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Supreme Court of Texas.
American Zurich Insurance Co.
v.
Daniel Samudio.
No. 10-0554.

January 10, 2012.

Appearances:

Robert D. Stokes of Flahive, Odgen & Latson, for Petitioner.

Byron C. Keeling of Keeling & Downes, P.C., for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter 10-0554, American Zurich Insurance Company v. Samudio.

MARSHAL: May it please the Court, Mr. Stokes will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT D. STOKES ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT D. STOKES: May it please the Court. In Dubai Petroleum, this Court concluded that a plaintiff's failure to comply with or meet a statutory prerequisite was not jurisdictional. In doing so the Court, overruled partially Mingus against Wadley.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, what's the reason that there was no impairment ratings certified? Was there a strategic reason for that or--?

ATTORNEY ROBERT D. STOKES: Probably not strategic, Your Honor. It was a matter of which way you were going to approach the problem at the agency level and there were a couple of different ways to approach the problem at the agency level.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you had Dr. Overling, is that the name of the doctor?

ATTORNEY ROBERT D. STOKES: Obermiller.

CHIEF JUSTICE WALLACE B. JEFFERSON: Obermiller there and present, why wouldn't he have certified a rating then and there and avoid all of this trouble?

ATTORNEY ROBERT D. STOKES: He couldn't because he was a peer review doctor and he did not physically examine the Claimant and in order to have a valid impairment rating, you've got to have a physical examination of the injured worker. The carrier in this case was faced with a 20% impairment rating that was facially invalid. There was not a facially valid impairment rating and rather than obtain an alternate impairment rating, the carrier chose to pursue the letter of clarification procedure that the division recognizes and to try to fix the facially invalid impairment rating through that procedure. The question in this case is whether the absence of any valid impairment rating deprives the trial court of jurisdiction to determine that the division was wrong in adopting one of the invalid impairment ratings.

JUSTICE EVA M. GUZMAN: How would the trial court determine an impairment rating without any evidence to give it a basis for coming up with an impairment rating?

ATTORNEY ROBERT D. STOKES: A couple of ways, Your Honor, and there are several different options that are illustrated in the cases that have dealt with impairment ratings in this case. In the Deleon case, for example, there was only one impairment rating. It was facially invalid. It suffered from the same defect that the impairment rating in this case did and the trial court said, the impairment rating that I have before me is not valid and that's all I can say. I cannot choose another impairment rating because there's no other evidence of another impairment rating.

JUSTICE DEBRA H. LEHRMANN: And so what is the authority for coming up with another impairment rating in answer to Justice Guzman's question other than that case because that's certainly not binding on us at this point?

ATTORNEY ROBERT D. STOKES: Well, the way that you would do that in that case, because of the nature of dispute resolution at the division of worker's comp is you start the dispute resolution process again. Unlike the pre-1989 Act, worker's comp cases are not decided in toto. They're decided on individual issues that go forward.

JUSTICE DEBRA H. LEHRMANN: But how would this particular plaintiff start over? Because the problem is; there were not, the correct preoperative exams were not done.

ATTORNEY ROBERT D. STOKES: Correct.

JUSTICE DEBRA H. LEHRMANN: And now that can't be done. That's impossible because the surgery--

ATTORNEY ROBERT D. STOKES: They can still have an impairment rating under the AMA guides.

JUSTICE DEBRA H. LEHRMANN: Okay, explain that, please.

ATTORNEY ROBERT D. STOKES: Because the AMA guides for a spinal injury rate the diagnosis. They use a DRE category and there are eight DRE categories to rate spinal impairment. In this case, the injured worker would qualify and Dr. Machado agreed with this in his deposition that a proper application of the AMA guides would qualify this employee for a 10% impairment rate. That's in defense Exhibit 1 at pages 6 and at pages 33 through 35 and that's cited in our brief on the merits at pages 8 through 10.

JUSTICE DEBRA H. LEHRMANN: So what would he do exactly?

