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98-0479
CONTINENTAL V. FUNCTIONAL

STONE: The legal issues involved in this worker's compensation case are important to the judicial review of Texas administrative decisions in this state in general. These legal issues also call for thoughtful consideration by this court of substantive due process issues, implications involving separations of powers and the integrity of the workers' compensation system.

When the legislature enacted the new Worker's Compensation Act they did something that hadn't been done before. They gave workers in Texas the entitlement to lifetime medical benefits. In exchange for this, they also implemented a regulatory system to regulate the cost effectiveness of the healthcare that the workers are receiving and put into place checks and balances for treatment guidelines so that the care would be medically necessary and appropriate for the treatment of their injuries. When they did this, it would be difficult to believe that they simply forgot to provide for judicial review of these property rights that were involved with the parties. In the *Continental* case, as you are well aware, the right involved is the right to the money that *Continental Casualty* was ordered by the worker's compensation commission to pay to Functional Restoration Associates in prime(?) For the injured worker the demand to the entitlement for health care benefits would be a similarly important protected right under the Texas Worker's Compensation Act. Could it possibly be true that the legislature simply forgot to provide for a right of review in the statute?

ABBOTT: Does it seem that it's not true they forgot, but they intentionally created a system for review of medical benefits with regard to benefits claimed by a claimant, and that's contained in Ch. 410? But when it comes to disputes between say an insurance company and health care provider, and the interplay they may have with regard to the commission, they decided that for those types of matters they were not going to provide judicial review, and that's what's contained in ch. 413, which is wholly separate and was seemingly intentionally created to be separate by the legislature.

STONE: Continental Casualty disagrees because of the structure of the Act as it was implemented.

ABBOTT: Looking at the structure of the Act, tell me anything in ch. 410 that provides recovery by an insurance company? If you look at ch. 410, it all speaks to proceedings that involve recovery for a contest of recovery by a claimant.

STONE: I would respond that that section doesn't preclude carriers from participating in recovery...

ABBOTT: Cite me a provision in 410? You can't, can you?

STONE: No, I can't cite you a provision in 410. Statutory right of review we believe is apparent when you look at the pre-codification version of the statute. 6.62(a) and 6.64 are the most important provisions to look at. 6.62(a) is what we believe became after codification section 410.301 and 410.255 that you're questioning. According to the sponsor of the bill medical benefits disputes were intended to be in a catch-all provision that appears in §6.64, the issues "other than". And those issues "other than" are benefit issues. We've heard the commission in its briefs argue repeatedly that there are other provisions of the Act that provide for judicial review expressly. None of those provisions that they cite, however, such as extra hazardous employer designations have anything to do directly with workers' compensation benefits. It would be redundant in fact for the legislature to have provided express judicial review in those statutes, and those were to be considered under 410.255.

The only "other than" issues, therefore, that makes sense to be included in 410.255 are issues involving benefits to injured workers. One of those issues, the very important one in this case, is medical benefits, the only issue not expressly addressed for judicial review.

ABBOTT: Again, you seem to be either unable to or unwilling to draw a distinction between a dispute say by a claimant for medical benefits provided to a claimant separate from a dispute between an insurance company and a health care provider concerning medical benefits. Why will you refuse to accept that distinction other than the fact that it would hurt your case?

STONE: I accept that there is a distinction between the two, but I do believe that both injured workers and carriers can recover for whatever wrong done to them whether it's a refund to an injured worker for a payment made when they indeed suffered a compensable injury, or if it's a carrier trying to recover from a provider for example in a refund situation. 413 provides for a dispute resolution of medical benefits disputes whether it's insurance carriers or injured workers or providers. All three may go into that _____.

ABBOTT: Have you noticed that under §413 it never discusses the claimant and never discusses any claims or remedies for a claimant?

STONE: I didn't really notice that, but I know in practice that a claimant does come in under §413 many times. That specifically would be a time when an injured worker has made a payment for a healthcare benefit and it was later determined that his injury was compensable. He would come in under 413 requesting a refund for an overpayment just as a carrier would have mistakenly paid a healthcare provider.

