ORAL ARGUMENT – 3/22/00
99-1011
PAYNE V. GALEN HOSPITAL CORP.

WALDNER: Janis Payne in August 1992 was working as an orthopaedic nurse on the 4th floor of Clear Lake Hospital in Houston. She was assisting a patient to the bed, the patient was an elderly woman, she started to fall, Janis grabbed her and in the process injured her low back. A soft tissue low back lumbar sprain. That was the injury that began the sequence of events that leads up to this moment in time.

Janis was treated by Dr. Green, who was an orthopaedist, who gave her a couple of weeks of bed rest, and prescribed medicine for and some very mild exercises, then placed her on light duty. She returned to work after a couple of weeks. Dr. Green's bill and the bill for the medication was paid for by worker's comp. by Charter Oak, who was the comp carrier for Clear Lake Hospital.

O'NEILL: Everyone agrees that the injury occurred in the course and scope of employment for compensability purposes, is that correct?

WALDNER: Yes.

O'NEILL: Why should we interpret that differently for exclusivity purposes?

WALDNER: As Justice Mirabal pointed out in her consent, I don't feel that the two necessarily are mutually entwined with one another. If you look at the section of the Comp Act which has been cited by the hospital in its brief it says that the exclusive remedy of worker's comp is for work related injuries. What happened to Janis in the pharmacy down stairs and what happened as a result of taking 143 days of a drug that said for limited duration use, not to be used for the management of chronic pain, the vasculitis, the demilanated(?) polyneuropothy(?), the cataracts on her eyes, and being put in a wheelchair for the rest of her life, that injury has nothing to do with what happened on the job in the hospital room on the 4th floor when she caught the patient.

O'NEILL: But it's considered to be for compensability purposes right?

WALDNER: For compensability purposes with regard to the responsibility of Charter Oak to make a worker's comp. benefit payments too.

O'NEILL: I guess that's what I'm getting at is the policy argument here for applying them differently.

WALDNER: Correct. This court has held that a further injury or disability in the treatment of a compensable injury is in itself compensable. That has to do with compensability. That has to

do with Janis' entitlement to worker's comp. benefits vis-a-vis Charter Oak. The question that this appeal creates for this court is whether under the exclusive remedy provision that says for work related injuries. whether that phrase has anything to do with Janis Payne's injury that was the basis of her common law negligence action that she filed in Harris County against the hospital.

HANKINSON: Would it had made any difference if the hospital had required her to get her medication from the hospital pharmacy?

WALDNER: I don't know if it would have or not. I know a question was raised by the hospital in its brief to this court about cases that involved an employee only pharmacy. And if she had been required by her employment as opposed to being given the option, which she was, had to have her worker's comp. prescriptions filled at the hospital pharmacy, from my standpoint I don't think that would affect what I feel should be the outcome of this case. For the simple reason, that in this case, unlike any that's been cited to this court this involves an independent act of negligence by the employer that created an independent and separable injury to the employee.

HANKINSON: But if that injury occurred in the course and scope of her employment, then it would fall within the exclusivity provision of the comp statute?

WALDNER: The exclusive remedy provision uses the phrase "work related injury." There is nothing that Janis Payne did in acquiring the Toradol, in taking the Toradol and sustaining the injury that disabled her for the rest of her life, that in anyway relates to her work.

HECHT: Then why is she entitled to compensation?

WALDNER: She is entitled to compensation for a few reasons. One is, is that the holdings of this court that an injury or a disability that arises out of the treatment of a compensatory injury is also compensable. That has to do with the question of compensability. The second thing is, that in this case Charter Oak made the decision as to whether it felt that what put her in intensive care at Clear Lake Hospital, the toxic reaction to the Toradol, related in any way to the treatment of the lumbar strain that was the initial injury.

HECHT: But you agreed with that decision.