ATTORNEY ROBERT D. STOKES: He would get a 10% impairment rating. He would go back to the division.

He would request that the division appoint a designated doctor because this designated doctor's impairment rating was incorrect or invalid. The division would order a re-examination. That doctor would provide an impairment rating. The carrier would look at that. They would decide whether it was facially valid or not valid.

JUSTICE DEBRA H. LEHRMANN: But what would they examine because they, you're saying that they can't consider the fact that the fusion surgery was performed, correct?

ATTORNEY ROBERT D. STOKES: That's correct.

JUSTICE DEBRA H. LEHRMANN: And so what would they look at?

ATTORNEY ROBERT D. STOKES: They look at the diagnosis. They look at the preoperative diagnosis. Each of the eight DRE categories in the AMA guides requires an examination of the diagnosis rather than the treatment for that diagnosis and based on the diagnosis, the doctor is instructed to provide an impairment rating. And so an examining doctor would look at the diagnosis in the case and would provide an impairment rating using one of the eight DRE categories in the AMA guides. That brings up a possibility of an alternate remedy in this case because in this case, there is evidence from Dr. Machado as well as from Dr. Obermiller that this may be an impairment rating that based upon expert testimony can be rehabilitated. The 20% impairment rating is invalid. It's facially invalid because it followed the advisories that even the division has withdrawn.

JUSTICE EVA M. GUZMAN: Let me ask you about that. Lumbermens, the seminal case on this issue with the division advisories came out after this case was decided.

ATTORNEY ROBERT D. STOKES: It did.

JUSTICE EVA M. GUZMAN: So at the time this case was decided, they weren't facially invalid. So how does that impact your argument? It was the only evidence and on its face, it wasn't invalid?

ATTORNEY ROBERT D. STOKES: Three weeks before the contested case hearing in this matter, a district judge in Travis County declared the Lumbermens, declared the use of the advisories to be ultra vires.

JUSTICE EVA M. GUZMAN: So that Travis County district's judge declaration was somehow authoritative at that point as to this trial court?

ATTORNEY ROBERT D. STOKES: The division was enjoined from applying the advisories at that point in time.

JUSTICE EVA M. GUZMAN: But were they applied in this case before that though?

ATTORNEY ROBERT D. STOKES: They were applied in this case at the contested case hearing because the hearing officer in this case ignored the district court's judgment and this case was litigated at the contested case hearing over that precise question. This is not an issue that came up subsequently. It was the heart of the case.

JUSTICE DALE WAINWRIGHT: What does the record show about what the hearing officer knew about the district judge's injunction?

ATTORNEY ROBERT D. STOKES: At that point in time the and the only part of the record because we've come up on a limited record because we're here on a plea to the jurisdiction, the only part of the record that you're going to see is in the hearing officer's decision and order, which is in the record. I believe it's attached to Plaintiff's Original Petition in the Clerk's Record and it shows that at that time, the hearing office believed that he had the authority to either follow the AMA guides or to follow the advisories and that he had discretion to follow either one. And unfortunately, the appeal to the appeals panel happens promptly. It happened more

quickly than the appeal from the district court's judgment occurred and so the Lumbermens' decision from the Austin Court did not occur until after this case had been placed in judicial review. Had this case been litigated at the division after the Lumbermens' case had been decided at the court of appeals, we wouldn't have this problem because the division withdrew the advisories promptly through a commissioner's bulletin after the Austin Court's decision became final.

JUSTICE DEBRA H. LEHRMANN: Let's get back a little bit to Lumbermens. If the act requires the division to consider the effect of the spinal fusion therapy, if it's necessary for the injured worker to reach the MMI, then why isn't Lumbermens wrong?