ABBOTT: You don't by any chance have all of §410 handy do you? If you would look under §410, one key focus of your argument is 410.255. And you want to view this whole thing in the concept of the way that the whole Worker's Compensation Act or Labor Code is structured. And

if you look at all the sections preceding and following 410.255, they all involve types of claims that are totally unrelated to the type of claim we have in here. Look at 410.256, about the court approving a settlement made by the parties. Look at 410(b)(2). Throughout there it talks specifically about the claimant. And the same thing pertains to the adjudication disputes in that same subchapter with regard to 410.252. Here's a classic example. With regard to filing the petition, under this particular subchapter, if you look at 410.252, which to me seems to have close interplay with 255, it talks about where the suit could be filed, the suit that you ought to be able to bring and it has to be filed in the county where the employee resided at the time of the injury or death, or in the case of an occupational disease, in the county where the employee resided on the date the disability began. When you have a dispute between an insurance carrier and a healthcare provider, I submit to you, that the location of the injured worker is fairly irrelevant with regard to where venue should be. Any response to that?

STONE: There are also provisions in there for subclaimant status during this very type of dispute for healthcare providers. For example, the healthcare provider can come in under the 410 series and request a benefit review conference, a contested case hearing. They can go to DC after going through the appeals panel in the shoes of the injured worker. That is a case where a healthcare provider can indeed follow those provisions.

ABBOTT: I frankly agree with you completely, but it's limited to situations where it specifically involves benefits that may be owing to a claimant, as opposed to the fight between the insurance carrier and the healthcare provider over whether or not the insurance carrier really has to pay those claims.

STONE: Yes. A similar situation would arise where there's a refund request by _____, and he does have to go through, or in practice, goes to §413, dispute resolution process to recover that money paid. There's no question that there is a great deal of confusion about that even though the commission in its own orders on these cases puts at the bottom of them, "You may seek judicial review by filing a petition in Travis County DC within 30 days of _____ the decision."

ABBOTT: Let's say 410 says what you claim it says, or means what you claim it means. Isn't 413 at least with regard to the medical review benefits provision just kind of totally silly for the legislature to have created, because there is no reason for it to even exist?

STONE: No, it's not totally silly, because you're dealing with issues that involve complex regulatory issues when you're talking about medical benefits.

ABBOTT: Why wouldn't 410.255 apply, and all the other adjudication of disputes contained in all of subchapter in 410, not govern all of that which would render that section 413 totally meaningless, totally surplusage?

STONE: They could have done that. Instead what the legislature elected to do was set up a division of medical review who would specifically be charged with enforcing the medical fee guidelines and stricter guidelines, such as this _____ treatment guideline, which are rules promulgated by the commission to implement the regulations in the Act to balance the award of lifetime medical benefit to the claimant. It's a very specialized area of practice. The medical review has the two levels where you do a paper review and the medical review division has a chance to apply its own guidelines and rules and issue a decision without a hearing, then there's a chance for SOA. It used to be the commission before the hearings went over to SOA to review the agency's application of its own rules and it's own treatment guidelines. I would propose that the legislature split that intentionally so that you could have very efficient and separate adjudication of compensability issues so that a worker who is injured in Texas can have a quick determination of whether he suffers compensable injury. Most disputes that arise after that determination is made over the life of the claim will likely involve medical benefits issues.

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PRINGLE: I would like you to do something for me. Imagine I'm the attorney for James Hood, and imagine that James Hood, who sustained an on-the-job injury wanted to get medical treatment for his injuries, so he could return to work, or so that it would relieve him from the effects of the injury. Continental Casualty Co refuses to pay for that treatment. So James Hood goes to the worker's compensation commission's medical review, and they refuse to order payment. So James Hood asks for a hearing before the State Office of Administrative Hearings. And the administrative law judge listens to the argument from the worker's compensation commission's attorney and refuses to order payment for treatment. So James Hood then says, Gee, do I have a right of judicial review of that decision? I believe this court answered that in the affirmative in the *Workers' Compensation Commission v. Garcia.* This court said there was a right of judicial review. The question was, What was the method of review?

ABBOTT: It seems clear that there is and that's provided under either 410.301 or 410.255?

PRINGLE: I believe it's under 410.255.

ABBOTT: But you're talking about the claimant seeking recovery as opposed to the insurance company having a dispute with regard to the healthcare provider, not over whether or not the claimant gets any benefits?

PRINGLE: Well medical benefit is a benefit under the Worker's Compensation Act. My clients are healthcare providers. They provide treatment to James Hood. I believe the Act clearly states, they do have the same right to seek judicial review.

ABBOTT: If that's the case, then explain to me if 255 covers what you say it does, I

simply do not understand why 413.031, especially (d), exists. There's no reason for the legislature to have wasted their time writing it.

