how they are enforced? And I can tell you the reason these guys can't tell you how it's enforced is because they never have enforced it. They never have paid it. They really don't know how it works.

I would also like to address the fact of the current rules that say the accrued benefits are paid till the time of denial. That rule was not inactive until after this case was decided by the CA. They've come up with that rule since this case was decided, but it doesn't change the fact that it doesn't address the waiver issue and in fact if you read that rule the way it's written, there's not an administrative violation anymore either, which is also a statutory requirement.

HANKINSON: I don't understand that. What do you mean there's not an administrative violation?

HOWELL: They don't have an administrative violation. They paid benefits up until the time they had been accrued.

HANKINSON: But you're asking us to read in §a, add the words the carrier shall do this or else shall waive the right. And that language is no place in part (a). How are we to get over that hurdle to engraft that kind of provision under the statute when the legislature didn't deem it necessary to include?

HOWELL: I think the way you get there is not by looking at 409.021(a) only, but you also look at 409.022. And under 409.022, the notice of refusal has to specify all the grounds for refusal. In a case like this one where they didn't file any notice obviously they've asserted no grounds for refusal in the first 7 days under the express...

HECHT: What were the benefits claimed in this case?

HOWELL: Statutory death benefits.

HECHT: What would those be in this case? Is it a payout or is it going to be a lump sum?

HOWELL: Generally they are paid - well they should start being paid on or before the first 7th day, and they are generally paid on a weekly basis until the different conditions for their termination occur.

Getting back to Justice Hankinson's question, I think you look at the language of 409.022. And this is where I think this language comes up about the waiver is kind of unfortunate and it's always been called a waiver under administrative appeals panel decisions, but really it's a waiver in effect but it's not a waiver in the terms of a common law voluntary relinquishment. It happens under the express terms of 409.022. If you didn't file a refusal in the first 7 days, no grounds are specified under the express language, then you cannot assert any grounds later on absent newly discovered evidence. And this is an important part of the statute that wasn't an issue in this case, but I think the court needs to look at when weighing the arguments about the harshness of waiver and the harshness of the result of such a construction...

OWEN: So you're saying the statute contemplates that even where you are entitled to take 60 days to determine compensability, is ultimately determined by everybody _____ it's not a compensable claim, the statute nevertheless contemplates that you pay death benefits for a noncompensable claim while you are investigating? You're saying that's what the statute contemplates?

HOWELL: I think the statute does contemplate that.

OWEN: Regardless of whether - even in compensable cases and almost every noncompensable case you are going to have to pay some benefits? That's your interpretation of the statute?

HOWELL: I think as the CA said if the carrier doubts the compensability or has questions about the compensability of the claim, yes, then the statute requires them to promptly initiate payments and that gives them the 60 day window within which to continue their investigation and make whatever determinations of compensability they have to make.

JEFFERSON: If then a later determination of noncompensability is the carrier able to get those funds back through subsequent injury fund or elsewhere or is that just gone?

HOWELL: If they began the payments voluntarily, I don't believe so. I don't believe there would be any provision for getting the benefits back from the subsequent injury.

JEFFERSON: Even if there was an adjuration that there was no compensability whatsoever conclusively established?

HOWELL: Now if there's a commission order or decision that it's not compensable, under that situation then they can apply to the subsequent injury fund. But in those early payments that are made until they make their final decision, I don't think there is any way to recoup those. But that was why I think the legislature intended - I mean if we go back to the very beginning of this '89 act, that was a very comprehensive reform of the worker's comp. system at that time. And part of the reform was aimed at eliminating or decreasing courts, decreasing access to courts, and decreasing attorney involvement because these were all significant factors that were driving up the costs of claims.

ENOCH: It seems to me there's some logic under the comp scheme to require the insurance company take the burden of paying ordinary benefits to an injured person while they are investigating whether or not the claim is compensable. It seems to me there's some logic to that process. But I don't know if the legislature truly believed that within the course of 7 days an insurance company would have the resources necessary to investigate a claim to the point that it could conclude what its proper defenses would be for not paying the claim. And then give them another 53 days to investigate to find out whether or not they have in fact supporting that defense. In one sense it looks like - we realize it's going to take you a couple of months to learn enough about the case to make a decision but you're going to have to say what the result of your decision is within the first 7 days. It seems to me there's not much sense to that interpretation.