ATTORNEY ROBERT D. STOKES: Well, the first reason that Lumbermens is not wrong is because in this procedural context, this Court is bound to give deference to our pleadings. We're here on a plea at the jurisdiction. The Court has to assume that our pleadings, which challenge the advisories in this case are correct and that there is a defect in the impairment rating in this case. We're here on a plea to the jurisdiction not on the merits of the case. If the case goes to the merits and we re-litigate Lumbermens, what you're going to find is that Section 40.124 requires that every impairment rating that is assigned by a doctor in the worker's comp system be assigned pursuant to the AMA guides not pursuant to a division advisory or some rule or something else. And the expert testimony, if you read the Lumbermens' opinion, the expert testimony in the Lumbermens' opinion says that, the methodology that is used in the AMA guides requires an analysis of the diagnosis in order to arrive at the impairment rating, not an analysis of the result from treatment that occurs. And so it was the legislator's policy choice to adopt AMA guides and that methodology, which incorporates the diagnosis related estimate methodology for assigning impairment to a spinal injury, which causes this impairment rating to be invalid. It didn't follow the AMA guides. It followed the advisories that had been adopted by the division. So that leaves the Court with several different remedies in this case and we have said, from the beginning that this case is a remedial case. It's not a jurisdictional case. In the Deleon case out of the Austin Court, the court went forward and said this is an invalid impairment rating, that's all I can declare. Parties are going to have to go back to the division and start the dispute resolution process all over again. That mirrors a process at the agency that occurs. The agency has got a statutory prohibition against its appeals panel remanding cases more than two times. And on a number of occasions, the agency's appeals panel has been faced with situations in which at the second case, they still didn't have a valid impairment rating exactly like we've got in this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: On this question of sending it back and starting the whole process anew, there are a couple courts of appeals that say there's no mechanism in the Labor Code for that sort of remedy. What's your answer to that?

ATTORNEY ROBERT D. STOKES: And there are two different remedies about that, Your Honor. The first is the Deleon remedy, which is not a remand. The Deleon remedy simply says, the court says, I fin this to be an invalid impairment rating and that's all that I can find. The parties are going to have to start all over again from the bottom up. The remand issue, which is brought up in the division's amicus curiae brief, compares two decisions from the courts of appeals so that the TWIC against Harris County out of the 14th Court as well as TWIC against Texas Mutual ou of the Dallas Court against one decision out of the El Paso court, which is Texas Builders Insurance against Molder. Molder says that, if there's not a valid impairment rating, you can remand to the division. The two TWIC cases say that there is no statutory mechanism for remand. Either reaches the same result. The case gets back to the division. The question, is procedurally how does it back to the division. Does it get back to the division because the parties have litigated everything that they can litigate and there is no valid impairment rating yet and so the parties are entitled to start process from the bottom up or does it get back to the division because the trial court has said, there's not a valid impairment rating and I'm going to remand the case to the division and if they remand the case to the division, it conceptually in my mind it comes back from the top down rather than from the bottom up? If it's a remand, then as the division argues is possible. The division has argued for a limited remand not a general right of remand, but only the creation of a remedy for a situation such as this where there is no valid impairment rating before the division.

JUSTICE DON R. WILLETT: Did your client have any duty to offer or proffer an alternative impairment rating during the administrative phase?

ATTORNEY ROBERT D. STOKES: Not at all, Your Honor.

JUSTICE DEBRA H. LEHRMANN: Is that really fair because here you've got an injured worker who presents an impairment rating and it's not objected to and nothing else is presented, an alternative impairment rating, and now when the other side does not present an alternative impairment rating, which it appears is required by 410.306(c), then the injured party has to start over in order to be able to be compensated.

ATTORNEY ROBERT D. STOKES: Two things about that as far as fairness is concerned, Your Honor. When it's a designated doctor's impairment rating even when it's facially invalid as it is in this case, the statute requires my client to pay those impairment income benefits to the injured worker. The impairment rating is presumed to be correct until we prove that it's invalid and that's what happened in this case. It's also not true on this record that there was no objection to this. The parties worked real hard to try to correct the validity of the perceived invalid impairment rating through the letter of clarification process and unfortunately, the doctor did not correct it.