PRINGLE: I think it goes back to how the Act was passed. Initially if you look at the legislative history of the Worker's Comp. Act, there was no bifurcation of the hybrid method of review sort of speak, as the San Antonio CA found. What the court originally had was you were going to have administrative procedure act hearings of all disputes before the worker's comp. commission. In the course of the 2nd session, you had the legislation change where you suddenly had the appeals panel created on the income death benefits and compensability issue. And they left the system the way it had originally been proposed for all other disputes. So you have your benefit review conference in 410, your contested case hearing. You then go to the appeals panel because of the concern about trial de novo, because that was the issue that was before this court. My opinion in the *Garcia* case, they created a limited method of trial de novo for the injured worker on compensability, income and death benefits. But for all other disputes, they left it with the Administrative Procedure Act, the method of judicial review and hearing. And that's why you see in 413.031 that says, A party. You asked my colleague where in 413.031 does it say, The health care provider? It doesn't say the _____. It doesn't say the health care provider. It doesn't say someone else. It says a party.

ABBOTT: Well it says, A party, including health care provider.

PRINGLE: That's correct, to make sure that it was very clear that any party has a right to a hearing.

ABBOTT: Wouldn't that also mean insurance company?

PRINGLE: It means insurance company, too. If you look at the old law before it was put in the Labor Code, under art. 8308, if you go to the section, I think it's a little bit clearer. You talk about the methods of review under 6.61, 6.62 and 6.63. You then come down to 6.64, which is now 14.255, and it says, All other issues. It doesn't say, All other issues from the appeals panel. It says, All other issues go up under substantial evidence. If you look at 401.021 of the Act, it says, That the Administrative Procedures Act, (g), which is the judicial review provisions, applies to every hearing or proceeding.

HANKINSON: The CA didn't buy the arguments that you and your colleague are making on statutory interpretation. Instead, determined that because of the property interests there's an inherent right to judicial review. In what way does the administrative procedures that are in the Act fail to give all the process that is due?

PRINGLE: At that time that hearing was heard before a contested case hearing officer of the workers' comp. commission. Now they are before the state office of administrative hearings. You did not have at that time the procedures available under the Administrative Procedures Act

under the rules of the workers' comp. commission. Now, you have the rules of the state office of administrative hearings governing, not the rules of the workers' comp. commission. I believe the rules of the workers' comp. commission, as applied, did not get fair hearing...

HANKINSON: Why not?

PRINGLE: Because it doesn't allow you to engage in adequate discovery. In addition what the worker's comp. commission did, and it was in rule 145.18, they said specifically, That only the paper filed that was produced at the first level of medical review was all that could be considered in the subsequent hearing. So you did not have a de novo hearing. You did not have the right to the hearing that the administrative procedure act specifically says that you do. So if you look at the worker's comp. commission rules, as they apply up until Jan. 1, 1998, you could not offer into additional evidence other than what was presented in the paper filed to the worker's comp. commission unless you had a hearing before SOA and were able to show good cause and a certain time frame why you should be allowed to put on evidence. So you didn't have an opportunity to depose witnesses. You did not have an opportunity to engage in discovery.

HANKINSON: Since the rules have been changed, is the process given now adequate?

PRINGLE: In my opinion, no.

HANKINSON: What's wrong with the current _____?

PRINGLE: Because I believe when you have a state agency saying what the law is, you need to have for purposes of public policy judicial review of that agency's decision. This agency has told you that if you grant a right of judicial review in medical disputes the DC's of Travis county are going to be flooded with medical cases. But the reason there are 25,000 supposed medical disputes out there is because the worker's comp. commission ignores its own rule 133.305(a), which says, There is a 1 year statute of limitations. If you've looked in the brief and you looked at the appendices, you will see how the commission has ignored that rule, has gone back and forth saying, Well, yes, we will consider some of these, we will de novo some of these over here, no we are not going to consider these - oops, we've changed our minds, yes we are. And I believe for public policy purposes, you must have judicial review of agency decisions.

HANKINSON: In all circumstances, the procedure followed by the agency could never satisfy due process in your view?

PRINGLE: In my opinion, based on my experience, it cannot. I know that may seem like an extreme position, but I do not believe that it does. I would urge the court in looking at what is going on as to how this agency interprets the act, they ignore the plain meaning of the act.