HOWELL: I think it is, and I think it's consistent with the purpose that I was getting to. What was intended by this act was to put a prompt, speedy, fair administrative resolution in favor of access to the courts or in place of access to the courts.

I think in most cases there's probably not a question. The guy fell off a ladder at work and got hurt. There's not going to be any question in 7 days. The guy got run over by a crane. There's not going to be any question as to whether or not that was in the course and scope. Those types of benefits would be commenced immediately. Now if there are other issues there that might require an investigation, I think that's what the legislature requires. And it's really not - I mean whether or not the legislature thought 7 days was a reasonable time or wasn't a reasonable time is really for the legislature.

OWEN: But all we're talking about here is the consequence. Let's assume your absolutely right. Even for noncompensable claims the legislature wants you to pay between the 7th day and up to the 60th day. Even if it's noncompensable. And the insurance company doesn't. The only issue we're being asked to decide is what is the consequences? It is total waiver of your ability to claim compensability or is it an administrative fine plus the payments that were not made? Isn't that the only question we're being asked to decide?

HOWELL: I really think that should be the only question before this court is what is the

consequence of the failure to take one of those two actions within 7 days. Whether it's an administrative violation or whether or not it's...

OWEN: And if it's a noncompensable claim isn't it a reasonable construction of this statute that what the legislature intended was you're liable for the payments you didn't make between day 7 and the time you ultimately denied as noncompensable plus any administrative fines that the commission might in its discretion impose? Isn't that what the legislature intended the consequence to be rather than waiver?

HOWELL: I don't necessarily agree that it is. I think the statute says what the statute says. Now I guess that kind of gets to that point, and that is, what the current rule that they come up with works along those lines. But that was not the rule that was in effect at the time that this case was decided.

HANKINSON: You said that this rule that's been referenced about if you deny compensability then you have to pay the back benefits that have accrued under this new rule that was enacted as a result of the decision in this case. Before that rule what would happen? If the carrier doesn't act within 7 days to do one or the other of the acts that are mentioned, decides to deny compensability or contest it on the 48th day, what happens then before the new rule happened?

HOWELL: What would happen under commission practice then was they were subject to a potential administrative violation.

HANKINSON: So at that date nothing happened with respect to benefits then?

HOWELL: Correct.

HANKINSON: What happens then and now if the carrier begins to pay benefits within 7 days and decides on the 48th day to contest compensability? Can they stop paying benefits at that point or do they have to continue paying benefits until some sort of resolution is made during the dispute resolution process?

HOWELL: I think the way the statute is written they could stop benefits at that point and notify the commission and the claimant: we've decided this is not a compensable claim for these reasons and you can go ask for a benefit review conference. I think that's what the statute contemplates. The statute contemplates that a carrier does something quickly. And this gets back to this concern I was talking about the 1989 act. One of the things in the legislative history of the act that was a concern was that claimants were going to seek attorneys and hiring attorneys right off the bat when their claims were denied because they couldn't get any communications from the carrier. They couldn't get any...

OWEN: But the rules aside, doesn't the statute contemplate that you either pay or deny by the 7th day and then you've got 60 days to decide whether you're going to deny on compensability

grounds? If you deny for compensability reasons you're going to still be liable for the failure to make payment plus administrative fines. Where do you glean from the statute that the additional penalty in addition to having to pay the benefits for noncompensable injury and a fine or you waive your compensability _____? The statute wants prompt payment. And they are willing to - and the tradeoff is you get 60 days to analyze compensability as long as you pay.

HOWELL: Right.

OWEN: And they don't pay but the statute contemplates that they should have paid. So isn't the reasonable intent of the statute that you're still on the hook for the payments between the 7th day and the date you also were denied based on compensability plus a possible administrative fine? But where does the statute say in addition to those penalties, if you will, you've waived compensability, you've waived the ability to contest compensability? They want prompt payment. But there's no intent here to prompt pay ultimately for noncompensable claims indefinitely.