JUSTICE DALE WAINWRIGHT: Are there instances in which your client would adopt the proffered impairment rating and the employee would dispute it? Has that occurred?

ATTORNEY ROBERT D. STOKES: It does, Your Honor, and in fact, the most recent case to come out of the court of appeals on impairment ratings came out of the San Antonio Court, State Office of Risk Management against Ramirez, in which the impairment rating that was challenged was a 5% impairment rating. It was the employee who challenged the 5% impairment rating not the carrier.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Hecht, do you have a question?

JUSTICE NATHAN L. HECHT: So what do you agree with the department, the division?

ATTORNEY ROBERT D. STOKES: We don't disagree with the department.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's very clear. Thank you, Counsel, the Court is now ready to hear argument from the Respondent.

MARSHA: May it please the Court, Mr. Keeling will present argument for the Respondent.

ORAL ARGUMENT OF BYRON C. KEELING ON BEHALF OF THE RESPONDENT

ATTORNEY BYRON C. KEELING: May it please the Court, this case raises three important principles. One, the division has exclusive jurisdiction over worker's compensation matters. Two, there is no right of judicial review from an agency determination unless a statute explicitly provides that right. Three, statutes should be as applied as written. Section 410.306 creates a limited right of judicial review of a DWC decision on an impairment rating. Zurich characterizes Section 410.306 as merely an evidentiary provision. This Court, however, in Garcia recognized that Section 410.306 is not merely evidentiary. It defines the very scope of the remedy available under the Labor Code for an impairment rating. The Legislature did not have to grant any review whatsoever from an impairment rating. Instead, Section 410.306 creates a limited right of judicial review where a court or jury must adopt one of the impairment ratings presented to the division under Section 408 of the Labor Code.

JUSTICE EVA M. GUZMAN: What would happen if both impairment ratings presented were not valid? Let's just assume they were simply not valid. Then what does the district court have authority to do?

ATTORNEY BYRON C. KEELING: In that instance, what would happen is the parties would present their expert testimony and the Court would have to pick one of the impairment ratings presented to the division.

JUSTICE EVA M. GUZMAN: Even though they're both not valid?

ATTORNEY BYRON C. KEELING: Well, even though they're both not valid. That functionally is no different than the position that the parties arguably find themselves in keeping at. I don't agree that Lumbermens means that Dr. Machado's 20% impairment rating was an invalid rating, but that being said, the way that the process works is that a designated doctor determines the impairment rating and that's presumed to be valid. If it's not challenged at the administrative level, then the very way that the judicial review process is set up is that that designated doctor's impairment rating is presumed valid for a reason. There's nothing to review in that instance and that goes toward and encourages the Worker's Compensation's Acts fundamental purpose of ensuring quick and expedient relief to a claimant and ensuring finality.

JUSTICE DEBRA H. LEHRMANN: Excuse me. And the Court's lack of authority to remand or to do anything other than choose something that's not valid, you contend is founded, is it 410 or where are we looking for this?

ATTORNEY BYRON C. KEELING: It's Section 410.306. This Court in Manasco addressed Section 410.306 and in that case, the Court recognized that the Legislature could have created an open-ended review of impairment ratings, but it didn't. The Court went on to emphasize in Manasco that courts should not interpret Section 410.306 to create broader remedies than the Legislature specified in the statute itself.

JUSTICE PHIL JOHNSON: Well, but surely we're not going to presume the Legislature requires a court to adopt one of two clearly improper ratings. That seems to me like that would be a very foolish thing for the Legislature to do. We don't presume it's going to do something completely illogical and foolish do we?

ATTORNEY BYRON C. KEELING: No, you don't presume that, but the court does presume that parties will exhaust their administrative remedies and the courts will presume that the judicial review is limited to that which the Legislature has specifically authorized. On the first point, exhaustion of administrative remedies, there was a remedy for this situation. Zurich could have invoked the available remedy under Section 408.125, presented the problem to the division and asked the division to select another designated doctor.