WALDNER: I agree with the decision. At the same time, I strongly disagree that her common law rights are left to the whim of a claim's adjuster for Charter Oak, the worker's comp. insurance carrier. Because if Charter Oak had denied that, if Charter Oak had said, Wait a minute, we signed on for a low back strain, we signed on for two weeks of light duty, and we are denying that there is a relationship between the ingestion of this drug over 143 days and this horrible life-threatening condition that she now has, and a soft tissue injury that happened 4-1/2 months ago. If they had made that decision, then there are no worker's comp. benefits that would have been paid for the treatment of that problem, and we're not faced with this situation here today.

HECHT: But you would have claimed them?

WALDNER: We would have made a claim on her behalf. She was not represented by an attorney at that time.

HECHT: And if they had made the right decision in your view they would have extended her compensation benefits for this?

WALDNER: Yes. I feel that the Toradol and the problems it caused are related to the treatment of the injury. I don't think there's any question about that.

HECHT: So I'm puzzled to know how it is you think that it's right that she be entitled to compensation now, but that the employer not be protected by the exclusivity provision?

WALDNER: The decision to pay her worker's comp. benefits, then the payment of worker's comp. benefits has to do with compensability, that issue. But then when you fast forward to that section of the Act that's been cited, having to do with exclusivity, where it says this is an exclusive remedy for work related injuries, that's where we part company. This injury, I don't think is work related, and therefore, the case subject to the exclusive provisions of the workers' comp act because a claim's adjuster made that call.

ABBOTT: Based upon Texas case law the second injury is considered to be compensable because it was concerning the on-going treatment of the injury that occurred in the course and scope of employment, correct?

WALDNER: Yes.

ABBOTT: Now in response to Justice O'Neill a second ago, you said the second injury was in the course and scope of her employment. Is that what you intended to say?

WALDNER: No. The second injury was a compensable injury for the purposes of her receiving worker's comp. benefits from Charter Oak.

ABBOTT: And that's based upon Texas legal precedent?

WALDNER: Yes.

ABBOTT: But isn't it true or is it your position that the second injury even though it's compensable was not in the course and scope of her employment?

WALDNER: Correct.

ABBOTT: And because it was not in the course and scope of her employment that's why it's not subject to the worker's comp?

WALDNER: That's the distinction I feel between this case and any cases that's been decided by this court before. All the cases that have been cited to the court with regards to the issue we are now discussion, you will have to do with a new and independent tort where the doctor misdiagnosed the risk fracture, or the doctor misdiagnosed the hepatitis B, or the cases have to do with like the *Gonzales* or *Southerland* cases where there was a new and independent injury. What *Payne* does is combine both. Where there's a new and independent tort, the negligence of the hospital pharmacist, and there's a new independent and separable injury and that is the vasculitis, the _____ that put her in a wheelchair.

ABBOTT: Had she gone to Eckerds as opposed to the hospital pharmacy and the same thing happened, the injury you contend would still be compensable because it was on-going treatment, but she would nevertheless have a common law cause of action against Eckerd?

WALDNER: That's correct.

ABBOTT: And what you're saying is that the pharmacy here is in the same shoes as Eckerd?

WALDNER: Yes. That analysis could be taken a step further. If she were an Eckerd's employee, if she hurt her back stocking shelves, that's where the injury came from, and she went back to Eckerd to fill Dr. Green's prescription for the Toradol, then where we presently are in this case, she doesn't have a common law remedy against Eckerd because the CA in the *Payne* case has held that it meets the test of compensability and exclusivity.

GONZALES: If in fact she's compensated for this second injury under workman's comp, if she were to be compensated and then we were to permit her to sue under common law would we be allowing her to recover possibly twice for her injuries?