HOWELL: I think this gets back to the express wording of 409.022. That is if you didn't specify a ground for refusal in the first 7 days, you can't...

OWEN: But you start paying. You're supposed to start paying and you don't. And then you do ultimately specify the grounds as contemplated in (b), within the 60 day period. You've still got 60 days to specify grounds.

HOWELL: If you initiate payments in the first 7 days. But under 409.022, if you refuse you are limited to those grounds in that first filed notice of refusal. In other words, you don't have 60 days to investigate if you refuse in the first 7 days.

JEFFERSON: Under .022 though your opponent says there's nothing that says that where you have to specify the ground has to be within the 7 days. They say to _____ easily apply to the 60 days.

HOWELL: I disagree. I think the plain wording of the statute...

JEFFERSON: Where does it say 7 days in .022?

HOWELL: That the notice _____ be filed under 409.021, which would be the requirement that the notice be filed within 7 days...

JEFFERSON: 409.021(c) doesn't say notice. It talks about notification of the injury. The same thing as notice.

HOWELL: Whether it's notice or a notification, I don't...

JEFFERSON: I'm just trying to see how we can decide that 409.022 only has to do with the

7 day notice period rather than having application to the 60 day notification period. Why do we have to say that .022(a) only talks about the 7 day period and not the 60 day period?

HOWELL: Because I think on its face that's what it says. It says you've got to file your notice of refusal, and it's got to specify the grounds, and it's got to be filed within 7 days.

JEFFERSON: There's a period where you can refuse up to the 60th day. Right?

HOWELL: If you have initiated payments or began compensation within the first 7 days is our position.

ENOCH: Do you agree that the way the commission interprets the rule the way the insurance carrier wants it to be applied?

HOWELL: Yes, I do.

ENOCH: So it's your point the commission's rule came out after this case was decided or not? Did I misunderstand that?

HOWELL: The rules that they are talking about now, the accrual of benefits, weren't enacted until March 2000, and the original opinion in this case came out in January.

OWEN: But they interpret the statute the same way. They're not relying on the rules. They are relying on the statute are they not? The commission says the statute says what the petitioner in this case says the statute says.

HOWELL: Under the current rules...

OWEN: Forget the rules. They interpret the statute the same way as the petitioner does do they not?

HOWELL: Yes. The commission has interpreted the statute the same way that the petitioner has and that the commission has.

ENOCH: Should we give that some deference? You argue that the statute is plain in its terms, but should we give the commission some deference in their understanding of that statute?

HOWELL: Well I think the law is settled that an administrative construction is entitled to some weight. And it can be given some deference. But the court makes that inquiry on its own. If it's not a permissible construction of the statute, the court does not defer to that construction. The San Antonio CA I believe correctly held that their construction is not a permissible construction of the statute. Under the construction that Continental and the commission are urging, you might as well just eliminate 409.022 from the labor code because it is meaningless and two statutes together

cannot be read...

OWEN: This is what I'm having a hard time understanding. How is it meaningless if you don't specify your grounds within 60 days, whatever grounds you specify, you are limited to. If you didn't start paying on the 7th day you're still liable from the 7th day through the day that you denied based on compensability plus you're subject to administrative penalties.

HOWELL: I think as you saw from Mr. McClellan from the commission, it's never been enforced. That administrative violation has never been enforced.

OWEN: Is there any evidence in the record to that effect?

HOWELL: There's no evidence one way or the other. But I think it can be fairly implied from the fact that there's numerous appeal's panel decisions that this issue has come up and the appeal's panel has come up with the interpretation that the commission has. I can answer the question as to whether or not this carrier has suffered any administration violations. It has not. It has not been assessed any violations. I'm not aware in doing 9 years of worker's comp practice of any carrier ever being assessed an administrative violation under these circumstances. Even after this decision is decided people come in our office every other day that haven't heard anything for months and it's still hard to get a hold of them even after they are contacted by the attorney. The administrative violation provision simply has not been enforced. But I would also like to add that the fact that it's included doesn't necessarily mean that waiver can also be a penalty. Even after 60 days everyone agrees there is waiver and there presumably would be an administrative violation too.