ABBOTT: If your position is adopted, doesn't it have implications and an impact a whole

lot bigger than just the issue we're talking about? If we rule your way, what that means is that in every administrative ruling, henceforth, not just involving workers' comp., but every single administrative ruling there is going to have to be a right of judicial review. If it's not otherwise included in the statute, we're going to have to say, Automatically you get a right of review to determine at a minimum whether or not what the administrative agency did was arbitrary and capricious?

PRINGLE: Yes, as to the first part. But the savings clause in the second part is the legislature can't come in as it has in a number of acts and specifically say, There is not a rider review from these proceedings. Otherwise, I believe the Administrative Procedures Act does indeed grant that _____.

ABBOTT: So what you're saying is, that if the legislature specifically says there is no right of review, then you wouldn't be entitled to an inherent judicial right of review? You said, that what I proposed would happen would not occur if the legislature specifically said in a statute, that there is no judicial right of review from this administrative proceeding.

PRINGLE: Yes.

ABBOTT: So that applies. But if the legislature doesn't say that, if they just don't provide a right of review, then there is one?

PRINGLE: I think the Administrative Procedures Act clearly says that. I recognize that the CA in Austin has consistently held that it doesn't. And I recognize that the commission stated in its brief, that this court had denied writ in some of those cases. But there is a case from the CA in Waco that clearly held that the Administrative Procedures Act does engraft a _____ entitlement to judicial review.

If you look at 401.021(a), which talks about how the Administrative Procedures Act applies to the workers' comp. act and you look at *Breyer v. Employee Retirement*, that language is very similar and the court there held, That, yes, it does give a right of judicial review. *Texas Health Facilities Commission v. West Texas*, a Waco CA decision said. That almost same identical language that's found in the worker's comp. act grants a right of judicial review because it talks about substantial evidence. If you look at 410.255(b), it talks about substantial evidence. And that's been held by the courts to say that that is granting a right of review. And I would urge this court to reverse the CA and find that there is a right of review under the Worker's Comp. Act, not just for medical benefit disputes, but for all disputes under the Act.

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RESPONDENT

HELMCAMP: I am an assistant AG with the State of Texas representing the worker's comp.

commission in this proceeding. The commission seeks from this proceeding today: 1) we are asking that the court affirm that portion of the 3rd CA's opinion, which expressly held that the Texas Labor Code, the Worker's Comp. Act does not grant a statutory right of review for such medical disputes as are at issue in this case; 2) we respectfully ask that this court reverse that portion of the 3rd CA's opinion which held, that there was an inherent right of judicial review because there was a vested property right at stake. The commission filed its petition for review on that point.

I would like to respond to one inaccuracy that my good friend and colleague, Mr. John Pringle made. I would point out in response to the Justice's question about whether or not the APA applied to this particular proceeding, the answer is an unequivocal, yes. You may determine this by reviewing the petitioner's brief. It is in fact a copy of the decision and order that was rendered by the APA hearing officer at the commission.

I point out at that time in 1994, the commission hired and employed trained lawyers to act as APA hearing's officers for such cases. In that order, the very first paragraph says, "This case is decided under the Texas Worker's Compensation Act then the Administrative Procedures Act." The point is simply in response to the Justice's question, the protections if you will, the procedural safeguards provided by the legislature in the APA were in fact present in this case.

The legislature in 1995 chose to shift the hearing responsibilities from the internal hearing's officers, employees of the commission, and transfer those responsibilities to the State Office of Administrative Hearings, which as you know is an independent _____ of administrative law judges that hear such cases for state agencies.

I would like to turn to the position of the commission as to why the CA erred in finding that there was a vested property right in this case.

ABBOTT: Let me ask you something about that order you were referring to a second ago. If you will look at the last page with the hearing officer's signature. What's the meaning of that fine print at the bottom?

HELMCAMP: I understand. You're wondering why in the world did we say in there that there is a right of judicial review. Two answers at least come to mind. One, the commission frankly was operating at that time under a misapprehension that there was a right of judicial review. It took this case quite frankly and the inquiry of the trial judge, Judge Margaret Cooper, who first raised for us the issue of jurisdiction. When she did that, the commission reviewed this and carefully looking at the statute itself and particularly §410.255 and the other sections that are preceded and follow it, the commission took the position and realized that in fact there was an error. And this statement that a party dissatisfied with this decision may seek judicial review by filing a petition, etc., was in error. Now I will tell you to this day because of the pendency of this case, that language still appears in the order. We haven't changed it because we don't know what this court is going to decide. But we have changed our position and we are now stating to this court that there is no right of judicial review.