WALDNER: No. I would refer you to the *Medina v. Herrera* case that was decided by this court a few years ago. In that case in the majority opinion it was discussed as to whether under the worker's comp. statute the worker's comp. carriers, Charter Oak in this case, would have a right to subrogation against the employer because the statute says when the employee brings a cause of action against third-parties. And then the discussion of the majority opinion in the *Medina* case said that, well is the employer a third-party, is it for certain that the worker's comp. insurance carrier would have a subrogation right when the so-called third-party is the employer? And that was discussed by the majority. I don't think that issue was ever resolved. But in his dissent, Justice Enoch pointed out that a) it wasn't an issue that was resolved by the majority; and b) under those circumstances even if it were resolved that the mutual statutory right of subrogation that the workers' comp. insurance carrier would have does not exist when the "third-party" is the employer, then

certainly Charter Oak would have a right to equitable subrogation under those circumstances. Either way, Charter Oak gets reimbursed for its expenditures in the event that Janis Payne is successful under the common law action against the hospital.

O'NEILL: But isn't that one of the problems with the respondent's argument is it would cut-off those subrogation rights?

WALDNER: Correct. And I don't think it would. I think the right of subrogation is there by statute, and if not, as Justice Enoch said in his decision in the *Medina* case, it certainly is their right _____.

ABBOTT: But what she's saying is if you don't get to prevail it cuts off the subrogation rights of the subrogor.

WALDNER: Correct. Charter Oaks would have no right to subrogation if this case stays in its present status.

And the last thing I would like to address is that one of the arguments that has been made in the motion for summary judgment, in the briefing before the CA and in the briefing before this court, is that Janis Payne in essence wants to have her cake and eat it too. She wants to be protected by workers' comp., and she wants to preserve her common law remedies. Well I would point out to this court is that argument cuts both ways with regard to the hospital.

Charter Oak is a worker's comp. insurance carrier. That's the product that's sold to this hospital. That's what the hospital paid for with regard to the premiums of Charter Oak. Charter Oak signed on to the back strain that happened on the 4th floor. Now if you assume under the rules that this court _____ have to do with the review of summary judgment that everything that we've alleged is true: Janis was hurt, she was hurt seriously, she was hurt as a result of negligence by the pharmacist at the hospital, and that she's totally and permanently disabled as a result of those injuries, if you make all those assumptions for the purpose of the review of the summary judgment, then what's happened is, is that the hospital through its worker's comp. carrier has gotten over $1 million. That's the figure they cite as to the present level of benefits. It's cost that much to take care of Janis. They've gotten over $1 million of professional liability coverage from the worker's comp. insurance carrier. I think that's having their cake and eating it too also.

HECHT: I'm still puzzled. You think they owe that money, that they owe it to the plaintiff?

WALDNER: I think _____ given an opportunity to pursue her common law action, then yes they owe that to Janis with the subrogation rights of Charter Oak _____. And one of the phrases that goes through all the cases that has been discussed in both of our briefs has to do with this delicate balance that is the worker's comp. scheme in this state. Delicate balance of rights and compromise, obligations and things of that nature. Well the delicacy of that balance is

tremendously upset when the worker's comp. insurance carrier has to pay for the professional liability sins of its insured, which at the same time extinguishes any possibility of subrogating, then all of that is upsetting. It's also upset when the common law rights of a citizen like Janis Payne are abridged or determined at least by a claim's adjuster for the comp carrier.

The election of remedies argument, the affirmative defense of that is also included in our brief does not apply because of the first criteria this court established in the *Bocanega(?)* case.

HECHT: I keep having trouble. Even if the adjuster hadn't made that decision for Mrs. Payne, she would have claimed benefits if she thought she was entitled to them?

WALDNER: She would have claimed under the worker's comp, yes.

HECHT: So what difference does it make that the adjuster did it himself?

WALDNER: Janis Payne is employed with Clear Lake Hospital. The intelectual honesty in this case would have to do with analyzing this case in the real world. Janis was covered by worker's comp, the hospital carried it. Janis was also covered by the benefit of her employment by major medical coverage. If Janis when she woke up a month later from the ICU - if the comp carrier had denied and said there was no nexus between the Toradol and the back strain, and she now is being covered in her _____, all her treatment is being paid for by her major medical care, I seriously doubt that Janis Payne nor any responsible individual who may later represent her would be pushing the worker's comp. aspect of that under those circumstances.