JEFFERSON: Did the carrier pay in this case between the 7th day and the 48th day?

HOWELL: No the carrier has never paid a dime, and until this new rule that was never the practice. In my experience even since this new rule, I still don't see it applied in that manner.

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REBUTTAL

LAWYER: Section 409.021 makes it clear that an administrative penalty is the penalty for violating part (a). Whether that's a sufficient penalty or not is not for the courts to decide. That's the legislative position and the court shouldn't second guess the legislature as to whether that's sufficient or not.

The real question this court has to decide is, should we read in the term waiver to part a when it's not there?

HANKINSON: I think that I heard Mr. Howell say something a little bit different, that the _____ waiver is too strong a word. And as I understood in response to our questions, he looks to

409.022 and says that because it addresses the notice of refusal to pay benefits, which is the term used only in 409.021(a) not any place else, that 409.022(b) provides for limitations on why you can't raise grounds for denying compensability after the 7 days if you have failed to initiate the payment of benefits. Now that's what I understand is how is having us interpret the section. Would you respond to that argument?

LAWYER: I would. But you would have to - even reading that you would have to read 409.022 to say that if the carrier has not filed the controversy within 7 days and has not initiated benefits within 7 days, then they can never file a controversy.

HANKINSON: No what he's saying is that if you don't initiate benefits, then we presume under (a) you must have done a notice of refusal to pay. And 409.022 requires them to put the grounds in there. So it's almost like this phantom notice of refusal, this kind of ___ thing that never happened and because there is no ground you can't rely on that. And he said if we don't do that we read 409.022 out of the statute.

LAWYER: And I don't believe that's correct. 409.022 can as easily and as clearly be tied to part (c) and (d).

HANKINSON: But (c) in no place talks about giving a notice of refusal to pay benefits, which is exactly the terminology used in (a). In fact, (c) just talks in terms of allowing a carrier to contest compensability. So he ties 409.022 to (a) because of the term of art notice of refusal to benefits. I think that's what he means.

LAWYER: A refusal to pay benefits must be tied to a _____ of compensability. You're saying that the claim is not compensable and therefore you're refusing to pay benefits.

HANKINSON: What I think he's saying is that the use of the words "notice of refusal to pay benefits" is a particular term of art. Means a particular document. It's that 7 day document.

LAWYER: Right. Part (b) of 409.022 is almost verbatim out of 409.021(b). It says unless defense is based on newly discovered evidence. This again, (d) says an insurance carrier may reopen liability only if its based on newly discovered evidence. And that is clearly tied to (c) not (a). So therefore that is why we come up with the...

HANKINSON: Say that again.

LAWYER: 409.022(b), the second half, says that the amendment has to be based on newly discovered evidence. 409.021(d) talks about reopening the dispute of compensability. And again it states based on newly discovered evidence. That's clearly tied to (c) not (a) of 409.021.

O'NEILL: Where does part (c) deal with the notice?

LAWYER: Part (c) talks about the carrier stating the basis for denial of compensability.

O'NEILL: Show me.

LAWYER: If an insurance carrier does not contest the compensability of an injury on or before the 60th day. The first sentence deals with the carrier's contested compensability. That contest of compensability is done pursuant to following a TWCC21, the notice of refusal to pay a claim. They are one in the same thing.

So the documents that they are referring to are one in the same document.

HANKINSON: So we have to go to the rules to find that out. We don't find that in the statute.

LAWYER: That's correct.

HANKINSON: And what rule is that?

LAWYER: I think it's cited as 124.3. It's cited in the brief.

O'NEILL: But that's notice of the injury and not notice of the ground. This says notified of the injury. And 409.022 talks about the grounds for the refusal in the notice.

LAWYER: That's correct. Your contest of compensability is the grounds for your refusal. When you're refusing benefits you're saying...

O'NEILL: I understand that. I just don't see the same notice provision that you're talking about in (c) that .022 seems to contemplate. We're going to have to find that somewhere in the rules.

LAWYER: In the rules in the statute. And with regard to consistent interpretation by the commission, the commission has been interpreting this since 1992 consistently with a waiver. And it has been applying it for 8 years.