I would also point out the second reason in response to your question, an agency does not have the power to independently grant judicial review if the legislature hasn't given it. It's axiomatic that agencies only have those powers which are given to them by the legislature. And even if we wanted to do this, we don't have the power to do it. So it's frankly just a mistake - plain and simple.

If I may return to my argument on the vested property right. It primarily rests on two principles. The CA wrote what we respectfully submit is a very well reasoned opinion on this point, but their analysis stops short. Because here is what they said at page 781 of the CA's opinion in paragraph 10, In the present case we must first identify the effected interest. Well we certainly agree with that. A person's property interest include actual ownership of real estate, channels and money. The property interest at issue in this case involves the money that the commission's hearing officer ordered Continental to pay to FRA and in fraud(?). We don't disagree with that. But the next sentence is problematic. The court said, It is self evident that a party has a vested property right in his own money. We do not disagree with that statement, but the problem is the CA stopped short in its analysis. What they should have gone on to do is analyze the context in which this case arises, the context in which the money is effective, and that context is critical, because this is a highly regulated economic endeavor. It is a statutory scheme created by the legislature to provide for all manner of resolution of all manner of issues arising under the worker's comp. laws of this state.

So to be a vested property right and have that right in one's money, the courts have also held that one must have an unfettered interest in that money and the ability to use it as one sees fit. Under the context of this case, and this is our critical point, Continental Casualty did not have an unfettered interest or discretion in that money. That money came from premiums paid by the injured worker's employer for a policy of worker's comp. insurance. Continental Casualty had agreed to abide by and be bound by the rules of the worker's comp. commission as set forth by its duly authorized enactments as well as by the statutory scheme. It was responsible and held that money almost in trust, I use that word advisably, for the payment of such claims, such benefits as may be ordered by the commission pursuant to the scheme. So the first point is, Continental Casualty did not in fact have as the law contemplates a vested interest in this money.

But secondly, as this court held in 1916, in the seminal case of *Middleton*, which I believe to be the first case testing the newly enacted worker's comp. law of this state. Now it wasn't called this at the time, but that's what it was. In *Middleton*, as you know, the court looked at the statutory scheme which the legislature created to settle some of these issues. Each of the parties in the worker's comp. scheme gave up something. The injured worker gave up his or her right to sue the employer as that right existed at common law in return for certain benefits which would be paid if that employee suffered an on-the-job injury. In return, the employer gave up certain rights that it had, such as the common law defenses of contributory negligence or assumption of the risk. And initially they weren't insurance companies involved in the process. But over time insurance companies took the place of the initial statutory scheme to provide that coverage. The point is, that the *Middleton* case stands for the proposition that employers who become subscribers under the Act

voluntarily waive the right to have their liability determined in the courts. So, too, do the other parties in the system. And we now suggest that is in fact *Continental Casualty*, by voluntarily participating in the worker's comp. system, and it has absolutely no obligation to do so, but by its voluntary participating in the system, Continental Casualty has like the Texas Power & Company in *Middleton*, voluntarily giving up its right to have its liability determined by the courts of this state.

ABBOTT: Are you thoroughly familiar with the insurance agreement issued by Continental Casualty?

HELMCAMP: I respectfully say I am not that familiar with the actual insurance contract.

ABBOTT: So you don't know if it says anything in there about whether or not they are subject to the procedures set out in either the Labor Code or the APA or anything like that?

HELMCAMP: I do not. I suspect that given the standardization of most insurance policies, especially in the worker's comp field, there probably is not such language. But I do suggest that by agreeing to write worker's comp. insurance in the state, Continental Casualty as approximately 580 some other insurance companies that write worker's comp. coverage agree to be bound and to follow the worker's comp. system enacted by the legislature.

HECHT: So under your argument, the legislature could pass an act that kept both claimants and their opponents out of the courts altogether?

HELMCAMP: Not only that they could do that, but they have in fact done that in this statute.

HECHT: I thought there was substantial judicial review in this stage.

HELMCAMP: And that is the point that Continental Casualty sought to raise and was rejected by the 3rd court. The legislature in crafting this act in 1989, which was a complete re-write as you know of the worker's comp. law and then subsequently was recodified into the Labor Code, the legislature for whatever reason chose for this particular type of dispute, that an issue between a health care provider and an insurance company over whether the insurance company had to pay the health care provider, the legislature chose to not to allow for judicial review of that case.