HECHT: But if she needed the coverage, she would have asked for it and in your view she would have been entitled to it.

WALDNER: Yes.

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RESPONDENT

O'NEILL: Mr. Sheehy would you agree that there is no way it can be argued that this injury she incurred as a result of the Toradol was work-related, or incurred in the course and scope of employment?

SHEEHY: It may have gotten mixed up a little bit in the negatives, but I agree that part of all reaction is considered work-related or being work-related for purposes of compensation statute.

O'NEILL: Compensation. But what about the exclusivity provision?

SHEEHY: The same thing. Because compensability and exclusivity of remedy are coextensive by definition.

ABBOTT: _____ part of the question is it's compensable but are you saying that the second injury was in the course and scope of her employment?

SHEEHY: The definition of compensability is an injury that is suffered in the course and scope of employment. That's the definition of compensability.

ABBOTT: Well that's one definition; however, with regard to on-going treatment Texas law has said that on-going treatment is compensable, but on-going treatment has not been defined to be within the course and scope of employment has it?

SHEEHY: That's my point, that once this court holds, and I think properly so, that the subsequent injury is compensable, you go to the definition of compensability in the statute, and the statute says that a compensable injury is an injury that's suffered in the course and scope of employment. So the subsequent reaction to the Toradol is deemed as a matter of law to be suffered in the course and scope of employment. If it's not, it's not compensable.

HANKINSON: On these facts, let's put aside the back injury, she being a hospital employee was allowed to get her prescriptions at the pharmacy, and she got this prescription for the Toradol from her physician, she goes to the hospital pharmacy and she gets it filled, and she has the drug reaction. Is that an injury in the course and scope of employment? She's using the hospital pharmacy, they are giving her this drug that she has a reaction to, is that an injury that she suffered in the course and scope of her employment?

SHEEHY: Judges have long memories, and there may be a time when I come before you and argue that point. But the point is that I think under those circumstances, it would not be compensable because it's not suffered in the course and scope.

HANKINSON: Okay. It's not a course and scope injury?

SHEEHY: That's right. In *Bomar*(?) there was a footnote that said, well there may be circumstances in which an injury may not be compensable but yet also may be subject to the exclusive remedy provision. My point is that if an injury is itself compensable it must be subject to the exclusive remedy provision.

HANKINSON: Regardless of what other conduct - let's change the facts a little bit again - that the second injury in this instance, the taking of the drug, is caused by a third-party, it's not a course and scope again if you look at it separately but it's compensable under Texas law because it's a drug reaction in connection with a drug taken for a work-related injury. Does she have a claim against the third-party?

SHEEHY: Certainly, just like she did here against the doctor and the drug company.

HANKINSON: Well if the action of the employer in this instance is like an action of a third-party and it's not something that is an action that occurs in the course and scope why should that action be protected under the exclusivity provision of the statute?

SHEEHY: Two reasons. One, it's the employer, and that's what the statute says. And 2) I disagree that it is not considered in the course and scope of employment. Because even if it's given by a third party it is still considered in the course and scope of employment by definition, because it's compensable. And the definition of compensable in the statute says: an injury is compensable essentially if it's suffered in the course and scope of employment. And this court, I think rightfully so, has said, we are going to deem the subsequent injuries to be compensable. So if we deem them to be compensable, we have to deem them to be within the course and scope of employment. Because if you don't, then it's not compensable and she doesn't get the benefits.

HECHT: Now this truly might not be compensable. I mean there is a sort of a hiatus here both temporally, and causally, and philosophically that at least raises the question that this might not be compensable.