JUSTICE PHIL JOHNSON: But we're here on a plea to the jurisdiction and your position is there's no jurisdiction because 410.306 allows the trial court to only pick one of the ratings presented to the division and the rating presented to the division, as I understand, the parties agree was improper.

ATTORNEY BYRON C. KEELING: The parties don't agree that it was improper. We certainly don't agree that it was improper.

JUSTICE PHIL JOHNSON: Okay, so then if the parties are fussing about whether it's proper or not, why doesn't the trial court have jurisdiction to determine that since we're here on jurisdiction only?

ATTORNEY BYRON C. KEELING: Because this Court recognized in Ferrell that if the Legislature has not authorized the trial court to grant any of the requested remedies in a judicial review proceeding, the trial court lacks subject matter jurisdiction over the case. Zurich has argued three potential remedies in this case. None of those remedies are remedies that the Legislature specifically authorized the trial court to grant under Section 410.306 of the labor code.

JUSTICE NATHAN L. HECHT: If the impairment rating is just not supported by the evidence, the trial court would pick the other rating?

ATTORNEY BYRON C. KEELING: If the trial court were presented with two impairment ratings that were presented to the division.

JUSTICE NATHAN L. HECHT: And if one is invalid, it would pick the other rating?

ATTORNEY BYRON C. KEELING: That would be a summary judgment case and that is the situation that has occurred in the Weeks and Ausaf cases on which Zurich relies.

JUSTICE NATHAN L. HECHT: And if neither one is supported by the evidence, the trial court does what?

ATTORNEY BYRON C. KEELING: Well, in that instance, the trial court would have to pick between one of admittedly two insufficient options, but that's the only measure of judicial review available to the trial courts.

JUSTICE NATHAN L. HECHT: How can you pick between the two that neither one of which is supported by the evidence?

ATTORNEY BYRON C. KEELING: Your Honor, functionally I just don't think that that situation is really going to arise. It's a great hypothetical for a law review exam, but the problem that has--

JUSTICE NATHAN L. HECHT: You might never thought this one was going to arise.

ATTORNEY BYRON C. KEELING: And the reason this one has risen is almost entirely because of the Austin Court of Appeals' opinion in Lumbermens.

JUSTICE NATHAN L. HECHT: I know, but assuming that's right, I understand your position that it's wrong, but assuming that it's right because it could be right that the division issued advisories that were just contrary to law. That could happen and if Lumbermens is correct that that did happen, then how can the trial court pick an impairment rating that's not supported by the law?

ATTORNEY BYRON C. KEELING: Because that's the only option that the trial courts give.

JUSTICE NATHAN L. HECHT: No, the one option is to just say zero. The only other option is zero.

ATTORNEY BYRON C. KEELING: Well, I disagree. That is, of course, the division's argument and the amicus. Actually to put a finer point on it, no one in this case argues that Mr. Samudio's impairment rating should be zero. Everyone acknowledges that Mr. Samudio is impaired. Zurich suggests that there are two possibilities. One is to remand it back to the DWC and one is effectively for the trial court to punt on its judicial review and do nothing at all. On the first, on remand, not only have the majority of courts of appeals' opinions rejected that remand is an available remedy, but statutorily, that's the result as well. Chapter 2001 of the Government Code creates the possibility for courts to remand cases back to administrative agencies. However, Section 410.225 excludes impairment rating cases from the scope of Chapter 2001. So statutorily, the Legislature has already recognized remand is not permissible in an appeal from an impairment rating.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, where does the burden of proof fall into this as far as did the carrier have the responsibility to present another impairment rating in order to fulfill the burden of proof?