HECHT: Your argument from *Middleton* is that the legislature could deprive all participants in the compensation process of any judicial review. And in *Garcia* we said, No.

HELMCAMP: I think that would be perhaps a reach and it would be too far to go. There are as someone pointed out administrative safeguards and due process provisions that are provided. They were provided in 1994 when this case arose and they are still provided today by the Administrative Procedures Act. There's notice. There's opportunity to be heard. There's full discovery, depositions, request for production of documents, representation by counsel, argument, full and imparting

hearing, etc., etc. But suppose the situation arose where say Continental Casualty was aggrieved by a decision of the dispute resolution process. Remember there's a two-tier process before the commission. And suppose Continental Casualty exercised the right, which the legislature did give it, to ask for a contested case hearing. Suppose further that for some reason when Continental Casualty gave notice to FRA of that hearing, by certified mail, return receipt requested, somebody else signed that green card by mistake, and in actuality Continental Casualty never got the notice. Under the SOA rules, you may be surprised to learn in particular rule 155.55, If a party comes to the contested case hearing and can establish that actual notice was given usually by the return receipt requested, and that other party has failed to appear a default judgment may be taken. And suppose that happens. Suppose that FRA did not get notice because the green card was signed for mistakenly by somebody else, Continental Casualty shows up at the hearing, but FRA is not there, they proceed to take a default judgment. And only after the fact does FRA find out about it. In that instance, I believe and would assert that FRA would have a right to get to the courthouse to say, Wait a minute, a substantial due process right of mine was violated because I did not get notice, and I need to have the court look at that.

HECHT: Is there any other issue that the commission decides that is not subject to judicial review?

HELMCAMP: At this moment, I am unaware of any other issues that are decided that are not subject to judicial review.

HECHT: Why would the legislature make this the one to the surprise of the commission apparently?

HELMCAMP: I think if I knew the answer to that, I think I could make a great living as a lobbyist trying to figure out what legislative intent was. I suspect when the legislature looked at this and truly thought about it, they just felt that this was not one of those issues that was of significant importance and magnitude to require further scrutiny by the court. I suspect, and this again is just one person's opinion, this kind of a dispute was not of that import. In other words, we're talking a $2,400 issue here.

HANKINSON: How much money is involved in the disputes that are resolved by this process administratively every year? I mean each claim may be small, but what's the total amount of money involved?

HELMCAMP: Each case of course is different and there are varying amounts. I can tell you that in this particular case, $2,400 was at issue.

HANKINSON: But when you start adding up all the medical dispute claims that are processed every year what is the total approximately of money in dispute that the procedure revolves the dispute?

HELMCAMP: I simply do not have that figure at this moment.

HECHT: The insurance fund says $88 million in one ...

HELMCAMP: I can tell you that what I do know with regard to approximately 25,000 claims that are presently pending at the commission as a result of the invalidation of the 1992 hospital fee guideline, there is approximately $200 million in additional claims that hospitals have filed. There's a total of about 25,000 claims seeking additional reimbursement for the difference between what they were paid under that hospital fee guideline and what they would receive had they been paid what they charged. But other than that, I don't have any further information.

HECHT: Do you agree with opposing counsel that before the current Act these issues were subject to judicial review?

HELMCAMP: I do.

HECHT: Let me take you to the APA. The language seems awfully clear that everyone who is aggrieved by a final decision on a contested case is entitled to judicial review?

HELMCAMP: I have several responses to that. First I would begin with §2001.001 of the APA. That is the purpose. The purpose is the public policy of the state through this chapter to 1) provide minimum standards of uniform practice and procedure for state agencies; 2) to provide for public participation in the rule making process; and 3) to restate the law of judicial review of state agency action. I think that's critical. It's not to allow for a judicial review. It is to restate the law. Then if you look at the specific provisions cited by the petitioners, §2001.171, the critical language I believe is the last three words of that subsection which says, Under this chapter. I believe and the courts have previously held since 1979, that the Administrative Procedures Act is simply, as regards this particular subsection, a procedural guideline to direct the steps which are undertaken when judicial review is expressly authorized by some other law.