SHEEHY: I say 1) that we all agree that it is, so whether this court ought to go down that road, I don't know. We certainly have never raised in the courts below that it is not. And I also think if we look at precedent that we would probably have to overrule some prior precedent in order to get to that point. Poor Mr. Sutherland who had a bad day, he gets hurt and he gets put on a table, he falls off and gets hurt again. We've got somebody else who takes a drug in the *Gonzales* case. We've got nurse _____, who because a physical therapist causes problems. So where do you draw the line to say that this subsequent medical conduct is somehow so separate from the prior that we don't consider it compensable. And I'm not sure where we draw the line. I think that if we are honest to precedent here and if we want to stay with the liberal approach toward the worker's comp. statute, I would have a difficult time arguing that the reaction to the Toradol is not compensable.

HANKINSON: Why should the insurance carrier's right to equitable subordination be cutoff on this fact pattern when it would not be cutoff if Eckerd or another third-party pharmacy had provided the medication rather than the hospital pharmacy?

SHEEHY: But I don't see a break there. I think that the hospital insurance carrier is going to have its right of subrogation to compensation benefits that it paid. That's the compensation carrier's battle. If Eckerd pays it and the plaintiff can sue Eckerd, then the carrier can go in and get the money from Eckerd.

HANKINSON: But in this case, the carrier is paying. You're asking us to cutoff her right to sue the hospital pharmacy on a common law negligence claim. There will be no common law negligence claim and therefore where there could be a potential recovery of damages, and therefore,

the carrier has no basis for asserting equitable subrogation rights?

SHEEHY: The carrier cannot assert subrogation rights against the hospital. That's correct.

HANKINSON: Why should the employer then be able to escape that piece of it and the carrier's equitable subordination rights be cutoff for an independent tort just because they happen to be the employer when in fact had it been another pharmacy that did it, they are subrogated because we know that we have a separate tort that's been committed?

SHEEHY: Where we disagree is just because it's the employer, the employer paid worker's comp. premiums.

HANKINSON: But the employer didn't pay premiums for professional liability coverage under this particular policy and the alleged bad act is an allegation of professional negligence by the hospital pharmacist?

SHEEHY: But it's covered. Whether you call it professional negligence or whatever it's covered, and once it's covered that's why the hospital pays its premiums. But this happens all the time. How often do we have a situation where the employer is negligent, which causes the injury? It happens all the time in worker's comp. And what the legislature has said is, I will tell you what we are going to do, we are going to give the employee quick recovery in exchange for not having to prove negligence.

ABBOTT: But that is in the course and scope situation.

SHEEHY: If it is compensable it must be in the course and scope by definition because that's what the statute says. The courts have deemed the subsequent injuries to be compensable. They have said, this court and others have said, I will tell you what we are going to do, we are going to say because of the liberal construction of the statute, we are going to say that the subsequent injuries are in fact compensable as a matter of policy.

ABBOTT: If we say that the second injury here was not in the course and the scope, what case law would we be inconsistent with?

SHEEHY: If you say it is not in the course and scope of...

ABBOTT: Say it's compensable but not within course and scope?

SHEEHY: You're violating the statute for 1.011, the definition of compensability.

ABBOTT: But we would not be inconsistent with any case law?

SHEEHY: Certainly. I think all the case law that has allowed recovery for the employee against a worker's comp. carrier for subsequent injuries. Because the only way that the carrier has the obligation to pay worker's comp. benefits is if the injury is compensable.

ENOCH: You say that's statutory, but isn't that actually case decisions that say the subsequent injury because it's the result of having to receive treatment. Isn't there cases that said to be compensable? It's not the statute that says compensable. Cases say that if this is something that arises out of the treatment that was required from an injury in the course and scope, that's also compensable.

SHEEHY: That's right except that only goes to the first half we all agree on, which is compensability.

ENOCH: You say that goes to the first half. You're arguing that compensability is synonymous with exclusivity because of the statutory definition. And then you make the next step and say since a subsequent injury that arises out of the treatment is compensable, it therefore, arises out of the course and scope. And you say that's because of the statute. But that other step is really decisional law, not statutory isn't it?