ATTORNEY BYRON C. KEELING: It's not really so much a burden of proof issue and let me back up and explain it this way. The designated doctor is neither the carrier's doctor nor the claimant's doctor. The designated doctor's impairment rating is given presumptive weight. Now if either party challenges that, then both at the administrative level and potentially on appeal as well, it's going to be that party's burden to overcome it. And as I say, there are procedures that are available to the parties so that they can carry their burden of proof. One is and the big one is under Section 408.125, if a party says, no, the designated doctor's rating is wrong, the way to

challenge that is to present that issue to the DWC and ask the DWC to designate another designated doctor off of the list of designated doctors and have that designated doctor come up with a new, presumably valid, impairment rating.

JUSTICE DEBRA H. LEHRMANN: That's what I'm asking.

ATTORNEY BYRON C. KEELING: If the carrier's challenge is correct.

JUSTICE DEBRA H. LEHRMANN: And in that sense, is that part of that burden of proof?

ATTORNEY BYRON C. KEELING: Oh absolutely.

JUSTICE DEBRA H. LEHRMANN: Because it's presumed that the impairment rating that was given by the designated doctor is correct and so that would be part of that burden of proof, which may answer some of this question of where do you go?

ATTORNEY BYRON C. KEELING: Not only that, but it goes to the exhaustion of administrative remedies. Again, the DWC has exclusive jurisdiction over worker's compensation matters. Carriers across the state have repeatedly argued that it's the claimant's burden first to make sure that they get a ruling on the issue in question from the DWC and having failed to do so they failed to exhaust their administrative remedies. The same is no less true of carriers. The carrier here had a remedy under Section 408.125 and just simply did not exercise it. Briefly on Lumbermens, Lumbermens was correct in pointing out that the two DWC advisories were ultra vires acts. Where Lumbermens went wrong was then in carrying that the next step and arguably in dicta suggesting that doctors may never rely on surgical treatment or consider surgical treatment in assessing an impairment rating. That's plainly untrue. Table 70 of the 4th edition of the AMA Guides explicitly allowed doctors to rely on pre-MMI surgeries to assign impairment ratings. The confusion in the Austin Court of Appeals' opinion and this is before the court in three pending petitions, Bell, Poehler and Deleon. The confusion lies in language that says that, surgery to treat an impairment may not modify the original impairment estimate. Surgery to treat an impairment is significant language because an impairment is different from an injury. An impairment under the code only arises after the claimant has reached maximum medical improvement after the claimant has reached MMI. Table 70 applies the injury model and says that, the injury model comes into effect and table 70 is applicable whenever a condition listed in table 70 applies. One of the conditions listed in table 70 is prior spinal surgery with radiculopathy and that's significant under the facts here as well as the in the facts in other petitions pending in front of the Court. Mr. Samudio reached MMI on April 7, 2004. He had four spinal surgeries before he reached MMI. He still continued to have radiculopathy. Notably, Zurich wants to rely on Dr. Machado's deposition, which was not before the DWC. It was taken in this case, but significantly and this is in the record in the second Supplemental Clerk's Record at pages 37 and 41, Dr. Machado drew a distinction. He said that, if he couldn't consider surgery, then he would assign a 10% impairment rating, but nonetheless, at pages 37 and 41, he pointed out that he interpreted the guides, the 4th edition of the AMA Medical Guides, to enable him to consider the effect of Mr. Samudio's prior pre-MMI surgeries in assessing his impairment rating and that considering those surgeries, he would still impose a level four 20% impairment rate. And again, that's where the error here arises. In the vast majority of cases, the 4th edition of the AMA guides on which designated doctors are supposed to rely, gives doctors a vast amount of discretion and that makes sense because doctors are doing something that requires their medical guidance. To some extent, medical guidance always involves discretion in reducing that to a number, that's why for the most part, you're not really going to see impairment ratings that are invalid, absent a flawed situation like Lumbermens that enters into the picture and that's why this Court has pending in front of it four Lumbermens cases Samudio, Bell, Poehler and Deleon. In conclusion, Mr. Samudio respectfully requests that the court affirm the trial court's order granting his plea to the jurisdiction. The Legislature in Section 410.306 simply didn't authorize any of the remedies that Zurich was requesting from the trial court.