I would point also the court to §2001.172. It's entitled, The Scope of Judicial Review. It says, The scope of judicial review of a state agency decision in a contested case is as provided by the law under which review is sought. That tells me and it tells administrative law practitioners really since the APA was enacted, that what you do is you go to the agency's enabling statute and you must then determine, Does the agency's enabling statute grant the right of judicial review.

I would also point out 2001.174. This is review under substantial evidence rule or undefined scope of review. If the law authorizes review of a decision in a contested case under the substantial evidence rule, or if the law does not define it, etc.

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REBUTTAL

STONE: In regard to the due process question, whether sufficient procedural due process is provided to the parties at the administrative level, let's not lose sight of the fact that due process has two prongs: procedural, which really isn't at issue in this case; and substantive. And the substantive prong is what's most troublesome here, because the substantive prong is what protects the citizens of the state from arbitrary and capricious actions of a state agency and just plain wrong decisions. We've already had at least 1 case in Travis County DC where a district judge, in fact under the substantial evidence standard remarkably remanded a case to the state office of administrative hearings on a question of interpretation of the law. So this is very important. Secondly, in regard to the number of disputes, I think at least one carrier stated they have 400,000 medical bills processed. Those bills have to be processed under the medical fee guidelines promulgated by the commission and the commission becomes its own policeman without the right to judicial review.

In regard to the flooding of the courts and the citing of the *Blair* case, *Blair* dealt with an express exclusion in the statute of the right to judicial review. And it's distinguishable because of that. And the commission's reliance on *Middleton*, I think, is also misplaced, because that case dealt with whether defenses could be taken away constitutionally from an employer.

BAKER: The APA is the only one that provides for review based on an arbitrary and capricious standard of review, is that correct?

STONE: No, I believe 410.255 restates the provisions of the APA and also provides for arbitrary and capricious...

BAKER: So whether it's under the compensation act or the APA, an arbitrary and capricious standard of review is available?

STONE: Yes.

BAKER: And is it your argument that that standard of review gives you the benefit of the vested property right?

STONE: Yes. I believe that the legislature would not have deliberately passed an unconstitutional statute if we have a deprivation of substantive due process rights. That may be what has happened here. They would recognize of course the inherent right to judicial review.

BAKER: What about his argument that this is really not a vested property right?

STONE: I think he's simply wrong. I think it's a very convoluted reason to say that money, the most basic of possessions, is not vested because it's somehow subject to a regulatory

system. If that's true, none of our dollars are vested either because they are subject to the IRS.

ENOCH: But if it's a vested property right, that entitles you to due process doesn't it?

STONE: Yes, both substantive and procedural.

ENOCH: And due process is something that can only happen in a court?

STONE: Yes - well not only in a court. But here, we have to have a review of an agency decision. You can have procedural due process of an agency.

ENOCH: Well you've got an appellate review of that decision. What you're asking is an additional court review of the review, don't you?

STONE: No, there is no appellate review for medical benefits disputes. There is for income benefit disputes.

ENOCH: Once the hearing officer makes the decision, you can't go to the commission and there's no appellate panel that reviews...

STONE: Not for medical benefits. And that's what causes some confusion. For income benefits that claimants are entitled to, there is an additional tier in the process. There is the benefit review conference, which is a mediation. There's a benefit contested case hearing, which is conducted not under the APA, but under specific rules of the commission. Then there's a right to go to an appeal's panel within the commission to appeal that, and they are primarily concerned with errors in law. They don't much look at the factual considerations. And then, you get to go to DC. What's missing in the medical benefits side of that tree is any kind of appellate review of the contested case decision.

ENOCH: But you've already had a benefit's review decision that you weren't satisfied with, so you create a contested case and went to the hearing officer?

STONE: The distinction I think that's important here is that benefit review doesn't involve the presentation of any evidence. It's simply a submission of documents to the commission saying, Oh, Commission, please order that, for example, the carrier, Pay Me. There's no evidence taken. The officers reviewing them aren't lawyers, they aren't medically trained, they are not judges. They are called medical review officers. So it's an initial determination, which is then reviewed now by the State Office of Administrative Hearings.

ENOCH: You get a review of that decision by a hearing officer. One of your complaints is, you don't get another review of that?

STONE: The medical review division doesn't do what we would normally consider practicing law.

ENOCH: Your point is that there are other levels of review that you ought to be entitled to under due process?

STONE: Yes.

ENOCH: And ultimately regardless of how many levels of review you get, due process is denied by not being allowed to go to court?

STONE: Yes, the substantive due process part of it.