SHEEHY: I don't think so. The definition of compensability in the statute is an injury that's suffered in the course and scope of employment. The exclusivity provision says, we are not going to allow you to sue for a work-related injury.

ENOCH: My question is wrong then. In answer to that question about what would be inconsistent with our previous decisions to say that this subsequent injury was not in the course and scope, you said would be contrary to a statute and you started to cite a provision. The statute says nothing about a subsequent injury that arises out of treatment for an injury that occurred, but that's case law. Now isn't that the answer that it was - that second step you take is a result of case decisions that has said this subsequent injury is compensable because it would not have occurred but for the original treatment that was being required because of that injury that was in the course and scope?

SHEEHY: There is no question that it is case law that provides us the law that says the subsequent injury for treatment of a work related injury is work related. It's compensable. That the medical treatment for a compensable injury, complications arising from the medical treatment and for a compensable injury is compensable.

ENOCH: And because of case law, that leads you to the conclusion that if a co-employee is the one who is responsible for that second injury, the employer is still protected by the exclusivity because of the decisions of the courts that have extended compensability to cover what would otherwise have been considered not a work related injury?

SHEEHY: That's correct, but let's go a step further. If your honors decide that you want to reverse prior precedent and hold that the subsequent injuries are not compensable, that's fine. But what we are doing is we are eliminating in other cases the scope of recovery for injured employees. If you don't want to make that policy decision, that you want to get away from that and say in this case, Janis Payne would not be entitled to workers' comp. benefits for subsequent injuries, that is certainly within the purview of this court to do. In talking with Justice Hecht a few minute ago, that is not a path that either side has chosen to take in this case. We all agree that that prior law ought to remain in effect. That is, that the reaction to the Toradol is compensable. We start with that. I think where we're having the disconnect is, you are saying that yes this court can change that rule, which undercuts what I am talking about in terms of the exclusivity of remedy, and that's true. Because I think that if this court decides that an injury is not compensable, I have a much tougher argument saying that it's subject to the exclusive remedy provision because if she didn't get any benefits from the reaction of the Toradol, I have a little tougher road to go to say that the insurance carrier didn't pay her comp, and she also shouldn't be allowed to sue us. Because I don't think that's what the statute says.

I think what the statute says is, if you pay comp because you only pay comp for work related injuries...

O'NEILL: But if it were a third-party again who filled the prescription, it would still be compensable.

SHEEHY: Certainly.

ABBOTT: So she could still sue the third-party?

SHEEHY: She certainly could. But here, she went to the employer. And this happens all he time in cases. The legislature has decided that the employer is going to be protected from common law causes of action if its insurance carrier pays comp. Had she gone to another pharmacy, not related to the hospital, would she be allowed to sue? Certainly. And in this case remember she was able to sue the doctor, which she did. She was able to sue the drug company, which she did. She had those claims. But your honor, you know from your prior legal experience and litigation experience, there are a lot of cases where something happens due to the negligence or the wrongful conduct of the employer where the employee has no remedy except comp. Sometimes that happens.

O'NEILL: No, I'm just saying there is a disconnect between your argument on compensability. Your argument doesn't fit if it's a third-party where she filled the prescription.

SHEEHY: Because the third party isn't the employer. And because the third party isn't the employer, there is no bar by the exclusive remedy provision.

O'NEILL: I understood your argument to be that because it followed up from the original

injury it was compensable.

SHEEHY: Correct. I think from the holdings of this court, that's correct.

O'NEILL: And the fact that it's a third party tort-feasor doesn't affect the compensability piece. And it's my understanding that you are trying to equate those two.

SHEEHY: No. She is able to - the injury in terms of comp is compensable whether she fills the prescription at the hospital, or she fills from a third-party. The hospital's worker's comp. carrier has to pay benefits. No doubt about that. In another case we might, but at least in this case we do not. We all agree compensation is due.