JUSTICE DEBRA H. LEHRMANN: Let me ask one more thing. A lot of your argument is based on the juris-

dictional aspect of it, but does it really matter whether it's jurisdictional or whether it's simply that the remedy is not provided for by the code?

ATTORNEY BYRON C. KEELING: I think those two are the same thing. And significantly, Zurich's argument is based upon the Dubai line of cases. Our plea to the jurisdiction wasn't based on any Dubai issue. It wasn't based upon the failure to meet statutory prerequisites. Our argument in the trial court was there was no justiciable controversy. A justiciable controversy is a fundamental element of subject matter jurisdiction. Without a justiciable controversy, there is no subject matter jurisdiction. Here there's no justiciable controversy because the Legislature has not explicitly created the right of review that Zurich has asked the trial court to do.

JUSTICE DEBRA H. LEHRMANN: Do you see any problem with the court, the court is somewhat hesitant at times to label something as subject matter jurisdiction because of the problems inherent with that label. And so do you see any problems if the court were to approach it from the other perspective that it simply was not provided for that remedy in the statute?

ATTORNEY BYRON C. KEELING: No, no I don't. I still think it's a Ferrell issue and Ferrell characterizes the lack of an available remedy as a jurisdictional issue. Certainly, we moved at the trial court level on the basis of lack of jurisdiction, but I do think the net effect is the same. If there's no remedy available to Zurich, then there's no judicial review.

JUSTICE DON R. WILLETT: Why isn't remand from a higher tribunal an implied remedy? Any time you have appellate review unless the statute says, otherwise, why not approach it that way instead of the opposite way?

ATTORNEY BYRON C. KEELING: Because this Court in Ferrell has said, the question is, never whether the judicial review statute prevents the reading that the Petitioner requests. The question is, whether the judicial review statute permits the reading that the Petitioner requests. There's nothing in Section 410.306 that provides a mechanism for remand. There's nothing in Section 410.306 that permits a trial court to reform an impairment rating from 20% to a 10% rating that was not presented to the division and there's certainly nothing in Section 410.306 that permits a trail court simply to punt and say that there's no valid impairment rating at all.

JUSTICE DON R. WILLETT: You would allow no room for the notion that remand from a higher tribunal or a court is an implied remedy whenever appellate review is taking place?

ATTORNEY BYRON C. KEELING: That's correct. I don't think that you can imply that into the statute.

JUSTICE PHIL JOHNSON: Counsel, we touch briefly on it. Assuming there is no jurisdiction, then what about the attorney's fees?

ATTORNEY BYRON C. KEELING: Under case law, the court has jurisdiction to award attorney's fees even if the court lacks jurisdiction over the subject matter of the case because the prevailing party is still a prevailing party under the statute that allows the recovery of attorney's fees. I think that's the Duken case out of Amarillo.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

ATTORNEY BYRON C. KEELING: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Keeling.

REBUTTAL ARGUMENT OF ROBERT D. STOKES ON BEHALF OF PETITIONER

ATTORNEY ROBERT D. STOKES: Section 410.306(c) the second sentence, which is at the heart of this argument says, the court or jury in its determination of the extent of impairment shall adopt one of the impairment

ratings under subchapter G, Chapter 408. Subchapter G, Chapter 408 contains Section 408.124. Section 408.124 provides that an award of impairment income benefit must be based upon an impairment rating assigned pursuant to the guides. Section 4, rather than 410.306 depriving the court of jurisdiction, it describes the court's jurisdiction. It prohibits the court from adopting an impairment rating that is not valid under Section 408.124. The court has got to grapple with the validity of the only impairment rating in front of it and were this Court to say because there's only one impairment rating and the trial court has to adopt an invalid impairment rating or that there are two or three or four impairment ratings and each of them are invalid for various reasons and there are many reasons why an impairment rating could be invalid. It would be ignoring the command of 410.306C, the second sentence, because it would be permitting the trail court to adopt an impairment rating that was not calculated pursuant to that section.