But the next question is, and I understand the thought, well if she went to a third-party she would be able to sue that third-party, but she can't sue the hospital because the hospital is her employer. That's correct.

ABBOTT: You're saying compensability equates to exclusivity?

SHEEHY: No. I'm sorry that I misspoke. What I'm saying is, in terms of the employer, limited to the employer, if a injury is compensable under the worker's comp. statute, the employee may not sue the employer. That is, if an injury is compensable, the employer is immuned from suit. Anytime the injury is compensable, the plaintiff cannot sue the employer. I didn't mean to say that the plaintiff could not sue a third-party if an injury is compensable. Certainly they could. Regardless of who provides the drug, which pharmacy, be it the hospital or another one, it's compensable. She could sue the third-party because the exclusive remedy provision doesn't bar her from doing that. But §408.001 of the Labor Code says, the employer is immuned from suit for work-related injury. So if you look at the two definitions step 1, the injury is compensable. We agree to that in this case, that the subsequent reaction to the Toradol is compensable. It has to be paid by the carrier. Because it's compensable, be it because this court has made a policy decision that it's compensable, but because it's compensable you look to the statute and the statute says, compensability means an injury suffered in the course and scope of employment. This court, and I think rightfully so, has said, We are going to deem as a matter of law that subsequent injury to be sustained in the course and scope of employment - because if you don't do that - then it's no compensable and the employee doesn't get paid.

O'NEILL: It seems that what you are saying is because it's compensable and because it's the employer it's exclusive.

SHEEHY: That's right. Because it's compensable, the definition of compensability says, suffered in the course and scope of employment. So we have to assume, we have to deem as a matter of law that this Toradol reaction was sustained in the course and scope of employment. Because if we don't it's not compensable.

ENOCH: Does she now file a second worker's comp claim on a second injury?

SHEEHY: By the Toradol?

ENOCH: Yes.

SHEEHY: It's been paid.

ENOCH: There's one issue where they are paying the medical benefits to her because that's arising out of the injury that was otherwise being treated. But I assume that she now has permanent total disability that is a different level of compensation than the low back strain that was originally calculated when she had the comp claim? The argument is the exclusivity is because of the benefits that are otherwise payable. But when the courts extended the compensability to recover the treatment arising out of a second injury that was not the work related deal, but it's because the treatment resulted out of that, the argument that's being made is it's by definition of work-related injury. Well this one produces a different disability. So by backtracking under the compensation provision, our decision to say that the exclusivity provision applies is synonymous with compensability, we have a second injury, the employee caused it, well that only answers part of the question. What now happens? By that, you just have a new comp claim?

SHEEHY: She gets the compensation benefits for the subsequent injury, which I think she has. But certainly she's entitled to those damages for those injuries. What I was talking about compensability equaling injuries suffered in the course and scope of employment, then you go to the exclusive remedy provision of the statute, which says, you can't sue the employer if it's work-related. So since the two definitions compensability and the exclusivity of remedy all deal with work-related it cannot be compensable and at the same time not subject to the exclusive remedy provision as far as the employer is concerned.

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REBUTTAL

OWEN: Mr. Waldner, this is a statutory scheme, is that correct?

WALDNER: The worker's comp. aspect is, yes.

OWEN: So when courts are deciding what's covered and what's not, we look to the statute?

WALDNER: The court would look at the statute that in response to some questions that Justice Enoch was asking, the statute has to do with worker's comp. That portion of this case having to do with extending compensability to injuries or disability caused by the treatment. That has been made by the courts in this state.

OWEN: Right. But the court has no authority to make law apart from the statute, is that correct?

WALDNER: That's correct.

OWEN: So when we said in our case law that subsequent injuries are compensable, we, by virtue of the statute, also were concluding that they were work-related?

WALDNER: I think that the conclusion that would come from those decisions is that they were compensable.

OWEN: Where would this court get the authority to say they are not work-related but they are nevertheless compensable? Where do we get the statutory authority to say that when the statute says only work-related injuries are compensable?

WALDNER: I'm not sure I understand your question.

OWEN: Where do we get the statutory authority to say it's compensable, but it's not work-related?

WALDNER: Well it's right there in the definitions. Because the legislature if they wanted to make these two things compensability and exclusivity mutually inclusive...

OWEN: How do they define compensability?

WALDNER: They say, the compensable injury means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.

OWEN: And where does this court get the authority to say that compensability is anything other than that definition?

WALDNER: I'm not suggesting that compensability is anything other than what it says right her in 401.011(10).

OWEN: So it's in the course and scope and it's work-related?

WALDNER: Yes. That's what compensability is defined under the statute as being.

OWEN: So it's work-related and in the course and scope. Why is it also excluded under exclusivity provision? Don't they also use course and scope?

WALDNER: No. They don't use course and scope. And they don't use compensability.

If the court were to look at 408.001, it says recovery of worker's comp benefits is the exclusive remedy of an employee for a work-related injury sustained.

OWEN: That's my point. Where do we get the authority to say on the one hand it's compensable but not work-related when necessarily under the statute it has to be work-related to be compensable?

WALDNER: If I understand your question correctly, I think it's right there in the statute. Because I think we are talking about two different things: 1) having to do with the circumstances under which an injury is compensable under the worker's comp statute, that is the right of an employee to obtain worker's comp. benefits, that's compensability.

OWEN: If it's not work-related, it's not compensable is that correct?

WALDNER: I'm saying that if it's compensable that that's between the worker's comp. carrier and the employee, and that has to do with course and scope issues. That's what the definition says. Now when you go forward to the exclusivity provision, that doesn't say course and scope, and it doesn't say compensability. It says work-related injury, and that's where Mr. Sheehy and I part company. Because with regard to the exclusivity portion of the worker's comp. act, if the legislature wanted to say if it's compensable then it's exclusive all they had to do was say that. But that's not what they chose to do.

HECHT: So I understand how you think they fit, you think this injury was in the course and scope of employment, but was not work-related?

WALDNER: To take it just one step further, I don't think this injury was in the course and scope of the employment as defined by the statute, as the decisions from the Texas courts have extended it in the so called extension cases, where an injury that arises out of a medical treatment of a compensable injury also being compensability, then it qualifies...

OWEN: Where do we get the authority to extend the statute as you say? Where does this court have the authority to "extend the statute?"

WALDNER: I'm not asking the statute be extended.

OWEN: Well you just said that's what we did. Where did we get the authority to do that?

WALDNER: I don't know. I guess the answer to that would be with the justices in the CA and the predecessors of your honors who wrote those decisions. And to answer very briefly something that Justice Hecht brought up about this might not be compensable. Well as I understood that question it's like if the Toradol doesn't relate to her problems, if the treatment that put Janis in

the hospital that made her so ill, if that doesn't relate to her back strain, then why would they be paying the worker's comp. benefits? Why would that happen? I think that if this is correct to give the common law rights back to employees for a new and independent tort that causes a new and independent injury, then there is a bad situation where it's right for collusion between the comp carrier and the employer, because the employer all they have to do is tell their worker's comp insurance carrier start paying the bills on this, she is still in intensive care. Pay those bills and we have limited our liability to workers' comp and we don't have any liability for a common law cause of action.

OWEN: But you could have rejected the worker's comp. and said, no I have common law rights and made that election.

WALDNER: At the time the worker's comp. benefits were accepted and being paid to her, she was in intensive care with an _____tracheal tube down her throat.

OWEN: But you haven't rejected the comp payments? You are not rejecting, you want them both? You want comp payments and your common law rights?

WALDNER: I want the comp payments and the common law right to pursue. If successful the money goes back to Charter Oak, not both. Janis Payne will never have both in her pocket because of the worker's comp. act and the subrogation rights of Charter Oak.