JUSTICE EVA M. GUZMAN: If the trial court found zero though, that is in my mind sort of the adoption of an alternate impairment rating zero. So wouldn't under your view the most appropriate course for the court to send it back because I think when you pick zero, that's picking a rating.

ATTORNEY ROBERT D. STOKES: You're absolutely right Justice Guzman. The trial court does not have the authority to pick zero and we have never advocated for that and the court of appeals repeated assertions that we have are in correct. There is nothing in this record that ever supports that we have requested a zero percent rating. We have said that, the trial court has got jurisdiction to say there is not an impairment rating, but that's far from saying that there is a zero percent impairment rating. An injured worker is entitled to an impairment rating.

JUSTICE EVA M. GUZMAN: So here we have 20% and the contention is that it is not valid. So the court is saying that there is not an impairment rating, is that not tantamount to the court saying it's zero?

ATTORNEY ROBERT D. STOKES: No.

JUSTICE EVA M. GUZMAN: Or would the Court have to say there's not an impairment rating; therefore, I'm sending it back to figure out whether based on medical evidence, it's zero or 20?

ATTORNEY ROBERT D. STOKES: Either under Deleon, the Court has got to say there is not an impairment rating and you go back to the division and you reinitiate it from the bottom up. Or under Molder and the division's amicus brief, there is an inherent right of remand and the trial court or this Court in some form or fashion, there is an order of remand back to the division to reinitiate, to reappoint another designated doctor, to get a letter of clarification from Dr. Machado, whatever the division's mechanism might be.

JUSTICE DEBRA H. LEHRMANN: What is your response to the argument that it was the carrier's responsibility to get a new doctor designated in order to fulfill their burden to prove that the presumptive designated doctor's impairment rating was invalid?

ATTORNEY ROBERT D. STOKES: It's important to understand what an impairment rating does in the statutory scheme. An impairment rating initiates impairment income benefits. If an employee doesn't have an impairment rating, they can't get impairment income benefits. It is the employee's burden to show that they are entitled to impairment income benefits and in order to do that, they bear the burden to present an impairment rating. The carrier is entitled to challenge the validity of that impairment rating under 408.124, which is what they did in this case. But this was a designated doctor. And the argument of the Respondent that the carrier has failed to exhaust its administrative remedies by failing to invoke Section 408.125 is simply wrong. 408.125 already had been invoked; otherwise, Dr. Machado never would have examined the employee. The division recognizes at the agency level, the ability to go back to the doctor through the division. Parties can't directly or improperly contact the designated doctor and that's what we did in this case. We tried to fix the impairment ratings and in fact, the irony is the employee never tried to fix it, only the carrier.

JUSTICE DEBRA H. LEHRMANN: When we get back to the Chief's, I think his original question and that is if

a new designated doctor had been requested and a new impairment rating would have been presented, there wouldn't have been any problem here and you just, there's no way I'm curious as to why that wasn't done?

ATTORNEY ROBERT D. STOKES: Well, you can request a new designated doctor, but ultimately, that belongs to the division to decide. And parties can request a lot of things, but we can't make the division give us one. And so as a result, Your Honor--

JUSTICE DEBRA H. LEHRMANN: But the request wasn't made.

ATTORNEY ROBERT D. STOKES: No, here was not a request for a new designated doctor because the division at that time and still through the appeals panel decisions that we cited in our reply brief, recognizes a letter of clarification process. The agency encourages parties to try to fix impairment ratings not throw them out and go get another one. Wherefore premise is considered, Petitioner respectfully requests that this Court reverse the judgment of the court of appeals in accordance with our brief.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel, the cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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